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International Law Practicum

Includes Chapter News

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NEW YORK STATE BAR ASSOCIATION

INTERNATIONAL SECTION

2017 REGIONAL MEETING

Dublin, Ireland

April 20-21, 2017

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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 10,000 words, footnotes included. Shorter pieces, notes, reports on current or regional developments, and bibliographies are also welcomed. All manuscripts must be sent via 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.

Manuscripts are submitted at the sender's risk, and the New York State Bar Association, International Section, assumes no responsibility for the return of material. Material accepted for publication becomes the property of the New York State Bar Association, International Section. No compensation is paid for any manuscript. The *Practicum* reserves the right (for space, budgetary, or other reasons) to move an accepted manuscript from an earlier issue to a later issue. Articles, reports and other materials reflect the views of the authors or committees that prepared them and do not necessarily represent the position of the New York State Bar Association, International Section, or the Editorial Board of the *Practicum*.

Deadlines

Manuscripts intended for publication in the Spring and Autumn issues must be received by the Editor-in-Chief by the preceding 1 December and 1 June, respectively.

Reprints

Each author will receive three complimentary copies of the *Practicum* issue in which the author's material is published. Additional copies may be ordered at cost before an issue goes to press by communicating with at the Newsletter Dept., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096 (telephone (518) 487-5671 or 487-5672) or via e-mail at newsletters@nysba.org.

Past Issues and Advertising

Requests for back issues, advertising and subscription information and general correspondence should be sent to the Newsletter Dept., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096 or via e-mail at newsletters@nysba.org.

Back issues (2000 to present) of the *International Law Practicum* are available, in pdf format, online to Section members on the New York State Bar Association's Web site at www.nysba.org/IntlPracticum. A searchable index is also available.

Upcoming International Section Events and Co-Sponsored Events

Monday, January 23, 2017

2017 NYSBA Annual Meeting International Section Events

12:00 p.m. - 2:00 p.m.: Reception and Awards Luncheon
2:00 p.m. - 5:00 p.m.: International Section Meeting

Friday, February 17, 2017

ILAW2017: The ILS Global Forum on International Law
Conrad Hotel | 1395 Brickell Avenue | Miami, FL 33131

Join us in Miami for the ILS's annual flagship conference focusing on the latest developments and best practices in international law. Details forthcoming.

Hosted by the International Law Section of the Florida Bar and Co-sponsored by the International Section of the New York State Bar Association

Presented by the Florida Bar International Law Section

Email rbecerra@rjbecerralaw.com for sponsorship or general inquiries.

April 20-21, 2017

Dublin Regional Meeting | www.nysba.org/ilpdublin17

Details TBA

May 8-12, 2017

Global Law Week 2017 | New York City

Join colleagues at CLE programs and networking receptions throughout the week, hosted by various major law firms and other organizations. The program, held at several venues throughout Manhattan, is sponsored by some of the city's most prestigious legal institutions, and will feature expert panelists from prominent multinational law firms, worldwide corporations, law schools, and the judiciary.

Panel topics include, among others:

- Views from the Bench and Bar on International Arbitration and International Litigation
- Hot topics in FCPA enforcement
- International awards and judgments involving major corporations
- Global mergers and acquisitions
- Protecting intellectual property globally vis-à-vis the Internet
- and many more!

Fundamentals Program offering transitional credit will take place on Monday, May 8, 2017.

For more information about any program, The International Section of the New York State Bar Association, or to join the Section, please contact Tiffany Bardwell at TBardwell@nysba.org.

Transcript:
Ethics Across Borders: Common Pitfalls and the Latin American Council's Presentation of Best Practices

[Editors note. This is a partial transcript of the presentations and discussion held by the International Section of the NYSBA on 25 January, 2016 at the Hilton Hotel in New York City during the Annual Meeting of the NYSBA.]

I. Welcome

GERALD FERGUSON: So we will go ahead and call the afternoon session in order.

We are getting ready to now move to the educational part of the meeting of the International Section of the Annual Meeting of the New York State Bar Association.

And to kick off our afternoon session, we are truly honored to have with us David Miranda, the President of the New York State Bar Association, and a true friend of the International Section.

(Applause.)

DAVID MIRANDA: Welcome to New York. Thank you all very much.

I know many of you have traveled from far away and you've braved our annual storm of the century, so it's really, really nice to have you here.

I want to thank Gerry Ferguson for his leadership to the Bar Association and to the International Section and to Neil Quartaro who will be following him. You are all well served in this section by your leadership.

I also want to recognize the Honorable Fausto Martin De Sanctis, who received the International Section's Award for Distinction in International Law and Affairs earlier today.

I want to talk a little bit about today's program and The Latin America Council. I want to thank the program's Chair, Azish Filabi, and the Latin America Council Chair, Ruby Asturias, and the Chair-Elect, Sandra González, for their fine work with The Latin America Council.

When I met with The Latin America Council and heard about their priorities—ethics, diversity, pro bono—I realized they align exactly with the priorities of our larger Bar Association. And so when we work together like this, it is a wonderful thing for our association and a wonderful thing certainly for your Sections.

I find, going around, that New York is increasingly the choice of law for many international and multi-national businesses and it is the work of this fine Section that certainly helps perpetuate that.

The International Section has existed for twenty-five years. You've been our Association's ambassadors to the world. Your fifty chapters represent an unparalleled network for The Bar Association to reach out for the world and reach back.

I was particularly taken by something that occurred in November when we had the terrible terrorist bombings in Paris, and many of our members of our European chapter urged me to reach out to our good friends in the Paris Bar. I, of course, did.

I recognized the memories that we have here in New York City of the tragedy that occurred here in 2001. And I said in my letter to the Paris Bar that, although we still remember that, we also remember the outpouring of support that we received from our friends around the world, including our good friends and colleagues in the Paris Bar.

They were appreciative, as we were appreciative of the support that we received here in New York during our time of struggle.

So I want to just conclude and say that our International Section does so much for our Association and for the legal profession—not only here in New York, but around the world.

In addition to providing wonderful substantive programs like this to all of us who need it, the International Section does a wonderful job, and all of you do a wonderful job, of casting a positive light on the Section, our Association, and on the legal profession throughout the world.

Our Bar Association is appreciative of the work that each and every one of you does to enhance and better not only the lives of attorneys around the world, but to, again, reflect so well on our profession.

This is a wonderful section, and I'm so pleased to have had the opportunity to work so closely with you.

As president, I look forward to seeing some of you again in the spring meeting in Krakow, Poland. I look forward to being there. I also look forward to joining all of you at your next annual meeting in Paris.

Again, thank you all very much and I look forward to talking to all of you. Thank you.

(Applause.)

MR. FERGUSON: I will turn the podium over to Azish, who has put together an amazing program today.

AZISH FILABI: Good afternoon. Thank you for joining us for this program that we have this afternoon.

We have a diverse group of speakers representing various global perspectives on ethics issues. And my job here is to introduce our moderator, Gonzalo Salinas Zeballos, who will introduce the panels and the panelists.

Gonzalo is a partner at the law firm of Baker & Hostetler, and he has a practice with multinational dispute resolution, including mediation, arbitration and litigation. He brings a truly global perspective to solving his clients' problems.

Since 2009, he has been the lead attorney in the Baker & Hostetler team that serves as the court-appointed counsel to the SIPA Trustee for the Liquidation of the Bernard Madoff investment securities, working on the global investigation of the Madoff Ponzi scheme which is, indeed, the largest financial fraud in history.

So on this theme of ethics, I pass it over to Gonzalo, who will lead us for the rest of the afternoon.

Thank you.

II. First Panel: The Best Practices Guide of the Latin America Council

GONZALO SALINAS ZEBALLOS: Thank you very much, Azish.

Just to clarify one point. I'm the lead attorney for international recovery. I wouldn't want David Sheehan, who is the lead attorney for the entire case, to think that I'm trying to take the benefit for the remarkable job he's being doing on the Madoff recovery.

This is a really timely program, and it is really a pleasure to be able to present our panelists and to present this theme to a group of people who are familiar with the pitfalls of international practice. It is something that those of us who work on cases or transactions that involve many jurisdictions face on a daily basis.

And we learn things the hard way: we learn things by having them go wrong, and then hoping they never happen again.

The problem is that things can go wrong in so many different ways when you're dealing with different legal systems because of the proclivity that all lawyers have to assume that everything in other jurisdictions is the same as we have here. And there's a good reason for that.

We're all highly trained. We all believe that our legal systems are good and that the principles are universal. But the way we implement those principles, as we'll see, can vary significantly from jurisdiction to jurisdiction.

We also all tend to think of ethical obligations as things that are limited by national borders. But the reality is that they're not. When you're dealing with more than one jurisdiction, suddenly you're going to be faced with having to comply with obligations that sometimes can be contradictory, not necessarily because the ethical rules are different, but because the substantive rules are different and you're going to find yourself between the proverbial rock and a hard place.

So our panelists today from The Latin America Council and the Vance Center, and Professor Rogers, are going to discuss the Latin America Council's work on preparing a Best Practices Guide for Latin America.

The Best Practices Guide is a tremendous effort that is meant to in a way universalize or at least provide transparency into the different obligations that lawyers have to face and the things they have to look out for when they're working for a client that's not from their home jurisdiction.

With that, I'll stop talking and introduce our panelists.

With more than seventeen years of experience, Ruby Asturias's expertise in the areas of corporate and commercial, labor and physical law with emphasis on mergers and acquisitions, foreign investment, foreign licensing, and joint ventures has been exemplary.

Ruby has for several years been the Chair of the Guatemalan Chapter of the New York State Bar Association and, until this morning, was the Chair of the Leadership Committee of the New York State Bar Association Latin America Council, of which she's the co-founder. In 2012, Latin Lawyer and the Vance Center granted her the "Leading Light" Award. Chambers Latin America and Chambers Global guides have listed her as a leading lawyer for five consecutive years. And in 2013, the IFLR1000's Legal Media Group granted her the American Woman in Business Law Award.

Sandra González is the new chair as of this morning of The Latin America Council. She leads FERRERE's Litigation and Arbitration team in Uruguay. She advises companies and individuals in commercial arbitration and litigation. In this area, she assists international and local companies operating in different areas and focuses on complex multi-jurisdictional cases. Sandra is an Associate Professor of Law at Universidad ORT in Uruguay, and teaches various courses in the master's programs at that university.

Catherine Rogers is a professor of law at Penn State, with a dual appointment as Professor of Ethics, Regulations and Rule of Law at Queen Mary University of London, where she is also a co-director of the Institute of Ethics and Regulation.

Professor Rogers is a reporter for the American Law Institute's Third Statement of U.S. Law of International Commercial Arbitration, a member of the Court of Arbitration for the Jerusalem Arbitration Center, and a Co-Chair, together with Rusty Park and Stavros Brekoulakis, of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration. She is the founder and CEO of Arbitrator Intelligence, a nonprofit entity that aims at increasing transparency, fairness and accountability in the arbitrator selection process. And her book, *Ethics in International Arbitration*, was recently published by the Oxford University Press.

In addition to being a member of the New York State Bar Association Ethics Committee, Hunter Carter is a longstanding member of the Committee for the Vance Center for International Justice and is a former chair of the New York City Bar International Interamerican Affairs Committee.

Hunter, along with Ruby, facilitated a discussion at the 2015 Vance Center Legal Summit of the Americas on strengthening the profession entitled Models For Standardizing Legal Ethics and Exercising Self-Regulation.

And with that, I hand it over to Ruby and Sandra.

SANDRA GONZÁLEZ: Good afternoon, everyone. It is an honor to be here.

Thank you, Gonzalo, and thank you, Azish, for your hard work in preparing for this afternoon.

My job here is to talk a little bit—and I'm going to share this job with Ruby—about why and how The Latin America Council decided to embark upon the task of coming out with a Best Practices Guide in terms of ethical conduct for lawyers that practice in Latin America.

In preparing for this afternoon, I recalled that one year and a half ago The Latin America Council had a meeting here in New York, and we started discussing the different approaches that, at the time in the room, we all saw with respect to ethical conduct.

We realized that, even though we were all from Latin America and there were people from New York as well—but even within the Latin American community—we approach things in different ways and, in our respective jurisdictions, we did not have the same rules, or even if we did have the same rules, we did not approach them in the same way.

That's how we decided that it would be a good idea to try to come out with something that could be a compilation of the best practices.

What were our goals in doing that? First of all, create awareness about the importance of standard practices, standard principles, and the way they're implemented for those of us who actually practice in international law.

Because that's actually when this has a much more important role. When you actually face different practitioners and you act as a team with people that come from different jurisdictions and from different legal backgrounds, you realize that sometimes the differences in the way we perceive our ethical duties and responsibilities or the way we actually implement them may create difficulties.

At this point, I would like to invite Gonzalo to tell you an anecdote that illustrates what I'm talking about.

MR. ZEBALLOS: So I'll hide the names and the jurisdictions to protect the innocent.

But my very first example of this was as a third-year associate, where we were defending a complaint in a jurisdiction that had a mandatory reconciliation period, and you weren't allowed to see the complaint during that period. All you did was you got a notice with a very brief description that a lawsuit had been filed against you by experts. And under the local rules, I believe it was a two-week period or three-week period, you were meant to contact the other side and try to mediate the dispute to try to keep it out of the court system.

So what wound up happening is we received the letter. My local lawyer called me and explained what was happening. And then, five minutes later I got a copy of the complaint. And I thought, "I thought we weren't allowed to see the complaint."

And I called the local office. It was in a Latin American jurisdiction.

That's as much as I'm going to say.

And I said, "Well, how did you get the complaint? We're not supposed to see the complaint." And he said, "Oh, I went to law school with one of the head clerks there and he put me in touch with the other guy. I gave him, you know, thirty bucks and he gave me a copy of the complaint."

Now, the problem was that maybe that is how things were done in that jurisdiction, but we had parallel litigation in the United States and it was a discoverable document and, because it's a discoverable document, the provenance is discoverable.

So it created a real problem for us from the very beginning of the case that really could have been stopped if we had just talked about these obligations.

Now, in that jurisdiction, the paying of thirty bucks to the clerk is not considered an ethical violation because that's what everybody does and that's how everybody gets the documents.

I'm not condoning that as right, but that's just the way things are done in that jurisdiction, and I've come to learn that nobody takes the mediation process seriously because it never works.

But it created a major, major, major threat to our client in the United States, and it was something that could have been obviated with a five-minute conversation and being patient for two weeks or three weeks.

MS. GONZÁLEZ: Thank you, Gonzalo.

As I said, I think this is one of the examples, a perfect example, of why this is important. Those of us who practice with colleagues from other jurisdictions and serve international companies do face these issues on a regular basis.

It happened to me not long ago that, in an arbitration case that I was involved with, the other side inadvertently handed over a document that was privileged. And for me, coming from Uruguay, I can use the document; I have no problem with that. There's no ethical rule that actually prohibits me from using it. But I learned in that case that my colleagues from a New York firm actually would not be able to use that document and had to actually give it back to the other side.

So as you can see from these examples, those are issues that we actually face on an everyday basis in our job.

That's why the Council decided to work on this. It is not the idea to go all over Latin America and in a way conquer them with something that's alien to the people that practice there. The idea was to come up with something that's standardized and with some basic principles that we can all abide by so that, in serving international clients and working together with lawyers from the U.S. or elsewhere, we can have something that is a common understanding of how we have to act on certain issues that are fundamental to what we do in the practice of law.

And it's also important not just to create awareness and have something that's sort of a standard basic principle, but also I think it could be an educational tool.

In Latin America, it's important that we start or continue talking about these issues.

In the six years that I was in law school, I was there six years not because I'm such a slow learner, though I could be, but just because it's a requirement that you are actually in law school for six years. And in my six years in law school, I had no one course that actually taught or discussed my ethical responsibilities and duties as a lawyer. And that continues to be the case now in Uruguay and in other countries in Latin America.

And I think that's a problem. We need to reflect on our responsibilities and our ethical duties. That's important. It is even more important now in the world today in which we see so much misconduct around. We have a role to play in this area and we better take it seriously.

The last point I wanted to make is that we also wanted this Best Practices Guide to be a tool that, by actually endorsing it, the firms in Latin America or the lawyers in Latin America could give certainty to clients or colleagues that, "Well, this is something we abide by": we understand what we are talking about, and so it could create certainty that there will be no misunderstandings or different approaches to the most fundamental issues.

Now, I'm going to talk a little bit about the content of The Best Practices Guide.

We came out with some basic principles that may sound to you or to people who are more used to reflecting or being educated about ethical issues as so obvious. Well, in Latin America, sometimes they are not so obvious. I'm going to give you some examples of why not.

And so those main principles are independence, justice, and conflict of interest.

Conflict of interest is something that is quite common in Latin America—in particular in the small jurisdictions in which lawyers just assume that conflict of interest is something that the enemy has created for you not to be able to have as many clients as possible. And it's a very important issue nowadays that the local market is no longer a "local" market, but a global market.

So something that may sound so obvious is not really that obvious in our countries.

Confidentiality, which is another of the basic principles, is also something not so well-understood in our countries. We like to share everything. You know that. We talk and talk and talk.

It happened to me not long ago that in my law firm, I was in an elevator and I heard people from the law firm—in an elevator that we share with people from other companies that are in the same building—talking about a case and talking about names. They were actually discussing the case.

Luckily, there was no one else from outside the firm in the elevator, but there could have been. You just don't do an identity check of everyone that's in the elevator.

So again, this is because in some or in most of our countries, we are not actually invited to reflect about these things when we are in law school, and then you may have very nasty surprises in real life.

So, it's very important that we reflect on these things and we actually educate lawyers about these things.

Now, interests of the client, that also may seem so obvious to everyone. Of course you have to have the best interests of the client in mind—that has to be your guide in what you do. Again, in our countries, sometimes this is not well understood.

Professional courtesies among us in Latin America sometimes is understood as something that goes above the interests of the client, so you would find colleagues that would ask you: "Why are you not doing this? I mean, we are colleagues. You should do this for me." And the answer should always be no, if by doing so I'm actually not serving the client the best I can serve.

Many times I find situations in which colleagues just come say to me: "Why didn't you tell me in advance that you were actually filing for an injunction?" Well, duh, it's because I cannot tell you in advance that I am going to do something that actually, if I tell you, you are going to try to just derail the whole thing.

And, truly, it's something that colleagues take in a bad way. They just feel that professional courtesy is something that you actually owe to them. It is not well understood. We should not in any event put that above the interests of the client.

Then freedom of the client is one of the most fundamental principles that we included in the guideline. Of course, commitment to the client and to the work you have to do for your client.

Customers and third-party property: that's another important issue in our countries. It may seem something natural that you are not supposed to actually mix your funds as a lawyer or as a firm and the funds of your client. Well, that's not necessarily the case. It's not understood this way. You sometimes could find that lawyers just use funds, those belonging to the firm or the lawyer and the client, as if it were the same thing. And it's not necessarily with bad intent but, at the same time, it's something that's not correct and could create lots of problems.

Legality is obvious. But sometimes legality, the way we understand it in Latin America, could be something different than what the law actually says. In Gonzalo's example, we are very used to saying, "Well, this is how things are done." But that does not necessarily coincide with how things should be according to the law, the law of the country where we practice but also the law or the rules that guide our profession.

Loyalty, that's another, obviously, paramount principle in what we do. Loyalty, again, is something that in our countries could be difficult.

I remember that fifteen years ago I was involved in a case and the partner who was in charge at the time was away for a week. Then one day I came for a meeting and I got into the office and the receptionist said, "The President called." And I said, "The president of what?" "The President of the country."

"What?" I mean…

And the President wanted to talk to me about a case that I was involved with. Political influence in Latin America is something that happens. You know, many times or sometimes people in power just feel that they can call you and say, "Well, this is my opinion about this."

Well, my loyalty has to go to the client. You listen to what they have to say, but that in no way should that actually have any influence in how you actually represent or best serve your client. This is something that, unfortunately, in different countries has been very difficult to achieve.

But at the same time, I'm not so sure that all lawyers have it clear that that's the principle that should guide their conduct. And if they feel that they cannot actually have the best interests of the client guiding their conduct, then they should cease to actually serve that client because they are not actually serving the client.

Then we have honesty, competition, efficiency and diligence and responsibility. And responsibility is if you did something that was wrong and you caused some damage to the client—and here in the U.S., you know that the lawyers actually have to compensate the client for those damages. That's not the norm in Latin America. Even if you do something horrible, normally there is no lawsuit.

Actually, clients do not sue you. You know, it's good that they don't sue you, but this is not because you don't make mistakes sometimes. It's because it's not something that's done.

And I think that it is very important that we are aware that it may not be a reality now, but at some point it could be a reality. So we had better take into account that we are actually responsible for the consequences of what we do in our profession.

Just to give you another example. In my home country, if I want to buy professional responsibility insurance for my law firm, it is not offered in the market. Nowadays, more and more the clients come to you and ask you if you have insurance in place for professional misconduct. It's something that is not in the market in many countries in Latin America because lawyers assume that they do not have to pay or face the consequences of how they behave.

Then we have, well, defense of people with limited resources. This has to do with the pro bono culture, which still is not very widespread in Latin America.

Ongoing training. Again, in some jurisdictions there is not even a requirement that you actually keep updated with the profession.

Prudence, probity and property; respect, punctuality, solidarity and fraternity and fees.

Obviously, we all deserve reasonable fees. What "reasonable" means is open for debate, but still.

With that, I will pass the mike to Ruby so she can talk about how we actually came out with these principles.

RUBY MARIA ASTURIAS: Thank you, Sandra, for the very descriptive examples that you gave.

That is the reason why The Latin America Council thinks that this project has a strong future.

They have asked me what is the difference between this project and the other thousands of ethics projects that have come along. What I always think, or like to think, is that the Latin America Council and this group that is trying to encourage this project are special in a way—we're eventually going to enforce it. So I think the enforcement is the key.

So I will try to show you what is the methodology that we used in order to get these Best Practices Guidelines.

What we did is review the main principles of ethics and conduct of the New York Code of Professional Responsibility, and we also took the IBA International Standards.

After that, what we did was we reviewed and compared eighteen Latin American ethics legislations to the NYSBA and the IBA principles. We did an extraction of these principles and the principles that were reflected within the Latin American legislation, and we did the draft of the Ethics Best Practices for Latin America. That was basically the methodology.

It took a long time, because we had to analyze all the legislation that we had. For example, in Argentina, we had two different pieces of legislation, because Argentina doesn't have an obligatory bar, so they sent us two different pieces of legislation. The same in Mexico.

So we did a very thorough analysis of Latin American legislation, and we put it into a blend with IBA's international ethics standards and the New York State Bar Association standards.

So, as an example, we talk about the principle of justice and the principle of confidentiality. And down, as a footnote, we have all of the notes in which, during our analysis, these principles were reflected.

So, this way, we tried to make it a very inclusive procedure and a very, I would say, original procedure, in which we not only started from scratch from the IBA principles and the New York State Bar Association, we wanted to take into account also what was done in Latin America, and the best way to do it is by analyzing the Latin American legislation on ethics.

So our main intention with the Ethics Best Practices for Latin America project is enhancing the profession to self-regulation on ethical conduct by evaluating the option of drafting an Ethics Best Practices for Latin America applicable to the international community.

That, after a process that we have gone through all last year—concluding it with the summit of the Americas invitation that we had which Hunter is going to speak to you about—is our main conclusion. Our intention is to encourage self-regulation on ethical conduct in the international Latin America community.

Our main objectives to achieve this project are the following:

First, transnational lawyers, working in the Americas through auto-regulation, voluntarily accepting the Ethics Best Practices for Latin America to increase and improve uniformity of ethics commitment and, in general, to elevate the standards applying international best practices.

Second, an alternative ethics best practice that is applied in cases where the jurisdiction does not contemplate the principle, or contemplates it but it's poorly regulated. It will not apply if it contradicts local legislation.

And this is one of the main principles that we have to take into account. We are talking about auto-regulation and we are talking about voluntary submission.

And definitely we are talking about respect of local legislation. I would not think of a Latin America country that has an ethics principle that contradicts an international principle. We haven't found that. So the idea is to complement it.

Third, serve mainly as a guarantee of the services that transnational lawyers will provide to the international community, since the project is intended to have a solid base on minimum already recognized international principles.

Fourth and finally, we think that in enhancing the profession through best practices from a manual, a model, a code, standards or ethics best practices, whatever you want to name it—it doesn't matter how we call it—it is imperative to find common grounds to understand how ethics should be understood and applied across the international professional community of the Americas. And in our specific case, we are placing emphasis on Latin America.

What will make the difference from the rest of the ethics projects that have arisen in the world is to find a way to enforce it, as I was mentioning previously. Understanding that the only way to achieve it—with so many different local regulations within the Latin American jurisdictions—is through self-regulation. To achieve this we need to educate our legal community and find a way to deal with the outstanding challenge of standardizing uniform ethical principles.

Let it become a trend, that will be one of my main objectives. To try for this to become a trend among the international Latin American legal community. That will be our main goal.

Since corruption is one of the main problems that American nations are struggling with, the legal communi-

ty should unite forces to implement mechanisms to fight it. Ethical conduct is the perfect concept to fight corruption from where the legal community stands.

Our project of drafting an Ethics Best Practices for Latin America is a perfect example of how the international community can enhance the profession and a solid guarantee of a continuance of the outstanding work that has already been done—and this was one of the conclusions that we had in the summit that Hunter is going to talk a little bit about.

We had the opportunity to meet for two days with lawyers from all the international communities of the Americas, and one of the group sessions was dedicated to our project and to enhancing the profession through ethics.

It is important to recognize the wonderful job that the Vance Center has done in the area of pro bono. Ten years ago they started their project of trying to encourage American firms to promote and enforce pro bono. And now, ten years after, you can see the results are amazing.

I will say that the most relevant and most important Latin America communities support today, abide today, and have budgets to support pro bono practices.

This was one of the main conclusions: that the international community can enhance the profession and provide a solid guarantee of the continuance of the outstanding work that the Vance Center initiated ten years ago.

After the summit was concluded, it was a common consensus to continue exploring the possibility of supporting this project, inviting members that are interested to add value to this outstanding effort. How? By endorsement. We need endorsement and the recognition of international organizations in order to go through with this project, in order to make it happen.

These endorsements, such as the New York State Bar Association, the International Section of the NYSBA, The Latin America Council, the Vance Center, the City Bar, are necessary, and we have already high chairs of the International Bar Association very interested in the project. Again, we need to endorse it through international organizations.

We envision a future in which the international community will require transnational lawyers of the Americas to comply with minimum ethical standards. The endorsement of these organizations is the optimum way to go, because if they eventually endorse it, the community will follow it.

We talked very briefly about the possibility to have a logo, a certification logo that you can put in your emails, saying that you abide by the code of ethics, by these guidelines of best practices.

My final remark will be that if we don't do it, someone else will. So let's be the first. Thank you.

(Applause.)

HUNTER CARTER: Well, I must say, it is quite an honor, a privilege and also a pleasure to be here. As I rushed in from court, I already saw and I see in the room several friends with whom I've had the pleasure of working over the years in international and inter-American efforts.

I am particularly honored and pleased to accompany Gonzalo and this panel.

I will be able to talk about our work together in September. But it was the first time that Ruby and I had a chance to work together—it will not be the last. And it was not the first time that I had a chance to work with Sandra.

And I will tell you, I am very impressed with the hard hours that we put in together, with the dedication that they have brought to this task. I admire them greatly and encourage you all to take them extremely seriously. If you don't, you do so at your peril.

The 2015 Legal Summit of the Americas, hosted by the Vance Center For International Justice of the New York City Bar, was convened in early December as the first such effort in a decade to help design themes and strategies for the international justice community primarily in the Latin America region.

As Ruby just pointed out—and we're very proud of this—the City Bar's Vance Center for International Justice has dedicated the last ten years to promoting an ethic and culture of pro bono in legal communities across the region and also in Africa.

And we believe we've done so with some great success. The pro bono declaration for the Americas initiated that ten-year period. It's been now signed by hundreds, if not thousands, of law firms and lawyers.

And that model, that declaration as a statement of common principles and common commitment, has had an amazing effect. It has become the gold standard. It defines who in the region accepts this responsibility as a part of their social responsibility as lawyers and as law firms.

And occasionally it is also the result of some good old-fashioned arm-twisting and hand-wringing by lawyers, including lawyers like Antonia Stolper and Todd Crider of the Vance Center Committee, who in their conduct of international business always make sure to ask their friends in foreign law firms if they've heard of the pro bono declaration of the Americas. If not: "Why not? And here, I have a copy. You can sign it now. And I'll proceed doing business."

Their tenacity, like that of Ruby and Sandra, has brought us to a place where we have looked at the suc-

cesses and the impact of the pro bono efforts through the Vance Center and said, "Well, what should we do doing next?"

So the Legal Summit of the Americas focused on three channels. I'm going to speak about one of the three and tell you quickly what the other two were.

But I should say as a preliminary matter that I'm going to start venturing into a summary of what we discussed. I'll be working from a document that I had the honor to prepare, based on a lot of work that we have done together. But I don't want to become the half of the Vance Center, where we're looking to form concrete ideas about how to express what I've learned and where we're going from there. That process, as you can imagine, less than a month old, is still quite new.

One of the three efforts that we made in December at the Vance Center's Legal Summit of the Americas was to look at strengthening civil society. What is the role of lawyers in the Americas to make sure that civil society organizations strengthen society? And why are we doing that? We are looking at strengthening justice: how are lawyers able to contribute to justice? So strengthening civil society was one of those three chains of thought.

The other one was strengthening honest government: fighting corruption.

Now, as an international litigator and somebody who speaks on the subject of the Foreign Corrupt Practices Act, I have a sense that we're doing in the private bar is trying to help our multinational clients, those with substantial United States connections, to fight corruption.

And, Gonzalo, I would like to say, I have not been in the same position you were in, but that's only because I would define that very narrowly. I've been in a similar position, and I know that discomfort very greatly. We all do.

So the idea of harmonizing principles among lawyers so as to combat corruption and to provide for honest government is, I think, a very high objective and it was one that demonstrated a lot of consensus.

What also demonstrated a lot of consensus was a third channel: our discussion on strengthening the legal profession through strengthened ethics enforcement and adherence.

I would say that there was a consensus and a belief that the law aims to defend the rights of people and business organizations, to promote the rule of law, and to promote justice and order—and that lawyers have an essential role to play in ensuring that the law serves these purposes and that the legal profession in the Americas can, and should be, enhanced by developing common and mutual commitments for ethical objectives and professional standards of conduct.

Now, to enhance the legal profession requires building and reinforcing positive expectations about the ethical objectives and about the minimum standards of conduct of legal professionals working on legal matters across national borders in the Americas. Simply put, law and the profession and lawyers individually are less effective anywhere they are perceived to be of questionable ethics.

To enhance the legal profession requires self-regulation. That was a common consensus in our summit. And that, in turn, requires contributions to the strength of the profession by lawyers, so the profession can be an instrument of justice.

The profession plays an important role in society and lawyers have a state-granted exclusive license, right and power to exercise the role of a lawyer within the legal profession, within the legal system, and within the judiciary.

Members of the profession have responsibilities, therefore, toward society for the conduct of the profession overall and for the responsibility of individual legal professionals and their firms.

That responsibility especially is the following: to ensure against corruption in the judicial and political systems; to ensure the independence of lawyers free from interference outside of their relationship with their client; and to help lawyers fulfill their commitments and obligations to their clients. Now, certainly, in ethical standards, in ethical systems, it was our consensus at the summit that sanctions for ethical violations are essential. And if Ruby tells you that she is going to work on a system that is going to work toward enforcement of ethics, take her seriously.

It is still a ways off, though, and it is important to remember that there are other ways beyond sanctions to create the environment in which the profession is stronger and we serve our clients better and we serve the cause of justice better as a result. And that comes from fomenting an environment that promotes and rewards ethical behavior and eschews and exposes unethical conduct.

Now, this could be done in many different ways. We are doing it right here. We are, by sitting in this room by agreement—with the incentive of some CLE hours—reinforcing the system of ethics.

We are going to learn about ethics, we are going to think about principles and standards, we are going to be giving ourselves guidelines or reminding ourselves of guidelines for our own conduct, and we're going to be hearing them from speakers whom we hold in high regard. And for good reason. They've worked hard at this; they've thought about it a great deal.

So education is crucial. So is interpretation. Gonzalo was kind enough to mention that I had the privilege and honor to work for several years on the New York State

Bar Association's Ethics Committee. We write those opinions that you read or hear about, and we deliberate on them just as precisely as a court might do.

We receive an inquiry, someone is tasked with drafting the opinion, and an analysis is performed. Sometimes facts have to be investigated on very rare occasions, but on important issues. We've heard many hearings. We have invited participants to come and address us and we have provided a draft of the opinion to the Committee.

The Committee presents those opinions, once approved formally, to the public and to the bar so as to educate people, but also to provide some interpretation, some guidelines.

This has the effect, in turn, of promoting a system of ethical conduct. Promotion of ethical conduct—as opposed to ignoring it entirely, which would be the mirror opposite of promoting it—is, we think, a very effective tool beyond sanctions themselves.

Of course, there is discipline.

Of course, there are other incentives. We also think it is important to reward and honor those who have earned—"earned"—the reputation of behaving in an ethical fashion as regarded by their colleagues and to hold them up as examples to show how through their ethical conduct, through their right behavior, through their eschewing or avoiding of situations of corruption or compromise, they have been able to serve not only their clients but the better cause of the bar and justice.

I will get to a moment now shortly where I will talk about the code and our overall view of how to proceed with the code.

But within the Legal Summit of the Americas, about ninety participants at the Vance Center, we felt that it would be important to focus sooner rather than later on guidelines. And I think that that's a direction I also see Ruby and the Committee and The Latin America Council working towards: guidelines. Because drafting a set of code principles may be rather difficult.

But we also felt there was a need among the participants: over and over again, lawyers expressed the need to focus on specific priority ethical problems: Of course, most participants are concerned about judicial system corruption. That is, paying off court officers and judges and having ex parte communications and the like.

Now, we think of those things as unethical here. And I want to stress that when I say "we," I'm referring to a New York lawyer. I am a New York lawyer in an American law firm. I understand, however, that there is great diversity and a variety of legal systems and different rules and expectations.

So one has to come to a conclusion as to how we would define "judicial system corruption" as well. Is it defined only by reference to local law or local custom and practice? And there's a question of legitimacy, that is: who says, who gets to say what's legitimate?

And if you're torn between two principles, helping your client (zealous representation, we used to call it in New York) on the one hand and eschewing all forms of corruption (that is, providing some incentive of an economic nature) on the other hand—well, we find that a lawyer can't do both. You can't serve your client unless you're also paying that clerk the thirty bucks to get the document. What then do you do?

Being on the horns of an ethical dilemma is something that is going to result no matter which system you apply, no matter which definition you apply. We were certainly very sensitive to it in our discussions at the legal summit.

As another example, some participants have emphasized the importance of having robust systems for receiving and judiciously, but efficiently, addressing complaints about lawyer misconduct. When there are lawyers who engage in misconduct, are there systems for dealing with them?

I'm aware of the honor board, for example, of the Guatemalan Bar Association—a court which has acquitted itself quite well in some circumstances and drawn some significant criticism in other circumstances. But there are systems that don't even have that kind of system in place for judiciously receiving and reviewing complaints about lawyer misconduct.

Many participants stress that, in some of their countries, lawyers associations or groups function much more like a trade association to defend their own than to look out for the proper behavior of their members.

We were broadly in favor of a process to develop consensus around, and to promulgate a statement that reflects broadly accepted principles for strengthening ethical conduct in the law profession in the region. And that could include negative principles ("thou shalt not"), and that could include positive principles ("ethical lawyers are those who work to do the following things").

We certainly applauded the work of The Latin America Council. We were very impressed to receive the code. And although all ninety participants got a chance to spend two and a half hours in a session on the code, three different sessions, it was certainly not the kind of time within which one could review the code.

I was very honored that Ruby accepted some comments that I sent her after reviewing the code. I poured hours into reviewing the document. I think I'm pretty familiar with the New York Rules of Professional Conduct and our own code and the canons and ethical considerations, as well as many of our opinions.

And I quickly found that being part of the drafting process felt like very slow going indeed. This gave me two results: one, a great deal of respect for the process that's gotten you this far; and two, a recognition, as many members of our summit had, that it would be difficult to arrive at this code.

So within the purposes of the Legal Summit of the Americas—which is to look at how to strengthen the profession really starting now over the next ten years and to achieve results—I would say, as a group, there was not a consensus to join in and participate with the efforts of the Latin America Council to develop the code. That is not to say that we disagree with that as an objective, and that is not to say that we disagree with any aspect of the code itself.

It is to say that that is a long-term objective and that, while there may be difficulty in getting to it, there are some really important reasons to do so.

First, to create awareness of the importance of ethics in the Latin America international community, even where local law doesn't regulate it or do so effectively.

Second, to give certainty on what international firms can expect when they hire a Latin American lawyer, or what international clients can expect when they work with lawyers from different jurisdictions.

Third, to educate the Latin American community and, in general, better the quality of legal services throughout the region.

Now, while I've indicated that many of us also felt that we would have to overcome significant hurdles in reaching consensus on language—that is, in drafting the guidelines—we were also very concerned about the enforcement mechanisms. So I think both of those things are going to require very serious thought—subgroups and drafting and the like.

So, to conclude, I'm very pleased to have been given the chance to tell you a little bit about the Vance Center's work for international justice, including in the Legal Summit of the Americas, to applaud the work of your Latin America Council, and to encourage you all to work with your friends and colleagues across the borders in Latin America to share ideas and to work as colleagues towards development of processes where we can at least enhance the importance of ethics as a subject, making sure they're present in every legal summit discussion, whether it's about pro bono volunteering or whether it's about international contract drafting.

The work that you're doing by sitting here today, the work that they have done by sitting here in front of you and leading up to today, is work that very much needs to go forward.

And about that, there is absolutely consensus. Thank you.

(Applause.)

CATHERINE ANN ROGERS: Hello. And let me begin by thanking the organizers for inviting me.

To be honest, it was a tough call because of my schedule. I flew in from traveling last night and I have to be back in Central Pennsylvania—not any part of Pennsylvania that's near to New York—tomorrow. So I'm, in fact, doing a round trip today to be here. But I think it is, obviously, time well spent because this is such an important project that deserves recognition and discussion. And I'm just so impressed with it that it's truly a delight to be invited here to discuss it today.

So I guess as the resident academic on the panel, I'm going to try to provide—even if I agree with everything that's been said, and I thought a very nice summary of almost everything I otherwise would have said was said by the last speaker—I will try to focus on some larger trends about why this is really important work to be done, and why in particular I think the Latin America Council is the one to do it in this context.

First of all, just as a general trend, these are things we know but we don't necessarily focus on. So we hear these anecdotes about collusion, and some great ones that I hadn't heard before, but I like them.

One of the things that we are seeing is that it is no longer the case that a client's representation is sort of hermetically sealed within one national jurisdiction.

So you have a case in Latin America, it is not necessarily the situation that the only place where that case is going to be heard is in Latin American courts. So it's not just a matter of hiring local counsel and overseeing them.

In fact, many cases either have reverberations or repercussions, most typically judgment enforcement or sometimes obtaining discovery, in the United States. That means that rules of multiple jurisdictions apply.

I'm thinking of U.S. attorneys who necessarily have to be operating in Latin America, even if they're not necessarily licensed there: they have to be collaborating quite actively in case strategy and not just, in a sense, subcontracting out legal work. That's no longer the trend, even if it used to be. You have Latin American firms representing U.S. clients. You have U.S. clients representing Latin American firms.

All these trends, which sound quite obvious, have really changed the background of expectations that used to exist about where a lawyer's primary duties come from.

The other important trend, that I assume we have some significant representation of in this room—at least I'm pretty sure in the panel—is: how many of you are licensed in New York and some other foreign jurisdiction?

(Audience show of hands.)

Okay. So that is an increasing trend, as I understand, given, for example, the explosion of LLM programs in the United States.

My understanding is that New York, which is one of only a few jurisdictions that licenses foreign attorneys after an LLM, has perhaps even more than twenty percent of bar takers who are from a foreign jurisdiction and who, in fact, go back to practice in their respective foreign jurisdictions.

Now, why is that important? Because, actually, once you're licensed in New York, New York bar rules apply to you. And New York bar rules have something to say about when you are engaged in practice in another jurisdiction but you are licensed in New York.

Now, the theme of this subheading—and I'm just going to review very quickly the sort of choice of law rules that apply in New York—is that what's important, I think, about this initiative is that it's happening essentially at an international level through a regional inter-script.

I think that is really important because I will say, with all due respect to the New York bar and to the American Bar Association, national and local bar associations in the United States are not themselves the right entities to do this kind of work. You need to have essentially internationally oriented and foreign-trained lawyers to come up with this kind of code.

By way of illustration of how difficult I think it is for national and state bars to even understand what the rules are that are implicated, I'll just briefly review for you a couple of factors that you should know.

I asked how many people are licensed outside of the United States. How many of you are licensed in New York and in Washington, D.C., or in another U.S. jurisdiction?

(Audience show of hands.)

All right. So this is really relevant to you.

The American Bar Association attempted to address some of these issues through conflict of law or choice of law analysis in Model Rule 8.5. They basically said that if you engage in conduct outside of the jurisdiction in which you're licensed, if you're appearing before—and the model rules say "tribunal," (which means both an arbitral tribunal or a court, in another jurisdiction including, let's say, in Brazil or Uruguay), you are bound by the rules, the ethical rules of the jurisdiction in which that tribunal sits.

And that's actually pretty interesting. I didn't see in the code, but in Brazil, it is not only ethically permissible, but a constitutionally and statutorily protected—and there's apparently case law also protecting it—right to engage in ex parte communications with judges. Now, obviously, in the United States, there is a very strong prohibition against that.

It makes a very big difference if you are applying Brazilian rules or U.S. rules. They are diametrically opposed on that point.

There are also a number of other rules that come into play.

Can you prepare a witness? Can you do interviews, certainly questions and answers before you put the witness on the stand? In most jurisdictions in Latin America, that's not considered permissible.

In the United States, there are (and I don't remember if they come from New York or not ethical opinions saying it is not malpractice—but a breach of your duties of ethical competence—not to prepare a witness.

Okay? So you have a number of these conflicts and it depends on which rules apply.

And the American Bar Association said that you look to the rules of the place where the tribunal sits, if it is a arbitral tribunal or a court. Similar rule in New York. If it's a court and you are admitted to practice in that court, including pro hac vice, you apply those rules.

But as a U.S. attorney—unless you're one of the LLMs who is dually licensed, and you are actually appearing as a Brazilian or Uruguayan attorney in those courts—you as a U.S. attorney are going to be covered as supervisory counsel not admitted to practice.

Okay. Well, then, what rules apply to you? Because you're not actually appearing in the case.

But the ambiguities involved are quite complex, in part because I think national bars didn't really understand the scope of the conflicts that came up and they didn't understand how to develop effective choice of law rules.

So the result is a tremendous amount of ambiguity that, actually, I believe puts lawyers at risk. Lawyers with good intentions and trying to act in good faith to comply with what they believe are the rules that apply to them.

Okay. And that's all by way of background to say that I think national bars and state bars trying to solve this problem through conflicts of law rules are just not working very well.

So enter, essentially, international rules. I'll go back—again, as the resident academic, with apologies—to a quote from a very famous academic of international law, Oscar Schachter, who referred to international lawyers as an "invisible college." The idea was that, even though we are representing individual clients in individual cases, we are essentially building a system of transnational justice.

And if you think about the ambition of this project, it's somewhat counterintuitive. Right? Lawyers are usu-

ally lobbying bar associations for rules that help their practice. Right?

But the idea that you would sit down, with all the hard work that they have, to try to come up with a new regime of regulation and one that's meant to harmonize and tackle some of the very difficult problems and difficult conflicts that exist, is a sign or a symbol of international lawyers being uniquely qualified and uniquely committed to building a transnational system.

They recognize that international lawyers cannot just be subject to the national and local bar regimes. In a sense, they have to develop their own regime.

And we've heard some of the reasons for this. The primary one is just to educate—because a lot of the kinds of conflicts that arise we don't know about until we hear about them or they happen to us. And why is that a problem? Because your client ends up paying for the sideshow that develops when you have to negotiate what happens in the parallel proceedings and whatnot that you didn't anticipate.

The creation of a document like this also, I think, creates dialogue. So any time you have rules that are created to guide, including meetings like this—and I think this was already sort of covered—it creates a discussion about which rules should prevail, what are the tradeoffs between particular rules, and it creates more important protections for clients.

Why? Because clients can avoid the accidental happenings of these collisions happening sort of in real time in their cases. No client wants to have a test case.

And I think the corollary of that—which was sort of alluded to and I will just take it to the next level—is that we are talking now about creating essentially a duty of competence for transnational and international lawyers to understand where the ethical fault lines are, where the pitfalls are, and how effectively to avoid them, including if you talk about a sort of service mark or a certification that shows one has this knowledge or has spent time thinking about and talking about that.

Again, why is that important? Because it actually has real consequences for clients—both in their case strategy and their money. And that translates, particularly for lawyers who are doing work abroad and for international clients/opportunities, it seems to me, into being able to distinguish yourself from what I would call the sort of accidental tourist lawyer.

So we all, I think, have heard stories about lawyers who tried to serve process in person in Germany and got arrested, or tried to take depositions in Switzerland and got arrested.

And if you think I'm exaggerating about getting arrested, look at the state.gov website, which gives guidance on international litigation and it will tell you that you actually run the risk of getting arrested, quite literally, if you engage in these.

Who got arrested? It wasn't the savvy international lawyer who was trying to get away with something sneaky, it was the accidental legal tourist: the American lawyer who never thought about these issues, didn't even think they had to inform themselves or didn't even know that there could be different ethical rules in different countries. And this effort I think, in that sense, just creating dialogue is in itself very valuable.

One of things that this effort also underscores is that just because you leave the United States, if you're a U.S. attorney, it doesn't mean you're no longer a lawyer and that no rules apply, that you can just operate as an accidental tourist in blissful ignorance.

I do think, and the recent cases in Europe are material, is that to some extent that at least partially explains what happened in the Chevron and Ecuador case.

It is a case that started in the United States: they were operating under U.S. rules. When it got transferred down to Ecuador, I think there were tremendous ambiguities about what the U.S. attorney's role was: what rules, if any, applied to the U.S. attorney? To some extent, I think he seemed to understand himself as not even operating an attorney, as just a tourist in that legal system.

And that might have led to some of the comments, the quote I have from him—taken from one of the videos—that I think to me suggests or implies that he wasn't thinking of himself as even acting as an attorney, even though he clearly was, I think, down there—even though he was not admitted in that system and was not representing clients in that court, per se.

And for those of you not familiar with the case. There were a number of ethical allegations, including discussions about threatening or trying to intimidate the judge; allegedly copying the drafting by claimants' counsel of the judgment; expert witness tampering. All sorts of other terrible things.

But on the issue of intimidating the judge, this is a direct quote from the lead, the organizing counsel, U.S. counsel in that case: "The only language I believe this judge is going to understand is one of pressure, intimidation and humiliation... As a lawyer, I never do this. You don't have to do this in the United States. It's dirty..." And he said some other things, essentially. "But here it is necessary. I'm not letting them get away with this stuff"—meaning Chevron.

I think that quote to me captures a mental state that as an American attorney when I go to another system where there may be a wobbly rule of law, when there is a way that things are done there, then I'm not really acting as a U.S. lawyer and I'm free to do whatever I want.

But if you know anything about the *Chevron* case, you know that that conduct has now become a whole separate legal action. It is the primary reason why plaintiffs in that case—and my biggest fault with the attorney here is not that whatever he did is unethical, but that his clients are suffering. The judgment has been very difficult to enforce as a result of these things.

So the link between the conduct of attorneys, the sensitivity of that conduct and how it relates to abroad is really important for the attorneys' competence and their duty of competence, and also in just literally being competent, to represent their client and the best interests of their client.

So with that, let me no longer delay questions.

MR. ZEBALLOS: Do we have any questions from the audience?

I'm going to exercise moderator prerogative to ask a question.

Ruby and Sandra, can you talk a little bit about how you would be able to enforce something like this? I know that's one of the central issues that you've had to face.

MS. ASTURIAS: Well, that is one of the main essential tasks for this year, Mary Fernandez from The Latin America Council is going to be the Chair Committee of the project. And one of our main questions that we have is how we are going to enforce it.

As we discussed in our previous meeting, Gonzalo, as you may remember, definitely there are ways now, international-wise, in which you can penalize or create a sanction to an international lawyer. For example, just having the information publicly in a website to have a verbal or official public sanction is sufficient.

So I really think two things: one, the enforcement of this project has to come from the trend that we are going to create in the Latin community and two, there are simple ways of enforcing, such as the one I just mentioned.

So we don't need to unify the codes of ethics of Latin America in order to get enforcement. I think that, with measures like this one that I already told you, we can produce very important awareness and make it effective.

MS. GONZÁLEZ: Yes?

MR. CARTER: Can I say something?

MS. GONZÁLEZ: Sure.

MR. CARTER: We in New York have the Disciplinary Committee at the department level and we have state bar membership and city bar membership. And actually, I was an active member of both organizations. I have no idea if the City Bar or State Bar can throw you out while you remain licensed to practice law.

Is there like an internal bar if anyone here knows the answer to that question?

But, from the perspective of the ninety or so lawyers I talked to at the legal summit, I don't think the objective is to root out the very last violator, the very last free rider, the very last person who thinks they can take advantage of a clever rule interpretation, you know, and sort of try to drive a result in either a transaction, an arbitration or international litigation.

I don't think that's the objective of The Latin America Council leaders. If that were, I might consider it unrealistic and would want to sit down with them and talk about that.

So I think that sanctions have to be thought of as creative. That's why I thought of the idea of the certification mark. So here using intellectual property law that says, "You can use this mark under the following conditions, that you have taken the test or been certified or whatever, and stay in compliance. And we can vote you out of that."

And I don't think it would be very good if FERRERE, for example, lost its little badge that said international ethics compliance law firm. That would really stink. That would affect their business.

Then you see self-governance. Where they are not going to get the unethical neighbor of yours who is always going to sneak around and try to do things. But you are going to get a great deal more of the bar that way.

DAVID RUSSELL: Having had to do something similar to this in the international tax field, I commend The Latin America Council for what it's done.

But it seems to me that the difficulty is not the problem that arises if you analyze it in the conflict of law terms, where within one jurisdiction conduct it is required and in the other it is prohibited.

At the moment, your choices are to decide which conflict of laws rules come in: you apply the local rules or, alternatively, you say that your duty is in your home jurisdiction and, if you have to, comply with local rules.

The difficulty is one level down, where something is required or prohibited in one's home jurisdiction but permitted in the jurisdiction in which you're carrying on the practice. Let's take the ex parte communication rule. It's prohibited here. It's prohibited in most, I'm tempted to say, civilized jurisdictions, but I know that would be regarded as offensive in Latin America.

But it really isn't good enough to say, "I want to do that, because if your opponent can do it and it's regarded as ethical and you fail to do it, then you may as well be disadvantaging the client." Once again you've got the option of saying "I want out," but that can disadvantage the client, too.

So harmonizing these varied national laws is very difficult, and I don't think it's a sufficient answer to say, "Well, we'll take away your certification." Because that may mean that certification of a supranational body can itself place the lawyer in a position of conflict.

I commend what's happened so far. Ultimately, I'm sure we would all like an international standard to apply generally. But I think we got a long way to go.

MR. CARTER: I certainly don't disagree with that. But I will say that, as a member of the State Bar Ethics Committee, we have found very useful the language of Rule 8.5. There are still some little tricks to it. I was just discussing one with Catherine.

But it is one thing to encourage counsel to look at Rule 8.5. It says the rules you are to follow are, first, where you primarily practice, your admitting jurisdiction. You are admitted in New York, you're governed by these rules. You're also governed by your own rules anywhere else you are admitted.

But the rules that apply to you when you're in a—it says "court" in the current rules. There is some language I would play with there. You are subject to the jurisdiction where the court sits. And if you are admitted in multiple jurisdictions, then your conduct is measured by where you're primarily practicing or, alternatively, where your conduct has its primary effects.

And so a New York lawyer whose conduct has primary effects in Ecuador—assuming that we're not in the forum scenario—New York has made the decision which rules apply.

New York's Disciplinary Committee won't discipline you if you are primarily in these other jurisdictions if it consistently applies Rule 8.5.

And that choice of law doctrine, although it doesn't—I'm sure you're correct in saying this—resolve every situation, is, I think, an absolutely imperative part of the international bodies of rules.

MS. ASTURIAS: Just an additional comment.

According to the analysis that we make on the international principles of ethics that we have included in the code, I will say that there are very rare exceptions in which they contradict directly one with another.

What I'm trying to say is the principles of ethics that we have included that are the IBA international standards are pretty much general globally wise, I would say. So it's very punctual, the exceptions that we would find.

And in those cases where the exception is found, according to the guide, it says that the law that is permanent is the law in which you are primarily working as a lawyer.

MS. GONZÁLEZ: I would like to add that the way we sit, this is the beginning of a process. We don't think that any document is going to actually act as a bridge to solve the gap that we may have in the different jurisdictions and how we understand or apply ethical principles.

But as many of us say today, we think that it could be a useful tool to help create awareness and promote education on these issues. And that's the fundamental value that I think this initiatives do have, that they serve as a tool to actually help in the process to make things better.

We all agree that we need some changes, and this is a first step toward those changes.

MR. ZEBALLOS: Professor Rogers, did you have something you wanted to add?

PROF. ROGERS: Yes, I was going to say, to some extent, the choice of law rules can actually facilitate some enforcement. Because, for example, in 8.4, which is the rule that defines misconduct, it includes, as a definition of misconduct that is sanctionable under New York or U.S. Bar rules, "any conduct that is a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Which I think, if you think, "Okay, well, my New York ethical rules say I can take a deposition of a witness, but it's criminal in the jurisdiction where you take that deposition," I think 8.4 might bring in through the back door what 8.5 kind of says that you can do through the front door.

The other point of 8.4 that I will point out: "conduct that is prejudicial to the administration of justice" is considered misconduct. I think there is an open debate. Certainly I think that, when the drafters were writing it, they didn't mean administration of justice outside the United States.

But I think if you do something that is considered contrary to the administration of justice in Uruguay or Guatemala, there is room to interpret that 8.4 provision as, effectively, misconduct under New York rules.

In addition, Rules 3.3 and 3.4 have some provisions that I think could help be a means of essentially finding ways under New York or U.S. ethical rules to say that once you are advised of and are aware of international standards, that you can't just willingly disregard them and consider yourself acting consistent with your own local rules.

MR. CARTER: But purely, a legal violation alone without more doesn't violate 8.4 or 8.5—

PROF. ROGERS: No. Only the administration of justice. Sorry. The lawyer's honesty, trustworthiness or fitness as a lawyer.

MR. CARTER: Right. So you have to have some kind of moral turpitude, we can call that there.

And the other one, the administration of justice, is really limited to concepts, according to comment 3, of obstruction of justice.

So those standards are not as exact. So you can violate the law by taking a deposition in Switzerland—a subject I know a little bit about by taking a lot of Swiss witnesses' depositions outside Switzerland—but you're not necessarily subject to discipline.

So my point is where to draw that line in an international code so as to make sure that we prohibit or discourage the kind of conduct that truly goes to the heart of whether you should be practicing law versus whether you're engaging in a violation that doesn't go to that level.

That's going to be a line-drawing exercise of some great interest, I think.

MS. ASTURIAS: And again, if we talk about trends, about auto-regulation, about voluntary submission, these are the pillars of the project: to elevate the standard.

And usually ethics, I would say, is one of the branches of the law that keeps or groups all the main subjective philosophical principles which relate to why we are lawyers and the principles that we defend.

So we have to stick with the idea of certification, auto regulation, self-submission, voluntary submission, in order to understand the enforcement of this project.

MR. ZEBALLOS: Please join me in thanking our panelists.

(Applause.)

III. Second Panel: Practical Ethics Issues in Cross-Border Practice

MR. ZEBALLOS: So we just had a very interesting presentation on some of the high level and philosophical issues addressing ethics and we touched upon a couple of the pitfalls that you can run into.

The second panel is going to build a little bit on that discussion, and it's going to be a little bit more a practical discussion of the problems that we face in illustrating the pitfalls that are out there.

The purpose of the presentation is to show how, from the very inception of a case or of a transaction or of any kind of legal proceeding, from the moment you start investigating what you're going to do until when you hire counsel, to when you start your proceedings, to when you're enforcing a judgment or consummating a transaction, et cetera, you can run into these pitfalls in the cross-border context.

I am a litigator; that by no means should be taken to suggest that these issues are limited to litigation.

We are trying something a little bit different here. Hopefully we're among friends, so if it is not working as well, you will be patient with us. We are trying something that's a little more akin to just an effective dialogue, where we are going to discuss some of these issues and some of the experiences that we have had in our various jurisdictions.

I think to help facilitate that process, we are going to invite you to please interject your examples or any questions that you may have that are relevant to the analysis.

Hopefully, this will be a lively dialogue and something that's very productive for everyone.

I'm going to introduce our panelists.

Sitting in the middle we have Marco Amorese. Marco is a corporate lawyer and a litigator with AMSL Avvocati, with a diverse practice covering all areas of corporate commercial law, including antitrust, mergers and acquisitions, private equity, corporate restructuring and bankruptcy, creditors' rights, commercial real estate and general corporate counseling.

Marco is a graduate of the University of Milan, where he received his JD magna cum laude and earned numerous academic awards.

Marco has advised clients on a wide range of corporate transactions and was a representative in numerous proceedings before Italian courts and regulatory agencies. He has particularly experience in advising and representing international clients and conducting business in Italy and is a member of the Bergamo and New York Bars.

Jonathan Armstrong, who is on the far left, is an experienced lawyer with a concentration in technology and compliance. His practice focuses on advising multinational companies on matters involving risk, compliance and technology across Europe. He has handled legal matters in more than sixty jurisdictions, involving emerging technology, corporate governance, ex post implementation, reputation, internal investigations, marketing, branding, and global privacy policies. He has also been particularly active in advising multinational corporations on their response to the U.K. Bribery Act of 2010 and its interrelationship with the U.S. Foreign Corrupt Practices Act.

Patrick Cook, to my left, is a partner with Burges Salmon, where he is a restructuring and corporate insolvency lawyer with experience in the banking and finance sector.

For more than thirty-five years, Mr. Cook has advised on all aspects of stressed and distressed entities in both the U.S. and the U.K., on a domestic and an international basis. Clients include all stakeholders involved in corporate activity, including directors, shareholders, secured and unsecured lenders, providers of asset-backed finance, private equity funds, pension fund trustee, employees and trade creditors.

So I think a common theme for all—and we mentioned it before—is that the biggest pitfall you can fall into as an international practitioner is assuming the foreign legal systems are the same as yours.

I will start out with a small anecdote from my early days of practice. But a mistake that I would venture to say a lot of lawyers in the room would commit if it was your first cross-border case, particularly if it was a fraud case, given the draconian nature of our discovery rules and our discovery obligations.

So as a young lawyer, I received a phone call telling me that there was a business-class ticket to London waiting for me: our client had been accused of fraud, and before I got on the plane, I was to draft a litigation hold letter, get to London, secure the documents, start interviewing employees, grab all their files and papers, take their laptops and image them, shove everything into a bunch of boxes, and get on the first plane back to New York.

Kind of what you would do if you were investigating a fraud in New Jersey if you were in New York. Right? Which is also considered a cross-border matter.

So I get to London and I start ordering everybody around, telling them what to do. I'm a New York lawyer. Here is what we do. My general counsel is looking at me like I'm insane, and I just tell him: "Do what I say. I'm an outside lawyer, follow my instructions."

And outside counsel from a very good U.K. law firm stops me and says: "What the hell are you doing?"

And I said: "I'm doing my job."

He said: "You're also breaking every anti tip-off legislation in the U.K. books; you are violating the employee's privacy rights; and you're creating ten thousand more problems than already exist."

So I stopped and I told everybody to stop what they were doing, and we decided to do something extraordinary—which is think about what we were going to before we did it.

Now, we had a real problem here, because we had an obligation under U.S. law to secure this evidence. This was a regulatory issue. And we also had problems with U.K. regulators being involved. So we were stuck. I probably will say this ten thousand times in this presentation, but we were stuck between a rock and a hard place. And it's a very, very difficult thing to extract yourself from. A very, very difficult thing to advise your client on.

Jonathan has had a lot of experience with these kinds of issues, so I'm going to invite him to give us some stories and examples of how you deal with these kinds of things.

JONATHAN ARMSTRONG: Thanks. To be honest, a major part of the role of being local counsel, and a major part of what we do, is obviously caught up in that seventy percent of our business of helping North American firms, North American clients, do something in Europe largely around investigations.

And it seems to me that part of our role really is almost to act as a good concierge at a five-star hotel: to tell people not just where to have dinner, but not to pack stuff in bankers' boxes and ship it back to the U.S. without consequence. And the difficulties I think are increasing year on year.

Many of you know—and we've had programs on this before—about the Schrems litigation, about the transfer of data to the U.S. from the E.U.

That case has reached a crisis point. Some of you will know there's a deadline on Sunday, which is likely to lead, I think—if you look at some of the opinions from German regulators—to cause criminal convictions of people for transferring data in the ways that you described.

So the situation is definitely very challenging. And, additionally, Europe has some new data privacy laws that are tougher than the existing laws that will come in about two or three years time which, again, will allow the E.U. authorities to reach out not only to U.S. corporations but also to their clients.

This is a regime that mimics the E.U. antitrust regime. It's been hugely successful—six-and-a-half billion Euros worth of fines in the past five years alone. So this tends to be very much a change.

And as a result, the things that you said are exactly true. We will have to watch out for data protection laws; we will have to look at employees' rights particularly; and we'll have to watch data export laws in countries like France and China, for example, and in Russia.

And interestingly, I think, in Russia there has been this debate over the investigation of Gazprom, where some will say that Putin is trying to protect Gazprom. And there is the French legislation, particularly in regard to transfer of documents to other jurisdictions. Obviously, the E.U. complains, but then those close to Putin have said the E.U. isn't really in any position to complain because you've not participated in France and because of the way in which they excluded the reach of U.S. investigators into France. So we are in this challenging situation.

In addition, regulators are much more alert. I mean, most of my work is in regulatory investigations, particularly, as you said, under bribery.

There have been some interesting cases in places like China where many of you will know a guy called Peter Humphrey, who was at our conference when we were in Shanghai all those years ago. He was arrested by the Chinese authorities for conducting a "private" investigation—because the Chinese authorities said it was the authorities' duty to investigate.

We had cases in the U.K. where a group of lawyers came over and, it is alleged, did not follow the correct procedures in terms of interviewing witnesses. As a result, the case was withdrawn from the jury. If the judge thinks that it is not sound to put before the jury, that is about as big a defeat that you get in the U.K.

At the same time, we have had cases like the recent deferred prosecution agreement with respect to the 2010 Bribery Act with Standard Bank, where Standard Bank gets credit for doing the investigation correctly and for giving access to those witnesses, for walking them through their evidence, and so on and so on.

So I think as far as I'm concerned, the cliché is you've only got one chance to get it right, and so you need to look at how you would secure the evidence and secure it from transfer.

It is a bit like a crime scene. You got to put some chalk around the body, and then you remove the body and you decide when you're going to move the body once you put the chalk around.

Internal investigations are much the same. You do have to preserve the evidence like in litigation; it doesn't mean to say you have to move it.

So you have to choose your team, I think, to start off with. I will say this: it is going to involve capable local counsel and they can act like the concierge and keep you as well as your client out of jail.

It is going to involve a proper plan, and that's a plan in terms of collection, but it's also things like interview plans being done properly.

You're going to have to allow time—in my experience, about a half hour—with many witnesses to talk them through their privacy rights before you start their interview.

And you're going to have to look at those things like where a server is located if you're collecting emails. If you got an email exchange between a U.S. guy and a French guy, you probably want to look at the U.S. emails first, because that's less of an issue, than looking at them off of the French server.

And then the third thing I'd say—now that I've chosen the team and plan—is communicate the plan. I know it sounds obvious. You might have to communicate the plan to employees, to those who you're investigating. But also don't rule out communicating your plan to the regulators, particularly if you're doing an internal investigation under regulatory supervision.

From my experience in some of these cases, if you explain things properly to regulators, they can be sympathetic. And I'm not saying they will remove you from the rock and the hard place, but they may make the rock softer for you.

So don't rule out the possibility of engaging throughout the process.

MR. ZEBALLOS: Have you ever had the experience of communicating with regulators at the same time or putting the regulators in touch with each other, or somehow trying to pony off the fact that they're contradicting each other and putting you in this tautological situation?

MR. ARMSTRONG: I think that whole area is publicly challenging.

The difficulty is that there is undoubtedly much more regulatory cooperation than ever before. And countries like Switzerland, who traditionally didn't play ball with the international system—I mean, I think I'm right in saying that every recent U.K. Bribery Act cases have specifically permitted the Swiss with cooperation. That solves one hurdle.

So I think if you're representing the investigated corporation, you don't know who is speaking when. I ought to go into specifics.

But I occasionally ask the direct question and say to the regulator: "Tell me whom you're talking to and when." I've had a straight answer, the straight answer is: "None of your business."

MR. ZEBALLOS: I once had the experience where the regulator in the U.K. wanted us to call for a U.S.-style discovery. And I said: "We just don't have the resources to do that in the way you want us to do this."

And they have very limited resources, so you can actually negotiate quite a bit on the limited resources. This is one of the things that our local counsel told us.

In the U.S., the regulator says "Do it," you kind of just have to do it.

And I remember in that case I took the advice, I pushed back and I said: "Well, this is an awful lot of documents, can you narrow the request?" And the junior lawyer—I can say, I guess it was the FFO—said, "Well, maybe you can just give us the documents that are good for your case."

And I heard something like a book flying across the room, then the mute button, and a couple of seconds of silence, and he said, "We'll come back to you on it."

It highlights the point that this is the beginning of the case. So you may not have hired lawyers yet, you may be dealing with your clients' lawyers that they already have over there, but you're just figuring out what's going on and you can already get yourself into a lot of trouble.

So I think one of the things that Jonathan is saying, that I think is the important takeaway here, is listen to your local counsel, things are different abroad.

Which brings us to the next point: "Hiring counsel." I'm going to start this with an anecdote as well.

I had a case in the U.K.—at this time I was not so young an associate; in fact, at this time I was already a partner—and I hired a barrister to represent us. I did direct retention, which you can sometimes do of a barrister before you're in court. I hired somebody that I know quite well.

And I got a very angry phone call from a New York lawyer threatening to have me disqualified from the case because I had hired a barrister from the same chambers that his local client was using a barrister from.

I'm going to invite Patrick to explain maybe why that's kind of a silly request.

PATRICK COOK: In the U.K., we wouldn't even turn an eyebrow with that because barristers are a different bunch in the profession: they work for themselves.

They congregate in chambers as a means of sharing an overhead. So typically they have a clerk and they have a building, but they are not in partnership with each other. Their cases are their own; they don't share them—unless they're a leader leading a junior. But that's a slightly different distinction.

But in general terms, barristers are self-employed, working for themselves, and the fact that they're in chambers is really a convenience, if you like. At least that's the theory.

A solicitor, on the other hand, tends to work in partnerships—typically LLPs, as you would be aware if you're in big law firms here. And those are entities in their own rights and, therefore, it would not be possible—saving very strange circumstances. Not in litigation circumstances, I suspect—for lawyers in the same firm of solicitors to act on different sides of a case. Certainly a litigation case.

You can have situations where lawyers from the same firm will act on different sides in corporate contractual transactions, but that can only happen if all the parties agree explicitly and understand the consequences.

MR. ZEBALLOS: And I think the important issue here is that the conflicts of interest analysis can vary from jurisdiction to jurisdiction. And then a question you have ask yourself, in light of the previous presentation, is which law applies there.

Can you hire a lawyer from a jurisdiction where partners in the same law firm can represent parties in both sides of the case? They may be allowed in foreign jurisdiction, but you may not want to do that because you don't want to create a problem where you have a parallel action here.

Marco, I don't know, how does it work in Italy? Can lawyers, partners in a law firm, work on opposite sides of the case?

MARCO AMORESE: There are quite strict rules on conflict of interest, and law firms cannot act for both parties. And actually, you cannot waive conflict of interest rules—not even if you formally disclose the conflict to your client.

So you have to pay attention to the rules because you can be easily disbarred on this.

MR. ZEBALLOS: So if I make a private agreement between parties that, you know, two American companies are subsidiaries in Italy, we don't care, we waive conflict, that doesn't help you in Italy in that respect?

MR. AMORESE: Probably the bad consequences are on the lawyer's side, obviously. And probably you will not have any serious consequences towards your client, but for sure you will have a huge deal of ethical consequences if you do.

MR. ARMSTRONG: I was just going to say: In some respect, that's part of the planning stage as well.

I know with Larry's help and Drew's, we did a survey in 2014, I think, looking at some different things that apply to the legal profession. And the findings were similar to the earlier panel. I think roughly fifty percent of jurisdictions were allowing lawyers even to share fees with non-lawyers, which is another area of conflict, particularly in litigation. I know you have thoughts on that, Patrick.

And in some countries, it is relatively common for countries not to have indemnity insurance. I personally have been trying to instruct a firm in the Philippines with indemnity insurance, and I have yet to find one. If you know one, let me know.

But I know from our survey that in other countries—Dominican Republic, Paraguay, Nigeria, El Salvador, Panama, Guatemala—there is no system of indemnity insurance there.

So even having rules isn't enough if there are no sanctions behind it. And it seems to me that oftentimes if we're instructing local counsel for our clients, we have something of a duty of care really. And sometimes we have to explain things to them, you know, things like FCPA. You can't take that as a given in any jurisdiction.

And we've been looking at this. There are checklists of how you would say to local counsel in a jurisdiction what matters to you—because it might not be what matters to them. And if you're asking them to look at the risks, you obviously got to tell them what your risks are—and not just ask them to start fresh.

You were talking about conflicts where the actual ways in which lawyers are paid as well.

MR. COOK: Well, yes, indeed. I mean, there are two parts.

On that particular point, there's been a lot of debate in the U.K. about conditional fee arrangements, lowering their fee, and the inherent conflict that that creates between the lawyer and the client. Because at the end of the day, the lawyer has a very, very specific economic interest in the client's case, and there are concerns that there are circumstances in which the interest of the lawyer supersedes the interest of the client in those situations.

There's a lot of concern, particularly when you marry that to, for example, regimes which don't allow cost recovery in litigation, that it unfairly weights the advantage in favor of one party or another—normally, in this case, the claimant.

Because the claimant has nothing to lose. You can easily start a piece of litigation: the defendant, if he wins, still has to pay his own fees and his own costs, whereas the claimant simply loses the case, so the claimant's lawyer might suffer a bit. But as far as the defendant is concerned, that's a problem.

And the way that manifests itself is particularly in the personal injury field, where ambulance-chasing law firms are accused of mounting pretty unsustainable cases on the basis that the costs of defending them are simply not worthwhile. So defendants end up paying up on claims which really don't have merit.

There's a lot of discussion at the moment in the U.K. about actions that have been taken against the armed forces arising out of the Iraq and Afghanistan wars, where claims have been brought against individual soldiers for conduct, effectively, on the battlefield or shortly thereafter.

And there are literally thousands of these lurking around. And they are having to be settled, because they're taken on a no-win/no-fee basis.

The claimants themselves risk nothing. The cost of getting the evidence from Iraq or Afghanistan or, indeed, the impossibility of gathering evidence in those circumstances, impossibly weights matters in favor of the claimant in those circumstances.

Conversely, of course—and we discussed this over lunch—if there is a cost-recovery regime, it puts up certain claimants who might have legitimate claims, that they don't want to risk litigating, because if they lose perchance—and we all know litigation carries risk of all sorts of nature—then they can end up paying substantial damages, or costs rather, to the defendants.

So, it is difficult. And you can think of things like defamation as an example where, say, a newspaper prints a Scarlet story. It is incredibly difficult for a claimant to risk taking on the financial muscle of a newspaper, for example, knowing that, if he loses, he might have to pay enormous sums in costs, because costs in things like defamation can be vast.

MR. ZEBALLOS: A question I put to all three of you is:

How do you view choosing a venue for a multinational case as part of your obligations or duties to your clients in light of these things like fee shifting, punitive damages, ability to gather evidence, ability to potentially burden your opponent with discovery, et cetera?

MR. ARMSTRONG: I think in most of my work, unfortunately, the client doesn't get to choose the regulator.

And I think gone are the days when we used to agonize over, you know, if I may, a Swiss bank with customers in the U.S. and the sales guys are in the U.K., which regulator is going to give them that business?

Well, the answer has always been obvious to me: all of them.

And what we're seeing, what has changed isn't this what you might call an "after you, Doris" situation—where regulators have allowed the others to go first. What we're seeing instead is, if you look at things like LIBOR or ForEx, you see every regulator involved. And that's the challenge.

So if you're a corporation, you rarely get to choose the forum anymore.

And the other thing that's even more challenging is what is called "carbon copy prosecution." I think it's named wrongly.

But, for example, the Bonny Island case would be an example of a corruption case where the U.S. authorities lead, they do all the hard work, and then a number of other jurisdictions come along—Nigeria, for example—and say, "We were harmed, too. And even though you've done a deal with the U.S. government and you think it's all good and the deal is done, we now want our cash."

Siemens would be another example where Siemens thought they had things freed up with the U.S. and German regulators, but then it follows on.

So the challenge I have with most of my clients is (a) they don't get to choose the venue, and (b) new venues crop up even when you think you've dealt with some already.

MR. COOK: This is a bit of U.K.-dominated table, so I'll shut up in a little bit.

But what you mentioned, in Europe, in particular, forum shopping is very common or has been very common, particularly in my sphere of bankruptcy work, where different regimes have applied different criteria over quite a long time. And that's normally informed by the way that the society and the jurisdiction concerned views bankruptcy: some of them have a much more critical view of allowing bankruptcy.

So, for example, in Germany, if a company is allowed to trade whilst it is insolvent, even for a very short period of time, the directors can be criminally liable and they go to jail.

Now, that makes restructuring of companies really quite tricky.

So what's happened in the past, and in the past ten years in particular, is that there has been a trend of shifting what we call the central main interest of the company from, say, Germany to the U.K., which has a much more relaxed view about trading whilst insolvent—the advantage of which is it allows restructuring processes to be implemented much in the same way as Chapter 11 occurs here.

And that actually doesn't sit terribly well with the German authorities, surprisingly enough. They don't really like it at all. And one can't blame them.

The fact is that what it has led to is a change in European directive legislation, which seeks to harmonize the insolvency laws across the different jurisdictions. And that's quite a challenge between a civil code and a common-law code.

But it's beginning to evolve in such a way that individual countries, such as Italy and Germany and France and Spain as well, have enacted different legislation that facilitates restructuring work.

MR. AMORESE: As to the choice of venue, I think one concern that you must have, whether you are a plaintiff or a defendant, is to make a quick choice. Because at least, like in the European experience—and especially, I think, about antitrust litigation mainly, but actually in most fields—there has been an abuse in the use of torpedo litigation. And usually Italy is like a chosen venue because we have a very long trial and a prohibition against bringing the same suit in another European country. It makes the defendant quite safe.

So if you're a plaintiff's lawyer, you will have to think quickly about which is the best venue. And if you're a defendant, you, too, have to make a good choice.

MR. ZEBALLOS: I think an important takeaway from here is that these are questions that you have to ask your outside counsel very early.

A very awkward situation to be in is with a client who would be losing an ancillary piece of litigation abroad and then having to explain to your client, "Oh, yes, and by the way, you also have to pay their lawyers."

In this jurisdiction, that's such an alien concept. It is remarkable to me. It's never happened to me, but I've heard it happen to others. It is a terrible, terrible situation to be in to now explain to your client that they have to pay for their side if you lose.

The last point on hiring counsel is that you have to do it. You can't just go to court as a New York lawyer.

Jonathan, you have a great story about that that I think is worth sharing with everybody.

MR. ARMSTRONG: Yes. I think about three years ago there was a case in the U.K. which always sounds incredible where a U.S. lawyer just bolted up to the higher court and said that he was representing his client.

And the judge said, "But you're not admitted in this jurisdiction." And he basically he said he thought he could have temporary admission, just as if he was in another U.S. state.

And it just seems incredible that you can get into a courtroom like that. Obviously, the sanction was that he had to pay the costs personally. The case was adjourned because he said: "My client won't proceed without me." So the case was adjourned and he had to pay the costs of the other side.

I've had a U.S. firm—who shall remain nameless, frankly, because I've forgotten their name—who delivered this very detailed opinion in an internal investigation on Spanish law, which I thought was quite interesting in part because it was based on a statute which had been superseded about six years earlier.

And I was assured by the U.S. lawyer, who is the lawyer the firm agreed upon for the client, that his firm was well-qualified to advise on Spanish law because—I kid you not—one of his associates' mother was Cuban.

And so there are still what you might call—I don't know what the American term is—space cowboys out there, who think they can just turn up in any jurisdiction and advise on the law. And you would like to say those days are over.

MR. ZEBALLOS: Right.

MR. ARMSTRONG: Well, they are not.

MR. ZEBALLOS: There is no pro hac vice in the U.K., I think is the important takeaway for American lawyers.

Yes. This is an interesting theme. This is an ethical issue even in the United States, giving advice on laws in jurisdictions where you are not admitted even within the U.S. is actually an ethical problem.

MR. ARMSTRONG: I'd be interested in people's views on this. Because years ago, I was in the northeast of England and used to schlep around to the little courts and you knew that in some courts, even my accent, being thirty miles away, was a disadvantage.

You knew that if you were in chambers with the judge against somebody who was in the same chambers with him, you know, every day, that someone had home-court advantage.

Equally, if I'm being really candid, I've won cases I knew I shouldn't have won, but just because the judge trusted me more than he did the guy from out of town. I mean, I don't know whether that still happens in a country like the U.S. I would suspect it still happens in the U.K.

And how would we think it's less of an issue to turn up from a different country with a completely different accent, speaking a different language.

MR. ZEBALLOS: Well, I mean, what is interesting is, as a New York lawyer I can't just show up in a Louisiana court and argue. I wouldn't do it. It would be malpractice. Even if I got admitted pro hac vice to do the legal analysis, I would need somebody locally admitted to help prepare that.

Moving on to the next topic, because we are moving a little bit slowly. The next topic, we are going to touch on this briefly, I really should have titled "Securing Evidence and Assets."

One of the curious things about a lot of foreign jurisdictions that don't have discovery is that they give you far greater remedies to secure assets, freeze assets, than you necessarily might get in a pre-trial context in the United States.

And one of the questions I have for the panelists is:

Do you see any ethical issues, for example, with securing assets, or do you see this as a problem where you can secure assets abroad and you get more relief than you get at home?

Do your jurisdictions (a) allow that, and (b) do you see any problem with doing that? Or is it simply taking advantage of the laws that you have access to?

MR. COOK: In the U.K., you wouldn't get, say, a Mareva injunction, which is designed to prevent the dissipation of assets which would otherwise be available to meet a pecuniary judgment.

You wouldn't get that if you couldn't demonstrate that there was a risk that they would be dissipated, in the first place, and, secondly, you wouldn't get an order of any kind in terms of injunctive relief, as we call it, which would give you greater benefits in the U.K. than you would be able to in normal U.K. proceedings.

In other words, you wouldn't get an order requiring the delivery of something from Spain if you couldn't get that in the U.K.

So I don't think that's particularly an issue on that side of things, but I can see from other aspects.

MR. ZEBALLOS: From my perspective, it's an interesting issue. Because I have gotten Mareva injunctions for clients even though they're not enforceable in the United States and they have not really been valuable to my clients in the United States.

I've got them on the basis that, frankly, I felt it was my duty as a lawyer and in the zealous representation of my client to take advantage of all the laws that were available. But it is an interesting situation. Because you are getting a greater benefit necessarily than you would have gotten in your home jurisdiction.

MR. COOK: But you don't get the Mareva injunction in U.K. courts if there are ongoing U.K. proceedings.

MR. ZEBALLOS: Right.

MR. DARBY: Yes. That was my question. If you don't have a proceeding in the U.K.—only a proceeding in the U.S. but there are assets in the U.K. that you might eventually want to attach and which likely might be subject to dissipation or whatever—you have to commence the action in the U.K. on the merits? Or can you apply for these Mareva injunctions simply in aid of the U.S. action?

MR. COOK: You can in certain circumstances, if you get a report to support overseas actions. It is pretty unusual, but it can be done if there is a risk—particularly of criminal activity having taken place. But it is not typical.

MR. AMORESE: I checked the Italian case law and didn't find anything in the cases of an Italian equivalent of a Mareva injunction now to be followed by an ordering action in Italy. I would say that, as a lawyer, I wouldn't take the risk to make the injunction void because you don't start a litigation in Italy. So I would take a very cautious approach.

MR. COOK: You have to bear in mind that, when you're getting any injunctive relief in the U.K., you have to take it into the court that you will pay damages in, if it turns out that for any reason the injunction shouldn't have been given. So you better be sure that you got a good underlying case. And, of course, you have to make the application to the U.K. court.

MR. ZEBALLOS: And once you take that step, have you submitted to jurisdiction of the U.K. or Italian courts for all purposes? To me the biggest pitfall in this area is seeking relief from a foreign jurisdiction to get something to help you in the U.S.

So you might start a small proceeding, you might start an ancillary proceeding, specifically an injunction proceeding where you have an ancillary liquidation proceeding pending. So you start this action and then all of a sudden your client gets sued because you submitted to the jurisdiction of the court or there is a counterclaim against your client. And now you're in litigation and you're in a cost jurisdiction, so you've suddenly created a tremendous vulnerability to your client.

And this is one of the areas where you can really run into a problem. Because once you started that, you can't get out.

So if I start an injunction, if I start a proceeding in the U.K., for example—pardon me if I'm wrong—but it is not so simple as just dropping it if you decide you change your mind. At the point you drop it, you're on the hook for costs.

MR. COOK: Yes.

MR. ZEBALLOS: So as an American lawyer, you might not necessarily immediately reach that conclusion. And these are the kinds of things that I would argue, as a local lawyer, you need to be upfront with your American client or your foreign client and say: "Look, you can start this case, but if you do, you're immediately on the hook."

I do want to move on to discovery, because I think discovery is probably the most challenging area of cross-border litigation, because it's where you most commonly find yourself stuck between two countervailing orders.

So there's a series of questions I will just ask you all.

Does pre-trial discovery exist in your jurisdictions or is it prohibited and who can do it?

I think of all the things American lawyers assume exist abroad that are the same as what we have here, I think discovery is the number one.

I can't tell you the number of times that I've had this conversation with other lawyers and with clients, when I say: "Well, there is no discovery in this jurisdiction," they say: "Well, what do you mean there is no discovery?"

And I say: "Well, there is no discovery."

"Well, there is some discovery, right, just limited?"

"No, there is no discovery. There is nothing. You can't do it."

It is even worse than that because in some jurisdiction, it's illegal. And we heard from our earlier presentation that if you go to Switzerland and you take a deposition, you might wind up in jail.

It is even worse than that. If you go to Switzerland and meet with a witness and they hand over a bunch of documents to you and you take them in a briefcase and go out of the country, you can be arrested for that as well.

So my question for you is: How does discovery work in your jurisdiction?

JOHN F. ZULACK: That's really unfair. I've taken many, many depositions in Switzerland, and I've taken them in France. It is really the U.K. that is breaking the law.

Because what we have is The Hague Convention on the Taking of Evidence Abroad, and it is essentially saying if you want to do something in our country, you have to say, "Please, may I?"

MR. ZEBALLOS: Right.

MR. ZULACK: American lawyers don't say, "Please, may I?" in the U.K. because they don't get arrested there. But if you say, "Please, may I?", you can take an American-style deposition in Switzerland.

Switzerland became part of The Hague Convention on the Taking of Evidence Abroad in 1995, and it is a very friendly place to take depositions.

I go to Switzerland all the time. I interview witnesses all the time, and I have no problems. So I think it is a real exaggeration.

MR. ZEBALLOS: Do you do Chapter 2 Hague Convention or do you do friendly ones?

MR. ZULACK: No. I have four banks I represent. I go there all the time and I talk to them all the time.

MR. ZEBALLOS: That you represent.

MR. ZULACK: Yes.

MR. ZEBALLOS: But what about your client?

MR. ZULACK: Excuse me?

MR. ZEBALLOS: What about deposing a client, adversary?

MR. ZULACK: What about an opposing adversary?

MR. ZULACK: Under the Hague Convention, you cannot take a deposition of your client, or your company.

MR. ZULACK: You can take a deposition of my client in Switzerland if you go under The Hague Convention.

MR. ZEBALLOS: What about your adversary?

MR. ZULACK: My adversary can take a deposition of my client in Switzerland under The Hague Convention.

MR. ZEBALLOS: You're a U.S. lawyer that does the deposition? I've never seen that.

MR. ZULACK: I've had numerous, numerous depositions in which Akin Gump or Gibson Dunn is on the other side suing the bank, the Swiss bank that I represent, we have a court reporter, we have two translators, we go into an office and we take an American-style deposition.

MR. ZEBALLOS: At the U.S. Consulate?

MR. ZULACK: No. We take it in a law office. All you need to do is to get the permission.

The same thing in France. If you want to take a deposition in France, you just have to say: "May I please do this?"

And you get an order from either the federal authorities in Switzerland or from the federal authorities in France, and they say: "Yes, you may do this."

MR. ZEBALLOS: My experience is that that works on consent.

MR. ZULACK: That's the difference.

MR. ZEBALLOS: But when there is no consent—

MR. ZULACK: That's the typical.

MR. ZEBALLOS:—you can't quite do it that way.

MR. ZULACK: When there is no consent, then what you have to do is you have to ask questions—and I've done that, too. I've gone to Switzerland, in Geneva, and the judge then asks the question.

MR. ZEBALLOS: Right.

MR. ZULACK: And the person goes in front of the court. It is not the same type of deposition.

I think we shouldn't stigmatize Switzerland in the way that people do. It is the same thing: it's consent in France; it is consent anyplace.

MR. ZEBALLOS: I think the point is well taken. I think the example we're giving is if you just show up unannounced—

MR. ZULACK: Right.

MR. ZEBALLOS:—and do this without asking, without saying, "Please, may I?," you are taking a big risk.

MR. ZULACK: Exactly. But it is fairly naïve for anybody in the international field to just show up without understanding what the protocol is. It is protocol. It is protocol, and it is very easy to do.

MR. ZEBALLOS: Sure. Unfortunately, I think it happens all the time. I don't think people get arrested all the time, but I think people go in all the time and do things they shouldn't do.

MR. ARMSTRONG: I think sometimes the sanctions are different as well.

I mean, I can remember increasingly, in an internal investigation particularly, while the subjects lawyer up, then you are usually in difficulty as a U.S. corporation.

I've had the situation—I've maybe told this story before in a similar forum—of coming in as second counsel after a firm had said that the corporation involved had to do various things in terms of their internal investigation, one of which was putting in place a structure to sweat the emails of the suspect in the U.K. And it seemed an enormous amount of cost involved.

And I said to the client, "You know, a completely dumb question, but who is going to sweat these emails?" And they said, "Well, we have two guys who do it." And I said: "Forget the really dumb question, why can't they get on a plane and come and do it in the U.K.?" And the answer was that they could. And so for various reasons, they ended up in the U.K.—you know, we gave them clear instructions.

One of things I ended up saying to these guys is, "Look, one of the things you're going to have to do for me is dine out a lot. I want you to dine out every breakfast, every lunch, every dinner at a different restaurant. You always got to pay by credit card."

And when the suspect's lawyer got really tricky and said, "I know you sweated all this data in the U.S. and I'm going to try and suspend the internal investigation" on the day of transfer point, I said, "I've got twenty-six points of independent evidence putting my guys in the U.K. three times a day." Because I had all the credit card receipts and their signatures, and I had twenty-six impartial witnesses of waitresses or maître d's in restaurants that could say they were in the jurisdiction at the time.

So sometimes you got to think in my world what the suspect's lawyers are going to be thinking and the objections they're going to make. If they're representing a suspect who is bluntly at it, they've got nothing to lose in averting things like tax protection rights, whether they got any substance in them or not. At worse, they will delay the investigation. And under employment laws in Europe, my client is probably obliged to pay them for that extra period of time.

So, we're seeing these arguments run more and more.

Are we seeing more cases before the courts? Probably not. But are we seeing more letters trying to suspend internal investigations? Yes.

Are we seeing more U.S. corporations feel browbeaten to pay off people who have already stolen from their company because the procedure hadn't been followed properly by lawyers? My worry is almost certainly.

MR. ZEBALLOS: Yes. And the reality is, too, when you're doing these things is the practical realities of what you can sort of get away with.

I always tell people that, if you're meeting with somebody in a jurisdiction where you're not supposed to meet with people and if somebody calls you up and says "I want to talk to you about this case," you have to know who you are talking to. I always talk to local counsel before I take any of these steps because it's worrisome to me.

And the advice I've gotten is, if the person you're talking to is somebody that really wants to help your case and you know them and you know that you're in good shape, you're fine, go talk to them. Be very careful about it, but you could talk to them.

But if someone is hostile to your case or it's somebody you don't know or somebody that's an unknown quantity, one of the ways you get in trouble in those jurisdictions is you go, you meet with them, you sit with them, they give you something to take back with you and then they call and say, "This guy is going to the airport with documents, stop them at the airport."

MR. ARMSTRONG: I mean, the essential thing, isn't it, Jack, you are doing exactly what we're telling people to do as a counteraction in a way.

Without making this personal, I know some of your restaurant recommendations in Geneva, I've passed on to local counsel in Geneva. You know that city well, you've invested time learning the language, learning the culture, learning the procedure, and that's essential to the model international lawyer. If you haven't got that nose yourself, you've got to buy it in, I think.

And so there are ways of doing things in most jurisdictions. As I said, the rock can soften if you get the regulators to assist as well. But you can't just ignore the issue.

MR. ZULACK: I'm not suggesting you do.

MR. ARMSTRONG: I know you're not.

MR. ZULACK: I'm just saying, we are international lawyers and there are international protocols. And the idea of a U.S. lawyer coming into Switzerland saying, "Okay, I'm setting up shop, I'm going to take depositions," is very offensive to them.

The most important thing for Swiss culture is their sovereignty. That's what they care about. Okay?

If you say, "We recognize your sovereignty." Simon say, "May I request to please take a deposition?" They say, "Of course you can, now that you've recognized our sovereignty."

MR. ZEBALLOS: I think that's absolutely right. It is also in the recognition of what sort of a judicial act and what is just sort of a rolling-up-your-sleeves act.

I don't want to speak for all American lawyers. But I often think of the going out, investigating, looking at public records, finding witnesses, the stuff you hire private investigators for, I don't think of that as a judicial act. I don't think of that as something that only a certain authority is allowed to do. That's the "rolling up your sleeves and doing the job" part of being a lawyer.

But in some jurisdictions, in Switzerland, that's a judicial act. You have to be empowered to gather evidence.

And what you're saying, if I understand you correctly, is as long as you take the proper steps to make sure you're properly empowered, as long as you respect that process, you're going to be fine. I think that's absolutely right.

But there are lots of jurisdictions where that's also the rule. Right?

I don't know, in Italy, is taking evidence something that's considered a judicial act?

MR. AMORESE: It is. It is. And it is exactly as he said. You need to apply and then you will take evidence before a judge.

I would like to say something about discovery, because I've had this conversation many times with many American lawyers.

I have to say, discovery is a powerful tool, but it usually puts American lawyers in what they call the "hammer" paradox. So if you have a hammer, you tend to treat everything like a nail.

My point is, true, you probably don't need discovery most of the time. You can maybe create a conflict and sue in the U.S., and then maybe you taint discovery because the company has an office in the U.S. So you can obtain the evidence you were looking for, but then you have a judgment that probably is not enforceable in the country that the counterparty is from. So I think it's much more sensible.

And in most European countries make them serve the The Hague Convention on the Taking of Evidence Abroad on this specific issue. But most European countries have a limited scope of evidence. If you know what you need, you can get a pre-trial disclosure of evidence.

So probably do things like some honing of what you need: it is much better for your client if you try to pinpoint what you're looking for.

MR. COOK: I think that's right.

There is a sense of not wanting to allow fishing exercises in this regard.

And I think the thing is, in applying the principle of qualified universalism, there is generally a desire to cooperate and help—provided it doesn't conflict with what's considered to be local public policy.

So in the U.K., for example, by and large, in civil litigation, a witness statement is not something which is discoverable on a pre-trial basis. It has to be produced prior to the trial if the witness is going to give evidence. But it is not something that you would produce and create in the style that you would with a deposition, which is used for entirely different purposes.

So I think the issue is accepting whatever the local public policy is in relation to any particular step you want to take, and then going to the court and explaining why you want something that the court feels it can be made to fit within the scope of the public policy by and large.

Unless you're in a stringent jurisdiction, you will get that.

LAURENCE DARBY: In matrimonial proceedings in the U.K., the initial discovery is very, very similar to what it is in New York. You have to give a net worth statement, you have to give documents to show the accounts. It is a very significant disclosure that you make. I don't know if it is so in other commercial cases. But it is very significant in family court cases.

MR. COOK: In U.K. civil litigation, there is an obligation to provide to the other side every piece of evidence that is relevant. So all—

MR. DARBY: That's our Rule 26, Federal Rules of Civil Procedure.

MR. ZEBALLOS: But that production is protected.

MR. COOK: It can only be used for the purposes of a specific case.

MR. ARMSTRONG: I have a slight variance in that I see that some of these disputes, as I alluded to with Russia, are getting more and more politicized.

I see Francois just joined. But we had the French regulator Camille describe the conflicts between the way the French do things and the U.S. as a war between two cultures.

If I were a betting man, I would say 2016 is going to be the year where this comes much more to the fore. If I were betting even more, I would say it is a case involving a car manufacturer, a company known by two or fewer initials.

But I think we're all going to see things like discovery, investigations, privacy rights become very much headline news rather than in the back pages of law journals.

PETER UTTERSTRÖM: I was just thinking there is a European act as well, I think that is from the Swedish perspective. The Swedes don't understand the importance of that discovery and the importance of providing proper correct, et cetera, information. That you can actually lose your case by sort of being misguided.

So it is equally important in a case in the U.S. to try to seek the advice of U.S. lawyers of, "How do I deal with discovery? What are the risks?" Because at least Swedish lawyers don't understand that, with a few exceptions.

MR. ZEBALLOS: Where I've been hired by clients in jurisdictions where there is no discovery, and particularly when I'm hired by the lawyers in that jurisdiction, that is always a huge tension. I've had more than once the nightmare situation of having to go through the local lawyer and say: "Here is the discovery demand. I need you to let me come to your jurisdiction with my team and go through the documents and get what I need to respond to this."

And the initial answer is always, "No, we'll take care of it." You wait a month, and then I get a banker's box of documents back.

Any American lawyer knows that if you're in some sort of complex commercial litigation, a banker's box is not complying with your discovery demands 99.9 percent of the time.

Probably the longest conversation I have when I'm retained, particularly to defend a foreign client, is this discovery conversation. I say, "Look, to you it's going to seem incredibly onerous, incredibly unfair, but if you don't do this properly, you're going to lose the case flat. That simple. You're going to lose the case at a very early stage." It is a very difficult situation.

We're just about out of time, so I just want to ask one last question relating to discovery.

Probably the place where I most see or where I find myself or have put an adversary in a difficult situation is in the discovery context, where you demand documents that are protected by either a foreign blocking statute, foreign bankruptcy law, an implied undertaking or something the equivalent of an implied undertaking, and documents are demanded that create a real conflict of interest, a conflict for a client. This is the collision that Professor Rogers was talking about where there is just no way out. Sometimes it happens and you have to advise your client, "You are going to have to break one law or the other."

And it's, frankly, a horrible situation for a lawyer to be in.

Because I don't think you can ever counsel your client in law, but it is a real situation that clients find themselves in.

Without asking specific examples or specific statutes, I just want to ask our panelists: if you found yourself in that situation, how would you advise? What are some of the solutions or factors you look at in advising your client in that context?

MR. ARMSTRONG: I think it's really challenging from my point of view. I think as a general rule of thumb, most clients follow their home jurisdiction, particularly when they're a listed entity. Because they know that, if they disobey the law in the jurisdiction where they are listed, it can shatter credibility that might not be the case in another jurisdiction. It is slightly cynical, certainly. But I think in many cases the answer follows.

MR. ZEBALLOS: Do you recommend a choice to your client? Or do you just simply lay the factors out and say, "Look, this is a decision you guys have to make?"

MR. ARMSTRONG: I don't believe lawyers should, as we say, sit on the fence. I believe they should guide the client through the thought processes. And I believe that

you should set out the consequences both in terms of what's the worst that could happen and what's the likelihood of that bad thing happening.

I've been involved in a similar situation where we're not the lead counsel and the lead counsel involved—which I think was a great solution—got everybody in one room, and there were maybe fourteen very small lawyers from different jurisdictions. Fourteen only. We had honestly, I mean, a full day working out what the advice should be to the client.

In the end, we had almost like a consensus memo, not saying you must definitely do this but saying, "The consequences of doing this are as follows." It was a very useful process, I thought.

MR. ZEBALLOS: Right.

MR. ARMSTRONG: But in that situation, there are very rarely dumb questions, other than, "Can I be admitted in this court on a temporary basis?"

You know, I think it's incumbent on us to try to help the client make the decision. I don't think it's necessarily a joke for us to make in court.

MR. COOK: No, I don't at all. I think it comes back to the point you made right at the beginning—which is all about planning, trying to foresee what consequences might arise from certain courses of action.

And if you can do that properly, having taken good advice from your firms around the world, maybe you settle litigation or maybe you do it with your eyes wide open.

MR. AMORESE: If I ever find myself in that situation, I would seek Jonathan's advice. He's very thoughtful.

MR. ZEBALLOS: Well, thank you very much. I thank our panel.

U.S. International Trust Reporting and Planning

By Glenn G. Fox and Paul DePasquale

I. Introduction

This article discusses the various regimes established by Congress and the Department of the Treasury to combat avoidance of U.S. income taxation through the use of foreign trusts and offshore accounts. The circumstances are outlined under which a foreign trust, be it outbound or inbound, is deemed a grantor or nongrantor trust for U.S. tax purposes, and the U.S. income tax implications with regard to each are described. An overview is also provided of the so-called "throwback rules," which prevent U.S. persons from using foreign nongrantor trusts to accumulate income without current income tax.

In addition, the U.S. reporting requirements regarding distributions to a U.S. person from a foreign trust and gifts to a U.S. person from a foreign person, and the rules governing the nature and imposition of penalties for failure to comply with the U.S. reporting requirements, are outlined. U.S. reporting requirements with regard to foreign accounts in which a U.S. person has a financial interest or signature authority, and a foreign trust in which a U.S. person has an interest, are also delineated, and the rules governing the nature and imposition of penalties for failure to comply with these U.S. reporting requirements are outlined. Finally, the reporting and withholding rules under FATCA as they relate to foreign trusts are discussed.

II. U.S. Income Taxation of Foreign Trusts and Their U.S. Beneficiaries

A trust will be considered a U.S. person if a court within the U.S. is able to exercise primary supervision over the administration of the trust (the "court test") *and* one or more U.S. persons have the authority to control all substantial decisions of the trust (the "control test").[1] Any trust which is not a U.S. person (i.e., a trust that does not meet both the court test and the control test) is considered a foreign trust for U.S. tax purposes.[2]

"The first rule is that if any person has the discretion to make a distribution from the trust to any person, the trust will be treated as having a beneficiary who is a U.S. person, unless the trust terms identify the class of persons to whom distributions may be made, and none of those persons is a U.S. person."

The manner in which the income of a foreign trust is taxed for U.S. tax purposes depends upon whether the trust is a grantor trust or a nongrantor trust. Following is a discussion of these two types of trusts.

A. Foreign Grantor Trusts with U.S. Owners

If a trust is a grantor trust, a particular person is treated as the owner of the trust, and the income, deductions, and credits against tax of the trust will be attributed to that person and, therefore, included in computing that person's taxable income and credits.[3] There are a number of sections of the tax law that result in a trust being considered a grantor trust as to a U.S. person. One such section is Code § 679. Under Code § 679, a U.S. person[4] generally is treated as the owner of a foreign trust, and such a trust is therefore considered a foreign grantor trust, if (i) the U.S. person transfers property to the foreign trust, and (ii) the trust could benefit a U.S. person.[5] (Note that it is immaterial for purposes of Code § 679 whether the trust is created for the benefit of the owner or for the benefit of a third party, as long as some U.S. person may be benefited.)

"In essence, this provision says that even if the taxpayer complies with all of the other requirements of Code § 679, the IRS can still require that further information be submitted before it is determined that the trust does not have any U.S. beneficiaries."

If a nonresident alien of the U.S. ("NRA") has a residency starting date within five years after directly or indirectly transferring property to a foreign trust, such person is treated as if he or she transferred to such trust on the residency starting date an amount equal to the portion of such trust attributable to the property transferred by him or her to such trust in such transfer.[6] Therefore, the trust will be treated as a grantor trust as to such individual once he or she immigrates to the U.S., thereby preventing him or her from sheltering assets from the income tax by transferring them to a foreign trust prior to his or her arrival in the U.S.

All foreign trusts are presumed by the IRS to benefit a U.S. person unless the transferor can establish that (i) under the terms of the trust, no part of the income or corpus of the trust may be paid or accumulated during the taxable year to or for the benefit of a U.S. person, *and* (ii) no part of the income or corpus of such trust could be paid to or for the benefit of a U.S. person if the trust were to terminate at any time during the taxable year.[7] Pursuant

to flush language added to Code § 679(c)(1) by the Foreign Account Tax Compliance Act ("FATCA"), which was enacted on 18 March 2010 as part of the Hiring Incentives to Restore Employment ("HIRE") Act, trust income is deemed to be accumulated during the taxable year to or for the benefit of a U.S. person, even if the U.S. person's interest in the trust is merely contingent on a future event.

FATCA added three more new rules that make it more likely that a foreign trust will be deemed to have a beneficiary who is a U.S. person, therefore causing a U.S. person who transferred property to that trust to be considered the owner of the trust income under Code § 679(a).

"A beneficiary shall not be treated as a U.S. person for the purpose of the above rules with respect to any transfer of property to a foreign trust, if such beneficiary first became a U.S. person more than five years after the date of such transfer."

The first rule is that if any person has the discretion to make a distribution from the trust to any person, the trust will be treated as having a beneficiary who is a U.S. person, unless the trust terms identify the class of persons to whom distributions may be made, and none of those persons is a U.S. person.[8]

The second new rule enacted by FATCA is that if the U.S. person who transferred property to a foreign trust is directly or indirectly involved in any agreement (written or oral) that may result in trust assets being paid to or accumulated for the benefit of a U.S. person, such agreement will be treated as a term of the trust, making the trust a grantor trust as to the transferor under Code § 679(a).[9]

Finally, FATCA provides that if a U.S. person transfers property to a foreign trust, the trust may be treated as having a U.S. beneficiary unless the U.S. person submits information to the IRS as the IRS requires *and* demonstrates that under the terms of the trust, no part of the income or corpus of the trust may be paid or accumulated during the taxable year to or for the benefit of a U.S. person, and no part of the income or corpus of such trust could be paid to or for the benefit of a U.S. person if the trust were to terminate at any time during the taxable year.[10] In essence, this provision says that even if the taxpayer complies with all of the other requirements of Code § 679, the IRS can still require that further information be submitted before it is determined that the trust does not have any U.S. beneficiaries.

A beneficiary shall not be treated as a U.S. person for the purpose of the above rules with respect to any transfer of property to a foreign trust, if such beneficiary first became a U.S. person more than five years after the date of such transfer.[11]

B. Grantor Trusts with Non-U.S. Owners

In the case of trusts having a foreign grantor—so-called "inbound grantor trusts with foreign grantors"—Code § 672(f) applies special rules that make it difficult for a foreign person to be treated as the owner of a trust for income tax purposes under the grantor trust rules. This, in many instances, prevents a foreign person from creating a foreign trust for U.S. beneficiaries and taking the position that he or she is the owner of the trust for income tax purposes.

A trust, be it foreign or domestic, is treated as a grantor trust with respect to transfers after 19 August 1996, only if the person deemed to own the trust is a U.S. person or a domestic corporation.[12] This rule applies whether the trust income would be imputed to the foreign person either "directly or through 1 or more entities."[13] Prior to the enactment of Code § 672(f), a foreign grantor could use a foreign trust to convert into a tax-free distribution a gift to U.S. beneficiaries of assets—say, foreign securities—producing taxable income. This is because, if such income were taxable only to the grantor, and the grantor were a foreign grantor receiving foreign-source income, then no person would wind up being taxed in the United States on the trust's income.[14]

"If the first or last taxable year of the trust (including the year of the grantor's death) is less than 183 days, the grantor is treated as having a power to revest if the grantor has such power for each day of such first or last taxable year."

There are some important exceptions to the above rule that prohibits grantor trust status unless the person deemed to own the trust is a U.S. person or domestic corporation. The first exception is when an NRA funds the trust and "the power to revest absolutely in the grantor title to the trust property to which such portion is attributable is exercisable solely by the grantor without the approval or consent of any other person or with the consent of a related or subordinate party who is subservient to the grantor."[15] In such a case the NRA grantor will be deemed the owner of the trust income and the trust will be treated as a grantor trust for U.S. income tax purposes. A related or subordinate party is presumed to be subservient to the grantor unless the presumption "is rebutted by a preponderance of the evidence."[16]

The power to revest, however, must be exercisable for at least 183 days during the taxable year of the trust.[17] If the first or last taxable year of the trust (including the year of the grantor's death) is less than 183 days, the grantor is treated as having a power to revest if the grantor has such power for each day of such first or last taxable year.[18] But if the trust fails to qualify for this exception in any particular year, it may not qualify in any subsequent year, even if the requirements otherwise would be satisfied.[19]

"Upon becoming a U.S. resident, the former NRA could claim that he or she was not the grantor of the trust."

The second exception is when an NRA funds a trust and "the only amounts distributable from such portion (whether income or corpus) during the lifetime of the grantor are amounts distributable to the grantor or the spouse of the grantor."[20] Again, in such a case the nonresident alien will be treated as the owner of the trust income for U.S. income tax purposes. For purposes of Code § 672, amounts distributable from a trust in discharge of a legal obligation of the grantor or the grantor's spouse that are enforceable under the local law of the jurisdiction in which the grantor or the grantor's spouse resides are treated as distributable to the grantor or the grantor's spouse.[21]

Code § 672(f)(5) adds a further layer of protection against tax avoidance by preventing NRAs planning to adopt U.S. residency from circumventing the grantor trust rules. It provides that if an NRA would be treated as the owner of any portion of a trust (without regard to the provisions of section 672(f)), and such trust has a beneficiary who is a U.S. person, such beneficiary shall be treated as the grantor of such portion to the extent such beneficiary has made (directly or indirectly) transfers of property (other than a nongratuitous transfer or a gift that would be excluded from taxable gifts under §2503(b)) to such NRA. Before the enactment of Code § 672(f)(5), a wealthy NRA could avoid U.S. tax on his or her wealth by transferring property by gift to another NRA who could, in turn, contribute the property to a trust of which the initial NRA grantor was a discretionary income beneficiary and over which the intermediary NRA retained grantor powers over the trust. Upon becoming a U.S. resident, the former NRA could claim that he or she was not the grantor of the trust. Under Code § 672(f), the former NRA will be deemed the grantor of the trust.

Certain trusts in existence on 19 September 1995 are not subject to Code § 672(f): those treated as owned by the grantor under Code § 676 (powers to revoke and revest) or Code § 677 (income paid to or accumulated for the benefit of the grantor or the grantor's spouse[22]). Code § 672(f) will apply, however, with regard to any portion of the trust attributable to transfers to the trust made after 19 September 1995.[23]

C. Foreign Nongrantor Trusts

While the income of a foreign grantor trust (like that of all grantor trusts) is attributed to the owner of the trust, resulting in the trust effectively being ignored for income tax purposes as a separate taxpayer, the income of a foreign nongrantor trust (like the income of a domestic nongrantor trust) is taxed to the trust, to the beneficiaries, or partly to each. Income is allocated between a foreign nongrantor trust and its beneficiaries through the concept of distributable net income ("DNI") and its limitation on the trust's distribution deduction. DNI for a foreign trust is, generally speaking, the taxable income of the trust, including capital gains (for domestic trusts, DNI does not include capital gains).[24]

"A complex foreign nongrantor trust receives a deduction for that portion of its current income that the trust is required to distribute plus that portion of its current income that the trustee actually distributes to the beneficiaries pursuant to the governing instrument."

A foreign nongrantor trust, like a domestic nongrantor trust, can be either a "simple trust" or a "complex trust." A foreign nongrantor trust is a simple trust if: (i) all income must be distributed currently; (ii) no amounts may be paid, permanently set aside for, or used for a charitable beneficiary; and (iii) no distributions are made other than of current income (i.e., no distributions are made of accumulated income or corpus).[25] All of the income of a foreign nongrantor trust that is classified as a simple trust will be taxed to the beneficiaries, and the trust will receive a deduction for its current income that it must pay to the beneficiaries, whether or not that income is actually distributed.[26] The amount included in the beneficiaries' gross income and the amount of the trust's deduction are both limited by the trust's DNI.[27]

A foreign nongrantor trust that is not required to distribute all of its income currently, that distributes accumulated income or principal, or that has a charitable beneficiary is a "complex" trust. A complex foreign nongrantor trust receives a deduction for that portion of its current income that the trust is required to distribute plus that portion of its current income that the trustee actually distributes to the beneficiaries pursuant to the governing instrument.[28] The trust's deduction is limited to the amount of its DNI.[29]

The beneficiaries of a complex foreign nongrantor trust include in their gross income all income that the

trust is required to distribute, and all income actually distributed to the beneficiaries pursuant to the governing instrument.[30] If and to the extent that a complex nongrantor trust does not distribute (and is not required to distribute) DNI, such DNI is taxable to the trust.

Each beneficiary must include in his or her gross income an amount equal to that beneficiary's pro-rata share of the trust's DNI.[31] A distribution in excess of the trust's DNI is treated either as a nontaxable distribution of principal or as a distribution of income accumulated from prior years taxable under the so-called "throwback rules."[32]

"The throwback tax is determined by averaging the distributions over a number of years equal to that over which the income was earned, and by including a fraction of the income received from the trust in the beneficiary's income for each of the five preceding years, excluding the years with the highest taxable income and the lowest taxable income."

The purpose of the throwback rules is to prevent U.S. persons from using foreign nongrantor trusts to accumulate income without current tax. Under the throwback rules, if a foreign nongrantor trust accumulates DNI in one year, the accumulation becomes undistributed net income ("UNI") for the following year. Since DNI for a foreign trust includes gains allocable to corpus, UNI will include any accumulated gains. An "accumulation distribution" is a distribution of any amount from the trust, other than income that is required to be distributed from the trust, to the extent that the amount distributed exceeds the trust's DNI for the year, reduced by income that is required to be distributed.[33] The throwback rules apply only to foreign trusts, since distributions from domestic trusts are calculated without regard to UNI.[34]

Under the throwback rules, the U.S. taxes a U.S. beneficiary of a foreign nongrantor trust that makes an accumulation distribution in the same manner that the U.S. would have taxed the beneficiary if the trust had distributed all of its income on a current basis.[35] U.S. beneficiaries who receive distributions of UNI from a foreign nongrantor trust may be subject to onerous U.S. income tax treatment on the distribution in the form of two types of penalties.[36]

First, the distribution of UNI is taxed to the U.S. beneficiary as ordinary income (taxable at marginal rates up to 39.6%), even if the UNI represents gains accumulated in a prior year (long-term capital gains are generally taxable to U.S. persons at a flat 23.8% rate, when accounting for the Medicare tax under Code Section 1411).[37] The throwback tax is determined by averaging the distributions over a number of years equal to that over which the income was earned, and by including a fraction of the income received from the trust in the beneficiary's income for each of the five preceding years, excluding the years with the highest taxable income and the lowest taxable income. The fraction of income included in the five years is based on the number of years the income was accumulated.[38]

Second, the U.S. income tax on the distribution is subject to an interest surcharge, calculated on a compounding basis, that is intended (in a rough manner) to charge the U.S. beneficiary as if he or she had owed the U.S. tax for the prior year in which the UNI was earned in the foreign nongrantor trust. The interest surcharge imposed on the throwback tax is equal to the rate of interest applicable to underpayments of tax (which is the Federal short-term rate as determined monthly, plus three percent).[39]

The combination of the above two penalties can result in a confiscatory tax as large as the distribution itself, because the longer UNI accumulates in a trust, the higher the interest charge.

In order to determine whether a distribution from a foreign nongrantor trust carries out UNI, certain ordering rules apply. To apply the ordering rules, one must understand the definitions of DNI and UNI discussed above and must understand the definition of fiduciary accounting income ("FAI"). FAI is the amount of the trust's income determined under the terms of the governing instrument and applicable local trust law. FAI can be, and often is, different in both timing and amount from DNI. To the extent there is any FAI exceeding DNI, it is not subject to U.S. tax but may be subject to local tax.

When the total distributions from a foreign nongrantor trust during the year at issue do not exceed FAI for the year, the distribution will be deemed to carry out the trust's current-year DNI. Once DNI is exhausted, FAI is carried out and no UNI is carried out, so the throwback rules will not apply.

"With the partnership blocker solution, the foreign trust owns an interest as a ninety-nine percent partner in a partnership."

When the total distributions from a foreign non-grantor trust during the year at issue exceed FAI for the year, the distribution will be deemed to carry out the trust's current-year DNI and once DNI is exhausted, UNI carried forward from prior years is carried out. Once all DNI and UNI have been carried out, the balance of any distributions from the trust is deemed to be trust capital.

1. The Partnership Blocker Solution to the Throwback Rules for Foreign Non-Grantor Trusts

Generally speaking, if a U.S. person is a beneficiary of a foreign nongrantor trust, the solution to avoid the throwback rules is to distribute all of the income on an annual basis (either to the U.S. person beneficiary or to another non-U.S. person beneficiary). Another solution is to decant the trust assets to a domestic trust where the income can be accumulated without being subject to the throwback rules.

If annual distributions from the foreign trust or decanting to a domestic trust are not possible or are not appropriate in the given circumstances, another solution that may be useful is the so-called "partnership blocker solution." The partnership blocker solution is intended to take advantage of the ordering rules discussed above for DNI, UNI, and FAI. The partnership blocker solution's objective is to control when the trust receives FAI.

"Because the income generated by the underlying investments passes through the partnership directly to the trust for U.S. income tax purposes as DNI, UNI will gradually accumulate in the trust."

With the partnership blocker solution, the foreign trust owns an interest as a ninety-nine percent partner in a partnership. The other one percent partner can be a corporation, all of the stock of which is owned by the trust. The assets that would have otherwise been held by the trust are held by the partnership. The partnership is transparent for tax purposes and, therefore, the DNI/UNI of the trust will be determined by the income of the partnership and the distributions from the trust. The partnership will nevertheless serve as a *blocker* for purposes of the trust's FAI. FAI will only be provided to the trust when an actual distribution is made by the partnership to the trust.

In most cases when the partnership makes a distribution to the trust, the trust will also have a DNI amount for the current year. Under the above ordering rules, a distribution from the trust will be first treated as taxable DNI to the extent of any current year DNI and, if the distribution does not exceed the current year FAI, the remainder of the distribution should be treated as FAI, which is not subject to taxation.

The partnership blocker allows the trustee to accumulate income in the underlying partnership without triggering the adverse effects of the accumulation distribution rules once a distribution to a U.S. beneficiary is made. Because the income generated by the underlying investments passes through the partnership directly to the trust for U.S. income tax purposes as DNI, UNI will gradually accumulate in the trust. However, the UNI will not be deemed distributed out of the Trust, and thus a U.S. beneficiary will not be taxed on such UNI as long as the trust's total distributions for the year do not exceed its FAI (the distributions will likely not exceed FAI, since the distributions will equal exactly what was distributed to the trust by the partnership).

D. Tax on Contribution of Assets to a Foreign Trust

If a U.S. citizen or U.S. resident transfers property to a foreign trust, the transfer is treated as a sale or exchange of the transferred property for an amount equal to the fair market value of the property, and the transferor recognizes gain on the excess of the fair market value of the property over its adjusted basis.[40] Such a transfer essentially is taxed at the capital gains tax rates (which is currently twenty percent plus a 3.8% Medicare surcharge, as discussed above). The tax on contribution to the foreign trust is not imposed, however, if the foreign trust is treated as a grantor trust for U.S. income tax purposes.[41] There would, however, still be IRS reporting requirements, discussed below.

III. Reporting Requirements for Contributions to and Distributions from a Foreign Trust and Receipts of Foreign Gifts

A. Overview

When a U.S. person makes a contribution to a foreign trust or receives a distribution from a foreign trust, in addition to complying with any required income tax reporting requirements and payments (discussed above), he or she is required to file a report with the IRS for the year of the contribution or distribution reporting the same.[42] Contributions by U.S. persons to foreign trusts and distributions to U.S. persons from foreign trusts must be reported annually on IRS Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts. If a U.S. person is an owner of a foreign trust, IRS Form 3520-A, Annual Information Return of Foreign Trust with a U.S. Owner, also must be filed.

"The U.S. person may also be required to report the names of the trustees or other persons in control of the trust and the names of the beneficiaries thereof, and may be required to attach a copy of the trust documents and other agreements and letters of understanding that control the trust relationship."

It should be noted that "distributions from foreign trusts" also may include distributions that are constructively received, such as the payment of the beneficiary's debts by the trust, payments to the beneficiary in ex-

change for property or services of the beneficiary if the payments exceed the fair market value of the property or the value of the services, and direct or indirect loans received by the beneficiary from the trust, unless the loan is in exchange for a so-called "qualified obligation."[43]

IRS Form 3520 must be filed by a U.S. person for each year that he or she makes a contribution to or receives a distribution from a foreign trust. The form is due on the date the U.S. person's individual income tax return, IRS Form 1040, is due (including extensions), and must be filed with the Internal Revenue Service Center, Philadelphia, PA 19255.[44]

With respect to contributions to a foreign trust, IRS Form 3520 requires the U.S. person who contributed the assets to report the name of the trust and the property contributed and value thereof. The U.S. person may also be required to report the names of the trustees or other persons in control of the trust and the names of the beneficiaries thereof, and may be required to attach a copy of the trust documents and other agreements and letters of understanding that control the trust relationship.

Among other things, IRS Form 3520 requires the U.S. beneficiary of a foreign trust to report the name of the trust and its address, the amount of the distributions received from the trust during the tax year, whether any loans were received from the trust during the tax year—and, if so, whether the loan is a "qualified obligation"—and whether the beneficiary received a Foreign Grantor Trust Beneficiary Statement or Foreign Nongrantor Trust Beneficiary Statement from the trust (discussed below).

"Certain other reporting requirements for such a U.S. taxpayer will depend on whether he or she receives from the trust a Foreign Grantor Trust Beneficiary Statement."

If adequate records are not provided to the IRS to determine the proper treatment of a distribution from a foreign trust, the U.S. beneficiary will be required to treat the distribution as an accumulation distribution (discussed above) includible in the income of the beneficiary. (This is so even if the trust is a grantor trust, the income of which is usually only taxable to the grantor with the distribution otherwise being treated as a gift, if adequate records are not provided to the IRS.[45]) The beneficiary will not be required to treat the entire distribution as an accumulation distribution if he or she receives from the foreign trust either a Foreign Grantor Trust Beneficiary Statement or a Foreign Nongrantor Trust Beneficiary Statement with respect to the distribution and attaches the statement to Form 3520[46] and further inquiries by the IRS are answered to its satisfaction.

If a Foreign Grantor Trust Beneficiary Statement is received from the trust, meaning that it is a grantor trust, the entire distribution to the U.S. beneficiary will be treated as a nontaxable gift. If a Foreign Nongrantor Trust Beneficiary Statement is received from the trust, meaning that the trust is not a grantor trust, the distribution will be taxed to the beneficiary under ordinary U.S. income tax rules (which may or may not result in accumulation distribution treatment, as discussed above).[47] If the U.S. beneficiary does not receive any such statement, he or she may be able to avoid treating the entire distribution as an accumulation distribution if he or she can provide certain information with respect to the distributions to the IRS (discussed below).

B. Foreign Grantor Trust: Reporting Requirements

1. Overview

As discussed above, under the grantor trust rules of Code § 679, a U.S. person generally is treated as the owner of a foreign trust, and such trust is considered a foreign grantor trust, if (i) the U.S. person transfers property to the foreign trust, and (ii) the trust could benefit a U.S. person. In addition to the income of a grantor trust being taxed to the grantor under U.S. tax law, there are specific reporting requirements with which the trust and the grantor must comply, above and beyond reporting the income on the grantor's annual income tax return.

"If the taxpayer has received a Foreign Grantor Trust Beneficiary Statement, he or she must attach it to Form 3520 and enter from it the pertinent information regarding trust income and the nature and amount of distributions on Schedule B of Part III of IRS Form 3520."

Part II of IRS Form 3520 covers distributions to a U.S. person from a foreign grantor trust where the U.S. person is considered the owner of any of the assets of such trust. Part II, Line 20, asks the U.S. taxpayer who has received a distribution from a foreign grantor trust to provide the name, address, country of residence, and identification number (if any) of any other owners of the trust, as well as the relevant Code section causing that person to be considered an owner under the grantor trust rules. Certain other reporting requirements for such a U.S. taxpayer will depend on whether he or she receives from the trust a Foreign Grantor Trust Beneficiary Statement. Whether or not a Foreign Grantor Trust Beneficiary Statement is received, however, the U.S. taxpayer will be asked to provide information regarding the appointment of a U.S. agent. This issue is treated below.

2. If the U.S. Taxpayer Receives a Foreign Grantor Trust Beneficiary Statement

Part II, Line 22, of IRS Form 3520 asks whether the U.S. taxpayer has received a Foreign Grantor Trust Beneficiary Statement. If the taxpayer has received a Foreign Grantor Trust Beneficiary Statement, he or she must attach it to Form 3520 and enter from it the pertinent information regarding trust income and the nature and amount of distributions on Schedule B of Part III of IRS Form 3520.

"If a foreign trust does not fall within the definition of a foreign grantor trust under Code § 679, it is deemed a foreign nongrantor trust for U.S. tax purposes."

The Foreign Grantor Trust Beneficiary Statement is found on page 4 of IRS Form 3520-A, which should be provided by the trustee to the taxpayer by March 15 of the year following the year at issue.[48] The statement must set forth the name and address of the trust, the name and address of the trustee, the name and address of the beneficiary, a description of the property distributed to the beneficiary, whether the owner of the trust is an individual, partnership, or corporation, and an explanation of the facts and law establishing that the foreign trust is treated as owned by another person, i.e., the grantor. In addition, the trustee must indicate whether the trust has appointed a U.S. agent who can provide the IRS with all relevant trust information (see below).

3. If the U.S. Taxpayer Does Not Receive a Foreign Grantor Trust Beneficiary Statement

As stated above, Part II, Line 22, of IRS Form 3520 asks whether the U.S. taxpayer has received a Foreign Grantor Trust Beneficiary Statement. If the taxpayer has not received a Foreign Grantor Trust Beneficiary Statement, then Part II, Line 22, of IRS Form 3520 requires that the taxpayer, to the best of his or her ability, attach for the trust in question a "substitute" IRS Form 3520-A containing the information outlined above, including that regarding the appointment of a U.S. agent. Provision by the taxpayer of the substitute IRS Form 3520-A, however, does not relieve the taxpayer of penalties (discussed below) for failure to cause the trust to file the form.[49] In addition to the substitute IRS Form 3520-A, the taxpayer is required to file with his or her tax return IRS Form 8082, Notice of Inconsistent Treatment or Administrative Adjustment Request, to inform the IRS that the owner has not received a Foreign Grantor Trust Owner Statement.[50] (IRS Form 8082 and Instructions are attached to this memorandum).

C. Foreign Nongrantor Trust: Reporting Requirements

If a foreign trust does not fall within the definition of a foreign grantor trust under Code § 679, it is deemed a foreign nongrantor trust for U.S. tax purposes. Under U.S. tax law, distributions by a foreign nongrantor trust to a U.S. beneficiary are taxed to such beneficiary.

1. If the U.S. Taxpayer Receives a Foreign Nongrantor Trust Beneficiary Statement

Part III of Form 3520 covers distributions to a U.S. person from a foreign trust. Part III, Line 30, asks whether the taxpayer has received a Foreign Nongrantor Trust Beneficiary Statement with respect to any such distribution. If the taxpayer has received a Foreign Nongrantor Trust Beneficiary Statement, he or she must attach it to Form 3520 and enter the pertinent information on Schedule B of IRS Form 3520.[51]

"The taxpayer is not asked on this schedule to provide identifying information with regard to the trust in question or to its trustee."

The Foreign Nongrantor Trust Beneficiary Statement is not part of a return and must, therefore, be prepared independently by the trustee. Pursuant to IRS Notice 97-34 and the Instructions for IRS Form 3520, a Foreign Nongrantor Trust Beneficiary Statement should contain the following information:

- Foreign Trust Background Information, including:
  - the name, address, and EIN (if available) of the trust;
  - the name, address, and TIN (if applicable) of the trustee furnishing the statement;
  - the method of accounting used by the trust (cash or accrual);
  - the taxable year to which the statement applies; and
  - a statement identifying whether any of the grant ors are partnerships or corporations.
- U.S. Beneficiary Information, including:
  - the name, address, and TIN of the U.S. beneficiary; and
  - a description of the property (including cash) dis tributed or deemed distributed to the U.S. person, and the fair market value of said distribution.
- Sufficient information to enable the U.S. beneficiary to establish the appropriate treatment of any distribution or deemed distribution for U.S. tax

purposes. According to Notice 97-34, information similar to that presented in an IRS Form K-1 would be sufficient. The trustee has the opportunity here to report what the components of the distribution represent (e.g., interest, dividends, etc.), so that the beneficiary can report the proper information on the beneficiary's own tax return. Income, deductions, etc., need to be reported using U.S. tax concepts, which may require significant recharacterization of amounts shown on the financials of the foreign trust.

- A statement that, upon request, the trust will permit either the IRS or the beneficiary to inspect and copy the trust's permanent books of account, records, and such other documents that are necessary to establish the appropriate treatment of any distribution. This statement is not necessary if the trust has appointed a U.S. agent.[52]
- The name, address, and EIN of the trust's U.S. agent, if applicable.

2. If the U.S. Taxpayer Does Not Receive a Foreign Nongrantor Trust Beneficiary Statement

Part III, Line 30, of IRS Form 3520 also provides for the case in which the taxpayer does not receive a Foreign Nongrantor Trust Beneficiary Statement from a foreign trust with respect to distributions received. In such a case, the taxpayer is asked to complete Schedule A of Part III of Form 3520. This schedule requires only that the taxpayer inform the IRS of the amounts received from the foreign trust and the number of years the trust has been a foreign trust. The taxpayer is not asked on this schedule to provide identifying information with regard to the trust in question or to its trustee.

"The fraction of income included in the five years is based on the number of years the income was accumulated."

The disadvantage to the taxpayer of not procuring a Foreign Nongrantor Trust Beneficiary Statement is that the IRS, pursuant to IRS Notice 97-34, may deem (unless a U.S. agent is appointed[53]) the entire distribution made by any foreign nongrantor trust an accumulation distribution, which would subject the amount of the distribution to unfavorable tax treatment and the imposition of the interest charge under the throwback rules. If a U.S. beneficiary cannot obtain a Foreign Nongrantor Trust Beneficiary Statement, however, Schedule A of Part III of Form 3520 allows the U.S. beneficiary to avoid treating the entire amount as an accumulation distribution if the U.S. beneficiary can provide certain information regarding actual distributions from the trust for the prior three years. Under this "default treatment," the U.S. beneficiary is allowed to treat a portion of the distribution as a distribution of current income based on the average of distributions from the prior three years, with only the excess amount of the distribution treated as an accumulation distribution. In making the calculation, the prior three years' distributions are added together. The total is then multiplied by a factor of 1.25. This amount is then divided by three, with only the excess amount of the distribution treated as an accumulation distribution. This formula, in effect, assumes that current income increases by twenty-five percent each year before the excess is treated as an accumulation distribution.

The information needed in order to qualify for default treatment is as follows:

- the number of years the trust has been a foreign trust (with any portion of a year to be considered a complete year[54]);
- the total distributions received from the foreign trust during the current year, including loans from a "related foreign trust" (a "related foreign trust" is a trust of which the U.S. taxpayer is a grantor or beneficiary of which a "related person" is a grantor or beneficiary; a "related person" is (i) a sibling of the whole or half blood, an ancestor, a lineal descendant, or a spouse of the U.S. taxpayer or of any related person, or (ii) a corporation of which the U.S. taxpayer owns directly or indirectly more than fifty percent in value of the outstanding stock); and
- the total distributions received from the foreign trust during the preceding three years.[55]

3. Reporting of Accumulation Distributions Under the Throwback Rules

Once the amount of an accumulation distribution is determined on Schedule A or B of Part III of IRS Form 3520, the throwback tax on the accumulation distribution must be calculated using IRS Form 4970, Tax on Accumulation Distribution of Trusts (a copy of which is attached). As discussed above, the tax is determined by averaging the distributions over a number of years equal to that over which the income was earned and by including a fraction of the income received from the trust in the beneficiary's income for each of the five preceding years, excluding the years with the highest taxable income and the lowest taxable income. The fraction of income included in the five years is based on the number of years the income was accumulated.[56] The interest surcharge imposed on the throwback tax is entered on Line 52 of Schedule C of Part III of IRS Form 3520.

D. Appointment of U.S. Agent

Any foreign trust (grantor or nongrantor) may appoint a limited agent (a "U.S. Agent") for purposes of responding to (i) IRS requests to examine records or produce testimony with respect to any items included on IRS Form 3520 or 3520-A or (ii) an IRS summons regarding

such records or testimony. A U.S. Agent is a U.S. person (including a U.S. grantor, a U.S. beneficiary, or a domestic corporation controlled by the grantor) that has a binding contract with a foreign trust that allows such person to act as the trust's authorized U.S. agent for the purposes mentioned above.[57] The format of the contract is contained in the IRS Form 3520-A Instructions.[58]

"This notification must contain the name, address and taxpayer identification number of the new U.S. agent (if any)."

If a foreign *grantor* trust does not choose to appoint a U.S. agent, then the IRS can determine unilaterally the amounts to be included in income by the owner of the foreign trust.[59] Also, if no agent is appointed, various attachments must be filed along with IRS Form 3520-A, including (i) a summary of the terms of the trust and all written and oral agreements and understandings with the trustee that are related to the trust (whether or not legally enforceable) and (ii) copies of all trust documents, including the trust agreement and amendments, memoranda or letters of wishes, and the like.[60]

If the U.S. agent of a foreign grantor trust resigns or liquidates, or the U.S. agent's responsibility as an agent of the foreign grantor trust is terminated, the U.S. owner of the foreign trust must ensure that the foreign trust notifies the Commissioner of Internal Revenue within ninety days of such event by filing an amended IRS Form 3520-A.[61] This notification must contain the name, address and taxpayer identification number of the new U.S. agent (if any).[62]

If a foreign *nongrantor* trust does not choose to appoint a U.S. agent, then the IRS can determine unilaterally the amounts to be included in income by the beneficiary of the foreign trust, unless "adequate records" are provided to the IRS.[63] Presumably this means that it would be enough to complete Schedule A of Part III of Form 3520 as outlined above.

"Foreign gifts are reported on IRS Form 3520, which is the same form used for reporting transactions with foreign trusts."

Even if a U.S. agent of a foreign trust—be it nongrantor or grantor—is identified on IRS Form 3520 or 3520-A, the U.S. beneficiary or owner of the foreign trust may be treated as providing incorrect information and thus may be subject to the penalty described in Code § 6677 (see below) if either the U.S. agent or the foreign trust does not comply with its obligations under the agency agreement (e.g., if the foreign trust fails to produce records requested by the IRS in reliance on the bank secrecy laws of the country where the trust's bank accounts are located).[64] This is the case even if the U.S. beneficiary has attached to the IRS Form 3520 a Foreign Grantor Trust Beneficiary Statement or a Foreign Nongrantor Trust Beneficiary Statement.[65]

E. Receipts of Foreign Gifts

If the value of the aggregate "foreign gifts" received by a U.S. citizen or resident during any taxable year exceeds $10,000, the recipient must provide such information as the IRS prescribes.[66] The term "foreign gift" is any amount received from a person other than a U.S. citizen or resident that the recipient treats as a gift or bequest.[67]

A U.S. citizen or resident is required to report the receipt of a foreign gift only if the aggregate amount of gifts from a particular foreign person or estate exceeds $100,000 during the taxable year, and is required to report the receipt of a gift from a foreign corporation or partnership if the aggregate amount of gifts from all such entities exceeds $10,000 during the taxable year.[68] For purposes of determining these thresholds, the gifts from related persons are aggregated.[69]

Note that gifts made by foreign persons (whether to U.S. persons or non-U.S. persons) are not subject to the U.S. gift tax, unless the gift is of U.S. situs real or tangible property.[70] Nevertheless, the gifts may be reportable if received by a U.S. person under the above rules.

Foreign gifts are reported on IRS Form 3520, which is the same form used for reporting transactions with foreign trusts.

F. Penalties

1. IRS Forms 3520 and 3520-A

Significant penalties are associated with the failure to file a complete and accurate IRS Form 3520 or Form 3520-A. Under Code § 6677(a), penalties are imposed for:

- failure to file in a timely manner;
- failure to include all the information requested; or
- failure to include accurate information.

For failure to file IRS Form 3520 to report a transaction with a foreign trust, Code § 6677(a) imposes a penalty of thirty-five percent of the gross reportable amount (as defined in Code § 6677(c)), i.e., thirty-five percent of the gross value of the property transferred to the foreign trust or thirty-five percent of the distribution(s) made from the foreign trust. The penalty is imposed on the individual who was required to file the IRS Form 3520.

The penalty for failure to file IRS Form 3520-A will be imposed directly on the U.S. owner of the foreign trust. The penalty is equal to five percent of the value of the trust assets treated as owned by the U.S. person.[71]

If failure to comply with the reporting requirements continues, the IRS is authorized to impose additional penalties of up to $10,000 for each thirty-day period during which the failure continues after the IRS mails a notice of failure to comply with the required reporting, not to exceed the value of the gross reportable amount.[72]

"Some practitioners have found that the IRS has shown considerable leniency in abating penalties."

Code § 6039F imposes a penalty of five percent of the amount of a foreign gift received by a U.S. person which was required to be reported on IRS Form 3520. This five percent is imposed monthly until the amount is reported, not to exceed twenty-five percent of the foreign gift. The penalty is imposed on the recipient of the gift, and not the donor.

Both Code § 6677 and Code § 6039F make an exception from the imposition of penalties if it can be shown that the failure to file was due to "reasonable cause and not due to willful neglect."[73] The Internal Revenue Manual states that reasonable cause "is generally granted when the taxpayer exercises ordinary business care and prudence in determining their tax obligations but nevertheless is unable to comply with those obligations."[74] Some factors that the IRS may consider in determining whether the taxpayer exercised ordinary business care and prudence include: the taxpayer's reason and whether it corresponds to the events on which penalties are assessed; whether the taxpayer's compliance history shows a pattern of noncompliance or if this is a first-time failure; the length of time between the noncompliance and when the taxpayer subsequently complied with the reporting requirements; and whether there were circumstances beyond the taxpayer's control.[75]

Some practitioners have found that the IRS has shown considerable leniency in abating penalties.[76] In particular, the IRS has been sympathetic where the failure has occurred in the first year in which a formerly non-U.S. taxpayer became a U.S. resident, or where the taxpayer complied as soon as possible after finding out about the requirement.[77]

Initially, the IRS generated automatic notices imposing penalties amounting to millions of dollars for late-filed IRS Forms 3520 and 3520-A.[78] This prompted taxpayers to scramble to have those penalties abated. Now, rather than imposing the penalty automatically, the IRS has been generating notices to taxpayers asking for an explanation for the late filing.[79]

Code § 6677(d) states that reasonable cause for the failure to comply does not exist merely because a foreign country would impose a civil or criminal penalty for disclosing the information required to be reported on the forms. Furthermore, refusal on the part of a foreign trustee to provide information needed to meet the reporting requirements, whether due to difficulty in producing the required information or because provisions in the trust instrument prevent disclosure of required information (e.g., in the case of a blind trust), is not considered reasonable cause.[80]

The Code § 6677 penalties apply only to the extent that the transaction is not reported or is not reported accurately. For example, if a U.S. person receives a distribution from a foreign trust of $1,000,000 but only reports $400,000 of the amount received, the penalties may be imposed only on the amount that was unreported (in this case $600,000).[81]

2. IRS Form 8082

Failure to file IRS Form 8082 may subject the taxpayer to the accuracy-related penalty under Code § 6662 or the fraud penalty under Code § 6663.[82] Code § 6662 imposes a single accuracy-related penalty equal to twenty percent of the portion of underpayment of tax attributable to, *inter alia*, (i) negligence or disregard of rules and regulations, or (ii) any substantial underpayment of tax. An underpayment of tax is considered "substantial" if the underpayment exceeds the greater of ten percent of the tax required to be shown on the return or $5,000.[83]

"On the FBAR, the United States person is required to report all foreign bank accounts and foreign financial accounts in which he or she has a financial interest, signatory authority, or other authority during the previous year, if the aggregate value of these accounts during the previous year is more than $10,000."

Under Code § 6663, if any part of any underpayment of tax required to be shown on a return is due to fraud, a penalty is assessed in an amount equal to seventy-five percent of the portion of the underpayment attributable to the fraud. The initial burden of proving fraud on the part of the taxpayer rests with the IRS.[84] Proof of fraud requires a showing that the taxpayer engaged in intentional wrongdoing with the specific intent to avoid a tax known or believed to be owed.[85]

IV. Reporting Requirements for Foreign Accounts in Which a U.S. Person Has a Financial Interest or Signature Authority

A. Overview

31 U.S.C § 5314, enacted as part of the Bank Secrecy Act on 26 October 1970, as amended, provides as follows:

Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship,

(2) the legal capacity in which a participant is acting,

(3) the identity of real parties in interest, and

(4) a description of the transaction.

In order to comply with the above statute, a "United States person" must file annually with the U.S. Department of the Treasury a "Report of Foreign Bank and Financial Accounts" (commonly referred to as an "FBAR").[86] On the FBAR, the United States person is required to report all foreign bank accounts and foreign financial accounts in which her or she has a financial interest, signatory authority, or other authority during the previous year, if the aggregate value of these accounts during the previous year is more than $10,000.[87]

"Under the Obama Administration, there has been heightened enforcement of the provisions of 31 U.S.C § 5314 and the filing of FBARs by the Financial Crimes Enforcement Network, an agency of the Treasury Department."

For FBARs due for reporting years prior to 2013, the report was completed by filing Form TD F 90-22.1 with the Treasury Department.[88] On 30 September 2013, FinCEN posted a notice on their website announcing a new FBAR form, FinCEN Report 114, "Report of Foreign Bank and Financial Accounts." FinCEN Report 114 supersedes the Form TD F 90-22.1 and is only available online through the BSA E-Filing System website. The e-filing system allows the filer to enter the calendar year reported, including past years, on the online FinCEN Report 114.

On 29 July 2013, FinCEN posted a notice on their website introducing a new report for filers who submit FBARs jointly with spouses or who wish to have a third party preparer file their FBARs on their behalf. The new FinCEN Report 114a, "Record of Authorization to Electronically File FBARs," is not submitted when filing an FBAR but, instead, is kept in FBAR records maintained by the filer and the account owner, and must be made available to FinCEN or IRS upon request.

For FBARs due for reporting years prior to 2015, the deadline for the report to be filed with the Treasury Department was June 30 of the following year, with no extensions.[89] For FBARs due for reporting years 2015 and later, the deadline for the report to be filed with the Treasury Department is April 15 of the following year, and the due date may be extended to October 15 of that year.[90] For U.S. citizens or residents whose tax homes are outside of the U.S. and Puerto Rico, the initial due date is June 15 of the year following the year for which the FBAR is filed, if a statement is attached to the report stating that the person for whom it is filed qualifies for the later due date.[91] Such taxpayers may also extend the due date to October 15 of the same year.

"A non-U.S. citizen is considered a resident of the U.S. for purposes of the FBAR regulations if the person is a resident for income tax purposes under Code § 7701(b)."

Under the Obama Administration, there has been heightened enforcement of the provisions of 31 U.S.C § 5314 and the filing of FBARs by the Financial Crimes Enforcement Network, an agency of the Treasury Department. Part of this heightened enforcement has come in the form of amended regulations with respect to 31 U.S.C § 5314, found at 31 CFR § 1010.350 and which are effective as of 28 March 2011 (the "FBAR Regulations"). The heightened enforcement has also come in the form of three recent voluntary disclosure programs by the criminal enforcement division of the IRS, one which ended in October of 2009, a second which ended on 9 September 2011, and a third which began in 2012 and is still in effect.

Under the FBAR Regulations, a United States person is defined as a U.S. citizen, a non-citizen of the U.S. who is a resident of the U.S., and an entity, such as a corporation, partnership, trust, or limited liability company, organized or formed under the laws of the U.S. (referred to herein as a "U.S. person").[92] As noted above, a U.S. person who has a financial interest in or signature or other authority over a foreign account in a particular year must file an FBAR for that year if the aggregate value of all such accounts exceeds $10,000.

A non-U.S. citizen is considered a resident of the U.S. for purposes of the FBAR regulations if the person is a resident for income tax purposes under Code § 7701(b). A non-citizen of the U.S. is a resident under this statute if

the person is a lawful permanent resident of the U.S. at any time during the calendar year through the issuance of a so-called "green card" or by satisfying the "substantial presence test." The substantial presence test is satisfied with respect to any calendar year if the individual was present in the United States on at least thirty-one days during the calendar year, and the sum of the number of days on which such individual was present in the U.S. during the current year, one-third of the days such individual was present in the preceding calendar year, and one-sixth of the days such individual was present in the second preceding calendar year equal or exceeds 183 days.[93] An individual is not be treated as meeting the substantial presence test if the such individual is present in the U.S. on fewer than 183 days during the current year and it is established that for the current year such individual has a tax home (as defined in Code § 911(d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the U.S. [94]

A "financial account" includes "any bank, securities, or other financial account in a foreign country. . . ."[95] The supplementary information to the FBAR Regulations states that an account is not a foreign account if it is maintained with a financial institution located in the U.S. Therefore, securities of a foreign company held in a brokerage account located in the U.S. are not considered to be held in a foreign account.[96]

"A U.S. person also must report a foreign account on the person's annual FBAR if the person has signature authority or other authority over the account, even if the person does not have a financial interest in the account."

A United States person has a "financial interest" in a foreign financial account if the person is the owner of record of the account or has legal title to the account, regardless of whether the account is maintained for such person's own benefit or for another's benefit, *e.g.*, as a trustee, custodian, guardian, etc.[97] A U.S. person also has a financial interest in a foreign financial account if: (1) the record owner of the account is a person acting as agent for the U.S. person; (2) the record owner is a corporation (or any other entity) in which the U.S. person owns directly or indirectly more than fifty percent of the voting power or total value of shares of stock; (3) the record owner is a partnership (or any other entity) in which the U.S. person owns directly or indirectly more than fifty percent of the interest in the profits or capital; (4) the record owner is a trust of which the U.S. person is the grantor and of which the person is treated as the owner under Code §§ 671 to 679; or (5) the record owner is a trust in which the U.S. person either has a present beneficial interest in more than fifty percent of the assets or from which such person receives more than fifty percent of the current income.[98] It is important to note, however, that a beneficiary of a trust who either has a present beneficial interest in more than fifty percent of the trust assets or who receives more than fifty percent of the current income, is excused from reporting the trust's foreign accounts on a FBAR if the trust, trustee of the trust, or agent of the trust is a U.S. person who files a FBAR setting forth the trust's foreign accounts.[99] In any event, it would behoove the beneficiary to report the foreign accounts on the beneficiary's own FBAR, in case the trustee should fail to do so.

The supplementary information to the FBAR Regulations clarify a number of questionable issues with respect to determining whether a person has a financial interest in a trust. First, the question had been raised as to whether a trust that has an interest in a foreign account should itself have to file an FBAR if the U.S. trustee of the trust would have an obligation to file an FBAR under the above rules. The supplementary information acknowledges that in this case the U.S. trustee would have an FBAR filing obligation, but states that it has nevertheless been decided to retain the term "trust" under the definition of U.S. person.[100]

Second, the supplementary information to the FBAR regulations addresses the issue of the reporting requirements of a U.S. person who is a discretionary beneficiary of a trust. The supplemental information acknowledges that determining whether a discretionary beneficiary of a trust has a present beneficial interest in more than fifty percent of the assets of the trust is difficult, and states that it is not intended for a beneficiary of a discretionary trust to be deemed to have a financial interest in a foreign account simply because such person is a discretionary beneficiary.[101] Therefore, if a beneficiary is only a discretionary beneficiary of a trust with foreign accounts, and the beneficiary has no other powers over or interests in the trust, the beneficiary should not have to report any foreign accounts of the trust on the beneficiary's FBAR, even if the beneficiary is the only current beneficiary of the trust.

"Beginning 22 October 2004, nonwillful violations without reasonable cause result in a penalty of up to $10,000."

A U.S. person also must report a foreign account on the person's annual FBAR if the person has signature authority or other authority over the account, even if the person does not have a financial interest in the account. "Signature authority" or "other authority" is defined by the FBAR Regulations as ". . . the authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in

a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained."[102] The supplemental information to the FBAR Regulations states that the test to ascertain whether someone has signature or other authority over a foreign account is whether the foreign financial institution will act upon a communication from the person regarding the account.[103]

For Each Reportable Foreign Financial Account, the Following Information Must Be Supplied on the FBAR:

(5) the maximum value of the account during the calendar year in question;

(6) the type of account (bank, securities, etc.);

(7) the name of the financial institution in which the account is held;

(8) the account number or other designation; and

(9) the mailing address of the financial institution in which the account is held.

A U.S. person with a financial interest in over 25 foreign bank accounts, however, need only indicate this fact on the FBAR and need not list the information for all the accounts, as long as information for the accounts is made available to the Treasury Department upon request.[104]

B. FBAR Penalties

The penalty for failure to file the FBAR, if due to a willful violation, is the greater of $100,000 or fifty percent of the balance in the account at the time of the violation in the case of failure to report the existence of the account or any identifying information.[105] If a U.S. person learns that he or she was required to file FBARs for earlier years, the U.S. person should file the delinquent FBARs and attach a statement explaining why the reports are being filed late.[106] No penalty will be asserted if the IRS determines that the late filings were due to reasonable cause (discussed above).[107] Beginning 22 October 2004, nonwillful violations without reasonable cause result in a penalty of up to $10,000.[108]

"Note that the filing threshold under Code § 6038D is higher than the $10,000 filing threshold for the FBAR."

Note that FBAR is not an IRS form and is not filed with the IRS. Rather the FBAR is filed with the U.S. Department of the Treasury, P.O. Box 32621, Detroit, MI 48232-0621.[109] The due date of the FBAR (June 30) is not tied to the filer's income tax return (*e.g.*, Form 1040), and there is no extension of time available for filing the FBAR.

According to the IRS website,[110] if there is insufficient information available to file the FBAR by the due date, the form should be filed with such information as is available, and an amended form should be filed later when information becomes available.

C. Code § 6038D

31 U.S.C § 5314, which imposes the FBAR reporting requirements, is not an Internal Revenue Code provision, and the FBAR is not filed with the IRS, but is filed with the Department of Treasury. Therefore, the information reported on the FBAR is not readily available to the IRS for purposes of enforcement. Recognizing the inability to readily access this information, Congress enacted Section 511 of FATCA, entitled "Disclosure of Information with Respect to Foreign Financial Assets." This section of FATCA provides for Code § 6038D, entitled "Information with Respect to Foreign Financial Assets." Temporary regulations were issued under Code § 6038D on 14 December 2011, and were effective for tax years beginning after 19 December 2011, and expired on 12 December 2014.[111] Final regulations were issued under Code § 6038D on 12 December 2014 and are effective for tax years beginning after 19 December 2011.[112]

"Note that this definition is broader than the definition of foreign accounts under the FBAR Regulations, since, unlike the FBAR Regulations, this definition includes a foreign security held in a brokerage account located in the U.S."

Code § 6038D applies to tax years beginning after 2010 (therefore, 2011 was the first year for which the requirements of this section were applicable).[113] Code § 6038D and the regulations thereunder provide that any "specified person" who has any "interest" in a "specified foreign financial asset" ("SFFA") must attach to his or her income tax return certain information with respect to that asset if the aggregate value of all such assets exceeds $50,000 on the last day of the taxable year or $75,000 at any time during the year.[114] For married specified persons filing a joint return the thresholds are $100,000 and $150,000, respectively (with respect to aggregate value of all SFFAs in which either spouse has an interest); for individual persons living abroad the thresholds are $200,000 and $300,000, respectively; and for married specified persons filing a joint return where one of the spouses lives abroad, the thresholds are $400,000 and $600,000, respectively (with respect to aggregate value of all SFFAs in which either spouse has an interest).[115] As noted above, the form that is used to meet the filing requirements under Code § 6038D is IRS Form 8938.

A specified person is a "specified individual" or "specified domestic entity." A "specified individual" includes a U.S. citizen and a resident alien of the U.S.[116]

Under the regulations, a specified individual is not required to report SFFA's on Form 8938 for a taxable year or any portion of a taxable year that the individual is a dual resident taxpayer pursuant to a provision of a treaty and who is treated as a nonresident alien pursuant to the treaty for purposes of computing his or her U.S. tax liability with respect to the portion of the taxable year the individual is considered a dual resident taxpayer.[117]

"Such a person would not have a filing obligation under the FBAR Regulations, as discussed above."

Note that the filing threshold under Code § 6038D is higher than the $10,000 filing threshold for the FBAR. Therefore, while many individuals with foreign accounts may have to file both an FBAR and the Form 8938, some may only have to file the FBAR. If the requirements for filing both the FBAR and Form 8938 are satisfied, then both forms must be filed.[118]

In addressing comments regarding the perceived duplicative nature of the FBAR reporting requirements of 31 U.S.C § 5314 and the requirements to file IRS Form 8938 under 26 U.S.C § 6038D, the preamble to the final regulations under § 6038D notes the following:

> Congress enacted both the Title 31 and the Title 26 provisions regarding the reporting requirements of the FBAR and Form 8938. Reporting on the FBAR is required for law enforcement purposes under the Bank Secrecy Act, as well as for purposes of tax administration. As a consequence, different policy considerations apply to Form 8938 and FBAR reporting. These different policies are reflected in the different categories of persons required to file Form 8938 and the FBAR, the different filing thresholds for Form 8938 and FBAR reporting, and the different assets (and accompanying information) required to be reported on each form. Although certain information may be reported on both Form 8938 and the FBAR, the information required by the forms is not identical in all cases, and reflects the different rules, key definitions (for example, "financial account"), and reporting requirements applicable to Form 8938 and FBAR reporting.[119]

Based on the above position of the preamble, it appears that the dual reporting requirements of the FBAR and Form 8938 are here to stay.

A "specified foreign financial asset" is defined by Code § 6038D(b) as any financial account maintained by a foreign financial institution, any stock or security not issued by a U.S. person, any financial instrument or contract held for investment that has an issuer which is other than a U.S. person, and any interest in a foreign entity. Note that this definition is broader than the definition of foreign accounts under the FBAR Regulations, since, unlike the FBAR Regulations, this definition includes a foreign security held in a brokerage account located in the U.S. Also, the term "foreign entity" includes an interest in a foreign trust. This makes the reach of Code § 6038Ds reporting requirement broader than those of 31 U.S.C § 5314 and the FBAR Regulations, since an individual who is the discretionary beneficiary of a trust with foreign accounts, or who just has a very small current interest in a trust that has a foreign account, could have an SFFA and therefore a filing obligation under Code § 6038D. Such a person would not have a filing obligation under the FBAR Regulations, as discussed above.

A specified person has an "interest" in an SFFA if any income, gains, losses, deductions, credits, gross proceeds, or distributions attributable to the holding or disposition of the SFFA are or would be required to be reported, included, or otherwise reflected by the specified person on an annual return.[120] A specified person has an interest in an SFFA even if no income, gains, losses, deductions, credits, gross proceeds, or distributions are attributable to the holding or disposition of the SFFA for the taxable year.[121]

"Receipt of a distribution from the foreign trust is considered actual knowledge."

The regulations clarify when an interest in a foreign trust or a foreign entity and assets held by a foreign trust or foreign entity are considered SFFAs with respect to a particular specified person. A specified person is not treated as having an interest in any SFFAs held by a corporation, partnership, trust, or estate solely as a result of the specified person's status as a shareholder, partner, or beneficiary of such entity (as is the case with FATCA in many instances, a trust is treated as an "entity" even though it is not an entity for common law purposes).[122] If a trust is a grantor trust for U.S. tax purposes under Code §§ 671 to 679, the beneficiary will be treated as the owner of the SFFAs held by the trust, regardless of whether the trust itself is a foreign trust.[123]

With respect to a beneficial interest of a specified person in a foreign trust, the interest is not considered an SFFA that must be reported on Form 8938 unless the person knows or has reason to know based on readily accessible information of the interest.[124] Receipt of a distribution from the foreign trust is considered actual knowledge.[125]

If a specified person owns a foreign or domestic entity that is disregarded as an entity separate from its owner as described under the "check the box regulations" of Treas. Reg. § 301.7701-2, the specified person is treated as having an interest in any SFFAs held by the disregarded entity.[126] Consequently, such a specified person must report the SFFAs held by the disregarded entity on his or her annual Form 8938.

"FATCA reporting and withholding is intended to prevent U.S. persons from avoiding U.S. tax on unreported income or assets held in or paid to accounts outside of the United States."

Code § 6038D(c) provides that the information that must be reported is the name and address of the financial institution or issuer, the account number, such information needed to identify the class or issue of a security or needed to identify such other instrument that is owned by the taxpayer, and the maximum value of the asset during the year. If the taxpayer fails to provide this information, a penalty of $10,000 will be imposed, and if the failure continues for ninety days after the day that the IRS mails a notice of such failure, and additional $10,000 penalty will be imposed for each thirty day period that the failure continues after the expiration of the ninety day period, up to a maximum penalty of $50,000.[127] No penalty will be imposed if the failure to provide this information is due to reasonable cause and not to willful neglect.[128]

If a specified person is a beneficiary of a foreign trust, the maximum value of the specified person's interest in the trust is the sum of: (i) the fair market value determined as of the last day of the year of all of the currency and other property distributed from the trust during the year to the beneficiary; and (ii) the value as of the last day of the year of the specified person's right as a beneficiary to receive distributions from the foreign trust as determined under Code § 7520.[129] For purposes of determining the Code § 6038D reporting threshold for a specified person with an interest in a foreign trust, if the person does not know or have reason to know, based upon readily accessible information, the fair market value of his or her interest in the trust, the value to be included in determining the aggregate value of the SFFAs of the person is the same as the maximum value, discussed above.[130]

Therefore, in the case of a foreign trust, for a year in which the beneficiary does not know, or have reason to know based on readily accessible information, the fair market value of the beneficiary's interest and the beneficiary does not receive a distribution, the value of the beneficiary's interest in the trust is considered to be zero. Consequently, if a specified person is a completely discretionary beneficiary of a foreign trust, and he or she has not received any distributions from the trust during the tax year and has no other SFFAs, the interest in the trust would not be reportable on Form 8938. If the same person has other SFFAs that put him or her over the Code § 6038D reporting threshold discussed above, then the person would have to include the interest in the foreign trust on his or her Form 8938, even if it has a value of zero under the above valuation rules.

V. Reporting Requirements of Trustees of Foreign Trusts under FATCA

1. General Background

FATCA reporting and withholding is intended to prevent U.S. persons from avoiding U.S. tax on unreported income or assets held in or paid to accounts outside of the United States. FATCA provides the IRS with additional sources of information regarding accounts maintained by non-U.S. financial institutions for U.S. persons. FATCA imposes a thirty percent withholding tax on withholdable payments to a foreign financial institution ("FFI").[131] An FFI may avoid such withholding if it enters an FFI Agreement with the IRS, after which it is considered to be a Participating Foreign Financial Institution ("PFFI").[132]

"A Trustee's FATCA classification will determine its duties under FATCA."

To address conflicts that FFIs may face between following FATCA and following conflicting local law in the FFI's own jurisdiction, many non-U.S. governments have entered so-called Inter-governmental Agreements.[133] Under an intergovernmental agreement ("IGA"), the non-U.S. government (a "FATCA Partner") agrees to require the FFIs in its jurisdiction to comply with FATCA or local laws implementing FATCA. The U.S. Treasury Department has issued two model IGAs that are the starting point for negotiations with FATCA Partners.

Under the Model 1 IGA, the non-U.S. government agrees to enact its own laws that implement FATCA or a similar regime that requires financial institutions in its jurisdiction to report to that non-U.S. government (as opposed to the IRS) on U.S. accounts holders.[134] Under the Model 2 IGA, the non-U.S. government agrees to enact laws that will allow financial institutions in its jurisdiction to comply with FATCA and report on U.S. account holders directly to the IRS under an FFI agreement.[135]

2. Classification of Trusts and Trustees

A Trustee's FATCA classification will determine its duties under FATCA. Under FATCA a trust is considered an entity, even though it may not be considered an entity under common law.[136] The trustee of a non-U.S. trust will therefore need to determine the FATCA classification of the trust. If the trust holds a private investment company ("PIC") formed outside of the United States that has not

elected to be treated as a U.S. company for U.S. federal income tax purpose, the PIC will also be considered a non-U.S. entity that will need to determine its FATCA classification. In a common offshore trust structure, one PIC would hold a bank account, another PIC may hold financial investments, and another may hold real property or tangible personal property.

"Neither the FATCA Regulations nor the IGAs specifically require a trustee to carry out the FATCA obligations for the trust."

In this typical trust scenario, FATCA rules may apply at different levels. For example, assume the trust is a settlor-directed irrevocable non-U.S. that is in a jurisdiction that has entered into a Model 1 IGA that owns one hundred percent of the shares of a non-U.S. PIC which has not made any elections under U.S. tax law. Assume that the PIC owns marketable securities held at a non-U.S. bank in a jurisdiction that has entered into a Model 2 IGA. The bank will apply the Model 2 IGA to determine the FATCA status of the PIC. If the PIC is nothing more than a holding company, then it will probably be an FFI that must report on its owner directly to IRS. At the level of the non-U.S. Trust, the trustee will need to consider the Model 1 IGA and local implementing legislation to determine Trust's FATCA status. In such case, the non-U.S. trust will likely need to report on its beneficiaries to the non-U.S. jurisdiction where it was formed. Finally, if the trust has a non-U.S. trustee, the trustee is likely to be an FFI under FATCA or the IGA applicable in the trustee's jurisdiction and will need to report on the trust accordingly. FATCA uses the Form W-8BEN-E (or substitute form) to provide the FATCA classification for the entity providing the form to the party requesting the form.

As a non-U.S. trust company, the trustee should be considered an FFI because it is an "investment entity." An "investment entity" is an entity that conducts as a business (or is managed by an entity that conducts as a business) one or more of the following activities for or on behalf of a customer:

a) trading in money market instruments (e.g., cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange, exchange, interest rate and index instruments, transferable securities, or commodity futures trading;

b) individual and collective portfolio management; or

c) otherwise investing, administering, or managing funds or money on behalf of other persons ("Investment Management Activities").[137]

Non-U.S. trust companies are likely to be considered investment entities under the last category of otherwise investing, administering, or managing funds or money on behalf of other persons. This would be considered a type 1 classification. If trusts or PICs have mostly passive income from financial assets they should qualify as investment entity FFIs.[138]

A type 1 classification is an FFI that engages in Investment Management Activities. A type 2 classification is an FFI that is managed by a person who engages in Investment Management Activities on behalf of the entity. As noted above, a non-U.S. trust company will qualify as type 1 investment entity. The trusts for which such trustees serve will qualify as type 2 investment entities. A type 2 investment entity is "managed" by an FFI that performs Investment Management Activities on behalf of the entity and fifty percent or more of the managed entity's gross income must be attributable to investing in financial assets.[139]

Neither the FATCA Regulations nor the IGAs specifically require a trustee to carry out the FATCA obligations for the trust. However, since most jurisdictions do not recognize trusts as separate legal entities, the trustee is the legal person that must act for the trust. As such, the trustee will need to comply with FATCA or the IGA for itself, if it is a non-U.S. trust company, and for the trust.

"A beneficiary who is entitled to a mandatory distribution from the trust is considered an account holder of the trust."

Under the FATCA regulations, the following persons may be considered account holders of a trust that is an investment entity FFI: (1) any person treated as the owner of all or a portion of the trust under the grantor trust rules; (2) a beneficiary who is entitled to a mandatory distribution from the trust; and (3) a beneficiary who may receive a discretionary distribution[140] from the trust, but only if such person receives a distribution in the calendar year.[141]

If the settlor of a foreign trust that is treated as a grantor trust dies, the trust will convert from a foreign grantor trust to a foreign non-grantor trust. This should not change the trust's FATCA classification. However, this conversion does change the identity of trust's account holders for FATCA purposes. For example, the settlor is no longer an account holder at his or her death. A beneficiary may become an account holder of the trust if the beneficiary was not already an account holder.

A beneficiary who is entitled to a mandatory distribution from the trust is considered an account holder of the trust. Such a beneficiary should be considered an account holder of the trust whether or not the settlor is alive and whether or not the settlor retains powers over the trust. A person is a mandatory beneficiary if the person has the right to receive directly or indirectly a mandatory dis-

tribution from the trust. A mandatory distribution is a distribution that is required to be made pursuant to the terms of the trust document.

A trust settled by a non-U.S. person may be treated as a grantor trust, provided that the settlor retains a right to revest the trust assets in himself or herself by way of a power of revocation. A revocable grantor trust may nonetheless make a distribution to a beneficiary who is a U.S. person. A discretionary beneficiary of a revocable grantor trust is treated for U.S. federal income tax purposes of the beneficiary to be receiving a gift from the grantor rather than a distribution from the trust. Such a gift received is subject to reporting by the beneficiary but generally is not subject to tax in the beneficiary's hands. Notwithstanding that there is generally no tax on the distribution, the trustee should obtain the FATCA documentation for the grantor and should obtain the FATCA documentation for the beneficiary to the extent a distribution is paid to the beneficiary during the calendar year.

A discretionary beneficiary of an irrevocable foreign grantor trust should not be treated as an account holder until the year in which the trust makes a distribution to the beneficiary. As explained above, in order to qualify as an irrevocable foreign grantor trust, the only amounts distributable from the trust during the lifetime of the settlor may be distributed only to the settlor and the settlor's spouse. Because the beneficiaries of an irrevocable grantor trust are limited to the settlor and the settlor's spouse during the settlor's lifetime, the trust may not make distributions to U.S. persons other than the settlor's spouse.

If a non-U.S. person settlor's U.S. person spouse is permitted to benefit from the trust during the settlor's lifetime and such spouse receives a distribution, the trustee should treat the U.S. person spouse as an account holder of the trust. Notwithstanding that there is generally no tax on the distribution (since the trust is a grantor trust), the trustee should obtain the FATCA documentation for the grantor and should obtain the FATCA documentation for the spouse to the extent a distribution is paid to the beneficiary during the calendar year.

A foreign trust from its inception may be a foreign non-grantor trust. Even a properly structured grantor trust becomes a non-grantor trust upon the death of the non-U.S. grantor. If a trustee of a foreign non-grantor trust makes a distribution to a U.S. person beneficiary, the trustee will be required to treat such U.S. person beneficiary as an account holder of the trust for FATCA purposes. Such a distribution is subject to reporting by the trustee under FATCA. The value of the "account" to be reported for a discretionary beneficiary should be the value of the distribution made during the year.

A PFFI is required to deduct and withhold thirty percent of any withholdable payment made by the PFFI to an account held by a recalcitrant account holder or to an NPFFI. These withholding obligations of a PFFI with respect to a recalcitrant account holder do not apply to accounts maintained by a reporting FATCA Partner financial institution under an IGA.

Glenn G. Fox is a partner, and Paul DePasquale is an associate, with the law firm Baker & McKenzie LLP in New York City.

Endnotes

1. Internal Revenue Code § 7701(a)(30)(E); Treas. Reg. § 301.7701-7(a)(1). Except where otherwise indicated, all references in this article to the "Code" shall be construed to mean the U.S. Internal Revenue Code of 1986, as amended. Furthermore, except where otherwise indicated, all references in this memorandum to the "Treasury Regulations," the "Regulations," and "Treas. Reg." shall be construed to mean the pertinent regulations promulgated by the U.S. Secretary of the Treasury.
2. Code § 7701(a)(31)(B).
3. Code § 671.
4. *See* discussion under Section D below for the definition of a "U.S. person."
5. IRS Notice 97-34, 1997-1 C.B. 422, Section III.A.
6. Code § 679(a)(4).
7. Code § 679(c)(1), (d).
8. Code § 679(c)(4).
9. Code § 679(c)(5).
10. Code § 679(d).
11. Code § 679(c)(3).
12. Code § 672(f)(1).
13. *Id.*
14. *See*, *e.g.*, Rev. Rul. 69-70, 1969-1 C.B. 182.
15. Code § 672(f)(2)(A)(i).
16. Treas. Reg. § 1.672(f)-3(a)(1).
17. Treas. Reg. § 1.672(f)-3(a)(2).
18. *Id.*
19. Treas. Reg. § 1.672(f)-3(a)(1).
20. Code § 672(f)(2)(A)(ii).
21. Treas. Reg. § 1.672(f)-3(b)(2)(i).
22. Not including, however, those treated as owned by the grantor under Code §677(a)(3) because of the application of trust income to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse. Treas. Reg. § 1.672(f)-3(d).
23. *Id.*
24. Code § 643(a)(6).
25. Code § 651(a); Treas. Reg. § 1.651(a)-1.
26. Code §§ 651(a), 652.
27. I.R.C §§ 651(b), 652(a).
28. Code § 661(a); Treas. Reg. § 1.661(a)-1.
29. Code § 661(a).
30. Code § 662(a).
31. Code § 662(a)(2).
32. Code §§ 662(a)(2), 665–668.
33. Code § 665(b).

34. Code § 665(c).
35. Code § 667(a).
36. Code § 667(b).
37. Code §§ 1(h)(11) and 1411.
38. Code § 667(b)(1); *see* IRS Form 4970 and Instructions.
39. Code §§ 667(a)(3), 668(a), 6621(a).
40. Code § 684(a).
41. Code § 684(b)(1).
42. Code §§ 6048(a) and (c).
43. IRS Notice 97-34, 1997-1 C.B. 422, Section V; Code § 643(i); Treas. Reg. § 1.643(h)-1.
44. Note that this may be a different address from that at which the beneficiary files his or her U.S. income tax return.
45. Code § 6048(c)(2).
46. IRS Notice 97-34, 1997-1 C.B. 422, Section V.B.
47. *Id.*
48. The trustee should file IRS Form 3520-A with the Internal Revenue Service Center, P.O. Box 409101, Ogden, UT 84409, by the same date.
49. *See* IRS Form 3520 Instructions (2008) (Line 22).
50. *See* IRS Form 3520 Instructions (Line 23). Filing IRS Form 8082 does not relive the taxpayer of penalties for failure to cause the trust to file IRS Form 3520-A. *See id.*
51. The information may be entered instead on Schedule A of IRS Form 3520, but generally it is more beneficial to complete Schedule B, which calculates the portion of the distribution that should be treated as current or accumulated income based on actual facts. To complete Schedule B, the trustee must characterize the income on the Foreign Nongrantor Trust Beneficiary Statement so as to distinguish between ordinary income, accumulation distribution, capital gains, and distribution of corpus
52. IRS Form 3520 Instructions (Line 30).
53. *See* Code § 6048(c)(2)(A) and Part III.D. of this article, below.
54. IRS Form 3520 Instructions (Line 32).
55. IRS Form 3520 Part III and Instructions.
56. Code § 667(b)(1); *see* IRS Form 4970 (2008) and Instructions.
57. *See* IRS Form 3520-A Instructions, "U.S. Agent," p. 2.
58. *See also* IRS Notice 97-34, 1997-1 C.B. 422, Section IV.B.
59. *See* Code § 6048(b)(2)(A).
60. *See* IRS Form 3520-A Instructions, "U.S. Agent," p. 2; Section 6048(b)(1)(A).
61. *See* IRS Notice 97-34, 1997-1 C.B. 422, Section IV.B. IRS Notice 97-34 does not mention IRS Form 3520 in this context. On one hand, as IRS Form 3520-A only applies to foreign grantor trusts, as IRS Notice 97-34 was issued prior to revision of IRS Form 3520, and as information on the U.S. agent is requested on Line 3 of IRS Form 3520, one could argue that an amended IRS Form 3520 should be filed in the case of a change of U.S. agent for a foreign nongrantor trust. On the other hand, it also seems reasonable to assume that the IRS would place a heavier informational burden on an owner-beneficiary than on a nonowner-beneficiary.
62. *Id.*
63. *See* Code § 6048(c)(2)(A).
64. *See* IRS Notice 97-34, 1997-1 C.B. 422, Section IV.B; IRS Form 3520 Instructions (Lines 29 and 30). The appointment of a U.S. agent in and of itself should have no effect on the trust's U.S. tax liabilities: under Section 6048(b), a foreign trust appointing a U.S. agent will not be considered to have an office or a permanent establishment in the United States, or to be engaged in a trade or business in the United States, solely because of the activities of such agent. Furthermore, the appointment of a U.S. agent will not subject such agent or records to legal process for any purpose other than determining the correct tax treatment of distributions. *See* Code § 6048(b).
65. *See* IRS Form 3520 Instructions (Lines 29 and 30).
66. Code § 6039F(a); Notice 97-34, 1997-1 C.B. 422, Section VI.
67. Code § 6039F(b); Notice 97-34, 1997-1 C.B. 422, Section VI.
68. Notice 97-34, 1997-1 C.B. 422, Section VI.B.1 and 2.
69. *Id.* at Section VI.B.3; see Code § 643(i)(2)(B) for aggregation rules.
70. Code §§ 2501(a)(2) and 2511(a).
71. Code § 6677(b).
72. *See* Code § 6677(a).
73. Code §§ 6677(d), 6039F(c)(2).
74. Internal Revenue Manual 20.1.1.3.1(2).
75. Internal Revenue Manual 20.1.1.3.1.2(2)(A) through (D).
76. *See*, *e.g.*, Evelyn M. Capassakis, Reporting International Trust and Gift Transactions and Penalties for Failure to Report, Fourth International Estate Planning Institute (27 May 2008).
77. *Id.*
78. *Id.*
79. *Id.*
80. IRS Notice 97-34, 1997-1 C.B. 422, Section VII.
81. *Id.*
82. IRS Form 8082 Instructions, "Penalties."
83. Code § 6662(d)(1).
84. *See* Code § 7454(a).
85. *See Stoltzfus v. U.S.*, 398 F.2d 1002 (3d Cir. 1968).
86. 31 C.F.R § 1010.306(c) and 31 C.F.R. § 1010.350(a). If such is the case, U.S. persons also must answer in the affirmative the question on Form 1040, Schedule B, about their ownership or signatory authority over a foreign account.
87. *Id.*
88. *Id.*
89. *See* FinCEN Report 114 for years prior to 2015, at http://bsaefiling.fincen.treas.gov
90. *See* Section 52105(b)(10) of the DRIVE Act.
91. *See* Section 52105(b)(10) of the DRIVE Act and Treas. Reg. Section 1.6081-5(a)(5) and (b)(1).
92. 31 C.F.R. § 1010.350(b).
93. Code § 7701(b)(3)(A).
94. Code § 7701(b)(3)(B).
95. 31 C.F.R. § 1010.350(a) and (c).
96. Supplementary Information to 31 C.F.R. § 1010.350, at Section II.A.
97. 31 C.F.R. § 1010.350(e)(1).
98. 31 C.F.R. § 1010.350(e).
99. 31 C.F.R. § 1010.350(g)(5).
100. Supplementary Information to 31 C.F.R. § 1010.350, at Section III.B.
101. *Id.* at Section III.I.
102. 31 C.F.R. § 1010.350(f)(1).
103. Supplementary Information to 31 C.F.R. § 1010.350, at Section II.B.
104. 31 C.F.R. § 1010.350(g)(1); Form TD F 90-22.1, General Instructions p. 7 (Item 14).

105. 31 U.S.C § 5321(a)(5). There is an exception if (i) the violation was due to reasonable cause, and (ii) the amount of the transaction or the balance in the account at the time of the transaction was properly reported. *Id.*; see also 31 U.S.C § 5322 for criminal penalties.
106. IRS News Release IR-2008-79 (17 June 2008).
107. *Id.*
108. 31 U.S.C § 5321(a)(5)(A), (B)(i).
109. The delivery address for private courier services is: U.S. Department of Treasury, Currency Transaction Reporting, 985 Michigan Avenue, Detroit, MI 48226. *Id.*
110. FAQs regarding Report of Foreign Bank and Financial Accounts (FBAR), http://www.irs.gov/ businesses/small/ article/0,,id=148845,00.html (last visited 9 December 2008) (Question 10).
111. Treas. Reg. §§ 1.6038D-1T to 1.6038D-8T.
112. Treas. Reg. §§ 1.6038D-1 to 1.6038D-8.
113. FATCA § 511(c).
114. Code § 6038D(a); Treas. Reg. § 1.6038D-2(a)(1).
115. Treas. Reg. § 1.6038D-2(a)(2), (3), and (4).
116. Treas. Reg. § 1.6038D-1(a)(1) and (2).
117. Treas. Reg. § 1.6038D-2(e)(1).
118. *Id.*
119. Preamble to Final Regulations of Code §6038D, Section IV G.
120. Treas. Reg. § 1.6038D-2(b)(1).
121. *Id.*
122. Treas. Reg. § 1.6038D-2(b)(4)(i).
123. Treas. Reg. § 1.6038D-2(b)(4)(ii).
124. Treas. Reg. §§ 1.6038D-2(b)(4)(iv) and 1.6038D-3(c).
125. *Id.*
126. Treas. Reg. § 1.6038D-2(b)(4)(iii).
127. Code § 6038D(d).
128. Code § 6038D(g).
129. Treas. Reg. § 1.6038D-5(f)(2)(i).
130. Treas. Reg. § 1.6038D-5(f)(2)(ii)
131. Code §1471(a).
132. Code §1471(b).
133. Treas. Reg. §1.1471-1(b)(78) and (79).
134. Treas. Reg. §1.1471-1(b)(78).
135. Treas. Reg. §1.1471-1(b)(79).
136. *See* Model 1 IGA, Article 1(1)(gg) and Treas. Reg. §1.1471-1(b)(39) and Code section 7701(a)(1).
137. Treas. Reg. §1.1471-5(e)(4)(A).
138. In addition to the policies underlying FATCA, the deemed compliant categories in the FATCA Regulations and IGA (and the IRS' statement in Notice 2010-60) strongly suggest that private family trusts can be FFIs—otherwise, the development of such deemed compliant categories in the FATCA Regulations and IGAs would have been unnecessary.
139. Treas. Reg. § 1.1471-5(e)(4)(i)(B).
140. A discretionary distribution means a distribution that is made to a person at the discretion of the trustee or a person with a limited power of appointment.
141. Treas. Reg. § 1.1471-5(b)(3)(iii).

Lauren D. Rachlin: Tribute and Memories

If you are receiving this publication then by definition, Lauren Rachlin has touched your life. As a founding member of the Section, a dedicated lawyer, a devoted husband, father and grandfather, whatever he was doing, he certainly gave it his all, and, in so doing, touched the lives of so many. Below are some thoughts provided by Section members and, as you read through them, you will note that in his life Lauren mentored, helped and affected so many people.

May his memory be for a blessing.

As a founding member of the International Section, Lauren inspired the creation of this wonderful group and all that has come from it. Lauren was a tireless promoter and supporter of the Section, and could always be counted on to be working on a new plan or initiative designed to further our collective goals. Lauren also guided and mentored many Section members, including me, offering kind words and support when needed (and even when not!). We will all be forever grateful for his advice in many areas, personal and professional.

Lauren was also an incredibly decent man. We don't get to pick our relatives, but if I could have picked just one, it would have been him. If you knew him, you would have too.

Neil Quartaro

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I first met Lauren sometime in 1992. He, of course, was full of ideas about international trade and wanted to know more about joining a specific U.S. government advisory committee, which he was still serving on at the time of his passing. He asked many questions about trade and customs and over the years taught me about international business and how to make connections. We became friends and I and my family looked forward to seeing him, his wife and sister at our annual Section meetings or in New York in between meetings. I consider myself lucky to have seen him more regularly at our Advisory Committee's DC meetings, where he cajoled and pushed our government into several projects benefiting trade, especially along the Northern Border. Lauren put together the first U.S. Department of Commerce visit to both sides of the border, which started in Buffalo, to meet with the trade community, politicians and Customs, in an effort to help review and solve problems that delayed commercial traffic.

As lucky as I was to have many memories with Lauren, one of my best memories of him was our "pre-trip" before the Section's 2001 meeting in Rio de Janeiro. A small group of us went literally up the Amazon and the Rio Negro to a hotel on stilts where the rivers commingled. One morning, our guide took us in small canoe-like boats further up the river, where we would have a short hike to an "outpost" where the government had encouraged the local population to sell handicrafts to tourists as an alternative to clearing the Amazon area for farming. The morning was humid but Lauren took the lead. When we came to a rather large gully we were allowed to either walk about five minutes in a different direction to go around it or swing across it on a Tarzan-like vine. By the time I arrived at the gully, Lauren was already swinging across! When we arrived at the trading post, his eyes immediately found an incredibly well-decorated "blow dart" device. He then saw a Styrofoam target on a tree about 10 feet away and without hesitation asked through the guide if he could try it. As soon as the trading post owner said yes, Lauren loaded a dart, quickly turned and blew the dart at the target. Yes, it was a bullseye and as Lauren proudly eyed his feat, I asked him as seriously as I could if that is how he became senior partner at this firm. He looked at me with a smile and said, "I'm not telling!"

Bob Leo

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Lauren Rachlin will be missed by all of us. He was the "father" of the International Section.

Lauren and I got to know each other in the early 1990s when I took over as liaison to the International Section. Lauren and I had many wonderful times with Jean and his sister, Nancy. While we were in Peru, Lauren and I had the unique experience of both ending up in the same small hospital—me with high altitude sickness and him with pancreatitis. We kept each other company by talking loudly. We laughed about it later. When I retired, Lauren read a beautiful tribute to me that I will always remember fondly.

Linda Castilla

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When I began my position as the Section Liaison and Meetings Coordinator for the International Section, I was quite overwhelmed. The amount of events, the number of committees and chapters, the depth and level the seasonal meeting held was a bit intimidating. I started with the sec-

tion in late December, 2011 and hit the ground running to plan for the Annual Meeting and Lauren's new strategic program—NYSBA and Ontario Bar Association (OBA) Summit. As many people know, time is of the essence when planning events such as these. It was late December and the Summit was in late March—and only the dates and venues had been arranged. Lauren's vision was that this would be a multi-day, multi country event—it would take place in Toronto on a Wednesday and in Buffalo the very next day. It required multiple panels, over 80 speakers and massive marketing and sponsorship efforts. Lauren wanted this to succeed and he trusted me with its planning. I was confused and nervous, not only in how he envisioned the program to run, but also in the amount of tracks, speakers and CLE needs—and with less than three months to get it all done! I had question after question after question for him—and he took every single one with a smile on his face and patience to talk me through it. He spent day after day on the phone with me—strategizing the plan, the marketing, the schedule, the sponsorship. He was adamant that the Section could make this a success and make money in the process. I was less than sure, but listened to every word he said and followed all of his instructions and guidance.

In the end, as seemed always the case, Lauren was right! The event was HUGELY successful. The Toronto program had 138 attendees and the Buffalo program had 99. The event made the section $41,000 in sponsorship! Lauren took almost no credit—saying it was a "team effort" and yet, the truth is…the "team" was really just him.

I often told him he was my favorite member—and he would joke that that was only because he paid his dues on time. But the truth is, if I needed anything—questions answered, guidance on a Section issue, historic details, a moment to vent about an event—he always took my call. I will surely miss the shoulder he offered me. Godspeed, my favorite member.

Tiffany Bardwell

***

Lauren was always a welcoming friend at NYSBA international meetings even to those of us from across the pond. He seemed on top of some of the latest developments in cross-border leading issues—I remember talking to him in October about the Safe Harbor issues that had just broken then. He is a great loss, a great lawyer and a great friend to many of us.

Jonathan Armstrong

I can clearly recall the day I first met Lauren—it was at the first OBA/NYSBA Legal Summit in Toronto on March 28, 2012. He sat next to me at the first program, and, in Lauren's true form, we were friends an hour later. By the end of the summit, he had already convinced me to get involved in the NYSBA in a leadership role. He took an interest in me and in my career instantly. It's hard to think that this was only four years ago, because, in that short time, Lauren and I got together more times than I can count, be it lunches, dinners, trips to NYC, seminars, etc. He made introductions for me, included me in several NYSBA and OBA committees and referred work my way. He did this never expecting anything back from me other than friendship. In four short years, he became not only my mentor, but a good friend, despite the difference in age measured in decades. I will cherish his friendship and mentorship forever and his presence will be sorely missed by all.

Ari Tenenbaum

***

Lauren Rachlin was a tireless champion of international trade. He truly and genuinely saw its as good for all countries.

He was instrumental in establishing the New York State Bar Association's International Law Section and multiple cross-border and "Golden Horseshoe" groups. He supported cross-border efforts whenever he had the opportunity—including those of competitors.

Lauren recognized that the Canada-U.S. Free Trade Agreement (NAFTA's precursor) would create a need for U.S. legal expertise in Canada and I believe was the first lawyer to establish a practice of U.S. law in Canada. His Foreign Legal Consultant License issued by the Law Society of Upper Canada is No. 2 and there is no No. 1.

Personally, Lauren hired me to my first position out of law school and was the best mentor I ever had. I expect that half a dozen, if not a dozen or more, lawyers also claim Lauren as their best mentor.

He assisted me in developing core legal skills—such as legal analysis and writing—but more critically taught me other important and perhaps subtle things, such as to listen acutely, to have empathy, "to leave something on the table" for the other party and (by example and hopefully) good judgment. I will forever hear him telling me, "You're too rigid. You need to be flexible."

I can honestly say that without Lauren's support and encouragement, I would not enjoy the success I do—and again, I am sure there are numerous lawyers and others that would say that.

As for memories, I will never forget the time when, as a first or second year associate, I was walking back from a laundromat early one snowy Saturday morning. My arms were full of shirts on hangers, detergent and a duffle bag full of clothes. Lauren just happened to be in the neighborhood, pulled up in his car and immediately began an intense discussion concerning a matter we were working on.

For me, it was surreal. Laden with laundry, arms getting tired and standing in deep snow and Lauren going on and on about the matter. Much later when I reminded him of the incident he laughed both heartily and sheepishly at having done that.

As for another, Lauren was especially fond of figuring out shortcuts while driving, wherever he was. I will not forget how he shared with me with glee the tip that the massive traffic back-ups that occur each afternoon going west on the QEW through Oakville and Burlington can be nearly completely avoided by shooting up Winston Churchill Boulevard to Route 407.

I will also not forget his look when driving and encountering a tight dead-end, he needed to repeatedly pull forward and back to turn around, and I complimented him for executing the "best 13-point turn" I had ever witnessed. He was proud of his prowess at the wheel and that hurt.

Lauren was a fan and patron of classical music and especially opera, and regularly traveled to New York City to enjoy Metropolitan Opera performances.

He was also the most traveled person I have known: I believe he and his wife Jean have been just about every place on the planet (save perhaps the North and South Poles). Most recently they took long trips to Africa and Brazil—in their eighties.

On top of his love of his work, travel, music, etc., however, I believe that he truly most enjoyed the company of his wife Jean.

I already miss Lauren greatly, but I am sure not nearly as much as Jean and their big, wonderful family.

Thomas J. Keable

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Lauren Rachlin was not only an outstanding lawyer, and a leader in the practice and study of international law, but Lauren was an innovative and original thinker and an extraordinary human being, as well.

It was my privilege to have practiced law with Lauren for some 25 years and to have been enriched by his friendship for over 60 years.

Among other things that my wife Janet and I did with Lauren, and his lovely wife, Jean, and his sister, Nancy, was not only attending the Annual Meetings of the International Law Section together, but the five of us each year also then traveled together, either preceding or following the Annual Meetings, whether in Europe or in South America or in Asia or Australia.

I am pleased to send you this note in honor of Lauren's memory and look forward to seeing and reading the tribute to Lauren that the International Law Section will be printing in the next edition of the *Practicum/Chapter News*.

Thank you for giving me and his other Section colleagues the opportunity to do so.

Lauren will be sorely missed.

Wayne D. Wisbaum

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I enjoyed enormously having been a close friend to Lauren. At some point we realized we had similar interests, a wish to enjoy life and the same passion for law and what it means for practitioners, the community, the world. We shared an interest in music, art and even for snowball throwing, which we practiced unsuccessfully in one of the snowstorms we had to suffer/enjoy in New York.

What a life the life of a lawyer like Lauren, how I admired his will power, his unflinching interest in helping others and in the rule of law, his tireless dedication to the profession and, of course, to NYSBA's International Section.

May he rest in peace.

Ernesto Cavelier

Book Review

Commercial Litigation in New York State Courts

(New York County Lawyers Association, West's New York Practice Series, 4th ed. 2015)

Edited by Robert L. Haig (Thomson Reuters, 2015)

Reviewed by John F. Zulack

When the New York state Commercial Division was created in 1995, Robert Haig was chosen by former Chief Judge Judith Kaye (1938-2016) to co-chair the Commercial Courts Task Force and create the court that would make New York state the preferred forum for adjudication of commercial disputes. Mr. Haig's seminal treatise, *Commercial Litigation in New York State Courts*,[1] was published the same year. His treatise helped make the Commercial Division the success that it is today and has been an indispensable resource for New York practitioners as well as those outside the United States who adjudicate complex commercial disputes. The Fourth Edition of Mr. Haig's treatise, released in October 2015, guides readers through the newly implemented recommendations of former Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century, which was created in 2012, as well as emerging areas of law that commercial litigators have confronted more frequently since the publication of the Third Edition in 2010.

Lawyers practicing outside the United States who want to understand litigation in New York, or who are collaborating with New York counsel on a cross-border commercial matter, should look no further than Mr. Haig's treatise to guide them. The Fourth Edition maintains the treatise's easy-to-follow style, which includes outlines, checklists and forms. These features also make it an ideal resource for international practitioners who want to gain familiarity with New York procedure. It is the only treatise devoted to commercial litigation in New York state courts, and the only treatise focusing on the interplay between the rules of procedure in New York courts and the substantive law that commercial litigators frequently encounter.

The Fourth Edition adds 57 new authors for a total of 182, who represent some of the most highly esteemed practitioners and jurists in New York. There are 29 judges on the roster of authors including, as previously mentioned, former Chief Judge Kaye as well as former Chief Judge Jonathan Lippman. Court of Appeals Judge Eugene M. Fahey, former Court of Appeals Judges Victoria A. Graffeo, Robert S. Smith and George Bundy Smith, and many Appellate Division Justices and Commercial Division Justices, have contributed chapters. U.S. District Judges Brian M. Cogan and William F. Kuntz, II and former U.S. District Judge Michael B. Mukasey are also among the authors of the Fourth Edition.

Without exception, the authors either practice commercial litigation or preside over commercial disputes as jurists. The insights in the Haig treatise can only be gained from years of litigation experience. It addresses the practical and strategic considerations that practitioners confront on a daily basis and was designed to be a step-by-step guide covering all aspects of commercial litigation, from the initial assessment of a case through enforcement of judgments. In addition to in-depth analysis of law and procedural matters, the treatise also provides checklists of allegations and defenses, hundreds of essential litigation forms and jury charges, and strategies for representing both plaintiffs and defendants. It is an essential guide for international practitioners who are just beginning to navigate the ins-and-outs of New York procedure and researching substantive points of New York law for the first time.

The Fourth Edition includes 22 new chapters, comprising two new volumes and more than 2,400 additional pages, addressing developing areas of the law that have grown in prominence in the five years since the Third Edition was published. The treatise now spans 127 chapters, eight volumes and 10,188 pages of text, a tremendous undertaking that represents more than $40 million in billable hours, according to Mr. Haig's "conservative[] estimate" of the time authors have devoted to the treatise since its first publication in 1995. The 22 new chapters include International Arbitration (Chapter 62, discussed in more detail below), Negotiations (Chapter 59), Mediation and Other Nonbinding ADR (Chapter 60), Securitization and Structured Finance (Chapter 91), Derivatives (Chapter 92), Licensing (Chapter 107), Social Media (Chapter 113), Tax (Chapter 117), Project Finance and Infrastructure (Chapter 122), Commercial Leasing (Chapter 120), and Energy (Chapter 125).

Another useful feature is a separate appendix with an Index and a table of all laws, rules and cases discussed throughout the treatise. References to the West Key Number Digest, McKinney's forms, other treatises and law review articles are included in most chapters, which makes it simple for readers to expand their research to additional sources. The existing chapters have also undergone extensive updates, including Chapter 1, authored by former Chief Judge Lippman. Former Judge Lippman's chapter addresses the recommendations of the 2012 Report of the Chief Judge's Task Force on Commercial Liti-

gation in the 21st Century, which included a wide range of rule changes and procedural reforms, many of which have been implemented with more on the horizon.[2]

Chapter 62 on International Arbitration, one of the new chapters included in the Fourth Edition, is particularly useful for international practitioners. Judge Kaye authored this chapter along with John L. Gardiner and Jonathan L. Frank, her colleagues at Skadden, Arps, Slate, Meagher & Flom LLP. It provides an overview of the statutory framework and a guide to the Commercial Division procedure for international arbitration matters, and covers all stages of international arbitration, from drafting the arbitration agreement to seeking recognition and enforcement of the agreement. The chapter reviews the procedure before the tribunal, including the appointment of arbitrators and the submission of evidence, and includes a form procedural order for arbitration under the ICC Rules of Arbitration. The chapter also covers recognition and enforcement of international arbitration awards.

The Fourth Edition also updates and expands upon existing chapters of interest to cross-border lawyers, including: Comparison with Commercial Litigation in Federal Courts (Chapter 12); Coordination of Litigation Within New York and Between Federal and State Courts (Chapter 16); Suing or Representing Foreign Corporations in New York State Courts (Chapter 20); Litigation Avoidance and Prevention (Chapter 63); Litigation Management by Law Firms (Chapter 67); Litigation Technology (Chapter 68); White Collar Crime (Chapter 102); The Interplay Between Commercial Litigation and Criminal Proceedings (Chapter 103); E-Commerce (Chapter 112); and Information Technology Litigation (Chapter 114). The treatise also covers commonly encountered topics such as contracts, insurance, sale of goods, banking, securities, antitrust and intellectual property.

Also of particular importance to the international law community is Chapter 13 on Enforcement of Forum Selection Clauses, specifically § 13:6, which discusses New York's General Obligations Law § 5-1402 ("Choice of Forum"), and CPLR 327(b). CPLR 327(b) works in conjunction with New York General Obligations Law § 5-1402, and provides that a court may not stay or dismiss any action on the basis of *forum non conveniens* where the action arises out of a contract, agreement, or undertaking to which § 5-1402 applies, and where the parties to the contract have agreed that New York law is to govern the rights and duties, in whole or in part, under the contract. In such situations, the court is required to keep the action in the New York courts. The treatise devotes substantial attention to the discovery process in New York actions, a process which can be accused of frightening potential litigants, who may opt instead to litigate outside of New York, or even outside of the U.S. Chapter 24 does an effective job of putting potential practitioners' minds at ease, and helps to focus potential litigants on the benefits of New York's comprehensive disclosure process, such as how the thoroughness of the discovery process better facilitates truth-finding.

As the Commercial Division has become the preferred court for adjudicating commercial disputes, it is more important than ever for international practitioners to expand their knowledge of New York procedure. Unlike federal courts in New York, the Commercial Division has statutory authority to hear disputes between parties to a contract who have no contact with New York or with the United States other than having included a New York choice of law and a New York choice of forum provision in their contract, as long as the contract relates to a transaction having a value of at least one million dollars.[3] As explained above, a Commercial Division court cannot dismiss such a lawsuit on the ground of *forum non conveniens*.[4]

The Commercial Division consists of 29 judges who have been selected for their expertise in commercial matters.[5] In addition to New York commercial matters, the Commercial Division handles many international and cross-border disputes. Largely due to the creation of the Commercial Division, "New York is widely recognized as having an established, well-developed contractual commercial law equipped to deal with complex transactions."[6] As New York's role as the epicenter of commercial law continues to grow, practitioners can rely on Haig's treatise as a guide in this constantly changing world.

Mr. Haig and the contributing authors should be commended for their work on the Fourth Edition. The treatise continues its focus on the practical needs of commercial litigation practitioners located in New York and internationally, leaving no stone unturned in creating a comprehensive, substantive work that remains easy to navigate. Haig's work will continue to encourage international practitioners to litigate commercial cases in New York, ensuring that the Commercial Division will continue to see the growth and success that it has experienced for the past decade.

Endnotes

1. Please note that Richard A. Williamson and Elizabeth A. O'Connor, two partners of Flemming Zulack Williamson Zauderer LLP, are the authors of Chapter 86 on Partnerships.
2. In addition to the summary of the Task Force's recommended reforms found in Chapter 1, the reforms are discussed throughout the treatise. See, e.g., § 30.5 ("Expert Disclosure and Communications with Experts"); § 35.10 ("Assignment to the Commercial Division"); §§ 65:8 ("Recent Rule Changes That Foster Expedited Litigation").
3. N.Y. Gen. Oblig. Law § 5-1401 (Choice of Law) and § 5-1402 (Choice of Forum).
4. CPLR 327(b).
5. History—Justices of the Commercial Division, http://www.nycourts.gov/courts/comdiv/history_justices.shtml
6. Final Report of the New York State Bar Association's Task Force on New York Law in International Matters (April 18, 2011), at 6.

Chapter News

Message from the Chair

On June 1, 2016 I assumed the position of Chair of the New York State Bar Association's International Section ("NYSBA International"). As all incoming chairs recognize, our predecessors have collectively built one of the premier international law organizations and leave large shoes to fill. I am especially indebted to immediate past Chair Gerald "Jerry" Ferguson, and to past chairs Thomas Pieper, Glenn Fox, Andrew Otis, and Drew Jaglom for both their leadership of NYSBA International and their friendship. I am also grateful to past Chair Michael Galligan for his friendship and support in setting me on the path to leadership with the Section and to past Chair Alfred E. Yudes for initially involving me in NYSBA International. I also wish to acknowledge the passing this year of one of our founders, Lauren Rachlin. Lauren was a friend and mentor to me and many members of NYSBA International and we are forever grateful to him for his many efforts to develop and grow NYSBA International. On a personal note, I am deeply appreciative of the love and support of my wife, Stacey, without whom my involvement with the Section would not be possible.

I assume the role of Chair at an inflection point for our Section. The hard work of the immediate past Chairs in restoring the Section's finances to a surplus and in reorganizing some aspects of NYSBA International have created a stable yet dynamic Section. As Chair, I intend to build on this work by focusing on three primary areas: Members, Money and Meetings. It has long been a Section goal to grow to at least 2,500 members so that NYSBA International can grow its representation at the NYSBA House of Delegates and thereby increase our ability to influence the larger State Bar. A larger membership will also bring positive financial results by way of membership dues, but NYSBA International must also consider ways in which the Section can create additional revenue streams outside of dues. It is critical to both of these goals that we engage our members at the Chapter and Committee level, and so I will build on the work of previous Chairs in this area by increasing the interaction of the Section's Committees with the Section's membership. In addition, NYSBA International's numerous meetings each year need to better reflect the needs of our members while also maintaining their widespread appeal. In this regard, I will work with past and future leadership and with the Executive Committee to identify ways in which the Section's meetings offerings might be improved and given broader appeal to increase attendance at our meetings.

NYSBA International has codified its goals in the Section by-laws, which provide that the Section: "shall in the field of public and private international and transnational law and practice (1) plan and conduct continuing legal education programs; (2) collect, publish and distribute educational and professional materials; (3) promote interest, activity and research; (4) formulate professional opinion; (5) study and comment upon the impact of foreign, federal and state laws and treaties; (6) develop and recommend policy and improvements in the law; (7) serve as a resource to business, civic and governmental organizations; (8) enhance the skills and competency of New York Lawyers; and (9) undertake all such other activities as may be authorized from time to time by the Association and the Executive Committee of the Section for the purpose of accomplishing the foregoing." Exercising the latter right, the Section's Executive Committee adopted three long-range Missions: (i) Custodian of New York Law as an International Standard, (ii) Guardian of the New York Convention on the Enforcement and Recognition of Arbitral Awards and the international arbitral process, and (iii) Monitor of International Law Development at the United Nations. I believe these are vital area of focus for the Section.

As Section Chair, I urge all members of NYSBA International to participate in Section activities and meetings, and to take advantage of the many benefits and opportunities that membership provides. During my term, there are a number of interesting meetings scheduled, including:

The Section's signature Seasonal Meeting, held this year in Paris from October 19–21, with a special pre-meeting in Strasbourg from October 16-17.

- NYSBA International's Annual Meeting, held in conjunction with the NYSBA Annual Meeting in New York City each January.
- Our Regional Meeting in Dublin, Ireland on April 21, 2017.
- Global Law Week 2015, featuring the Fundamentals of International Practice (dates to be announced).
- Our 2017 Seasonal Meeting in Antigua, Guatemala in September 2017 (dates to be announced).

In addition, each Committee and Chapter will be holding its own meetings—a great opportunity for you to participate. I look forward to welcoming you in person at one of our events.

Again, I invite all of you to fully participate in all of the activities offered by NYSBA International and its Committees and Chapters. This is *your* Section—so please get involved!

With my best personal regards,

Neil A. Quartaro
Chair, NYSBA International
nquartaro@wfw.com

Privacy Shield Update

By Jonathan Armstrong

The Autumn 2015 edition of this publication contained an article entitled *The Sinking of Safe Harbor—Navigating the Stormy Waters Ahead*. This article reported on the issues with the EU/U.S. Safe Harbor scheme for transferring data and looked in detail at the issues around the October 2015 ruling of the Court of Justice of the European Union (CJEU) in the case of *Maximillian Schrems v. Data Protection Commission*.

In response to the sinking of Safe Harbor, the Commission presented their replacement proposals to the Article 29 Working Party (known as WP29), an influential group of data protection regulators. Since then, the European Commission has produced a new scheme known as Privacy Shield in an effort to resolve some of the deficiencies of the now dead Safe Harbor scheme.

WP29 decided that, in its view, Privacy Shield does not offer adequate protection.[1] Whilst the decision is not binding on the Commission, it is likely to impact the success of Privacy Shield, especially since enforcement is still in the hands of the data regulators who sat around the table at WP29.

WP29's position is not surprising, especially given sentiment amongst some in Germany. Some German data protection authorities have long held an objection to Safe Harbor and they have been the most aggressive in enforcement since Safe Harbor died.

Amongst WP29's criticisms of Privacy Shield are:

- A lack of clarity over the ombudsman role; and
- Exceptions allowing the U.S. to continue to collect European bulk data.

In the short term, most companies will have to continue to plan for a world without Safe Harbor or Privacy Shield. They will have to explore alternative solutions, including EU model terms and Binding Corporate Rules (BCRs). BCRs are likely to gain momentum and sources close to WP29 tell us that we can soon expect statements from regulators removing some of the existing objections to BCRs. We had a lively debate on this topic at the New York State Bar International Section Meeting in Krakow, where the Deputy Director of the Bureau of Inspector General for Personal Data Protection (GIODO), Piotr Drobek, spoke in favour of the BCR scheme and its advantages. In addition, BCRs will gain traction once their statutory status is confirmed by the forthcoming General Data Protection Regulation (GDPR).

There are various options for data transfer after Safe Harbor, although none of them are without their issues. The issues related to data transfer are likely to be problematical for those doing transatlantic trade for many months to come.

Jonathan Armstrong
Codery
London, England

Endnote

1. Its not an official position across all of Germany

Report: UNCITRAL Working Group III on Online Dispute Resolution—A Change of Focus in the Outcome Document

By Clara Flebus

Introduction

In 2010, the United Nations Commission on International Trade Law ("UNCITRAL") established Working Group III on Online Dispute Resolution ("ODR") to create unified standards and mechanisms for online dispute resolution of cross-border electronic commerce disputes.[1] The project was born out of the shared concern that traditional judicial venues such as national courts do not offer adequate redress for international disputes arising out of low-value, high-volume cross-border e-commerce transactions. In addition, it was recognized that the credit card charge-back system used in the United States—an efficient solution that deals directly with payment without requiring additional enforcement mechanisms—is not available in most countries.

"At its inception, the Working Group agreed that arbitration was a necessary component of ODR because it provides finality and the possibility of enforcing the arbitral award across borders through the 1958 New York convention."

In fact, worldwide, very few legal mechanisms currently exist to obtain redress in the context of e-commerce. Thus, the objective of Working Group III was to foster the development of a global and coherent ODR system that would improve access to justice by providing an efficient, low-cost, and reliable framework for dispute resolution. This aim was viewed as consistent with UNCITRAL's mission to further the unification of international trade law and contribute to the expansion of cross-border commerce and economic growth.

The Original Mandate: ODR Model Rules

Initially, the Working Group's mandate included the drafting of harmonized procedural rules to resolve international disputes arising out of both business-to-business ("B2B") and business-to-consumer ("B2C") e-commerce transactions. The goal was to produce ODR model rules capable of being applied by ODR providers worldwide. The challenge lay in conceiving rules that needed to comply with the restrictions imposed by national laws on the ability of private parties to enter into agreements to use certain types of ODR. At its inception, the Working Group agreed that arbitration was a necessary component of ODR because it provides finality and the possibility of enforcing the arbitral award across borders through the 1958 New York convention. However, a tension subsequently developed between those jurisdictions that allow pre-dispute agreements to arbitrate with consumers and deem the resulting arbitral awards as valid and enforceable (*e.g.*, the United States), and other jurisdictions in which mandatory consumer protection law renders pre-dispute agreements to arbitrate non-binding upon consumers (*e.g.*, the European Union member states).

In 2012, the Working Group proposed a compromise solution: a "two track" system that separated binding arbitration from other non-binding ODR mechanisms. In track I, the parties would agree at the time of purchase that any dispute would be resolved through successive phases including negotiation, facilitated settlement, and arbitration. Track I would be applicable to B2B disputes and also to B2C disputes in countries where pre-dispute arbitration agreements could be enforced against consumers. Conversely, in track II the parties would only agree to negotiation and facilitated settlement when they executed the online transaction with a single click. A second click would be necessary for consumers to expressly consent to arbitration after a dispute arose and the parties failed to reach a solution through the non-binding phases of negotiation and facilitated settlement. The requirement of a second click was conceived to ensure consumer protection against arbitration in those jurisdictions where pre-dispute arbitration agreements are not allowed.

"In the event the parties could not agree on the procedure for a final determination, the default procedure would be a non-binding recommendation."

As the deliberations of the Working Group continued over the years, many delegations recognized that the implementation of a "two track" system posed the difficult issue of guiding the parties to choose the proper track based upon the jurisdiction and the status of the purchaser. Members of the Working Group first observed that it may not always be clear whether the purchaser is, in fact, a "consumer" because the concept of consumer is defined differently in different jurisdictions. Second, it was noted that private international law offers various criteria for determining jurisdiction, including nationality of the

parties, place of residence, place of purchase, and others, which may have complex definitions. Third, it became apparent that the jurisdictional issue is more complicated in the e-commerce context because vendors' websites can be accessed from several countries, customers can make a purchase while visiting a foreign country, and network traffic can be rerouted through other countries. In an attempt to resolve these problems, the Working Group discussed the creation and maintenance of a list of countries that would fall into each of the two tracks. The list would become an "annex" to the ODR rules and tell ODR providers which rules to apply in a specific transaction. Another issue discussed by the Working Group was whether the "two track" system would require two sets of rules or a single set of rules including two tracks.

A Change of Focus in 2015

At its thirty-first session held in New York in February 2015, the Working Group discussed a new proposal envisaging a single set of rules. The proposal provided for a three stage process comprising negotiation, negotiated settlement facilitated by a neutral party, and a final determination pursuant to a procedure to be determined by the parties on the basis of options set forth by the neutral party. The options would only include a non-binding recommendation or binding arbitration. In the event the parties could not agree on the procedure for a final determination, the default procedure would be a non-binding recommendation.

"The UNCITRAL Commission instructed the Working Group to continue its work toward elaborating such a document and also imposed a time limit of one year, specifying that after a year the project would come to an end whether or not a result had been achieved."

However, this new proposal did not clarify whether a single click or two clicks were required and left that issue to be determined based upon the national law of each jurisdiction. This solution was deemed unsatisfactory and the Working Group reached an impasse. Some countries expressed the view that the UNCITRAL Commission should terminate the mandate of the Working Group, while others advocated that the Working Group should continue its efforts to find a consensus on the new proposal.

When the UNCITRAL Commission convened in July 2015, a further proposal was presented to avoid termination of the Working Group altogether. This proposal provided that the Working Group could change its focus and develop a non-binding descriptive document reflecting those elements of an ODR process on which consensus had been previously reached, and excluding the question of the nature of the final stage of the ODR process (arbitration or non-arbitration) that had caused insurmountable differences among the delegations. The UNCITRAL Commission instructed the Working Group to continue its work toward elaborating such a document and also imposed a time limit of one year, specifying that after a year the project would come to an end whether or not a result had been achieved.

"ODR is described as a process that may comprise three stages: negotiation, facilitated settlement, and a third and final stage."

The Technical Notes on Online Dispute Resolution

Since July 2015, the Working Group has endeavored to draft a non-binding document entitled "Technical Notes on Online Dispute Resolution," which describes elements and principles of an ODR process—an example of a similar type of document can be found in the "UNCITRAL Notes on Organizing Arbitral Proceedings." The stated purpose of the Technical Notes on ODR is to support the development of ODR and assist all potential participants in an ODR system, including ODR administrators, ODR platforms, neutrals, and the parties to the dispute. The Technical Notes are not suitable to be used as rules for any ODR proceeding because they do not impose any legal requirement that is binding upon the parties or the people/entities involved in administering or facilitating an ODR proceeding. Rather, the Notes describe practices and procedures that reflect approaches to ODR mechanisms based upon principles of fairness, due process, accountability, and transparency.

"It is recommended that the neutral party be required to declare his or her impartiality and independence."

The Notes define the scope of the ODR process as including disputes regarding both B2B and B2C transactions, and covering claims arising out of sales as well as service contracts executed online. ODR is described as a process that may comprise three stages: negotiation, facilitated settlement, and a third and final stage. If the negotiation stage does not result in a settlement of the claim, the process may move to the second stage, facilitated settlement, in which the ODR administrator appoints a neutral party who communicates with the par-

ties in an effort to bring about a resolution. If that stage also fails, a third phase may be commenced in which the ODR administrator or neutral party may inform the parties of the nature and the form of that phase. The Notes provide specific guidance on commencement of the ODR proceedings, negotiation and facilitated settlement stages, appointment, powers and functions of the neutral party, handling of language issues, and governance of the proceedings. It is recommended that the neutral party be required to declare his or her impartiality and independence.

At the most recent Working Group's meeting held in New York in February-March 2016 (its thirty-third session), some delegations pointed out that an Internet-based ODR process could be vulnerable to hacking. A discussion followed about whether the Technical Notes should include a recommendation that ODR administrators and platforms adopt appropriate measures to ensure the security of the ODR process. In previous sessions, the Working Group had already acknowledged the importance of standards for security of data exchange for ODR providers.

"The Notes are intended to be of assistance regardless of the structure and framework of an ODR system, which may offer a variety of dispute resolution mechanisms including, for example, conciliation, negotiation, mediation, facilitated settlement, arbitration, ombudsmen, and complaint boards."

Thus, the Notes were amended to include a recommendation that an ODR process employ a system for processing communications (*i.e.*, generating, sending, receiving, storing, exchanging information) operated in a manner that ensures data security. The Working Group also discussed including a recommendation that ODR administrators who wish to publish data or statistics regarding their decisions should comply with applicable principles of confidentiality.

The Technical Notes were submitted and adopted by the UNCITRAL Commission at its forty-ninth session this past June/July in New York. Given the rapid growth of cross-border e-commerce transactions, ODR has emerged as a necessary tool capable of providing a simple, quick, and effective option for the resolution of disputes arising out of online contracts. In this regard, the Notes are a step in the direction of harmonizing ODR systems and practices worldwide. The Notes are intended to be of assistance regardless of the structure and framework of an ODR system, which may offer a variety of dispute resolution mechanisms including, for example, conciliation, negotiation, mediation, facilitated settlement, arbitration, ombudsmen, and complaint boards.

Clara Flebus
New York City, New York

Endnote

1. In the Autumn 2014 edition of this publication, vol. 27, no. 2, Ms. Flebus provided an article that highlighted her interview of Soo-geun Oh, Chairman of UNCITRAL Working Group III on ODR (2010-2014).

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The International Section Welcomes New Members

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Aurelien Christophe Marie Zuber

International Section Officers

Chair
Neil A. Quartaro
Watson Farley & Williams LLP
250 West 55th Street
New York, NY 10019
nquartaro@wfw.com

Chair-Elect/CIO
Nancy M. Thevenin
43-10 Crescent Street
Long Island City, NY 11101
nancy.thevenin@theveninarbitration.com

Executive Vice-Chair
William H. Schrag
Thompson Hine LLP
335 Madison Avenue
New York, NY 10017
william.schrag@thompsonhine.com

Senior Vice-Chairs
Azish Eskandar Filabi
Ethical Systems/NYU Stern
44 West 4th Street
New York, NY 10012
afilabi@ethicalsystems.org

Thomas N. Pieper
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022
thomas.pieper@hoganlovells.com

Diane E. O'Connell
PricewaterhouseCoopers LLP
300 Madison Avenue, 11th Fl.
New York, NY 10017
diane.oconnell@us.pwc.com

Secretary
Jay L. Himes
Labaton Sucharow LLP
140 Broadway
Nwe York, NY 10005
jhimes@labaton.com

Treasurer
Lawrence E. Shoenthal
Weiser Mazars LLP
6 Dorothy Drive
Spring Valley, NY 10977
lbirder@aol.com

Vice-Chair/Chapters
Marco Amorese
AMSL Avvocati
Via Zelasco, 18
24122 BERGAMO ITALY
marco.amorese@amsl.it

Peter Bouzalas
Cassels Brock & Blackwell LLP
2100 Scotia Plaza, 40 King Street West
Toronto, ON M5H 3C2 Canada
pbouzalas@casselsbrock.com

Azish Eskandar Filabi
Ethical Systems/NYU Stern
44 West 4th Street
New York, NY 10012
afilabi@ethicalsystems.org

Hernan Pacheco-Orfila
Pacheco Coto Attorneys at Law
6610-1000
San Jose 01000 COSTA RICA
hernan.pacheco@pachecocoto.com

Vice-Chairs/CLE
Andrew D. Otis
Curtis Mallet-Prevost Colt & Mosle LLP
101 Park Avenue
New York, NY 10178-0061
aotis@curtis.com

Vice-Chair/Co-Chair Publications Editorial Board
Dunniela Kaufman
Kaufman Trade Law
125 4th Street SE
Washington, DC 20003
dkaufman@cdntradelaw.com

Amber C. Wessels-Yen
Alston & Bird LLP
90 Park Avenue
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amber.wessels@alston.com

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P.O. Box 9194
Garden City, NY 11530-9194
atl@atlevin.com

Oliver J. Armas
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022
oliver.armas@hoganlovells.com

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Vice-Chair/Liaison w/International Law Society
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St. John's University School of Law
Herzfeld & Rubin, PC
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mmeyer@herzfeld-rubin.com

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Abreu & Associados - Sociedade De Advogados RL
Av. Das Forças Armadas, 125 - 12.º
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mgalligan@phillipsnizer.com

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New York, NY 10007
AllenEKaye5858@gmail.com

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Brooklyn, NY 11249
max.shterngel@arentfox.com

Vice-Chair Microfinance and Financial Inclusion
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Bracewell LLP
711 Louisiana Street, Suite 2300
Houston, TX 77002-2770
Theano.manolopoulou@bgllp.com

Vice-Chair/Seasonal Meeting
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75008 PARIS FRANCE
fberbinau@bfpl-law.com

Azish Eskandar Filabi
Ethical Systems/NYU Stern
44 West 4th Street
New York, NY 10012
afilabi@ethicalsystems.org

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CorderyCompliance.com

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rosenbergm@sullcrom.com

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New York, NY 10019
alabloom@mac.com

Delegates to House of Delegates
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gferguson@bakerlaw.com

Thomas N. Pieper
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022
thomas.pieper@hoganlovells.com

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Glenn G. Fox
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452 Fifth Ave
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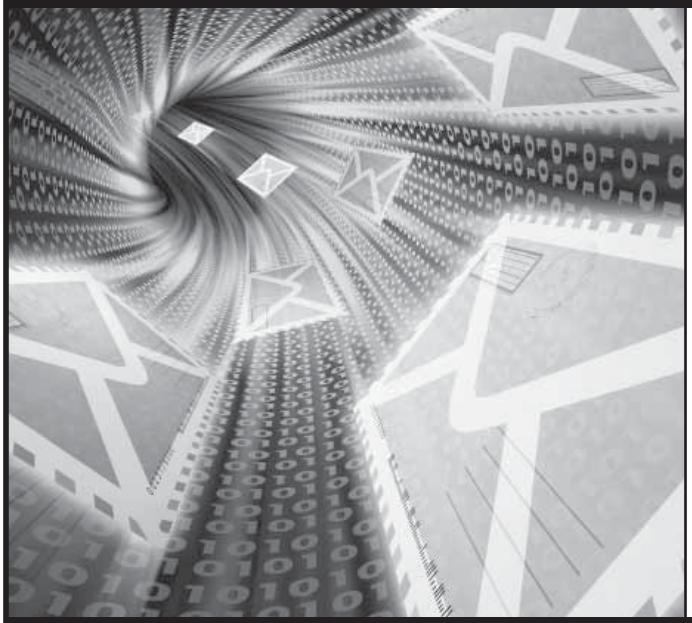

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Dunniela Kaufman
Kaufman Trade Law
125 4th Street SE
Washington, DC 20003
dkaufman@cdntradelaw.com

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