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Seasonal Meeting 2018

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Save the Date

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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 ILPArticles@nysba.org. 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 semi-annual 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.

Chair Message

Welcome to the new *International Law Practicum and Chapter News*!

We want to encourage all of our chapters to provide news of the latest legal developments in your countries, whether they are cases, new legislation or practice tips in your jurisdictions. Going forward, feel free to make your submissions to our new editor, Torsten Kracht, at tkracht@hunton.com.

In 2017, the Section held its Seasonal Meeting in Antigua, Guatemala, and we thank the Conference Co-Chair, Ruby Asturias of Pacheco Coto, who is also the Chair of the Guatemala Chapter, for the her tireless effort in organizing such a successful conference. Ruby was ably assisted by Co-Chairs, Jay L. Himes of Labaton Sacharow and Jay Safer of Wollmuth, Maher & Deutsch both in New York. Members of the Steering Committee included Hunter Carter of Arent Fox LLP, Diane O'Connell of PricewaterhouseCoopers LLP, Mark F. Rosenberg of Sullivan & Cromwell, our immediate past chair, Neil A. Quartaro of Watson Farley & Williams LLP, and Esperanza Segarra of Hinshaw & Culbertson LLP.

Thank you also to all of you who were able to make it to the Guatemala Seasonal Meeting, those who sent delegates as well as those who sent their regrets. It was a wonderful meeting and a more detailed report with pictures will follow in the next *Practicum*.

Below is information about our upcoming events:

- Monday and Tuesday, April 12-13, 2018 - NYILR Symposium. Co-organized by St. John's University Law School and this Section, there will be a dinner on Monday night followed by a full-day program on Tuesday. More information to follow.
- Monday and Tuesday, April 23-24, 2018 - Asia-Pacific Regional Meeting in Seoul, Korea, to be organized by Conference Co-Chairs Hyun Suk Choi of Choi & Park, LLC in Seoul and Neil Quartaro of Watson Farley & Williams LLP in New York.
- Week of June 11, 2018 - Global Law Week (GLW). We are seeking a group of volunteers to assist in organizing this week of exciting programs and events to be led by 2018 GLW Chair, Neil Quartaro.
- Wednesday to Friday, October 24-26, 2018 - Seasonal Meeting in Montreal, Canada, to be organized by Conference Co-Chairs, Mark Rosenberg of Sullivan & Cromwell in New York and Stéphanie Lapierre of Stikeman Elliott in Canada.
- Monday to Thursday, November 5-8, 2019, Seasonal Meeting in Tokyo, Japan, to be organized by Conference Co-Chairs, Tsugumichi Watanabe of Morgan, Lewis & Bockius LLP in Tokyo and Edward Lenci of Hinshaw & Culbertson LLP in New York.

Given the disparate admittance and ethics guides for lawyers throughout the different Latin American countries, our Latin American Council (LAC) drafted an ethics guide for Latin American lawyers engaged in cross-border work, which we hope to submit for approval to the Section's EC soon.

The rules for the annual Albert S. Pergam International Law Writing Competition have been revised so that submissions can be from law students at the time of submission whether or not the student is already admitted to a bar; submissions must not have been previously published and must primarily focus on an aspect of law (as opposed to psychology, sociology, or economics, for example); and preference will be given to papers discussing a private international law topic in line with the origins of the Section and the practice of its members. Submissions for the competition are due in November. Please feel free to forward the brochure to anyone you think may be interested in competing for this award.

Finally, we are once again discussing separating the *Practicum* from the *Chapter News*, and experimenting with disseminating the *Chapter News* only as an electronic newsletter every few months. We now have a new editor, Torsten Kracht, for publication submissions and continue to seek additional volunteers to help review and edit the submissions for the *Practicum* and *Chapter News*. If you are interested, please don't hesitate to contact me or him.

As a Section, our Rapid Response Committee, led by Jonathan Armstrong, coordinated NYSBA sending solidarity letters to the UK Bar, the Paris Bar and the Barcelona Bar after the tragedies there. These days our thoughts are also with our friends around the world who are experiencing difficulties due to the recent natural disasters there.

In considering ways to assist, note that the NYSBA and The New York Bar Foundation accept donations to provide legal services for the victims of natural disasters in the U.S., including providing legal aid with flood insurance issues, securing FEMA benefits, foreclosure and tenant issues, contractor and consumer protection matters, and replacing important documents. Donations can be made online at www.tnybf.org/donation/. Select restricted fund, then Disaster Relief Fund. If you would like your funds directed to a specific area please note Florida, Texas, Puerto Rico, or the U.S. Virgin Islands. Donations can also be made in general to the Disaster Relief Fund.

If giving, our colleagues in our Mexican Chapter suggests making donations to the Mexican fideicomiso (trust) called "Fuerza Mexico," which was created by the private sector and the Mexican government to better distribute help where it is most needed: https://embamex.sre.gob.mx/eua/index.php/en/recent/1357-donations-from-abroad. The site also offers the option of giving to the "Mexican Red Cross Via Amazon" where you can directly buy goods that are needed by the Mexican Red Cross.

We will continue to share any other information received from our chapters about ways to assist in their countries.

To close, we encourage you to make the most of your Section membership by participating in the Section events, activities and meetings, which aim to help you keep abreast of the latest developments in your field as well as provide invaluable opportunities to network to develop and grow your business. Feel free to contact our Section Liaison and Meetings Coordinator, Tiffany Bardwell at tbardwell@nysba.org or me at nancy.thevenin@theveninarbitration.com if you have any questions about the Section.

As always, thank you for your membership in this dynamic group. We look forward to seeing you at many of our upcoming events!

With best regards,
Nancy
Chair, NYSBA International Section

Globalism Versus Territorialism

[Editor's Note: This is an edited transcript of the Continuing Legal Education Program held during the Annual Meeting of the International Section of the New York State Bar Association on 23 January 2017 at the New York Hilton in New York City.]

WILLIAM H. SCHRAG: Hello, everyone. I'm Bill Schrag. I'm the executive vice chairman of the International Section and program chair of today's events. I'm also a partner at Thompson Hine in New York where I specialize in corporate reorganizations and bankruptcy.

I want to thank Neil Quartaro, chair of the International Section, and Tiffany Bardwell, our professional liaison and meeting coordinator. Without their guidance and support, we wouldn't be able to provide the wonderful programs that we have for you today.

I want to thank everybody for joining us. I hope you find both programs interesting, engaging, and worthwhile, and I hope you'll participate in the Q and A at the end of each session.

Our first program today is called globalism versus territorialism. It's a topic that's all around us in the news. Brexit, the U.S. Presidential election, international trade, Latin America in U.S. and Canada, as well as Canada's unique role and perspective on how the world is changing, are some of the topics we'll be exploring in our first program. One thing I think we can all agree on is that we're living in interesting times.

The moderator and chair of our first panel is Patrick Cook. Really, we have fantastic speakers today, both programs. Please take the time to look at their bios after today's programs. They'll be great resources for you in the future.

PATRICK COOK: Bill, thank you very much. I'll cut the introductions because we're a little bit short on time now, but we have a fantastic panel here. To my immediate left is Dan Brock from Fasken Martineu in Toronto. He's going to talk to us about the Canadian experience under the new Prime Minister Trudeau and its application in terms of his globalist views.

We've got then Mark who is going to wrap up the session for us today looking at the more terrible legal aspects of universalism.

On the end, Robert Leo from Meeks, Sheppard, Leo and Pillsbury, who is a specialist in trade law. He's going to talk to us about trade, trade agreements, the WTO, and those kinds of things, and also the unique position of the U.S. as it has been and how it might be.

And then between both of them is Carolina Palma. Carolina is from Pacheco Coto in Costa Rica and is going to tell us about the Latin American trade deals.

But my first task is to talk to you a bit about Brexit. Brexit is being dubbed the world's most complex divorce and I'm going to try and cover it in these sections: politics, economics, legal/constitutional position, technicalities, and perhaps the domino effect.

Looking at the politics as a starting point, it's important to understand that core to the European Union is a concept of a single market, which is a tariff-free trading area, but it's much more than that as well. And the single market has been defined by what are called the four freedoms, that is to say the free movement of goods, people, services, and capital.

The original Treaty of Lisbon referred to the free movement of labor but that got morphed into the free movement of people and that's a somewhat different principle and it's possibly one of the reasons behind the Brexit decision that took place in the summer.

There's a broad consensus that many voters were against that free movement, but we really don't know why people voted because, as in any referendum, the question put to the British people was a simple binary one: Should the United Kingdom remain a member of the EU or leave the EU. So there are only two possible answers: You either stay or you leave.

And I think that whilst the desire to regain control over immigration and borders was part of the decision for many people, there was also a sense of rejecting the authority of the EU Commission and the European Court of Justice and bringing the authority back to the UK, and for some the sense that the EU itself has become an institution that isn't working and isn't likely to be able to reform to make it work properly. That's a slightly different topic which could go on for a long time, but I'm going to try and do that.

Looking very briefly at the economics, most commentators predicted that Brexit would be catastrophic for the UK economy mainly because the EU is such a large market for British goods and services. About 45 percent of our exports go there, and the number is slightly declining at the moment. And in particular, because the financial services industry is so important to the UK, there was concern about the loss of passporting between the UK and the rest of the EU.

However, there's also a recognition that in the medium term and perhaps the longer term, not being constrained by the EU customs union will allow the UK to trade more effectively with regards to the rest of the world. And it has to be recalled that the EU is fiercely protectionist as regards every country that is not a member of the single market.

The short-term impact on Brexit has been pretty limited, largely because we've not left yet. The UK economy has, in fact, continued to grow more strongly than the EU countries and indeed most G7 countries, so predictions of the immediate recession were clearly wrong and misleading. However, the pound has devalued extraordinarily against all leading currencies.

Now, that's very good for UK exports but less good for imports and it's likely to lead to inflation in the UK, which will have an adverse effect. Conversely, our FTSE 100 has risen from six thousand three hundred eighty-eight on the day of referendum to over seven thousand, but that's likely because the FTSE 100 companies' earnings come from overseas.

So the big question remains: what's going to happen to our financial services industry? Will we see a massive migration of banks and staff to other European cities or will the attraction of London as a financial services center be strong enough to overcome the loss of passporting if we leave both the customs union and the single market, as appears to be likely?

Just looking briefly at the legal and institutional position, leaving the EU can only be triggered by virtue of Article 50, which enables a member state to inform the rest of the EU that it intends to leave. When the Article 50 decision is triggered, there is then a two-year period of negotiation in which to hopefully effect an orderly

exit, after which the membership is terminated. The process will end either with or without a negotiated agreement; if there's no negotiated agreement, then we'll simply leave without one, which could be mayhem.

Our Prime Minister, Teresa May, has said that she will trigger Article 50 before the 31st of March, which means that, if that happens, we will be out by March, 2019.

Now, just a quick look at the technicalities. It's a massively complicated task ahead of us to as we, to borrow a phrase, consciously uncouple the UK from the EU. Estimates vary as to the number of laws which were influenced by or whether each law's main purpose was to implement our obligations, but depending how you look at it, between thirteen and sixty-two percent of our nation's laws are tied up with the EU. And whatever the figure—actually the EU itself makes it eighty percent because it figures it in slightly a different way—but whatever the figure, it's a massive task. And it will start with what's called the Great Repeal Bill by which the European Communities Act of 1972, which is when we joined the EU, will be repealed. This new bill will come into force on the day that the UK leaves the EU and will end automatically and convert all EU law into the UK as the UK law, which can then be amended or repealed as UK sees fit at a later date.

But the question is, is it that simple? The answer is no, because some of the laws give powers to EU bodies and agencies such as the European Court of Justice. Of course, when we leave, the UK will not want to recognize these institutions, and EU laws are constantly being interpreted and reinterpreted by the ECJ anyway, so once we've left, there is bound to be a divergence between our law and the EU law and it remains to be seen how that works in practice.

Now coming back to this question when Article 50 can be triggered, a wealthy hedge fund manager called Gina Miller applied to court for an order or a decision on whether the government—the vote having been made in the referendum to leave—can simply exercise the leaving, triggering Article 50 by using what's the royal prerogative, or whether a further vote in Parliament is required before it can do so. The subtext of this is important from a political point of view, because there is a belief that the majority of the members of the House of Commons, members of Parliament, voted to remain. And so the thought behind this court action is that the Parliament might then refuse to trigger Article 50 because the government has only got a slim majority in the House of Commons and some of the government's own party are very clearly the remainers.

In the first instance, the High Court has held that Parliament must be given a chance to vote before Article 50 is triggered. This is very unfortunate because, regardless of whether that's right or wrong, it triggered an instant outcry against the judiciary in the popular press and some politicians. The concern was that a lot of lawyers and the majority of the judiciary were remainers, as they are called, and that they would have allowed that to sway the way they exercise their judgment. Well, if nothing else, this is just an unwarranted result of all of this, because judges must remain independent and free from political or other interference. And whilst it's unavoidable that, to some degree, a judge would be influenced by his or her persuasions or prejudices, the essence of a judge's position is that they set aside these prejudices in the exercise of their judgment as far as possible, and we have to trust them to do so.

Now, the matter has then been appealed to our Supreme Court and, as timing would have it, the judgment is indeed handed down tomorrow morning. So by the time you wake up, it will have been delivered.

The overwhelming thought is that the Supreme Court will support the High Court's judgment, although the current thinking is there will be a split. There are eleven judges who sit on the Supreme Court and the thought is that they're split between them; that by a relatively small majority, the High Court's judgment will be confirmed. That's slightly unfortunate. It would be better if it was completely one way or the other. But where there's no written constitution, and we don't have a written constitution—which may sound a bit alien but we don't—and where the argument is finely balanced by half the court or some of the court to vote one way and some on the other, it's arguably open to the judges to find an interpretation that can facilitate the government's effect of the referendum or to put articles in its way to delay or frustrate the implementation, and that's sort of not comfortable. Hopefully it won't cause the same outcry as before.

If you want my opinion, it is that it will go back to the House of Commons and the House of Commons won't have the nerve to vote down the effect of the referendum. But then it has to go to the House of Lords and the House of Lords is not elected. The government doesn't have a majority in the House of Lords, so we'll have to see what happens there.

Now, just briefly, one of the reasons why our exit negotiations are going to be very tricky is that there are significant minorities within some of the key member states in the EU who oppose continued membership, and there is a concern that Brexit might lead to other countries seeking to leave the EU and to its ultimate collapse. Frankly, I think it's unlikely because there's too much history involved.

You have to remember the EU was started and founded at the end of the Second World War to ensure that western Europe never again tore itself apart in warfare. Nevertheless, there are elections coming up in Netherlands, France, and Germany. The right wing party very nearly took Austria last time in the autumn. Just before Christmas an anti-establishment, anti-EU party overturned the government in a referendum there. So although I don't think that any of those elections will go, if you like, the wrong way, the EU establishment is uneasy and is likely to remain so.

Perhaps some of the troubles facing the EU can be traced back to the establishment of the Euro, the decision to create a single currency across the union. Making a currency union work without also creating a fiscal union is a balancing trick which seems certain to fail eventually. To get fiscal union would require political union, which in practice means the merging of all EU states into one new country, the United States of Europe. That would require twenty-seven countries which between them have thirty-three parliaments to come to an agreement to surrender their national sovereignty and presumably rewrite the treaties to establish an elected government for Europe. Given the cultural, philosophical, and numerous difference between the states, that sounds tricky to me.

So just to wrap up, I think that we will leave. I think the court will tell us that Parliament's got to vote again; I think there will be problems with the EU economy, but it's not the end of the world. The stated aim of the government is to be very much globalist and expansionist to look to get trade treaties all the around the world. Already there's talk between the UK and the U.S. for trade treaties. And I don't think that in the end that the Brexit vote will be allowed to be treated as a victory of territorialism over globalism. I think that the UK, particularly the UK establishment, will ensure that the UK goes out there and looks to trade with everyone around the world and actually becomes a beacon for globalism, and I think universalism as well.

Thank you.

DANIEL BROCK: So that's one for globalism.

To do justice for this panel, we probably should have a Twitter feed somewhere in the room in order to stay on top of current events because things change very quickly, as we know.

CAROLINA PALMA: So good afternoon, everybody. Thank you to the New York State Bar Association for inviting me and thank you for my co-panelists for very interesting and stimulating articles. I encourage you to read them.

The title "Globalism versus Territorialism" is a very wide topic. It's on top of the agenda, as you know. I was just watching the discussions from Davos yesterday and this is one of the main topics there, also. But I'm going to address it from the point of view of Latin America and from an international trade perspective, so this is what I'm going to talk to you about today.

The first thing I'd like to point out is that, when we advise businesses and companies when trying to enter new markets, this is sometimes how it looks like for them. It looks as if there are so many obstacles and they don't know how to move forward, what regulations they have to comply with, where are the obstacles that they are going to encounter when entering new markets, what are the duties, the tolls that they have to pay. And so sometimes it's a bit difficult for them to navigate these regulations. Lucky, of course, we have lawyers and we can do anything and everything.

But even for us, it's difficult to advise companies when regulations are regional in design. So when we don't really know what we can expect when entering a new market because of politics, because of Brexit happening in the next two years, 2018 more or less, so if it's going to happen, so sometimes it's difficult for us to do this. Particularly in Latin America we know about this.

I have a chart here where you can see the global growth forecast. This was for 2016, so it's outdated, but it still looks like this for 2017. You can see Latin America is still behind in growth when you compare it to China and India, also developing economies, and you can see that it's not growing as fast as it should. Well, we know that in Latin America, so we also know that the only way forward to growth is to integrate better to world markets and to achieve this globalism and liberalization in order to expand our markets. And this is the reason why some of the countries in Latin America have come up with an initiative which is called the Pacific Alliance Initiative, and that's what I will talk to you about today.

The Pacific Alliance Initiative can be seen as the flowering of Latin American globalism. I took this from one of you. Who was it who mentioned the flowering of Latin American globalism? I'll tell you why I think this could be the case.

As you see, there are four countries that are members currently of the Pacific Alliance Initiative, and those are Mexico, Colombia, Peru, and Chile. Costa Rica and Panama are members in the process of succession. And you can see the profile of the bloc also in this slide. It's a population of two hundred fifty million people that is thirty-six percent of the total of Latin America's population with a GDP per capita in average among the countries of $13,000, combined GDP of $2 trillion, and the exports—this is really interesting—account for almost fifty percent of Latin America's exports. And this is a very interesting market from a business perspective, also. And they know that and that's why these countries have come together to have a sort of disruptive initiative in trade; I will explain that later.

The way this looks today is that there are many other members that are only observers. The U.S., Canada, many European countries, France, Spain, Portugal and so on are observers of the Pacific Alliance. That means that they take part in the discussions but they don't vote for the decisions that are being taken.

So what is the Pacific Alliance; what are its objectives? The first one is to build in a participative and consensual way an area of deep integration to move progressively towards a free movement of capital, people, services, and goods. This sounds a little bit like the European Union but it is not because of the next objectives that I'm going to mention.

The second one is to promote further growth, development, and competition of the economies of the parties, to achieve greater welfare, overcome socioeconomic inequality, and promote social inclusion of its citizens.

And the third one, which is a bit different to other trade blocs, is to become a joint platform, particularly for Asia-Pacific region, so to act as a sole promoter of trade and projections to the world. So this is something that is different from other initiatives in Latin America.

There have been some regulatory achievements already since the Pacific Alliance started in 2010. They have signed already a protocol called the El Acuerdo Marco where there is a lowering of tariffs, and will absolutely have free trade among the four countries to the extent they are integrated, except for sugar and ethanol. There is already a schedule of liberalization that has been signed by the parties and that is going to come to zero duties.

There is an initiative for trade facilitation that's already in place and there are many actions moving forward. For example, Colombia has this one-stop shop now that they didn't have before, and I can mention to you many other ones that are being executed. There is a collaboration agreement between the pro export agencies among the countries to promote exports. There is an agreement on the mechanism for cumulation of origin. This is really, really important, as you know. We have this made-in-the-world initiative so most of the goods that you consume here are not done only in one country but they come with parts from different countries worldwide. So if we have the right rules of origin, we can have cumulation and these countries will be considered as one sole territory in terms of exporting goods.

And there are other initiatives, such as joint offices, visa exceptions, and student platforms; there's a Latin American market, an integrated market for finance, and there is a whole chapter on regulatory convergence that I am also very interested in. It's something new, it's something that we don't have in any other of the free trade agreements that we have so far. And there is a committee on regulatory convergence that oversees rules for transparency, mutual recognition, sanitary measures in TBT, and trade facilitation in customs. For example, something that is really nice is the equivalent in cosmetics. So you would be able to register your product in cosmetics only once, only in one country, and it's going to be recognized in the rest of the territories. This is something that is very new and facilitates all the procedures, especially for cosmetics and the medical industry.

In service, there is mutual recognition of service providers. In IP, there's the harmonization and simplification of brand registries; this is also another thing that would facilitate a lot. In customs, there is the harmonization of customs documentation. You know that when you are doing export/import procedures, sometimes you need more than ten different documents that you have to sign when importing or exporting among Latin American countries, and now this is going to be different with the Pacific Alliance. These are initiatives that are not in place yet but there's a schedule of commitments. And it encourages members to have information available to the public and so on.

There are other subjects that I won't go into detail here. You can ask me afterwards if you're interested. For example, there's a business council, which is an initiative that is not government only but is also triggered by the businesses that sit on the committees. There's an innovation platform. There have been four forums so far. And there's also venture capital funds for the entrepreneurs that are from these countries with the IDP being the administra-

tor of the funds which is something that is disruptive among free trade agreements.

And there are other projects. For example, there are scholarship and student exchanges. Last year two hundred eighty students moved across borders within these countries to study.

There are also some difficulties I do have to mention. For example, one of them is that the Pacific Alliance does not have a parliament, does not have a standing committee, and does not have a structure like we would imagine the whole integration to be. It is a presidential initiative, which means that the presidents are obligated to move forward or they are the ones that are having the meetings. There are councils within the Pacific Alliance of the ministries that have to deal with each one of the subjects, and there is a presidential mandate to do so. But there is nothing like a committee sitting somewhere of the Pacific Alliance.

Some people have asked: How can you achieve everything that you want to achieve without any type of organization behind it? I tend to think that in Latin America, sometimes we do things a little bit more practically. We have seen, in contrast, very little progress with other initiatives that do have standing committees, so maybe this is just a way to move forward more quickly, but that's my opinion. We can discuss that further.

And then some final remarks. The first one is that international trade is an important vector of development and poverty reduction. This is worldwide, not only for Latin America. However, trade reports, as I mentioned, show obstacles to trade both in emerging and in developed economies. Most of the obstacles are not even duties, but non-duty-related obstacles.

So as an antidote towards inward-looking regionalism, the Pacific Alliance Initiative emerges as a trade facilitation and deep integration area, so sort of like a medicine to some of the other things that we will discuss here today. And it aims at supporting also micro and small enterprises because micro and small enterprises are the most affected by these obstacles. Not the only ones; of course, large companies are also affected. And it contains chapters that are new and interesting, like investment, finance, migration; there's a chapter on gender; there's a chapter on sustainable development, and there are other areas that are being discussed right now among the four countries and the two observer countries.

Finally, in my opinion, businesses that we give advice to could consider the Pacific Alliance countries' new markets because of these regulations that are going to be implemented in the next years that are going to facilitate businesses. But also, our duty as legal counsel is not only to support this initiative but also, when possible, to push forward for the right policies and for the facilitation that our clients and businesses require for their international transactions.

Thank you. I couldn't go into every single detail of the Pacific Alliance—there are a lot of chapters—but I'd be happy to answer questions or discuss in the Q and A part.

MR. COOK: Thank you. We'll now have Dan Brock from Fasken Martineu.

MR. BROCK: Thank you very much, everyone. Thank you to the New York State Bar Association for having me as a speaker. Thank you to the panel.

My practice is in the area of government relations which means I spend an inordinate amount of time with politicians and with bureaucrats. Don't pity me. And so as a result, my presentation is going to be probably more politics than law, if you will.

What I hope to achieve in the twelve minutes allotted to me is to provide you with a sort of brief understanding of the current liberal government in Canada, the government of Justin Trudeau.

I titled my paper "The Curious Case of Canada" because in 2015, in the fall of 2015 when the government was elected, it entered into an international order in which would have looked very familiar to it. It was a socially progressive liberal government interested in interconnectedness and international relations and very open to the world. In 2017, it has woken up and it's in a very different world. And I thought that, to the extent the Canadian government represents or may represent a beacon for globalism, a beacon for multilateralism, you might find it interesting to know a little bit more about this curious government.

Also, being Canadian, I set for myself the objective of being a little bit funny, hopefully punctual, and certainly polite. And politeness is very consistent with the ethos of the current Canadian Liberal government.

On the date of his election, Justin Trudeau held a news conference in which he invited people to have a look at sunny ways, the power of progressive politics. He had defined his government as being a government of sunny ways; if you know the Parliament Building in Ottawa, the implication was that under the previous government, it was awash in rain and a very miserable place but under the Liberal government things were going to be a very positive, a progressive experience.

So in this presentation, I do want to spend a little bit of time talking about the election of 2015. I want to talk about this government's struggle with style and substance or the tension that exists between style and substance, the international alignment that existed for the Liberal government, and then the implications of the winds changing. I've titled this "Brexit and the Election of Donald Trump", but there are many other things happening in the world, which may suggest that the world order is significantly changing. And I'll conclude briefly on some of the challenges and opportunities that face the Liberal government and to the extent you agree with the thesis, perhaps the fate of sort of the liberal democratic consensus at large.

Again, in keeping with the direction of international politics, this presentation will have more pictures than words, more pictures than analysis.

This is our former prime minister, Stephen Harper, whose politics and government probably would have been more comfortable interacting with the current Trump administration than with the previous Obama administration. And the critique of his government that the Liberals and others leveled against it was that it was a fairly angry, very partisan type of government. It put its specific political agenda over good and sensible policy in the country, that it notwithstanding having campaigned on a platform of accountability, was one of the least accountable most secretive governments Canada had seen in many decades. It went out of its way to alienate the public service, and in particular—and again in a way that perhaps is consistent with the current Trump administration—the media. The media were a very specific target for the Harper government to belittle and create as much distance between it and itself as possible.

The Liberal government is the face of the kinder, gentler government, the power of positive politics. In the election campaign in 2015, the Trudeau government was going to get elected by agreeing to cut taxes to the middle class, run significant budget deficits, invest billions of dollars in infrastructure and in climate change and clean technologies. It was going to open its borders to more refugees and more immigrants. It was going to be a happy, very kind and gentle progressive government. That was what they campaigned on. And Trudeau made a commitment at the beginning of

the campaign, which he stuck to, which was that he would not engage in any negative campaigning—no negative ads, no negative TV ads, or newspaper ads—obviously with a successful result.

Canada's population is similar to that of California. You can get elected with a very solid majority government in our country with seven million votes, which is what the Liberal government got. It got forty percent of the popular vote which can be equated with the approval rating of your current president because in our first-past-the-post parliamentary system, forty percent is a sizable majority. It's not uncommon that with forty percent of the vote in a three-party system as we have, that you'd have such a sizable majority government, electing one hundred eighty-four MPs from three hundred thirty-eight ridings.

This is what you get. This was an editorial cartoon on the day of the swearing in of his cabinet. Cynical, yes, but true. And this goes to this tension between style and substance. Being a Canadian following politics as I do, you see an awful lot of Justin Trudeau, of his image. There's a number of selfies. He's everywhere as the image of this government. And so too, the cabinet.

This is also a Trudeau cabinet from the 1960s. Whenever I do a presentation like this, I like to show this slide just because I think it's so cool. It's a very cool cabinet. It looks like Oceans 13 but it's the Canadian government. They're walking up the drive at the Rideau Hall, which is the same place where his son with his cabinet was sworn in, and walking up as a group on the time of their swearing in.

And Justin Trudeau's cabinet is a typical Canadian cabinet with some very important changes. He committed in the government that his cabinet would have gender equality, that there would be the same number of women as men in the cabinet and he stuck to that when he swore them in. It's a cabinet of great diversity. There are four Sikh cabinet ministers in varying portfolios within the government. I'm told there are more Sikh cabinet ministers in our government than in the government of India.

Apart from that, it's lawyers and businesspeople, doctors, an astronaut, a math teacher, and an oboist. You're an international audience so I can't ask the skill testing question who's the oboist; you'll never get it but you know who the math teacher is, of course. The math teacher is the prime minister.

His government, his approach, is very decentralized in its decision-making. Ministers were actually going to be making decisions. Under the previous government, all the important decisions got made in the prime minister's offices and the ministers were sent out to deliver the good news to the people. It would be an open and accessible and transparent government, one example being ministers would have to declare in real time all of their expenses incurred during their official business. And it would be both collaborations and partnerships with municipal and provincial governments, with First Nations people.

Again, respect for public service as a counterpoint to the previous government. The media engagement not only is important, it is deemed essential by this government. In the mandate letters of the ministers that they received from the prime minister to carry out their functions, it expressly says that you must go and speak to the media as often and as effectively as you can. Constructive dialogue and parliamentary reform, which was and is not uncontroversial.

Some key ministers in the current government are: the Minister of the Environment, Catherine McKenna; the Minister of Defense, Harjit Sajjan; and the Minister of Innovation. Also very important is the Minister of International Trade until recently, now the Minister of International Affairs, Chrystia Freeland. She is a very impressive person, and I'm told that, by virtue of two books that she's written about Russia, she is persona non grata in that country.

Trade, environment, immigration, security, these are all going to be key focal points for this government. On trade it was all about free trade and promoting free trade, finalizing the trade agreement with the European Union, and concluding a trade agreement with China. On the environment, reengaging on climate change. On immigration, open the borders to foreigners and to refugees. And on security, repositioning Canada as a country of peacekeeping, not of military intervention, and then the world changed.

We've kind of covered this, but the world has changed. So for Canada, it's hard to know what Brexit represents, and it's hard to know whether this causes problems for Canada or not. The UK is one of Canada's most important trade partners after the United States. Brexit, in light of the Trump presidency, raises a lot of serious questions for the Canadian government. They're basically in crisis mode at the moment. The cabinet is meeting in Calgary in a two-day urgent meeting basically held because of the inaugural speech last week. So where this goes and how the Canadian government functions in this new environment remains to be seen. We're a middle power. Canada works well with others. It works well in international organizations. It works well in multilateral situations. If it can be beacon of that, you'll see a lot of Justin Trudeau, and this is a picture of Justin Trudeau doing a balancing act.

Canada is also a very conservative country in many ways. It is socially progressive but fiscally very conservative, and as big a threat as NAFTA may pose or the renegotiation of NAFTA may pose to Canada and Mexico, a much greater threat may simply be the lowering of corporate tax rates in the U.S. and the effect and pressure that would put on Canada's corporate tax base.

So with that, we will wait to see. If you see as much of Justin Trudeau as I have over the last little while, we can safely say that Canada will succeed in being a beacon for globalism.

Thank you.

MR. COOK: We're now going to have Bob Leo.

ROBERT LEO: Good afternoon, everybody. I thank you all for coming here.

When I was first asked to speak on this panel, the topic was "Globalism versus Territorialism" and I said I do trade, I do imports, exports, I do trade, that's a very broad topic, and Bill actually said, you're right, forget it. And then things changed.

And we've already heard, trade is the underpinning of economies. There's no denying that anymore. Whether you get into the details, which I will not, but when you talk about globalism versus territorialism through the prism of trade, you get a feeling of where the world is or has been up until last week, and then maybe what will change going forward.

Again, I'm going to talk about through trade but trade agreements, trade treaties include treaties with other countries, include tax, IP, investment, immigration with visa policies, the environment. Globalism includes all of that.

Since World War II, the U.S. has been the proponent of globalism. We all rise together, we all get benefits together, and the U.S. honestly would benefit more from globalism: the largest economy, we wanted to export more, we took in imports, it made our economy stronger. There's always been protectionism but globalism, multilateralism was trade. The U.S. was behind the World Trade Organization, a prime mover of the World Trade Organization, which started out as GATT in 1948, and they've pushed treaties, multilateral treaties, and the Uruguay round of tariff reduction. Before that there was the Tokyo round, and before that there was the

Kennedy round of lowering tariffs, especially in the United States. From 1930—the average tariff in the United States in 1930 because of the Smoot-Hawley Tariff Act was approximately sixty-five percent. The average tariff now in the United States is 2.3 percent. And that's due to globalism, it's due to the WTO, it's due to the free trade agreements.

So the perspective of globalism versus territorialism from the U.S. is not really a versus question. It's a question of what has the U.S. been doing to promote globalism and multilateralism over the last forty, fifty, sixty years, and then where we go from here.

Just a couple of quick examples. In the WTO, there's been two major treaties, and one major treaty passed in the last year that will be in effect sometime in the next month or two, and that's trade facilitation, which encompasses all your border controls, and it's going to be one hundred nine countries at least that have signed up for it that's going to make border control uniform for goods and logistics and a little bit into immigration. The U.S. was a prime mover behind that. They've been pressuring countries for years to sign the agreement.

With regard to WTO dispute resolution, the U.S. has brought twenty-six cases in the last eight years to the WTO for dispute resolution against other countries, including Canada, our friends to the north, including mostly China, but a whole bunch of other countries. There's even one against Portugal. They're all over the place. Twenty-six different ones; six are still pending. The U.S. has won twenty of the twenty that have been decided. It's multilateralism, yes, it's dispute settlement, it's the U.S. protecting its rights internationally and protecting their domestic industry, but in a multilateral form.

There's an agreement on environmental goods that was close to being finalized and then the proponent at Davos on Friday who gave a great speech about globalism, which was China—interestingly enough—globalism, but didn't mention protectionism is the one that at the last minute came up for the environmental agreement and said, oh, we have a whole bunch of new demands, sorry, and the agreement stopped right then and there. And that was just right before the election or actually right after the election.

There's also globalism in export controls. The U.S. has used export controls for the last thirty years to protect U.S. security and to get other countries and regions to protect their security but also protecting the U.S. security at the same time. For those of you who are in the trade area, and I see a number of you that are still awake so that's new, you know the U.S. export law is extraterritorial to the nth degree. You can export something from Costa Rica that is in the United States and you can export it to Malaysia and it's subject to U.S. export controls. It's not a U.S. product but it was exported from the United States. You export—you take your Windows software, Windows 10 operating system, you send it to Germany, it's put onto a microscope in Germany, it's a German microscope made in Germany, it's exported to Iran. Guess what? That's subject to U.S. export controls.

The U.S. has pushed that for years and there are multilateral arrangements on that. The Wassenaar Arrangement, dual-use goods, there's a whole other area of export controls which people don't really know unless you're in the trade area but the U.S. has said we want our interests protected, this is what we want you to do. Yes, you're a sovereign country, we get that, but we want you to do what we want you to do.

We have sanctions. We all know about sanctions. We have the U.S. unilateral one against Cuba, but then we have the multilateral one, the EU, U.S. against Russia, Russian entities. Not the whole country but certain entities targeted. There's the UN—the multilateral one, the UN embargo on arms sales, the UN arms embargo where certain firearms, weapons of mass destruction, things like that are subject to sanctions which each country has to adopt. So again, the U.S. has used multilateralism.

The prime point of my paper is that people equate well, free trade agreements are bilateral or trilateral or they were about to be twelve-lateral, if that's a word. For those of you who don't know, this morning Mr. Trump signed an order to withdraw effectively from TPP. That's it. The U.S. is out. So a sort of multilateral Asian-focused free trade agreement is up in the air. From the U.S. perspective, it seems to be done. We'll see what happens.

But these free trade agreements are actually—you may call them territorialism but that's what the multilateral trading nations, economic powers have been dealing with for a long time. And there's a whole bunch of stats in my paper. But there's six hundred thirty-five recognized regional trade agreements by the World Trade Organization. FTAs are ninety percent of those. The U.S. has FTAs involving twenty different countries and still Canada and Mexico, still, although—by the way, I heard a rumor, I'm not sure it's true, that the Federal Register will be going on Twitter, it will not be public anymore.

The TPP, just very quickly, whether you like it or don't like it, I'm on an advisory committee to the U.S. government. It's supposed to be secret status. We're not sure why because it's in the paper the next day anyway. But the TPP, the U.S. said we want this and if you don't give it to us, we're not going to be part of it. So there's worker's rights in there, environmental standards that are higher than any other free trade agreement the U.S. negotiated, intellectual property, immigration, visas, service agreements, non-tariff barriers, everything is in the TPP that the U.S. wanted. That's gone.

So what happens? NAFTA is the focus. Supposedly there's going to be an announcement today from the Presidential office about NAFTA. The reports are as of this morning, and somebody can correct me if I'm wrong, that he's going to ask for renegotiation over a very short period of time, at least to start, and then if it doesn't happen say in three months, which is ridiculous for a negotiation, then he'll give notice of withdrawal.

The U.S., you probably know this but I'm going to tell you anyway, the U.S. can give, under the NAFTA agreement, six months' notice for withdrawal. In other words, they can say tomorrow six months from now we're going to withdraw from NAFTA and then the withdrawal would be effective six months after that, so within the space of one year. It's not subject to congressional approval. The NAFTA agreement provides for—the rest of U.S. trade law says the withdrawal or termination of a free trade agreement is subject to the terms of the free trade agreement. Now, that doesn't mean the U.S. Congress or the Democrats won't fight and people won't sue—they will; Congress will get involved—but legally there's no legal mechanism for this not to happen, let's put it that way.

With renegotiation, one of the things you learn if you're in the trade area is that Canada and Mexico have wanted renegotiation since NAFTA went into effect because they didn't get everything they wanted. And I've had clients where they said, hey, can't we renegotiate this provision, get the U.S. because it will help U.S. jobs, U.S. companies, to talk to the U.S. Trade Representative, get them to renegotiate this. And we don't even try because we already know, we've talked to the USTR over the years and the answer's always the same: we don't—up until this week—we don't want to open NAFTA again because Mexico and Canada want things renegotiated that we don't want to renegotiate.

So this renegotiation could be a very good opportunity for Mexico and Canada depending on how that plays out. It's a good opportunity for certain laws in the United States, like our clients that said hey, we wanted this renegotiated five years ago,

and there are technical provisions in customs and trades, rules of origin, things that are hurting very global U.S. businesses that weren't as global in 1994 and actually when you look at NAFTA and the way it was negotiated, the U.S. pharmaceutical companies were not manufacturing much in Canada at that time. They were manufactured in Puerto Rico, they were manufacturing in the U.S.. NAFTA as negotiated actually hurts U.S. pharmaceutical companies now because they're manufacturing all over the world. So there might be some benefits there.

What this means is that it depends on what this administration is going to do. When it says renegotiate, is it going to be a unilateral take it or leave it, we're the only ones that want it renegotiated so you don't get anything you want. You want to keep NAFTA? You need to do this. If that's the case, I believe it's going to be great for trade lawyers. For any of you who want to shift practices, the next year or two is going to be very good for trade lawyers because everything might change and things are changing already. But somebody's import is somebody's export; right? The U.S., they've been talking about a border tax. Not a border tariff, and that's an interesting distinction because a tariff only Congress can do. A tax Congress would have to approve but it's not subject to the trade agreements, like the WTO. So it depends on how it's put in.

If we put in a thirty-five percent border tax on imports, on companies that import or derive revenue from imports, we think nobody else is going to think of the same thing and do it for their imports, U.S. markets? Retaliation happens all the time. Right now it happens if you win a dispute settlement case at WTO and the other country doesn't agree or says, well, yeah, we lost but we're not changing our laws, then the U.S. has a right to retaliate, and it has come into effect a couple of times. Minor cases, fine, but the U.S. already has that right. The other countries have that same right. If they think a border tax is affecting their trade, they can bring a dispute settlement.

We're left with really two questions. We don't know what the impact will be but is it going to be the increased territorialism that we're seeing and we're going to see for a while now, is that a negotiating strategy. Be tough up front, make them sweat and then back off a little bit? Maybe. Or is it will the U.S. stand up to what it's done or continually what it's done over the last forty, fifty years and be the leader and say okay, the multilateral world has to change, we're going to renegotiate, it's going to benefit the United States but we're going to do it through the WTO, we're going to do it through the world intellectual property organization, the world labor organization, the World Health Organization, maybe the UN, which is a whole other seminar subject. But those are the two questions that we're left with and I'm going to leave you with.

So thank you very much.

MARK BLOOM: Thank you, Patrick. Good afternoon, everyone. Fascinated though I am by the insights and observations by my fellow panelists about events that seem to be unfolding in real time, I'm going to restrain my own remarks to those of a U.S.-based insolvency lawyer, things that I feel comfortable with largely focused on two opinions. First is the unremarkable proposition that any disruption of trade policy among major trading nations will lead inexorably to additional insolvency situations or, if you do what I do, opportunities in companies that engaged in international trade. And second is that, while change has come about abruptly in political systems that may lead to quick changes in policy, legal systems tend to be a lot slower and more purposeful in their reaction and the trend towards universalism or, as you'll see, modified universalism and its characterized cross-border insolvency cases over the last twenty-five years is likely to continue, even accelerate, without much change.

With regard to cross-border insolvency laws and international trade, it's no mystery to anyone that there's been an exponential increase in the number of cross-border insolvencies situations and major cases over the last two decades. Those types of proceedings require substantial coordination between and among legal and financial professionals in the affected jurisdictions, and I think you can say that the legal system is a trailing indicator of a lot of these political and policy changes that we see happening in real time. Legal systems necessarily react to shifts in trade policy and other factors far more slowly than commercial market players do. One example of that is the UNCITRAL model law on cross-border in solvency adopted first in 1997.

Now in its twentieth year, the model law has been adopted in only forty-three jurisdictions. You see a list up on the slide of those that have and some of the more significant international trading nations that have not. The core principle of the model law is to grant recognition and comity to a qualified insolvency proceeding that's commenced in the jurisdiction in which the debtor has its center of main interests or COMI. So let's talk about that principle against the backdrop of traditional approaches to cross-border insolvency law.

First is the universal approach, on the one hand, in which one primary court administers with the insolvency case with the assistance of ancillary courts in other jurisdictions where assets of the debtor or creditors may be located. The insolvency law of the primary jurisdiction in those circumstances is intended to govern all of the cases and extend to all assets of the debtor, wherever located.

On the other hand, at the other extreme is the territorial approach, hereinafter known as the grab rule. This involves a series of separate insolvency proceedings in each place where a debtor can satisfy local insolvency laws. There's little to no cooperation between and among courts, there's a tendency to favor local creditors within each jurisdiction, and I think quite clearly it goes without saying that this type of approach is particularly ill-suited for the restructuring or reorganization of a distressed group of multinational companies on a going concern basis despite whatever attractiveness it may have as part of a liquidation scenario.

Where does the model law fit within this spectrum? The notion is that the model law represents something called modified universalism where the proceedings and the law of the main jurisdiction are recognized automatically in the secondary jurisdictions but only once the statutory requirements for recognition are satisfied. There are of course two important caveats to that. The first is that the ancillary court retains the ability to take steps that are deemed necessary to ensure that the interests of local creditors are sufficiently protected. And the second is that an ancillary court can refuse to grant recognition or other relief that may be sought from it where it's deemed to be manifestly contrary to the public policy of the local jurisdiction. In the U.S., at least, that principle is narrowly construed.

I'm going to focus on some of these issues in the context of one industry that is particularly vulnerable to global change and has seen a great deal of the stress even before the recent developments across the world, and that's the global shipping industry.

By definition, it's a global industry that is more than merely dependent on global trade, it, in fact, is the very engine of global trade and for years it's been in a prolonged state of distress for reasons that you'll see on the slide. If the era of globalism is indeed at risk, then the presence of shipping at the center of that risk will clearly lead to greater distress and additional multinational insolvency filings. In fact, at the 2017 annual survey of restructuring professionals that was published just last week by AlixPartners, global shipping was voted as the second most likely industry to see significant distress on a worldwide basis in 2017. In case anyone is interested, oil and gas remains the first, but that's a different topic.

Selected international cases in this area reflect markedly different approaches and results and I'm going to go through a couple of those very quickly.

One is the ongoing case of Hanjin Shipping which started with a Korean receivership that spawned a Chapter 15 filing in New Jersey and more than forty ancillary filings in other jurisdictions. It was a case that was filed with little or no planning when the lenders walked away from the table on a $700 million U.S. bailout loan and at the time it was actually the inception of the Christmas goods season. There was some $4.9 billion worth of U.S.-bound cargo on the high seas. The liquidity problems that were obvious from the outset had some drastic consequences. Ships were arrested at sea, denied entry to canals, and of course that resulted in considerable delays in deliveries.

More at the core though, there was a lack of financial transparency and accountability that came out of the Korean receivership, in contrast with U.S. Chapter 11 cases where post-petition financing is readily available under well-established principles. The first day proceedings that occur in most Chapter 11 proceedings in the U.S. provide creditors, and even the public, with a level of visibility into the operations and the financial condition of the debtor. Well, used that to kind of proceeding, the lawyers for many of the U.S. creditors became increasingly disenchanted over the course of the Hanjin proceedings to the point where, even after recognition had been granted by the U.S. court, there were calls for the appointment of an examiner to investigate the U.S. assets. Some $82 million in accounts receivable collected in the U.S. had already been repatriated to Korea, and just last week there was a controversy arising over the enforcement of a Korean court order that approved the sale of certain interests in the U.S. where objecting creditors in the U.S. invoked this manifestly contrary to public policy argument to argue against the approval of the sale, first of all, and then against the repatriation of the proceeds to the Korean court.

But if we step back for a minute, that's exactly what we were talking about with the territorial approach. That's the grab rule. The assets are here, your Honor, keep them here, they're for us, they're for U.S. creditors. Judge Sherwood to his credit did not fall for that and, in fact, the sale was approved, the assets were repatriated to Korea, recognition has been granted here and in at least ten other significant jurisdictions.

But contrast that to the result that occurred with the Marco Polo Seatrade series of cases filed here in the Southern District of New York several years back. This was a Netherlands-based group of companies that owned ships sailing in international waters and was able to take advantage of the ability to file in the U.S.. There is a very low bar to eligibility for filing in the U.S.. If you have any assets in the U.S., including a retainer in the U.S. trust account of your chosen U.S. counsel, that's a sufficient basis to lay venue and create eligibility to file Chapter 11 in the U.S.. So looking to obtain some key benefits, these Netherlands-based companies filed here.

The moral outrage of the European lenders followed based upon pride and interventionism. Judge Peck had a famous quote about keeping the case and keeping it on a short leash. And, in fact, when the debtors were not able to draft a credible plan or reorganization within a reasonable period of time, the cases were resolved through a plan of liquidation that provided for the orderly turnover of the ships at the direction of the lenders.

And so two questions arise. Number one: Is Marco Polo Seatrade reflective of a growing trend among international companies, given the low barrier to entry into Chapter 15 in the U.S., to opt for the flexibility and the statutory certainty in the Chapter 11 process over the insolvency schemes of other jurisdictions. And then second, in light of the outcome of that case and the depressed market for cargo and container ships in the current environment anyway, would the offshore lenders the next time around express similar outrage or embrace the U.S. filing as a multinational vehicle by which to achieve a commercially reasonable result.

I'm going to accelerate here and slip over to the OW Bunker case which simply stands for the proposition that yes, indeed, there does exist fraud in the international shipping industry and that there is a third way of parallel procedures which are full plenary proceedings in multiple jurisdictions at the same time.

Those proceedings have a long history dating back twenty-five years to the Maxwell Communications Corporation in 1991 and the cross-border protocols that were first employed there. You see some of the details about *Maxwell* on the slide, but the establishment and use of protocols in those cases, primarily in the UK and the U.S., led to the coordinated filing of a Chapter 11 plan here in the United States and a scheme of arrangement in the UK, the first worldwide plan of orderly liquidation that was ever achieved.

These types of cross-border protocols continue to be very, very significant in multinational insolvency situations. In fact, three of the articles of the model law expressly authorize courts to cooperate and communicate with foreign courts and foreign representatives. All of this is consistent with that modified universalism approach. And the beauty of that is they can be tailored to meet the needs and circumstances of a particular case. What I find phenomenal is that in 1999 Judge Gonzalez here in New York conducted the first joint closed-circuit hearing in a U.S.-Canada case for the Livent companies that involved the sale of assets of the U.S. and Canada company to a single bidder. But with increasing frequency in landmark cases now, like *Lehman Brothers* and *Nortel Networks* that I'm going to turn to briefly now, you see the proliferation of these types of protocols and these types of procedures.

Nortel is one of the largest proceedings ever filed. There were one hundred thirty subsidiaries and affiliates in more than a hundred jurisdictions. Extensive protocols were approved by two of the three primary courts that were involved, the Delaware Bankruptcy Court and the Ontario Superior Court. Within six months of the filing, Nortel threw in the towel on a reorganization and decided to focus on its liquidation efforts entering into this interim funding and settlement agreement among the U.S., Canada, and UK affiliates. And the liquidation proved to be extremely successful through auctions that were very skillfully conducted by the professionals and realized more than $9 billion U.S., of which almost seven and a half billion was placed in escrow in New York pending the determination on how to allocate them among the many countries that were involved, among the creditors in many countries.

Keep in mind now that much of the value was received through the sale of the patent portfolio, the intellectual property rights, and it would be beyond me to say that intellectual property knows no geographical boundaries but I guess it's a self-evident proposition and therein lies some of the problem with allocation.

What was remarkable about *Nortel* is you had a full-blown trial, not just a single hearing on an asset sale but a full-blown trial conducted over a period of six months in two international courts, the U.S. and Canada. It was governed by the legal practices and rules and procedure in both countries and counsel in each of their own country were allowed to participate in their own pieces and to observe in respect of the rest.

The long and short of it is that the allocation theories put forward, advanced by all of the parties, were rejected by the courts who had to come up with their own resolutions and came up with relatively similar resolutions that were going to allocate the assets on a relatively pro rata basis. Those led to appeals but, remarkably, during the course of the appeals, there was a settlement that

is in the process of being approved and you see the settlement put there that happened just this month, January of 2017.

So to close with just a few comments and observations, there's little reason to believe that the disruption in the political and policy spheres will disrupt the spirit of international cooperation in the resulting insolvency proceedings that will occur around the world. Indeed, in the two countries that we've talked so much about on this panel today, the United States and Great Britain, are the ones that are mostly affected, it would appear, by the political circumstances in 2016 and 2017 but they have been at the forefront of international cooperation ever since the *Maxwell* cases, those very first protocols that were approved over twenty-five years ago.

Most importantly, I think the ingenuity and resourcefulness of the courts and the professionals in devising and implementing the measures that are tailored to address complex situations continue to drive multinational insolvencies regardless of the political shifts. The quarter century of expanding experience in these cases will advance the principles of modified universalism will remain alive in future cross-border cases and, if anything, more restrictive trade policies that lead to more cross-border insolvencies will lead to the growth and development of these well-established principles on an even greater basis.

As I remarked to somebody at lunch, things may be going to hell for global trade but at least they'll do so in an orderly manner when it comes time to liquidate and reorganize.

With that, I thank you all.

MR. COOK: On that note, that concludes our presentation.

First of all, I'd like to thank Bill for putting this together. I'd like to thank the New York State Bar Association for allowing us to speak and for all of you for staying until tea time. You've heard from Costa Rica, you've heard from Canada, you've heard from the United States and the United Kingdom. I think it's been interesting, and thanks for your attention.

Transcript: Cyber Security

[Editor's Note: This is an edited transcript of the Continuing Legal Education Program held during the Annual Meeting of the International Section of the New York State Bar Association on 23 January 2017 at the New York Hilton in New York City.]

MR. SCHRAG: Welcome back to our second program. This program is on cyber security and never has cyber security been more topical than it is today with personal and potentially embarrassing information accessed and, in some cases, disclosed for political ends. But it is not just politicians who face these threats. All of us, in our home and in our professional lives, are vulnerable. Lawyers are often seen as easy targets to access their clients' data for corporate deals and to gain an advantage in litigation.

Our second panel of experts will look at today's risks and what we might do to minimize the threat and harm from data breaches.

The moderator and co-chair of this panel is Jonathan Armstrong. Jonathan will introduce his co-chair and the rest of the panel. Jonathan is a partner at Cordery in London where his concentrations are compliance and technology. His practice includes advising multinational companies on matters involving risk compliance and technology across Europe. He has handled matters in over sixty countries involving bribery and corruption, corporate governance, and privacy policies.

Please give your attention to Jonathan as he introduces the rest of his panel and program. Thank you.

JONATHAN. ARMSTRONG: Thanks so much, Bill. Thank you for the invitation this week and for putting together a great panel. We've got a very distinguished panel here today. First of all, to my immediate left, the man who needs no introduction; most of you know Jerry Ferguson from the sterling work he's done. What you probably don't know is that he's been an attorney for more than thirty years now and Jerry's day job is doing things like breach response in which he's regarded as one of the nation's greatest experts.

To Jerry's left is Jay Kramer. Jay's a supervising special agent and attorney at the FBI where he's led the cyber team since 2014. Prior to that, he helped set up the FBI's cyber law unit in 2013, and he's had some twenty-plus distinguished years in government service.

To Jay's left is Marcello Antonucci. Marcello is also an attorney and then joined Beazely in 2012. He was formally a litigation attorney in New York. He's the global focus group leader in Beazely's work around insuring cyber risk.

And last but by no means least, we're really grateful to have Richard Levick come down from D.C. Richard is the chairman and CEO of Levick. He's one of the foremost authorities in managing data breaches in terms of press and government affairs. He's got a stellar track record in these issues as you'll see in the list and he has been voted one of the one hundred most influential people in the boardroom. He writes for a whole host of publications, including Forbes.

As Bill said, it's a very topical panel. Cyber security is often, I think, the number one topic for many of our clients and, as Bill has said, as attorneys we're under threat partly because of the information that we hold on our clients but partly we're under threat because we're part of the fabric of society in many of the countries where we operate.

It's important to remember that it is a professional responsibility both to advise your clients around cyber risk and also to look after your own cyber hygiene. In the UK, for example, we had a solicitor debarred for failure to secure his wi-fi router that he used to run his practice with. So I think the threat is certainly increasing both in terms of the number of episodes that we're seeing but also from the involvement of regulators who at times can be somewhat unsympathetic.

There are new general data protection regulations which will apply across Europe from May 2018, and will increase the penalties for corporations to four percent of global revenue for a breach and incurs on them a requirement to report breaches in seventy-two hours. There's been an experiment with that system in the Netherlands where they're in their first year of the operation, and we might discuss how that almost harms data hygiene and cyber security rather than helps.

So as I say, it's quite hopefully a timely topic, and I think one that's of interest not just to compliance lawyers but also is going to be a key factor in M&A deals going forward, there's been litigation cases compromised through cyber security issues, and something that we're certainly going to have to keep a weather eye on .

So maybe I can start with Jay. What are the current threats that you're seeing? What is the climate like?

JAY KRAMER: Folks, can you hear me in the back? Great. Thanks for the opportunity to participate in the panel, Jonathan.

The threats—let me back up a moment.

I'm a supervisory special agent for the FBI's cyber division here in New York City. I, along with a number of colleagues, have differentiated investigative groups that are focused on related but a whole host of threats. There are criminal threats, financially motivated mostly. The things that are keeping me busy in my criminally-focused squad as opposed to nation-state actors—we have differentiated groups and some of my colleagues handle all of the nation-state activity—I'm going to talk for a moment about the criminal threat and particularly the financially motivated actors.

We're seeing variations of old themes that are enhanced by the use of technology and that are now cyber enabled, such as extortions, thefts of corporate data, and then accompanying demands for payment to withhold the release of that data. Sometimes it's embarrassing data about testing or protocols or financial compensation, sometimes it's merger and acquisition data. The release of one comes to mind just a few weeks ago in the pharma sector, the premature release of an effort to put out a generic version of a very popular drug.

We're seeing those kinds of sophisticated attacks, and then we're seeing some of the attacks that there's been a lot of press or publicity about, the ransomware attacks that can happen through a number of different vectors. These are an easy payday for actors largely overseas. Increasingly non-financial actors are also trying to organize to use cyber means to protest, in other words, or in a different way as opposed to a rally in Washington, D.C., to compromise a site and to splash a page about a company's practice.

So I could talk for a week about the threats in the criminal space. I think we were just talking about this a moment ago, data is such a valued commodity to be traded, to be stolen and resold, that the FBI is evolving to address those threats, and it's not easy. Attribution is difficult. It challenges our structure regarding field offices and local prosecutor's offices. These cases are mostly international. But we're working more closely than ever with our partners, our federal, our state, our local partners, and our international partners to move quickly to address them.

MR. ARMSTRONG: Marcello, is what you're seeing vastly different from your insurance book?

MARCELLO ANTONUCCI: No, over the last five years we've seen about five thousand incidents, small, large across all kinds of verticals in the largest companies and some of the smallest. So I can add a little color.

I have an interesting anecdote about a colleague who went on maternity leave and came back to a meeting and we were discussing what we're discussing today and she turned to me and was like what is all this stuff? Ransom what? And that just shows how quickly—if we talked two years ago, it would be a very different conversation. In March it would be different conversation. It's going to be a different conversation at end of the year. But ransomware certainly is the current conversation. We've seen about a twenty to thirty percent increase in hacking and ransomware, particularly moving down in the smaller companies because they're the most susceptible to the ransomware. They're most likely to pay it because they don't have backup tapes. So a pound of prevention there goes a long way.

Hacking in general is social engineering, which is similar to what you've been seeing. Except going after data, they really are trying to monetize things much faster. We saw the evolution of phishing and spearphishing and whaling, which is the spoofing or impersonation of a CEO and usually asking for W-2 information. And you'd be surprised at what HR folks and financial folks are willing to do to help their CEO get the data he wants while he's on the golf course, so breaking every single protocol and literally delivering on the golf course if they possibly could. And so we saw quite a few of those and we will see whether there is a re-uptick in those as we get closer to tax season.

And then while we talk about the sophisticated hacking, malware, all the bad guys, still folks are making mistakes every day. They leave servers open, they leave data in a situation in which Google could index it, they leave their laptop and it's not encrypted, they e-mail with someone they shouldn't, so that's still happening every single day; information is getting lost on a regular basis.

And you never know where it's going to end up. Folks say, well, I don't have any international data. But what if your outsourcer outsources it to India and that's where the breach happens? You kind of do and you didn't even realize it because you didn't know where your data was. And of course with larger companies, data migration and compliance is a major issue.

MR. KRAMER: Let me add that I agree with Marcello that, in our experience in dealing with victims, we are still seeing even in 2017 that not enough is being done to do the basic things, to make it hard for an adversary to monetize your data, to get your data. If you have a very sophisticated adversary, they're likely going to get in and get what they're looking for, but that's not most of the incidents. Most of the incidents are crimes of opportunity where hackers have a particular skill set either that they have themselves or that they hire because there's a more differentiated list of services available in the criminal cyber community so you don't need to write your own code. You can hire people pretty cheaply to do a lot of these of things.

I was going to add as a footnote to one of the trends in addition to thefts of data and attempts to monetize data: increasingly the concern is the denial of services.

You may recall a couple of months ago there was a huge outage because of an attack on a DNS provider called DYN, and the ability of bad actors to threaten to and to carry out, an ability to deny you and your customers access to data is a growth market for bad actors.

MR. ANTONUCCI: That was an old one, too. They had abandoned it because people had found ways to reroute this traffic. There are folks out there that you can hire to reroute traffic from Beirut that's jamming your system. Well, it's a lot harder when it's every Internet connected device coming at you from every angle. So they went back to an old idea and made it way more powerful weaponizing the things that we don't think about on a daily basis.

So that's I think another scary thing. Some of these are getting really sophisticated at the top end, some of it is not even that sophisticated, and then they're rehashing old ideas because people have forgotten about them or they have new ways. So it's every day a challenge for you guys. I have nothing but the utmost respect for these folks.

MR. ARMSTRONG: Richard, are you seeing anything that's vastly different and what should corporations be doing to respond to this sort of thing?

RICHARD LEVICK: Thank you, Jonathan. Four points. I think we're at an inflection point and that is if you look at wave one, it's probably represented by TJX who would take eighteen months to respond to its data loss. They even had—I believe it was three analyst reports before they went public focusing more on stock than they did on their customers.

Then you have wave two when you have Bob Carr and Heartland come along, the payment system company, and I think Bob Carr probably represents courage in this space. For the first time a company steps forward, is fully transparent, not in the way that they say it but in the way that we really mean it, talked to all one hundred fifty-five thousand of his customers in a week. They

had the open kimono strategy. They talked to their competitors and they said if it can happen here, it can happen anywhere. We need as an industry to have a solution to this. And they put their customers ahead of their profits, just as Johnson and Johnson did thirty-one years ago, thirty-two years ago with the Tylenol crisis. So I think that really represents wave two.

I think what we have now is we're just on the verge of wave three. Right now most of the customers of your clients already have notification fatigue. Forty-six percent say they don't do anything about it; oh, another letter, if they even read it. Seventy-one percent will not leave a company after engagement. Why? Because we haven't felt enough pain.

Just before we came up here we were meeting and we asked the question about, well, why is this? Do you remember two years after 9/11 we had the blackout here, all of a sudden, from Cleveland to New York. In prior blackouts, did we ever shut down the phone system calling our loved ones fearful of where they might be, within minutes? Why? Because we had experienced 9/11 and for the first time our imaginations were what a shutdown could really mean and where it could be coming from. And the same is true in data loss.

Already when you look at studies of consumers, they are no longer mollified by having free credit reports. They're increasingly wanting ID theft protection. Now they're increasingly wanting cash or the corporate product for their incapacitation. But that's only because of information. What's going to happen next we all know is that health and safety and lives, real cash, not just information, is going to start disappearing and that changes audiences dramatically. So we are actually in our peacetime just at the beginning of the reverse hockey stick curve and we should expect that the public and with it the media and particularly as we see increased fines, it means more headline risk, and it means for the first time there's going to have to be a wrongdoer. There's nothing new since Shakespeare and Freud. There's a hero and a villain. So far mostly we haven't had the companies being perceived as anything other than a victim. But if now lives are lost or fortunes are lost, there's going to be more than just the hacker who's going to be accused of wrongdoing. So how we use our peacetime is critical.

Two, I think the Internet of things represents new threats that we've hardly begun to look at. The numbers are something like twenty-two million new Internet of things products per day, an extraordinary number that are entering. Many of them are not smart and their product developers have never considered the hacking issue and yet they are already being hacked and lawsuits against things like cameras and alarms by the plaintiff's bar are about to be embarked which will change again who the victim is. I also think that customers are going to look a lot more differently once they realize that these products designed to make our home safer are, in fact, robots controlled by adversaries.

Three, and I hate to say this in a room full of lawyers, but you're the next target as well. I think *Johnson v. Bell* is just the beginning. We've had the honor of representing over four hundred law firms around the world. I'm a lawyer myself by training. I have really bad news for you guys. You are among the worst clients. It's really hard. Why? Because you're so smart and you're used to driving the bus. But what happens now in technology and with these breaches is the expectation because of the confidentiality and privilege, the information that you have is so high and what's going to happen, as that information is breached, is that you are increasingly going to look like a likely wrongdoer. And even if you escape that in the minds of your clients, what we are selling as lawyers is trust. And so a breach I think, just as in national security, represents an extraordinary threat to us above and beyond a lot of point-of-sale companies.

And in terms of things that you can do and some of your clients can do, John, I've read some of your articles, any number of series of articles, everyone here has put out some great stuff that I think is very helpful, and I encourage you to look at it.

One mistake that we see frequently, whether it's AIG in the financial crisis or it's a data breach, is that you need to use your peacetime wisely. Your teams need to know each other right now; they need to have a relationship. When my phone rings at 4:00 in the morning, I know it's not Ed McMahon. You have to have your communications and legal and IT and security have to have a relationship now and trust each other, and IT and security speak completely different languages and it's very difficult to communicate what your communications exposure and concerns are unless you have a relationship with them now and they understand what's at stake.

MR. ARMSTRONG: Can I just ask a question of the audience then? How many people in their firms have a fire evacuation plan? So I guess that's 63.7 percent.

And how many people have a data breach plan?

MR. FERGUSON: I just wanted to add one more trend that I think is particularly important for this audience, and Jonathan alluded to this in his introductory remarks, the globalization of mandatory notification obligations. Just from what I've witnessed in the U.S., around 1999 or 2000 I was working with Marcello' s competitors—I'll never make that mistake again, Marcello—they were looking to develop a cyber insurance product, brilliantly thought out product, no one bought it. Then about five years later Marcello's firm Beazely introduced a product that really revolutionized the industry, this cyber risk insurance is viewed as the—one of the hottest if not the hottest areas in the insurance industry. Look at the legal profession. Jonathan introduced me as a privacy lawyer. The profession didn't exist in the United States twenty years ago.

What is the difference? It's mandatory notification laws. It was California's notification laws, it was the banking regulation, the health care regulation that introduced these mandatory notification laws that built up a whole legal infrastructure and liability structure around data security incidents, and that is the international trend.

The example in the EU is this seventy- two-hour notification which is, as a practical perspective, kind of crazy but we'll leave that for other discussion. It is going to change privacy practice in Europe and you've got to be ready for it. In many countries, Mexico, Colombia, many countries around the world either have mandatory notification or are moving towards some form of encouraged notification which gets pretty close to mandatory in the political context and we've got to all be preparing for how that is going to change the way you run a business, how you run a law firm, what the consequences of these events are going to be.

MR. ARMSTRONG: I think that's a great example.

So Richard, just one more last point to you, if I can. I was interested in your point about communications and I recently had the privilege of sitting down with the chair of an audit committee of a publicly listed company who, first of all, who told me he was the head of their data breach response program and then told me that he didn't know how to read e-mail.

So in that sort of situation, who should be running the team? Who are you going to put up as a spokesman? Who should be making the decisions about what you do in terms of your public strategy?

MR. LEVICK: I'm going to sidetrack for a moment, if I can.

In the last sixty days since the November 8 election, I think we've seen an extraordinary change in communications. Never before have we had a President of the United States who communicates going over or around the media in one hundred forty characters. It has already an outsized effect on Toyota, GM, Lockheed, Boeing, Carrier, Yuengling, and the list just goes on and on. I will tell you this, that in the three speeches I gave since the election to boards and general counsels, for the first time in years they're recognizing that we're in this information revolution that has changed everything. And I think heretofore we evolved in rushing to retirement in hopes we got to retire first before we had to deal with the changes, but they're here.

We were talking a little earlier. There's this great fear because babies grow up now touching glass expecting interactivity. They touch paper and they don't understand it. We do not understand many of the terms that the younger generation uses and grows up with and we're intimidated and afraid to ask. Boards of publicly traded companies don't have digital reporting directly to the board and yet it represents in so many ways, in hacking, in brand, in presidential tweets. One of the greatest measurements of risk, the Eurasia Group, just ranked Trump tweets as the number one corporate risk for the year. So I think that we're very behind here in understanding.

Again, as we were talking about earlier, we're in a hyperdemocratic form of communication—small D—as opposed to a republican form where everything used to be representative. You knew the financial analyst, you knew the journalist who covered you, you knew the lobbyist that you had, so you had the time. You don't anymore. You have to use your peacetime wisely. As to the question of who is the spokesperson, who is the most avuncular, who's most trustful, who's going to be understood, each situation is different. But the person who is going to be able to be most credible is the most important.

Two, who are your third-party allies? Who are other thought leaders who are going to speak up on your behalf?

Three, interestingly consumers no longer care about the story you've used about what's happened. They want to know what you did ahead of time prophylactically and what you're going to use now. Most letters and most media responses up to now have been this is what happened. When I tell you we're going into the third wave, that's what I mean. Those responses are becoming increasingly invalid, increasingly of less use.

What are your pictures? What are the pictures that show what it is that you've done? How are you going to communicate visually? How can you reduce some of your points down to one hundred forty characters so that you can tweet that information out?

What's your backup plan? So many crisis plans have only e-mail or phone and then of course all that gets shut down in a crisis, so what's the backup?

It's critically important to identify who your allies are, what prophylaxis you're doing now, what are you doing in terms of dark pages, that is to show information of all the things that you've done to prevent so that you're prepared and, even if it does occur, it shows that you've not been negligent.

MR. KRAMER: That's a fascinating point about the appetite being reduced for the narrative about what happened. And at the bureau, at the FBI, we still care about what happened because we hope to hold people accountable. It's difficult in this space but we want to indict someone, we want to extradite someone, we want to hold someone accountable. But we know that we can't force that narrative onto someone or demand that a victim firm provide that data in hour two or twenty-four hours out, forty-eight hours out. We recognize that the "what happened" is less important for them. More important is what are we going to do now, and how are we going to message what we did to try to avoid this, but we'll sort that out later, this is what we're doing now as we're moving forward. We're cooperating, we're getting our arms around the data loss if there was any. And it's a salient point to recognize that the times of "okay, listen, take your time, we want to know what happened, you figure it out, we'll wait" are over. The communications are instantaneous. The hunger for the story and what is the sequel to the story is really more important than what happened in the past.

So it's a different way for us to do business within the FBI. We know that we're coming into a scene where it's not just us and a victim or a witness, it's us and general counsel, outside counsel, a forensic firm, corporate communications specialist, it's a whole team and we're trying to leave as light a footprint in this space as possible. Get some data that we can go back and work with, in the hope of adding some value to the process by saying, hey, look, this is something we've seen before six times in the past several weeks and you also may want to look here on your network or within your environment because, based on these signatures, based on these indicators of compromise the bad actor may also be looking for this. Look here. And that's going to help your response moving forward.

So this is a very different way of doing operations for the FBI but it's something that we're growing into.

MR. FERGUSON: I know that shameless plugs are always dreaded at these panels, but I'm going to make a shameless plug for the FBI. There's that old joke "we're here from the government, we're here to help," and I think that's an attitude that informs a lot of perception of what could be the role of the FBI.

The reality is that the bad guys are all out there cooperating right now. They are either working as state actors where they're actually getting trained by their government or they're participating in collectives that are meeting on the dark web sharing information. To the extent that we try to defend a coordinated attack in an isolated way, we lose. The FBI is making itself a tremendous resource and sharing information about what are the latest threats, what are the latest virus signatures that we're seeing, what is the method of attack that you have to be preparing for, and if there's anything that could come out of this panel that I could leave people with, that is that getting access to threat information has got to be a number one strategy in terms of dealing with all the risks we're talking about here.

MR. ANTONUCCI: I love this part of the panel, right? You've got the "you should be scared" in terms of the threats, and obviously Richard scared you some more about kind of the challenges you're going to face. And for a long time, Richard, you know this, the conversation was so focused on breach response, am I going to be breached. You're going to be breached. It's a matter of when. And it's not a disaster, but handling it is the disaster. And I think that's where we get into do you have a plan, how detailed is the plan, does it involve the people that need to make decisions—legal, crisis management, marketing, various—if it's among the employees, it should have HR. You'll also need a decision-maker on the board. And I think that some savvy companies are getting reports from their teams and you've got to practice it.

This is not something that you can do on the fly. We're just human beings. We're not really good at dealing with crisis and planning, and we're not really good with dealing with crisis and making decisions and that's where this panel, the FBI, and these folks are here to help. And this is a bit counterintuitive, I think, for folks that run companies and lawyers who like to control every punctuation, this is not your wheelhouse. Someone like Richard who does this every day can be kind of cold about it because he's

thinking about all the angles, whereas this is your law firm, this is your business. It's much more typical to make a bad decision.

You have to have really a very militaristic channel approach to breach where things funnel up, they get escalated, folks start triggering their responses, and I mean it's robotic if you really do that. Okay, we need to call this person, this person, this person, bring them in, and then use your resources to get people together to start making decisions and to stop reacting and feeling and start thinking again. And I think you also have a little less time than you'd like but you still have to be moving.

And when you bring in the international layers, I think it's only more complicated and again counterintuitive. You only need to rely on your expertise and more. You're not going to be able to deliver the message to the Japanese regulators, and you're not going to be able to plan to deliver a message to Japanese regulators. You're going to need to have a network that can do that for you and flex. And that's why it's all about preparation, it's all about making sure the people you work with are vetted, and in some ways making sure that your core values, your core message are delivered, but let them be the messengers for that. That's key and the hardest thing to do is to give up a little bit.

MR. KRAMER: Agreed. Two things to follow up quickly.

Marcello mentioned the practice element of this and exercising it. I'll tell you, within the cyber branch of the New York office, which is a big office, we do a lot of things, all the things the FBI does, all the criminal violations, securities fraud, healthcare fraud, counterterrorism. The thing that struck me as among the most valuable exercises are the cyber tabletop exercises that we're invited to participate in. I think reluctantly folks say or hesitantly they say well, I know you're busy but we'd love it if you participate. And inevitably we learn as much from the exercise as they do. Because we hear about concerns, we see gaps that make us more sensitive to issues that come up, and we learn about handling information coming in from multiple sources more effectively.

The FBI is largely considered a domestic organization, law enforcement organization, but it's also a national security organization and we have personnel in seventy-four countries in the U.S. embassy typically, but there are relationships that have developed in each one of those countries. Trust relationships with—I pause, some better than others admittedly, but overwhelmingly a great spirit of cooperation in Germany and Japan, all over in all quarters.

So if you have clients that are international in scope, in business dealings, and you have an incident, you should be prepared to have an incident that crosses borders and we can be a resource to bridge connections with investigators on the ground there, whether it's forensic experts or simply to provide information about what's going on on the ground over there, we urge you to take advantage of that.

MR. ARMSTRONG: You made the point I was going to make, actually.

From my experience, we've certainly involved your UK equivalents in these cases. Obviously for most clients, what you have to understand is this unequalness of the war, particularly when you're dealing with state actors.

We've had a client that was compromised by a group that the intelligence seems to suggest is comprised of more than a million interlinked individuals through various academic institutions, et cetera. My client's information security team was twelve. So twelve versus a million isn't a fair fight.

Now, of course you can engage outside forensic specialists who will probably be able to find you, I don't know, one thousand two hundred people to help but then you're going to pay them on an hourly rate and some of them charge more than attorneys. So you do need the help of your government to make the war a little bit more equal.

Might I just turn it onto value? So one of the things that I'm seeing more and more is clients, for example, in a due diligence situation saying will have a look at this target because we're worried that, if we acquire a business with issues, that it isn't what we're paying for it. I've done an interesting piece of work for a client where we're buying an asset off private equity. Its cyber due diligence was terrible. My client still buys the asset but buys it at a hugely reduced price. I know, Jerry, you have some thoughts about that, you know, after the Yahoo breach in the U.S.

Is it good business sense as well for our clients to do cyber hygiene?

MR. FERGUSON: Well, I'll certainly say in an acquisition context that doing proper diligence of cyber risks has got to be a top three or four priority right now. And I want to make clear what I'm talking about when I say proper due diligence. It's not that they have the proper policies in place and they've turned over those policies, it's not even that you look at that, that's a starting point and that's a red flag if they don't, it's not that they have the people with the right credentials. I'm actually talking about as part of the due diligence doing a compromise assessment. Mandiant is a forensic firm that handles many of the sophisticated breaches and they issue a report every year. The number fluctuates, but generally they're finding that the average time between compromise and discovery in a sophisticated breach is two hundred forty days.

The very sophisticated attackers who are out there are very good at covering their tracks, they're very good at establishing persistence within a network and then just scooping up data, going into hiding when they think they might be detected and then reemerging. And if you don't have a qualified firm doing compromise assessment, there is a substantial risk not only that you're buying an asset that's compromised but that's been compromised for quite some time.

So I think we really have to—the principles, kind of the key principles of sound cyber security, a lot of them we've already been alluding to, it's the preparation that Richard's talking about, it's the threat intelligence that I was talking about earlier, but it's also having someone else come in and do an outside assessment.

If I wanted to get a critical review of a legal document that I drafted, I probably wouldn't review it myself, I'd probably need to send it to a third party. I think a mistake that too many companies make is that they're having their internal information security team assess their own work. And it's not that they're dishonest or they're incompetent, it's just if they made a mistake the first time, they're probably going to miss it a second time. So this third-party assessment is such a critical part of sound security practice.

MR. KRAMER: Agreed.

And in the context of the numbers that Jerry mentioned, I think too often the real world, kind of brick and mortar analogy is used in the context of a breach or a theft of data to something like, well, there's a tiara in the window. Someone smashes it and grabs it and runs as a one-time event. This is more akin to someone having made a duplicated copy of your house key and somehow learning your security code for your alarm system. So they may go in when you're on vacation, look around, take a couple of things, and then look up and leave and then come back. So the persistent access is leaving shells on your network to be able to go back in over and over. We've even seen some very I'd say unsophisticated actors who have been resident on significant systems, so financial institutions that are billion dollar enterprises come in, go out, come in, go out at will.

So the point about exercising and hiring folks to do an analysis, some black box testing as it's referred to or penetration testing, not just to see if you're vulnerable to an attack but to look for forensic remnants of folks that have been on your system and may still be there, is also very important. But I've also seen sitting in our conference rooms in Federal Plaza downtown hedge fund principals with billions and billions of dollars under management who don't want to spend $20,000 or $30,000 for some periodic testing. I'm not going to tell them how to spend their money but it's shocking, frankly.

MR. ANTONUCCI: I think testing is key particularly for a large company doing large transactions. But this is where flawed technology is now trying to save itself and the tech industry is trying to come up with it. Not all of it for your smaller clients is that expensive. There are now data analytics tools that can just monitor what's going in and out of their systems and determine whether there's the potential for threats that can work right into some IT person's work flow and it's not that expensive. You can get monitoring for a month and just see where things are at.

So if an underwriter can figure this out and they're looking at some of these tools, I think that it makes sense for mergers and acquisitions that you do the same due diligence.

AUDIENCE MEMBER: I go back to the question that you asked before which is talking about crisis management and incident response planning.

Who is the right person, the right business leader in an organization to be leading this effort? As you said, if it's the IT, the security people, maybe they kind of look over their own thing. If it's the CFO, it's the COO, or the CEO, what kind of skills should the person have?

MR. LEVICK: We have a rule in crisis communications. You want to have the highest level person that's at the lowest possible level you need that equals the crisis.

But I think here what we're talking about in crisis situations—first of all, you have to have the CEO involved. It's that important. They need to be on and aware of what is happening on the team. They have to make sure that the communications are clear amongst the different players. But I think a lot of times it is going to end up being the CEO or a very senior executive is going to be the communicator.

What's critical is that audiences need to understand, they need to understand that they're okay, this is what's being done, this is what's being done next, and the other thing that they need to feel is trust.

So every situation is different. Forgive me, but in the Catholic Church crisis, we could not use the highest senior official, it was a global matter, but we were able to identify, find someone and train them who was avuncular, who was trusting, who was articulate, and that was the criteria. I don't want to get hung up on them having to be the CEO but they have to be authoritative, they have to be thoughtful, trusting, and they have to be telling the truth.

AUDIENCE MEMBER: That wasn't actually the question that I was asking. That's helpful.

What you were saying in terms of all the work that needs to be done in peacetime, the employee has the crisis, he's preparing the response plan, getting everyone to talk to each other.

Who's the person that's leading that effort?

MR. ANTONUCCI: You have an incident response leader. Now, it depends on the sophistication of the organization. A more sophisticated organization is going to have privacy officers. They should probably have the team leader and then obviously you're going to have the CISO, you're going to crisis management, you're going to have legal who are going to be debating these things, you're right. But there's ultimately the decision-maker and spokesman that is the one it can be reported to and they make the call, the tough calls. I would say that not everything escalates to this level. Everyone knows what escalates to this level.

MR. ARMSTRONG: Can I just say one of the critical things from my point of view who do you ask. And some of you have heard this story before, so apologies. I got involved in a breach of a major U.S. corporation and the general counsel decided that he would convene a response group and he sat everybody in the boardroom and said "I've convened this meeting because we've had a data breach and we have to work out our strategy as to how we're going to respond." After about ten minutes one of the guys who was facing the window said, "Can I jump in, we need to move quicker." And the general counsel said, "No, no, no, we have to reach consensus first." And he then got more impatient and said "Look, you shut me down but why we have to move quicker is I've just seen the CNN truck pull into the car park" and the GC kept saying, "Yes, but we have to give the right response." This guy said the mast is up. Again, he was shut down.

And finally the next thing that happens is the CEO bursts into the room and says "Thank goodness you're all in this room together, I want to talk to you about our data breach response." And the general counsel preens his own feathers and says you'd be very pleased with me, boss, because that's why I've got everyone in the room and we're working out what the strategy is and we're about halfway through. And the CEO said, "I just told CNN what the strategy is. Now we're talking about implementation." And the next thing he said is, "I've got two rules of thumb. When I appear on CNN and they didn't invite me, somebody leaves the organization, and I didn't invite them." And he said, "My second rule of thumb is I always give senior management a chance to go gracefully" and turns to the GC and says, "I think you were telling me you had a health issue on the golf course." And literally GC is gone, CEO takes over.

The critical thing there is, of course, the CEO had a plan and he didn't tell anybody else. And the GC was trying to develop a plan. He didn't tell anyone else. The critical, like I said, is to have—just as if you're saying in the hotel on the back of your door it tells you how to get out of the building in a hurry—you've got to have the same mindset for data breaches and practice getting out of the building, which is why I was asking you about your plans before.

MR. KRAMER: That's an uplifting story, John.

MR. FERGUSON: Just to focus on specifically the question of who should lead the team, there's no one answer to that. It does depend on the nature and the size of the company. If you are large enough where you have a chief privacy officer, that's the ideal person, as Marcello said, because ideally you want someone who's going to straddle legal, operations, and IT and be giving a critical eye to all. If you're not that large, I can tell you my experience is in most companies it defaults to the CISO, the chief information security officer. That's not such a bad thing if you've got a good escalation framework in place.

The reality is there are a lot of incidents that are kind of false alarms, and the CISO and his or her team can deal with them very quickly. What I will often recommend is that if certain criteria are met then someone from legal is assigned and CISO and legal essentially will form a team at that point forward in leading an incident, with the CISO probably still project managing the incident, kind of keeping the spreadsheets on the to-do list and following up on the different tasks, but you don't want an incident totally run from an IT perspective or you're going to miss everything Richard's been talking about, all the legal issues.

MR. KRAMER: Let me add that my experience is that overwhelmingly it is most of the time the CISO in combination with the general counsel.

But back to Richard's point, not all CISOs are alike. Some are Ph.D.s in computer science. It should be someone who is close enough to operations and tenured enough in the organization to have relationships to be able to talk to general counsel, to be able to talk to IT, to be able to talk to public relations to bring together information and be clear and accurate about it.

Within your respective client's firm or your firm, that may not be the case. I think the better choice is who's going to be the best communicator, who's going to be relay information accurately, succinctly, and be able to gather information quickly with a cool head.

MR. LEVICK: If I may, I want follow up on two points that Jonathan made which I think are critical. As uplifting as the golf story was, I think that it's emblematic, crises are won and lost by what we do in the opening minutes and all of our training from law school is to get as much information as possible. What the general counsel did there is neither wrong nor unusual. In fact, with no pun intended, it is par for the course.

And instead the reason was his other point that we do training. You do not do the tabletops and the training and the preparation so you can anticipate every form of crises and data breach. You do it to change your DNA.

When you look at the Miracle on Ice in 1980 when the United States beat the Russians, you have Viktor Tikhonov, the coach of the Russians. He was such a brilliant coach, he had never been down by a goal with two minutes remaining, he didn't know to pull his goalie, he didn't know what to do in the crisis just as the GC doesn't know what to do, as many people don't, when the Klieg lights are on them. That's why you train, and what you're looking for in your people, the standard is Gene Kranz, go/no go. We don't have enough information, we're going to have to make a decision, this is our hard deadline. Who's got the courage to step forward and make a decision.

MR. ANTONUCCI: One other thing I would note is, as important as it is to decide who's going to do what and how you're going to do what and all these things, it is also important to decide in the various company-wide trainings what people aren't allowed to do and also what the incident response team isn't allowed to do. You'd be surprised how folks will operate on some grey thoughts and the guy comes back and says I didn't know I wasn't supposed to tweet to the students every day after we did the notice about what was going to happen the next day. And again, they were well intentioned but what they should have been told is what they're not allowed to do. I think that's key.

And the last thing is make sure you notify your insurance carrier.

MR. KRAMER: Clear division of responsibility, and then duty rosters. If the responsibilities are by title, someone may be on vacation or at a conference. There have to be backup roles assigned to cover for people when they're out because you may never know.

And I'll tell you, that tension is palpable when dealing with a victim in the first few hours after a significant incident and the exercise is—even in the exercises, if there's an honest effort to try to simulate an event, even when it's an exercise, we hear the discomfort during the scenario when it's now time to report the matter to law enforcement and the phone will ring or we'll give an e-mail please contact us and you can hear the hesitancy; hello? Like I don't know what to tell you. Having worked through those things in an exercise is invaluable just to say okay, that wasn't so bad, they asked reasonable questions; the things I didn't know I told them I'd get back to them on. I have a comfort level that should this happen next week, I feel like I'm much better equipped instead of scrambling to figure out who am I going to call, does anyone know someone here, there.

So to the gentleman's question about peacetime preparation, very, very important in this space.

MR. FERGUSON: Richard, you had earlier alluded to the challenges of giving communications advice in this new political era that we're in.

Were you surprised by the role cyber security played in the election? Are there lessons you think we should be drawing from that, perhaps lessons that aren't getting the attention that they should be right now?

MR. LEVICK: Thanks for the question.

You know, let me answer this. First of all, I think this is—it starts with Russia and I would say two things before I answer the question, and I really appreciate the question.

One, I was a professor in politics and constitutional law for a number of years and I think I have some perspective of history and because of the work I do with our firm having handled Guantanamo Bay, we've tested our commitment to due process, AIG, which tested our financial markets, the gulf oil spill which tested our environmental response, and any number of others—Boko Haram, Sheikh Mohammed—certainly the highest profile matters in the world. And I'm honored and feel so lucky to have been involved in those.

But never have I walked away or looked at a situation and thought that it threatened our democracy. And I viewed what happened in this last election, whether or not the Russians impacted the outcome, they clearly impacted the election and that is a question for all of us to be concerned about because the tools that they used are as accessible to the Chinese and the North Koreans and the Iranians as anyone else. Also, a sidebar, I think that the president's response is a disservice. You know, I think this is as great a threat to democracy. When you hear a little bit more in just a moment, I'll expect you'll agree with me. It would be as if to respond to Pearl Harbor as they did on Fantasy Island, "da plane, da plane." It clearly is a threat.

Now, understand this: What the Russians did comes from a thirty-year old plan known as the Gerasimov Doctrine. It actually has iterations earlier than that but the most recent one is named after a former general chief of staff Valery Gerasimov and it is a five-part plan which is we know that we cannot compete with the United States or with the west militarily or commercially. So we will commit war, a non-linear war is what they call it, and it includes to be all out, it includes to focus on trying to create doubt about truth, to defile faith in institutions, and to create an illiberal world in which all the post World War II alliances—the UN, WTO, NATO, the EU—are disassociated so that the west and Europe are weaker.

And I think what this election does, just as it was in the Ukraine, just as it was in Georgia and other nation states, that it is an extraordinary attack and that it represents not just what might have happened on November 8 but what is going to happen and how exposed we are going forward. And for those reasons, I am deeply concerned and never before have I asked the questions about are we resilient enough to be able to withstand those kinds of extraordinary attacks.

MR. KRAMER: Let me follow that up. I think that is now the leading comment on the panel for most depressing.

But all kidding aside, it's a very is serious and important point and it is not a new strategy and it's not exclusive to Russia. There are what we refer to as perception management campaigns that have been going on, whether it's the Falun Gong or Cuba, nation states that have an interest in managing the perception of the U.S. public, U.S. lawmakers on important issues, and this has been going on for decades.

So in the cyber arena, this is a very dramatic and a significant example of that, but in the cyber arena it leads us to—I will tell you without speaking out of school that we have discussions and it's part of ongoing debate, what is our role in this space regarding nation state actors? I think to Marcello, everyone's point here, some of these events are not preventable. We're out on the stump, so to speak. To get you to employ the best cyber hygiene and the best practices for the health and safety of your own organization, but in the broader sense we can't stop all of this—the barrage of incoming traffic. We just can't.

So what is our role here for an organization like the FBI? I think what we eventually come to in this space, in the nation state activity space—I forgot my disclaimer. These comments represent my own and not necessarily those of the Department of Justice or the FBI—I think it is to provide the best available information to policymakers in the U.S. government up to the President of the United States about what the landscape is, what it looks like, to use diplomacy if at all possible to try to negotiate resolutions to some of these issues. But these are challenging times.

MR. ANTONUCCI: I wasn't surprised that it became an issue because Podesta clicked on something he shouldn't have. We've all made that mistake; right? It was actually a pretty low sophistication attack that happened at that stage.

I am a little sad that these entities weren't experimenting with more sophisticated authentication procedures, and I think that there's a lot to be done, certainly at the government level and in the political level and then obviously with respect to private entities.

We started to develop tools that can really start to narrow the sophistication of some of this stuff. If the entire country of India can be put on biometric identification, why aren't we experimenting with some of these tools? Multilayer authentication, why didn't the DNC have better machine learning that would have figured out that there was a potential issue with his credentials? A lot of these things are a little sad that it was that exposed, to be honest with you. And then the thing that's really sad is that it didn't trigger any substantive discussion about what government could do, what private citizens can do, and the morass we have in items of where we're focused on in terms of data, what we're focused on in terms of breach response, sending paper records to people and talking about cyber incidents, and then there has been no movement at all on synergizing our system or even dealing with how we're going to sync up with Europe and the rest of the world.

We're at a stage right now where we probably need to reconsider where we are and learn from the world because we're falling behind on this way, too.

MR. ARMSTRONG: I was in the room when the Podesta hack happened. I don't know if you're familiar with the story but there was a cyber security conference in London and I was a speaker. Two behind me was due to be Guccifer, this hacker who had exposed the details. He didn't turn up to the conference but sent some PowerPoint slides and had somebody read his remarks and the remarks were how easy it was to hack into a mythical e-mail account. And then the final slide was the link to the however many thousand e-mails it was.

And even though the conference chair who was the former security services operative tried to shut the overhead projector down very quickly, asked people not to write down the URL, of course this is a refreshing conference where many of the conferences I go to now people are photographing the PowerPoint slides as they go along. So by the time he had asked people to not write down the URL, I think at least thirty, forty people had photographed it.

And so I think the difficulty is in all these political attacks we don't know how the data's going to get in to the public domain. People like Julian Assange, which I know we've talked about at these conference in the past, has some very sophisticated ways of getting information that shouldn't be in the public domain into the public domain. So whereas we used to be able to do more of our stuff in private, I don't think we can anymore.

Jerry?

MR. FERGUSON: I just want to echo what Marcello was saying about why didn't the DNC have the technology that would have detected it? I think you've got to assume someone's going to click on an e-mail that they shouldn't click on. You're not going to be able to prevent the event.

And so to me the factor in terms of how devastating, how damaging an event is going to be is how quickly do you detect it and I think that a conversation I would have liked to have seen come out of this incident is the investment—I agree with everything Richard says, we also have an existential threat to our existence that we need to be discussing. But in the context of what we're talking about here, cyber security, why wasn't there more discussion about how easy this was to happen but also how easy it would have been before to perhaps detect it much earlier before it gets to the point where Jonathan identifies that the genie has left.

MR. KRAMER: Let me add I have to be a little careful here based on my basis and knowledge.

If this was the group that was responsible moving forward for let's say the next presidential campaign, I'd be very confident that we've got law school-trained individuals who are professionals in their field who can be briefed on the importance of information security and certain practices that need to be employed.

I was in those campaign headquarters, both sides, and there were kids running around, literally beanbags, scooters; you wouldn't believe it. It was like out of the movies. So in that kind of environment, when you have—look, I support grassroot efforts in the political process and people that are donating their time, but in that kind of environment, it's virtually impossible to employ some of the cyber best practices that you would really need to do to button down tight communications within a campaign, very, very difficult.

MR. ARMSTRONG: Are there any more questions from the floor?

AUDIENCE MEMBER: I have a somewhat unrelated question to what you've all been discussing. You've been talking about large organizations and whatever but I would be interested in hearing what you feel are the greatest mistakes that individual lawyers make.

For example, I just resigned from a big firm, I'm now an independent arbitrator. If I take a phone call from a client on an arbitration and I'm not in a secure wi-fi environment, is that a problem? Do I have problems with a simple Website that I put up that has no security? I presume it's a reputable company that put it up. But for things individual lawyers do, I bet we do a lot of stupid things.

Have you seen particular ones that you can advise us not to do?

MR. ARMSTRONG: I can think of one.

So we're a small law firm, obviously we're based in the UK, I always try and tell my colleagues that it's flattering that we get a cyber attack every week because it's a sign of how far we've come in such a short space of time. But the one we get, I kid you not, every week, very sophisticated, is a phishing attack that is basically just saying it's usually an e-mail that comes from one of us—today's happened to be from me—to our finance, head of finance, and all it does is says are you at your desk, Mark. And obviously the scam is Mark replies, it establishes its confidence a bit like you were saying about the transfer of funds. Once the dialogue started then how that ends is eventually the "me" in this scenario e-mails Mark and says, thank goodness you were at your desk, I'm out of the office, which Mark would know anyway, we need to wire $40,000 to this account to help a client out or something like that. My suspicion is, certainly in the UK, most firms. Even firms of two, three, four partners, have seen a variation of that type of attack.

The other thing we see, we talked about this earlier, I've seen litigation compromised where a client goes to use an insecure wi-fi network, the pleadings are taken to demand almost certainly by the other party in the litigation.

I've also seen reputational-type issues. So a friend of mine, for example, his name appears regularly in phishing attacks, a bit like the old Nigerian scam where it says we need to release money, this happens to be a variation of where it's a Canadian real estate transaction that needs some money to pump—prime the pump and it uses the name of my friend, credentializes it as his law firm to make it all look legitimate. Of course, they Google his name, they come with it, they look at the firm, they come up with that, the e-mail account's spoofed.

So those are three off of my head.

MR. FERGUSON: I'll throw in a few.

One is that I think for any small organization, small law firm, to go with a large reputable cloud services provider. I think there's a fear that somehow putting my data in the cloud I've lost it. You're never going to be able to make the investment in security that Amazon Web Services makes; you're never going to be able to make the investment that Office 365 makes. Make sure you're buying the enterprise solution and not the individual solution, but I do think that that is one of the easiest things a small firm can do to upgrade their security.

To the extent you do have a local area network and you need it for certain reasons, spend a couple of thousand dollars on having an independent assessment of it done. I want to keep pitching that mantra of the need for an independent assessment.

MR. KRAMER: I wanted to second that. That is the million dollar question in a lot of ways. What do I do now? You've got my attention I understand there are risks out there but I don't have the time or the wherewithal to learn about every risk and every vector of intrusion and how to defend against it. So I think there is great strength in using some of these cloud-based solutions because there are some very smart people who are thinking about the evolution of threats daily by the hour and you get to share in that and there's a scale, there's a benefit in joining an Amazon Web Services or there are a number of big name vendors that provide those services and that's helpful.

On a personal level, I would just add that e-mail is still the largest vector of intrusion, a compromise of your e-mail and getting your credentials for your e-mail either because the pass phrases aren't strong or poor passwords.

Almost all problems come back to a deficit in education, at least in a—let me speak for myself in my office. When agents make mistakes, it's because they were missing some training or they were poorly trained. So learning a little bit about strong pass phrases, dual factor authentication, which if you Google that term so easy to apply to that your e-mail communications are exponentially more secure and the risk that a bad actor is going to compromise your e-mail, learn about your business, your other clients, and use that vector to spread out, that's still the leading cause. You want to take that one off the table in addition to leveraging some of the services that are more and more affordable now.

MR. ANTONUCCI: It's better in the cloud than in the closet at this level. So technologically that's something that you can leverage and they're inexpensive and they basically want to house all of our data so they're trying to make the price point very low. I think making sure that your IT folks are updating software. A lot of vectors are through weak and not updated software, so weaknesses, finding vulnerabilities that way.

I think it's important to remember the psychology of information security and privacy. We're human beings and we forget about things a lot so you probably want to test yourself and your employees, and you can buy a spoofed phishing software where you spoof your employees, you spoof yourself, and you see who clicks on it or not and, when they click on it, they get a little buzz. And that's really what people need, it's just a little negative reinforcement.

Initially, in terms of physical security, there's some things you can do. Creating a culture of privacy has been very successful, particularly in the hospital space. If you're walking around and you have a somewhat open environment, everything is somewhat open and you see that people haven't locked their computer down, put a little red sticker on it. It's not to shame anybody but it's to remind them that they weren't being really secure and it's another little buzz. Because you know what they're going to do? Forget about it. But if you can buy three months, that's really what you're trying to do is buy security time.

MR. KRAMER: I think Richard mentioned it earlier, it's a mindset. It's very true and it's so counterintuitive to the way we've operated for years. Again, I'll speak for myself: If it's not broken, don't fix it. This is an argument I have with my wife almost weekly. We should get rid of this. No, don't worry, I'll put it in my shop, I'll keep it.

Here that's not an apt analogy because things that work perfectly well as a matter of business function, old software—patches are no longer available, they work perfectly well for a database for a customer housing customer data and may be very, very vulnerable right now. So the mindset has to swing around to say let me assume that everything is vulnerable unless I'm sure it's not vulnerable. I'm sure because I know that the patches are up to date, I know it's been the subject of an assessment, I know that it's air gapped, it's offline, no one has access to it. It requires a one hundred eighty degree swing, not say everything's running fine, no problem, nothing to see here. It really should be the opposite that everything is vulnerable unless I'm sure that it's not.

MR. ANTONUCCI: Richard might disagree or agree, when your business is secrets and you have a breach, those are the only ones we've seen where folks don't come back or have gone into bankruptcy afterwards because that's really what you're selling and the legal industry is probably closest to the examples that we've seen to actually go under or to no longer be doing business. So I think if I was going to scare you, that's what I would say.

MR. FERGUSON: This has been a privilege to be with all of you and to hear everything you have to share and the questions have been fantastic. And again, thank you so much for your attention.

Practicum

Export Compliance: The Roles of the Bureau of the Census and U.S. Customs and Border Protection

By Robert J. Leo

I. Introduction

The world of U.S. export compliance includes not just the export control regimes of Department of Commerce, Department of State, Department of Defense and the Department of Treasury, but also procedures and controls of the Bureau of Census ("Census") and the U.S. Customs and Border Protection's ("Customs") enforcement by regulations. Both Customs and Census have increased their compliance and enforcement activity over the past several years and show no sign of slowing down. Corporations and their counsel should have a basic familiarity with these agencies' roles and their policies.

II. Census

A. Generally

Census is the bureau within the Department of Commerce that is responsible for, among other things, collecting, compiling and publishing export trade statistics for the United States under the provisions of 13 U.S.C. § 301. The data collected are used for statistical purposes only. However, Census is actually more involved with export compliance than ever before and its efforts are increasing each year. Failure to file the required data with Census renders the exporter subject to possible penalties, not to mention delays of shipments. Additionally, under 15 CFR § 30.10(b), Census now has the power to audit a company to ensure compliance.

The export information filings are also used for export control purposes under Title 50 of the U.S. Code, International Emergency Economic Powers Act (IEEPA),[1] and the Export Administration Regulations (EAR)[2] to detect and prevent the export of certain items by unauthorized parties or to unauthorized destinations or end users.

B. Census Export Regulations

Census requires mandatory electronic filing of certain export information through the Automated Export System for all exports of physical goods prior to exportation. That system has migrated to the new internet-based system, the Automated Commercial Environment, or ACE. Census's Foreign Trade Regulations (FTR) use the term "electronic export information," or EEI. The EEI must be filed through ACE by the U.S. Principal Party in Interest (USPPI) (*i.e.*, the person or legal entity in the United States that receives the primary benefit, monetary or otherwise, from the export transaction—usually the seller, manufacturer or order party) by the USPPI's authorized agent, or the authorized agent of the Foreign Principal Party in Interest (FPPI). Again, failure by any of the above to properly file EEI renders such person subject to possible penalties.[3]

The mandatory data elements required in the export filing are listed in 15 CFR § 30.6(a) and include, among others, the USPPI, date of export, ultimate consignee, U.S. state of origin, destination country, commodity description and value. Department of Commerce and Department of State requirements concerning the Export Administration Regulations and International Traffic in Arms Regulations, respectively, must also be met.[4] Additional data elements may be required depending on the applicable controls. *Id.*

All parties to the export transaction (including carriers) are required to retain documents pertaining to a given export shipment for five years from the date of export.[5]

Certain exports are exempted from the EEI reporting requirement (e.g., shipments bound for Canada; exports valued $2,500 or less, "tools of the trade," U.S.-bound shipments incidentally passing through Canada or Mexico, shipments in the U.S. under bond, etc.).[6]

Other exports are exempted from full EEI reporting requirements, requiring only limited information to be reported, such as "usual and reasonable kinds and quantities of wearing apparel..., toilet articles, medicinal supplies, food, souvenirs, games, and similar personal effects and their containers"; "usual and reasonable kinds and quantities of furniture, household effects"; "usual and reasonable kinds and quantities of vehicles" and others.[7]

The EEI collected pursuant to the FTR is confidential, and used solely for official purposes as authorized by the

Secretary of Commerce.[8] As stated above, the information collected is used by Census for statistical purposes and by the Bureau of Industry and Security (BIS) for export control purposes. In addition, EEI is used for export control by other federal government agencies, such as the Department of State, Customs and Border Protection, Department of Homeland Security, and Immigration and Customs Enforcement (ICE), and for statistical purposes by other federal government agencies such as the Bureau of Economic Analysis, Bureau of Labor Statistics, and Bureau of Transportation Statistics.

Finally, Census and Customs may jointly authorize the postponement of an exception to the requirements of the regulations in this Part as warranted by the circumstances in individual cases of emergency, where strict enforcement of the regulations would create a hardship. In cases where export control requirements also are involved, the concurrence of the regulatory agency and Customs also will be obtained.[9]

C. Penalties

Census (or Customs or both) may impose criminal or civil penalties for reporting false or fraudulent EEI, or failing to report at all.[10]

Criminal penalties for false or fraudulent reporting or furtherance of illegal activities include a fine not to exceed $10,000 or imprisonment for not more than five years, or both, for each separate violation.[11] In addition, any person who is convicted for a reporting violation under the FTR shall be subject to forfeiting to the U.S. any interest they hold in the goods that were the subject of the violation, as well as any of that person's property that constitutes "proceeds" obtained directly or indirectly as a result of the violation.[12]

Civil penalties for the above may issue as follows:

- Failure to file or delayed filing violations. A civil penalty not to exceed $1,100 for each day of delinquency beyond the applicable period prescribed in § 30.4, but not more than $10,000 per violation, may be imposed for failure to file information or reports in connection with the exportation or transportation of cargo.
- Filing false/misleading information, furtherance of illegal activities and penalties for other violations. A civil penalty not to exceed $10,000 per violation may be imposed for each violation of provisions of this part other than any violation encompassed by paragraph (b)(1) of this section. Such penalty may be in addition to any other penalty imposed by law.
- Forfeiture penalties. In addition to any other civil penalties specified in this section, any property involved in a violation may be subject to forfeiture under applicable law.[13]

When a complaint is issued, the charged party is entitled to receive a formal complaint specifying the charges and, at his or her request, to contest the charges in a hearing before an administrative law judge.[14]

However, where Census penalty functions are delegated to another federal agency, as they have been with Customs, the FTR provisions of that other agency relating to penalty assessment, remission or mitigation, collection of such penalties, and limitations of action and compromise of claims will apply. In practice, Customs is imposing the Census penalties of $10,000 per violation for even clerical errors, such as adding a "0" to the value.

Finally, Census and Customs have express authority to audit export activity by requiring exporters to produce export documents going back up to five years "[f]or purposes of verifying the completeness and accuracy of [the] information reported as required under [15 CFR] Sec. 30.6, and for other purposes under the [FTR]."[15] This audit authority extends to "all parties to the export transaction"—i.e., "owners and operators of the exporting carriers, USPPIs, FPPIs, and/or authorized agents." Upon request, the party under audit must provide "EEI, shipping documents, invoices, orders, packing lists, and correspondence as well as other relevant information bearing upon a specific export transaction" to Census, Customs, Immigration and Customs Enforcement (ICE), Bureau of Industry and Security (BIS), or any other participating agency.[16]

D. Voluntary Self-Disclosures

Section 30.74 of the FTR allows violators to disclose to Census "any violation of suspected violation of the FTR" to count as an extraordinary mitigating factor in the enforcing agency's determining what administrative sanctions, if any, will be sought. The voluntary self-disclosure procedure is applicable only when information is received by Census for review prior to the time that Census, or any other agency, has learned the same or substantially similar information from another source and has commenced an investigation or inquiry in connection with that information.

The voluntary self-disclosure section further states as follows:

> While voluntary self-disclosure is a mitigating factor in determining what corrective actions will be required by the Census Bureau and/or whether the violation will be referred to the BIS to determine what administrative sanctions, if any, will be sought, it is a factor that is considered together with all other factors

in a case. The weight given to voluntary self-disclosure is within the discretion of the Census Bureau and the BIS, and the mitigating effect of voluntary self-disclosure may be outweighed by aggravating factors.

Currently, voluntary self-disclosures to Census of FTR violations will likely result in a warning letter and increased scrutiny of exports, without a penalty. However, penalties are still possible even if substantially mitigated by Census. The focus on revenue enforcement by Customs and Census has them seeking some penalty payment even if a disclosure is made.

III. Customs Export Enforcement

A. Generally

U.S. Customs and Border Protection, a bureau of the U.S. Department of Homeland Security, is responsible for enforcing all U.S. import and export regulations at the border, whether those regulations are its own (Title 19) or another agency's (*e.g.*, Census's FTR). Customs accomplishes its mission through its broad inspection, detention, seizure and penalty-issuing powers as laid out in Part V of Title 19 of the U.S. Code.

Customs's regulatory authority to seize violative exports explicitly includes other agencies' statutes and regulations.[17] Regulation 161.2(a) describes some of the laws that Customs enforces, such as, importations and exportations of:

- implements and munitions of war;
- controlled substances;
- goods, services and technology from or to embargoed countries; and
- atomic energy source material.

There are various Customs regulations directly affecting certain exports. For example, 19 CFR Part 192 describes Customs's specific enforcement authority as pertains to self-propelled vehicles, vessels and aircraft,[18] as well as exporters' obligation to transmit export information through the AES to Customs prior to the merchandise's departure from the country.[19] Exemptions from reporting, as permitted by Census in the FTR, are listed in subsection 192.14(d).

Finally, 19 CFR Part 12 contains various regulations on exports, from Customs's role in exporting FDA refused merchandise[20] to Customs's role in seizing merchandise prohibited to required notices of exportation for EPA refused merchandise.[21]

B. Customs and Census

In 2009, Customs issued guidelines for the imposition and mitigation of civil penalties assessed for violations of the FTR.[22] Customs put forth penalty amounts for failure to file EEI, late filing, failure to comply with other FTR requirements, and failure of carriers to comply with FTR requirements applicable to them.

Customs states that penalties may be issued against USPPIs, authorized agents or other parties to the export transaction, or the Foreign Principal Party in Interest (FPPI), its authorized agent, or other appropriate party to the transaction.

Mitigating factors include, but are not limited to:

- being a first-time exporter;
- having made a voluntary self-disclosure of the violation in accordance with 15 CFR § 30.74 ("Extraordinary Mitigating Factor");
- clear documentary evidence of remedial measures undertaken to prevent future violations;
- exceptional cooperation with the enforcement agency;
- showing that the violation was an isolated occurrence;
- the violative party having provided substantial assistance in the investigation of another;
- demonstrating that the party has a systematic export compliance effort in place.

Aggravating factors include, but are not limited to

- several violations in the same export transaction (e.g., wrong port code, incorrect value, missing required data, violations of the regulations of other agencies in addition to the Census violation);
- circumstances suggesting the intentional nature of the violation (e.g., wrong value where invoices or other documents show correct value);
- high number of violations in preceding 3-year period;
- evidence of criminal conviction for a related violation, such as a BIS violation;
- the party exhibits a pattern of disregard for its responsibilities under U.S. export laws and regulations;
- the party exports as a regular part of its business, but lacked a systematic compliance effort.

In practice, the role of Customs in export enforcement is increasing and resulting in more delays, seizures and penalties at the ports.

IV. Conclusion

This summary highlights the myriad Census and Customs requirements for companies that export and the possible consequences.

Due to the U.S. government's emphasis on compliance and revenue enhancement, Census and Customs will continue to increase their enforcement of exports. Companies wishing to avoid delays, detentions or seizures will need to have strong, effective export compliance procedures and controls in place. As in other compliance areas, whether tax or Foreign Corrupt Practices, your clients cannot pay mere "lip service" to these regulations, which are no less important than the much more publicized BIS or ITAR export controls.

Endnotes

1. 50 USC § 1701.
2. 15 CFR Part 730 *et seq*.
3. See 15 CFR §§ 30.1; 30.2.
4. See 15 CFR §§ 30.15(b); 30.16; 30.17.
5. 15 CFR § 30.10.
6. *See* 15 CFR § 30.36; 30.37 *et seq*. See *also* Appendix C to Part 30 of the FTR, Summary of Exemptions and Exclusions from EEI Filing.
7. *See* 15 CFR § 30.38.
8. 15 CFR § 30.60.
9. 15 CFR § 30.62.
10. 15 CFR § 30.71.
11. 15 CFR § 30.71(a).
12. 15 CFR § 30.71(a)(3)(iii).
13. 15 CFR § 30.71.
14. 15 CFR § 30.72.
15. 15 CFR § 30.10(b).
16. 15 CFR § 30.10(b).
17. *See* 19 CFR § 161, "Enforcement for other agencies," 161.2(b).
18. 19 CFR 192.14(a) and (b).
19. 19 CFR 192.14(c).
20. *See* 19 CFR § 12.1.
21. *See* 19 CFR § 12.125.
22. Cust. B. & Dec., Vol. 3, No. 2, 4 (2 Jan. 2009).

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Comparative Legal Ethics: The United States and the European Union

By Azish Filabi, Gregory D. Green and Kenneth G. Standard

I. Overview: Common v. Civil Law Systems

Confidentiality of client communications, loyalty, and professional judgment are some of the most recognized mainstays of a lawyer's code of conduct in both the United States and the European Union. That said, there are both similarities and differences regarding the ethical regulation of lawyers in common law and civil law systems. To achieve an understanding of the similarities and dissimilarities between these two systems, this article will focus on the legal systems in the United States and a select number of countries in Western Europe.

Lawyers in the United States practice common law approaches while those in the European Union embrace the civil law system. On the one hand, common law codes for regulating lawyers have a more formal and legalistic style expressed as rules rather than standards. The civil law approach is remarkably different: civil law codes and norms are framed in more general terms with updated legal codes that specify the applicable procedure for lawyer regulation, including provisions emphasizing the collegiality of the bar and the duties lawyers owe to each other.[1]

The United States common law approach derives its ethical codes from judicial decision making because

> [t]he nature of litigation in the United States is such that courts are called upon to interpret the rules of professional ethics much more than in the civil law system, giving rise to an extensive gloss on their meaning and application. Such rules thus "directly enter the judicial arena where litigants can debate their application and meaning; trial courts can interpret them…and scholarly authors can comment upon the court's interpretation"…[2]

In contrast, for example, with respect to the rules of evidence, "a judge [in the civil law system] exercises much greater control over the taking of evidence than in the United States.[3] In the European Union, unlike in the United States, a lawyer plays a more reduced role with issues pertaining to the code of lawyer conduct.[4] In the Unites States, lawyers appear before a judge to protest against another lawyer when he or she contravenes ethical rules of conduct. Contrarily, an issue regarding a lawyer's conduct in a civil law system is generally resolved before the local bar associations, charged with investigating and prosecuting lawyer's misconduct. Lawyers are active players in the United States insofar as they may make a motion before a judge to disqualify another lawyer from a judicial proceeding in connection with an ethical code violation. For example, in *National Medical Enterprises, Inc. v. Godbey*[5], the Texas Supreme Court disqualified a law firm based on the fact that one of its attorneys had obtained confidential information from the opposing party under a prior joint defense agreement in a substantially related matter. The court reasoned that the lawyer "simply could not honor his obligations under the joint defense agreement and, at the same time, prosecute the pending claims" against a participant in the prior joint defense arrangement.[6]

Another salient distinction between common and civil law countries regarding conflict of interest is that

> the approach taken by the United States and European civil law countries to conflicts of interest is remarkably different. In the United States, codes permit a client to waive most conflicts, provided that the client is fully informed and voluntarily assents. By contrast, civil law codes generally do not contain waiver provisions. Consequently, if a lawyer does not perceive a conflict, there is no need to withdraw from a representation. In other words, lawyers in civil law systems tend to view conflicts as "a matter of [personal] ethics, not law. Conflicts are a matter of your relationship with your client."[7]

Moreover, the civil law system of the European Union supports what is termed "professional independence and autonomy"[8] from the client, whereas the common law system of the United States requires a total commitment from the lawyer to his client.[9]

II. Lawyer Regulation in the United States and the European Union

The European Union's embrace of liberal lawyer regulation has led to the growth of multijurisdictional practice (MJP). MJP is described as "the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law." Moreover, member states of the European Union have eliminated prohibitions on alternative legal practice structures (ALPS), resulting in a trend among countries worldwide to begin permitting ALPS, such as firms with non-lawyers who may own, manage, or work for the practice.[10]

This liberalization across the European Union member states has significantly impacted the European legal market. For example, some law firms have been transformed into multi-disciplinary practices or full services practices, where clients may be provided a one-stop shop to cater to all their needs, be it legal, consulting, financial or other services. This one-stop shop model has led to the need for greater specialization in certain areas of the law.[11] For example, there is a need for attorneys who solely practice in specific areas such as tax law, mergers and acquisitions, and corporate finance law, among others. These practices are said to promote freedom of initiative and competition and may benefit clients in terms of time, cost, and efficiency.[12]

The United States's legal system presents quite a contrast. Lawyers in the United States are constrained by the licensing and regulation regimes of the individual states: lawyers must be admitted to a specific state in order to practice in that state. They may be able to appear before the court in a state in which they are not licensed through a *pro hac vice* admission or on other court order, but these are the only ways through which a lawyer may engage in MJP in the United States. ALPS are restricted in the United States based on the Model Rules of Professional Conduct. Enacted in most states, the rules preclude nonlawyers from creating, owning or managing law firms, either alone or in partnership with lawyers (an exception is the District of Columbia, which allows minority-nonlawyer ownership of law firms) and multidisciplinary practices combining legal services with non-legal services are restricted.[13]

The Lisbon Treaty on European Union governs the European Union member states.[14] The relevant provision for lawyers relates to the free movement of services.[15] This freedom forms the basis for European Union lawyer regulation, whereby an admitted lawyer may presumptively practice anywhere in the European Union, with limited restrictions imposed by where the lawyer is admitted to practice.[16] This allows lawyers to practice across European jurisdictions, unlike in the United States, where lawyers are restricted to state practice because of state focused licensing and regulation.

The treaty grants professionals the right to establish a permanent practice throughout the European Union by requiring member states to allow foreigners to set up business or professional entities, or pursue self-employment.[17] It also authorizes legislation for the mutual recognition of qualifications and for harmonization of business regulations.[18]

The European Court of Justice, in the case of *Van Binsbergen*[19], established three guiding principles that form the basis for the regulation of lawyers within the European Union. This regulation stems from the Lisbon Treaty. First, each member state has the right to restrict the activities of professionals but only where such regulation is justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability.[20] Second, the rules must be non-discriminatory with regard to national origin and residence.[21] Third, an individual may challenge an infringing national rule by relying on the Treaty of Lisbon, as a right.[22] Following the guidelines set forth in *Van Binsbergen*, a more comprehensive directive on lawyers' rights emerged from the Lawyers' Establishment Directive. This directive provides guidance on how a lawyer within the European Union may practice law outside the jurisdiction in which the lawyer is admitted. A European Union lawyer may practice outside of his or her home state either by (i) temporarily engaging in practice in a state where the lawyer is not admitted; or (ii) applying for admission to the state where the lawyer is not admitted after practicing in such state for three years, subject to local review and rules.[23]

The United States Constitution, unlike the European Union's Lisbon Treaty, emphasizes state autonomy. Rules regarding the conduct of lawyers in the United States are largely created by the various states, with guidance from the Model Rules on Professional Conduct. That said, lawyers in the United States may practice across state lines only on a limited basis—either on a motion before the courts, which allows the lawyer to temporarily gain bar admission outside his bar state without taking another exam; or 2) by *Pro Hac Vice* Admission[24], which harmonizes state processes regarding out-of-state lawyers engaged in litigation.

A court may, in its discretion, and consistent with the standing rules of that court, admit a foreign lawyer to practice before it *pro hac vice* under such terms and limitations as that court sees fit. Typically, the foreign lawyer would be required to associate for the duration of that admission with an attorney regularly admitted to the practice of law in that court.[25]

A foreign (non-U.S.) lawyer who wishes to be admitted to the practice of law in the United States would generally have to sit for the bar, the same as any other attorney, and may also have to meet additional requirements (since his or her foreign law school or other training might not comport with the requirements required by the state in question).

More important, there is no general or national license to practice law in the United States. Rather, attorneys are admitted to the practice of law in each individual state. After being admitted to a particular state, the foreign attorney then has the right to practice law in that state and that state alone. Further steps (beyond state admission) must be followed to gain permission to appear as an attorney in the federal courts, before the U.S. Supreme Court, before the Internal Revenue Service, and in various other contexts within the United States.

III. Law Firm Structures

The main distinction between organization and structure of the legal profession in the United States and European countries is that the United States has a unitary system while it is divided by function in most European countries. In European civil law countries

> functions typically associated with the practice of law in the European Union… are generally divided among at least three different categories of legal [professionals]: 1) those…who may represent clients in court (e.g., *advocat* in France… and *Rechtsanwälte* in Germany); 2) those who advise on and document the transfer of real and personal property (e.g., notaries in France, Germany, Italy and Spain); and those who counsel clients on business transactions (e.g., the former *avouees* and *conseil juridique* in France.[26]

Because law firms in the European Union are free from restrictions on their practices, law firm structures are far more liberal in their formation than in the United States. For example, in Italy several areas of legal regulation have been liberalized, leading to the formation of multidisciplinary partnerships.[27] With new national regulations regarding business structures in the legal profession, individual European member states allow non-lawyers to partner with lawyers or to participate in ownership and management of law firms.

> The member state reform that has attracted the most attention is the United Kingdom's decision to embrace ALPS, after conducting research on consumer preferences and needs. The United Kingdom's 2007 Legal Services Act implemented many significant changes, placing regulatory control of the profession in the Legal Services Board and the Office for Legal Complaints, and declaring that a majority of members of both entities must be non-lawyers. Furthermore, the Act permits the Board to consider new business models, based on the view that the market will benefit from legal advice offered with other business services.[28]

Based on this manifestation, several types of law firms, with non-lawyers joining the partnership, have emerged in the United Kingdom. These alternative legal practice structures include "legal firms owned by passive investors, firms that issue stock to non-lawyers to raise capital, multidisciplinary practices, and firms owned, in part, by non-lawyers but limited to providing legal services."[29]

The United States presents a sharp contrast with law firm structures compared to the European Union. All fifty states in the United States prohibit lawyers from sharing fees with non-lawyers.[30] However, due to technological advancements in legal practice, some lawyers in the United States have circumvented the rules against multidisplinary practices or alternative legal practice structures by being innovative. While maintaining the core values of professional ethics, such innovations have led to the emergence of non-traditional legal service providers. For example, online legal services are regarded as non-traditional legal providers. These non-traditional legal service providers aim to "offer consumers easy access to basic legal forms and legal services."[31] For example, clients may now log into legal services websites such as Rocket Lawyer, Legal Zoom, and Avvo and use the platform for legal services.[32] For instance, one may access the service online to create a testamentary will. Another non-traditional legal service now occurs in general merchandise retail stores such as Walmart where small "law stores" within the retail store provide "fast, face to face legal services in convenient Walmart locations."[33] Accordingly, these small law stores offer "free first in-person meeting with an attorney with extended hours and prices far lower than [one] you would find at a law firm."[34]

Paramount to these non-traditional legal services in the United States are the ethical concern and regulation of these non-traditional practices. These legal services may employ non-lawyers who are not subject to the Rules of Professional Conduct, thereby creating an immediate problem as to what rules would apply to them.[35] Also, the form of lawyer advertising may not align with the advertising and solicitation rules and guidelines in the Rules of Professional Conduct. For example, Avvo's legal services website advertises that you can "get the legal help you need at a fixed price," and "every five seconds someone gets free legal advice from Avvo."[36] This kind of advertising may be unethical and essentially goes against the grain of the Model Rules of Professional Conduct.

IV. Professional Ethics

A. Lawyer Advertising—Solicitation

Advertising and solicitation among lawyers is one of the most contentious areas in legal ethics. Scholars often assert that lawyer advertising and solicitation frequently lead to mistrust and threaten to discredit the legal profession.[37] In the United States, lawyers advertise their services to obtain clients in various ways. The United States Supreme Court held that lawyers have the right to First Amendment protections of commercial free speech and that the states may not ban them from advertising.[38] However, each state of the forty-three states that adopted the ABA Model Rules of Professional Conduct provides the necessary guidelines to regulate lawyer advertising and solicitation. The guidelines require lawyers to advertise their services in ways that are not false or misleading.

The ABA Model Rules in the United States lists four provisions banning false or misleading representations:

1. A communication is false or misleading if it "contains a material misrepresentation of fact or law."[39] This standard prevents lawyers from misstating their credentials or any aspect of their services.

2. A lawyer must not "omit a fact necessary to make the statement considered as a whole not materially misleading."[40]

3. Lawyers may not make a communication "likely to create an unjustified expectation about results the lawyer can achieve."[41]

4. Communications must not "compare the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."[42] For example, lawyers should avoid using terms such as "highly qualified" or "best lawyers in town."[43]

Another limitation on lawyer advertising and solicitation in the United States is the prohibition on solicitation of a prospective client in person or via telephone contact. On the one hand, a lawyer may not contact a prospective client if the lawyer has no family or professional relationship with that person and the contact is solely for the lawyer's pecuniary gain.[44] This prohibition prevents "ambulance chasing." On the other hand, direct mail is permissible in some instances. Unlike "ambulance chasing," direct mail gives the potential client the option to ignore the mail.[45]

Lawyer advertising is strictly regulated in European countries, too. The Council of Bars and Law Societies of Europe (CCBE) code employs a "conflict of law" approach, which specifies that a lawyer should not advertise where it is not permitted.[46] The CCBE code's provision on advertising covers publicity by law firms, as well as individual lawyers, as opposed to corporate publicity organized by bars and law societies for their members as a whole.[47] Many European Union countries have abandoned traditional rules on advertising, allowing for some advertising, though not as liberally as in the United States. For example, in France lawyer advertising was strictly prohibited until 1991, when it was authorized by a decree.[48] French lawyer advertising is governed by local bar regulations. Similar to the United States, lawyer advertising in France must be truthful and not misleading.[49] In like manner, French lawyers must not engage in the canvassing of clients unless it is requested by the clients.[50] They may advertise by the use of brochures, phone books, sponsorship of legal events, seminars and professional shows.

In Italy, lawyer advertising is regarded as potentially harmful to the dignity of the Italian legal profession. To safeguard the profession against such harm, Italian lawyers must "honestly" and "truthfully" advertise their services.[51] Advertising is strictly limited to the use of brochures, letterhead, professional, telephone or other directories, and telematic networks (including those with international circulation). Solicitation is prohibited—since it is seen as being offensive to the dignity of the profession.[52]

In Spain, the traditional restrictions on lawyer advertising have been substantially relaxed. Permitted lawyer advertising must be truthful and respectful to the dignity of potential clients.[53] As in the United States, there must be no direct or indirect solicitation of accident victims.[54] Like Spain, Germany has broad rules for regulating lawyer advertising.

B. Formation of the Lawyer-Client Relationship

Generally, lawyer codes of conduct are built on the assumption that a lawyer-client relationship exists, but do not mention how this occurs.[55] For example, in the United States, the ABA Model Rules require duties of competence, obedience, diligence, communication, confidentiality and loyalty to clients. The CCBE code imposes similar duties to clients.[56] A lawyer-client relationship can be created either by private agreement between the parties or by court appointment.

In the United States, courts are empowered to appoint an attorney in both criminal and civil cases if the party is unable to afford to pay for private legal services.[57] Lawyers are obligated to serve when they are appointed by the courts, unless there is a conflict of interest.[58] The CCBE code requires similar compliance. For example, it is considered a violation of disciplinary rules when an Italian lawyer refuses, without adequate justification, to act as appointed counsel.[59]

Other than court appointment, a lawyer-client relationship is formed through contract law. In the United States, this contract is formed when a prospective client or a client seeks legal advice and the lawyer agrees to provide such legal advice. The client would then arrange for payment for the advice received. In civil law countries, lawyer-client relationships are formed in a way similar to those in the United States, although in our jurisdictions the client grants an expense provision in certain circumstances.

Important to the lawyer-client relationship are the fiduciary responsibilities owed to the client—competence and diligence. In the United States, the ABA Model Rules require competent and diligent legal representation. Competence implies "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[60] Diligence requires "promptness in representing a client,"[61] as well as commitment and dedication to the interests of the client, and zeal in advocacy upon the client's behalf.[62]

Similarly, the CCBE Code prohibits lawyers from undertaking a matter unless it can be handled "promptly."[63]

It further provides that lawyers should not accept cases that they know, or ought to know, they are not competent to handle without co-operating with a lawyer who is competent.[64] Once a matter has been undertaken, lawyers must advise and represent clients "promptly, conscientiously and diligently."[65] For example, the French Code provides that lawyers owe to their clients "a duty of competence as well as of dedication, diligence and care."[66]

C. Professional Liability and Indemnity Insurance

"In the United States, the law of legal malpractice clarifies the contours of professional duty and offers clients a monetary remedy when breach of such a duty causes clients harm. The standard of care defines the necessary level of competence. Lawyers, like other professionals, are required to exercise the skill and knowledge normally possessed by members of their profession."[67] Damages are directly attributable to the lawyer if any harm results from the lawyer's omission or negligence during representation of the client.

In the European Union, the CCBE code requires all lawyers to be insured against claims based on professional negligence, or to notify their clients if they are not able to obtain such insurance. For instance, insurance is mandatory for lawyers who are admitted to the Paris Bar, as it is required for lawyers in Germany, the Netherlands, Poland, and Romania.[68]

D. The Attorney Client Privilege (Confidentiality)

A lawyer's duty of confidentiality owed to clients is a hallmark of the client-lawyer relationship, and is endorsed in the ethical standards regulating the legal profession both in the United States and in European countries.[69]

> Without this guarantee, there is a danger that a client would lack the trust which enables him to make full and frank disclosure to his lawyers, and, in turn, the lawyers would lack sufficient (and it may be important) information required to enable the lawyer to give full and comprehensive advice to the client or represent him effectively. Without that trust, the client would not have the assurance that he can be full and frank with his lawyer, which is essential for providing full and accurate legal advice and support and is therefore a crucial guarantee for the fair trial process.[70]

In contrast to the United States, where the lawyer's duty of confidentiality prevents disclosure of information relating to the client to other persons, the ethical and professional codes of most European countries extend such duty to cover communications between lawyers. For example, in France, professional secrecy encompasses not only written or verbal exchanges between the lawyer and her client, but also those between lawyers:

> The terms of the Penal Code are such that any "secret" communicated in confidence to a lawyer in his professional capacity by any person is covered by the obligation of professional secrecy. The obligation (and the corresponding rights) therefore extend, not only to information communicated to a lawyer by his client, but also to information communicated by the opposing party, by his lawyer or by a third party, provided that the information constitutes a "secret" and has been communicated in confidence.[71]

In the United States, the attorney-client privilege includes any communication between client and lawyer for the purposes of providing legal services within the course of the attorney's employment. This privilege, however, is not protected if a third party who does not work for the lawyer is present at the time of the communication. Communications that involve the performance of non-legal functions by an attorney are also not protected. Additionally, the privilege does not apply for the purposes of committing a crime or fraud.[72] In the United States, materials prepared in anticipation of litigation are not discoverable and are protected under the work product doctrine immunity rule.[73] Prepared materials may include written statements, private memoranda and personal recollections recorded by the attorney. This immunity does not apply to materials prepared in the ordinary course of business or when litigation is not reasonably anticipated.

Exceptions to the duty of confidentiality include:

- to prevent reasonably certain death or substantial bodily harm;
- to secure legal advice about the lawyer's compliance with these Rules;
- to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- to comply with other law or a court order.[74]

The European ethical professional codes are somewhat similar to those of the United States, with some exceptions to the duty of confidentiality. For instance, in England, confidentiality may be breached "when the client is seeking help in commission of a crime, when the solicitor has been unknowingly used by the client in the commission of a crime or fraudulent act, and when disclo-

sure is necessary for the solicitor to establish a defense to a criminal charge."[75] For barristers in England,

> whether or not the relation of counsel and client continues a barrister must preserve the confidentiality of the lay client's affairs and must not without the prior consent of the lay client or as permitted by law lend or reveal the contents of the papers in any instructions to or communicate to any third person (other than another barrister, a pupil, in the case of a Registered European Lawyer …) information which has been entrusted to him in confidence or use such information to the lay client's detriment or to his own or another client's advantage.[76]

In Europe, the decision-making power is vested in the lawyers, while in the United States it is vested in the client.

V. Law Practice Topics Presented in the Trans Pacific Partnership (TPP) Agreement

The Trans Pacific Partnership is a multinational trade agreement among twelve countries: the United States (as of this writing), Japan, Malaysia, Vietnam, Singapore, Brunei, Australia, New Zealand, Canada, Mexico, Chile and Peru. The trade agreement "aims to deepen economic ties between these nations, slashing tariffs and fostering trade to boost growth. Member countries are also hoping to foster a closer relationship on economic policies and regulation."[77] The agreement intends to create a single economic market, much like the European Union. Although the TPP has been signed by these countries, the agreement must be ratified by at least six countries before it goes into effect.

The United States has indicated that there will be "no changes in US's' existing rules concerning how and when foreign attorneys may practice law in a particular state."[78] To ensure that no change occurs, there will an implementation of a backstop which will prevent "states from making their rules any less accommodating toward practice by lawyers licensed in other countries."[79] Countries may request "consultation" about a U.S. state rule if they believe the rule substantially impedes cross border supply of legal services.[80]

TPP creates a private justice system, termed as the investor-state dispute settlement (ISDS). The ISDS is an instrument of public international law that resolves investment conflicts without creating state to state conflict, protects citizens abroad, and signals potential investors that the rule of law will be respected.[81] "ISDS arbitration is needed because the potential for bias can be high in situations where a foreign investor is seeking to redress injury in a domestic court, especially against the government itself. While countries with weak legal institutions are frequent respondents in ISDS cases, American investors have also faced cases of bias or insufficient legal remedies in countries with well-developed legal institutions."[82] For lawyers who serve as arbitrators in international trade disputes, the signatory country will develop a code of conduct for "panelists" serving as arbitrators in order to safeguard the integrity of the dispute settlement mechanism.[83]

Endnotes

1. Maya Bolocan, *Professional Legal Ethics: A Comparative Perspective*, Ceeli Concept Paper Series, 8 July 2012, at 9.
2. *Id*. at 10.
3. *Id.*
4. *Id.*
5. 924 S.W.2d 127, 129-131 (Tex. 1996). The lawyer's conflict was imputed to his firm despite efforts to screen the confidential information from other lawyers at the firm.
6. *Id.* at 129.
7. *Id.* at 11.
8. *Id.*
9. *Id.*
10. Mullerat, *The Multidisciplinary Practice of Law in Europe*, 50 J. Legal Ed. 481, 481 (2000).
11. *Id.*
12. *Id.*
13. Aba Model Rules of Professional Conduct (2002) (MRPC], Rule 5.4, 5.5.
14. Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. C 326/47 (providing the basis of EU law).
15. Goebel, *Lawyers in the European Community: Progress towards Community-Wide Rights of Practice*, 15 Fordham Int'l L.J. 556, 566 (1992) (explaining that the freedom to provide services applies to intermittent practice, while the freedom of establishment protects a lawyer's right to practice in a new residence).
16. Goebel, *The Liberalization of Interstate Practice in the European Union: Lessons for the United States?* 34 Int'l Law. 307, 339 (2000) (stating that there are very few limitations to MJP in the European Union).
17. Melissa Pender, *European Union Law Issue: Multijurisdictional Practice and Alternative Legal Practice Structures: Learning from EU Liberalization to Implement Appropriate Legal Regulatory Reforms in the United States*, 37 Fordham Int'l L.J. 1575, 1584 (2014).
18. *Id.*
19. *Id.*, [1974] E.C.R. 1300.
20. *Id.*, [1974] E.C.R. at 12.
21. *Id.*, [1974] E.C.R. at 18-27.
22. *Id.*, [1974] E.C.R. at 27.
23. Pender, note 17 *supra*, at 1591.
24. An "out-of-state" lawyer is a person not admitted to practice law in this state but who is admitted in another state or territory of the United States or of the District of Columbia and not disbarred or suspended from practice in any jurisdiction. An out-of-state lawyer is "eligible" for admission *pro hac vice* if that lawyer:

    a. lawfully practices solely on behalf of the lawyer's employer and its commonly owned organizational affiliates, regardless of where such lawyer may reside or work; or

    b. neither resides nor is regularly employed at an office in this state; or

    c. resides in this state but (i) lawfully practices from offices in one or more other states and (ii) practices no more than temporarily in this state, whether pursuant to admission pro hac vice or in other lawful ways.

ABA Model Rule on Pro Hac Vice Admission, dated August 2002.

25. *Id.* A foreign lawyer is a person admitted in a non-United States jurisdiction and who is a member of a recognized legal profession in that jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, and who is not disbarred, suspended or the equivalent thereof from practice in any jurisdiction.
26. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Code of Conduct by U.S. And Foreign Lawyers*, in 32 Vanderbilt J. Transnat'l L. 1117, 1148-49 (Oct. 1999).
27. The Bersani Decree-Law of 4 July 2006 (transposed into law on 4 August 2006) (liberalizing professional regulation in Italy).
28. Pender, note 17 *supra*, at 1607.
29. *Id.* at 1608.
30. *Id.*
31. Christina Couto, *Future of the Legal Profession: As Field Evolves, New York Attorneys Chart New Territory*, NYSBA (September/October 2016).
32. *Id.*
33. *Id.*
34. *Id.*
35. ABA Model Rule 5.3 outlined the responsibilities regarding nonlawyer assistance:

    With respect to a nonlawyer employed or retained by or associated with a lawyer:

    > (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
    >
    > (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
    >
    > (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
    >
    > (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;
    >
    > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
36. Couto, note 31 *supra*.
37. Bolocan, note 1 *supra.* at 11.
38. *Bates v. State Bar Arizona*, 433 U.S. 350 (1977).
39. ABA MRPC, Rule 7.1(a).
40. *Id.*
41. ABA MRPC, Rule 7.1(b).
42. ABA MRPC, Rule 7.1(c).
43. See Virginia State Bar Ethics Opinion 1297 (1989).
44. ABA MRPC, Rule 7.3(a).
45. Under Model Rule 7.3(c) direct mail solicitations to potential clients known to be in need of legal services in a particular matter must be labeled as "Advertising Material" on the envelope and at the beginning and ending of any recorded message.
46. CCBE Code, Article 2.6.
47. Explanatory Memorandum and Commentary to the CCBE Code, Article 2.6.
48. Decree n. 91, 1197 of 21 November 1991, Article 161.
49. National Council of Bars' Code of Conduct (1999), Article 10.1
50. *Id.*
51. *Codice Deontologico Forense* (Ethical Code for Italian Lawyers, 1999), Article 17.
52. *Id.*
53. Ethical Code for *Estatuto General de Abogacía Española* (2001), Article 25 (1).
54. *Id.* (2) (e).
55. ABA MRPC, Rules 1.1-1.4, 1.6, and 1.7-1.13.
56. CCBE Code, General Principles and Relations with Clients.
57. *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221 (D. Neb. 1995).
58. ABA MRPC, Rule 6.2.
59. Ethical Code for Italian Lawyers (1999), Article 11 (II).
60. ABA MRPC, Rule 1.1.
61. *Id.*, Rule 1.3.
62. *Id.*, cmt 1.
63. CCBE Code, Article 3.1.3.
64. *Id.*
65. CCBE Code, Article 3.1.2.
66. National Council of Bars' Code of Conduct (1999), Article 1.
67. Bolocan, note 1 *supra*, at 27.
68. *Id.* at 27-28.
69. *Id.* at 30.
70. Council of Bars and Law Societies of Europe, CCBE Recommendations: On the protection of client confidentiality within the context of surveillance activities.
71. www.iadclaw.org/assets/1/7/17.11 FRANCE.pdf.
72. The attorney-client privilege does not apply to a communication occurring when a client:

    > (a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
    >
    > (b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.

    See Restatement Third of the Law Governing Lawyers § 82 (2000).
73. Federal Rules of Civil Procedure, Rule 26.
74. ABA MRPC, Rule 1.6 (b).
75. Bolocon, note 1 *supra*, at 35 citing Andrew Boon and Jennifer Levin, The Ethics and Conduct of Lawyers In England and Wales 256-58 (1999).
76. Bar Standard Boards, *Regulating Barristers—Conduct of work by practicing barristers*, https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct/the-old-code-of-conduct/part-vii-conduct-of-work-by-practising-barristers/.
77. *TPP: What is it and why does it matter?* (July 27, 2016), http://www.bbc.com/news/business-32498715.
78. *Proposed Trans-Pacific Partnership Aims to Ease Bars on Cross-Border Legal Practice 31*, ABA/BNA Manual on Professional Conduct 679.
79. *Id.*
80. *Id.*
81. Office of the United States Trade Representative, *Fact Sheet: Investor-State Dispute Settlement*, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.
82. *Id.*
83. *Proposed Trans-Pacific Partnership Aims to Ease Bars on Cross-Border Legal Practice*, note 78 *supra*, at 681.

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TRADE SECRETS PROTECTION IN THE EUROPEAN UNION AND IN ITALY

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1.- The EU Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

On June 8th, 2016 the European Parliament and the Council adopted the EU Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure with the aim to approximate the relevant national laws of the Member States.

Even though all the EU Member States, as well as the European Union itself, were, and still are, bound by the TRIPs Agreement, a stronger and more modern protection was sought.

Companies across Europe, in particular small and medium-sized enterprises, were asking for coherent legal protection within the EU against the unlawful acquisition of know-how and business information. They were suffering from industrial espionage and unfair practices which put their competitiveness at risk and the fragmented legal system, where EU countries had substantial differences between their national laws or had no specific laws on the issue, did not protect their interests sufficiently.

Such differences in the different national legal systems of the EU countries also hindered know-how exchange or joint-development between companies in the European single market.

In a survey carried out in 2013 by the European Commission, 75% of the companies stated that trade secrets are important for competitiveness and innovative performance. It also revealed that one in five European companies had been the victim of trade secret misappropriation, or attempts at misappropriation, at least once in the past 10 years. Two in five European companies stated that the risk of trade secret misappropriation increased during the same period.

Other studies pointed out that the European fragmented legal system discouraged cross-border R&D projects and sharing of trade secrets for more than half of the interviewed companies; that only 40% of the companies having suffered from trade secret misappropriation cases have sought legal remedies in the EU; and that at least 70% of European companies, both big and small, and across all sectors, were favourable to EU legislation on misappropriation of trade secrets.

More in the detail, the Commission study highlighted that Austria, Bulgaria, the Czech Republic, Estonia, Germany, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden had legislation on the misappropriation of trade secrets, although some of them failed to define what trade secrets are (for example, Germany, Finland, Greece, Denmark and Spain). In Belgium, France, Ireland, Luxembourg, Malta, the Netherlands and the UK there were no specific provisions on trade secrets in civil law. The protection of trade secrets against misappropriation depended on judicial interpretation of the general provisions on extra-contractual liability or on traditional common law. In Cyprus, trade secrets were only protected by contract. In France misappropriation of certain types of trade secrets (namely, manufacturing secrets) are criminally punished if committed by employees.

Other important differences in the Member States' legislation concerning the protection of trade secrets were observed. First and foremost, not all Member States had national definitions of a trade secret: some EU countries did not provide for protection of commercial confidential information such as business information, customer and/or client lists, etc.. Also a commonly adopted definition on the scope of protection was not readily accessible and the scope of protection was different across the Member States. Furthermore, there was no consistency as regards the civil law remedies available in the event of unlawful acquisition, use or disclosure of trade secrets, as cease and desist orders are not always available in all Member States against third parties who are not competitors of the legitimate trade secret holder. Divergences also existed across the Member States with respect to the treatment of a third party who acquired the trade secret in good faith but subsequently learned, at the time of use, that the acquisition derived from a previous unlawful acquisition by another party.

In the light of the above, the European Commission organised a public consultation open to all interested parties and stakeholders between December 2012 and March 2013. An online questionnaire was available in all official languages of the EU. The Commission received 386 responses, coming from almost every EU country. The consultation showed that 73 % of the SMEs that replied were of the opinion that legal protection against misappropriation of trade secrets should have been addressed at EU level. For 67% of SMEs trade secrets have a strong positive impact on their innovative and competitive performance. About 40 % of the respondents were other than industry-related stakeholders.

A few years later, the Directive was eventually adopted and published. It entered into force on July 5th, 2016 and now all the EU Member States must bring into force the national laws and administrative provisions necessary to comply with the Directive by 9 June 2018.

Unfortunately, the Directive allows the Member States to provide for more far-reaching protection for trade secrets as - for example - it is provided by the Italian Intellectual Property Code. This provision of the Directive will likely result in a still fragmented legislation and case law in the EU market.

2.- Overview of the Directive and of its most important provisions.

The first scope of the Directive is establishing a homogeneous **definition of trade secrets** without restricting the subject matter to be protected against misappropriation. Such definition is therefore constructed so as to cover know-how, business information and technological information. The definition of trade secret excludes trivial information and the experience and skills gained by

employees in the normal course of their employment, and also excludes information which is generally known among, or is readily accessible to, persons within the circles that normally deal with the kind of information in question.

Accordingly, art. 2 of the Directive states that 'trade secret' means information which meets all of the following requirements:

a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

b) it has commercial value because it is secret;

c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Another main aspect of the Directive is the clear definition of **lawful acquisition cases** given by art. 3. It states that the acquisition of a trade secret shall be considered lawful when the trade secret is obtained by any of the following means:

a) independent discovery or creation;

b) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;

c) exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices;

d) any other practice which, under the circumstances, is in conformity with honest commercial practices.

After the definition of fair practices, art. 4 of the Directive defines the **scope of protection** of trade secrets stating that Member States shall ensure that trade secret holders are entitled to apply for the measures, procedures and remedies provided for in this Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret. It must be noted that three main illicit behaviors are indicated by the Directive: acquisition; use; and disclosure. It is also important to notice that the scope of protection is set outside the boundaries of unfair competition laws and therefore is not limited from a subjective point of view.

Following the reasoning behind the official note to art. 39 of the TRIPs Agreement, the Directive addresses explicitly the issue of a person who knowingly, or with reasonable grounds for knowing, unlawfully acquires, uses or discloses a trade secret being able to benefit from such conduct. In this regard, it states at art. 4.4 that the acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure, knew or ought, under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning of paragraph 3.

For what concerns the **remedies** made available to the legitimate holder of a trade secret, the

Directive confirms that the main remedies available are preliminary and definitive injunctions and damages. Publication of decisions can be also awarded as a supplementary deterrent to further infringers. Preliminary injunction, together with seizure of the suspected infringing goods can be ordered during provisional and urgency proceedings. Damages - with exclusion of punitive damages - can be awarded upon the request of the injured party, if the infringer who knew or ought to have known that he, she or it was engaging in unlawful acquisition, use or disclosure of a trade secret. Alternatively, the competent judicial authorities may, in appropriate cases, set the damages as a lump sum on the basis of elements such as, at a minimum, the amount of royalties or fees which would have been due had the infringer requested authorisation to use the trade secret in question.

Lastly, the Directive addresses one of the most crucial aspect of trade secrets litigation: the **preservation of confidentiality of trade secrets in the course of legal proceedings**. It was in fact noted that the prospect of losing the confidentiality of a trade secret in the course of legal proceedings often deters legitimate trade secret holders from instituting legal proceedings to defend their trade secrets, thus jeopardising the effectiveness of the measures, procedures and remedies provided for. Accordinly, art. 9, states that Member States shall ensure that the parties, their lawyers or other representatives, court officials, witnesses, experts and any other person participating in legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, are not permitted to use or disclose any trade secret or alleged trade secret which the competent judicial authorities have, in response to a duly reasoned application by an interested party, identified as confidential and of which they have become aware as a result of such participation or access. In that regard, Member States may also allow competent judicial authorities to act on their own initiative.

3.- Trade secrets protection in Italy in brief.

Trade secrets protection in Italy is first and foremost granted by unfair competition law provisions. Art. 2598, n°3, of the Italian Civil Code states that any act of competition contrary to honest practices and that may harm competitor's interests has to be considered unfair and, therefore, illict.

This provision clearly mirrors art. 10-bis of the Paris Convention for the Protection of Industrial Property (CUP) that similarly states that the countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition and that any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

According to art. 2598 of the Civil Code, the Italian case law developed a very strong and effective protection against trade secrets misappropriation cases. Most notably, the Italian Supreme Court designed an even stronger protection for commercial trade secrets such as company's commercial and/or business information, lists of clients, etc.. According to the Italian Supreme Court, this kind of information is confidential "*per se*" and its acquisition, use and disclosure, without the legitimate holder's consent, is prohibited even if this information is not protected as a trade secret by the legitimate holder.

After the entry into force of the TRIPs agreement the Italian Parliament introduced art. 6-bis in the Italian Patent Law (today no longer into force having been replaced by the Italian Intellectual Property Code). This provision was almost an exact translation of TRIPs art. 39.

For what concerns labour law, another provision of the Italian Civil Code, namely art. 2105, provide

for a general loyalty obligation according to which employees can not disclose or use any kind of information regarding the organization or the production methods of their employer.

Together with these civil law provisions, trade secrets misappropriation cases are also considered a crime under specific circumstances according to artt. 621, 622 and 632 of the Italian Criminal Code.

All these law provisions were further enhanced by the adoption of the Italian Intellectual Property Code and the provisions of art. 98 an 99 of the IP Code.

Art. 98 clearly defines - jointly with art. 1 and 2 of the IP Code - trade secrets as being an intellectual property right and gives a clear definition of what can be protected as a trade secret. This definition is very close to the definition adopted by the TRIPs Agremment and by the EU Directive. It says that any kind of company information can be protected as a trade secret provided that: i) it is secret; ii) it has commercial value because it is secret; iii) has been subject to reasonable secrecy measures by the legitimate holder of the trade secret.

Art. 99 is a key provision as it defines the scope of protection for trade secrets. In its original wording it simply stated that - without prejudice of unfair competition provisions - it is prohibited to acquire, use and disclose trade secrets. In this way, the IP code gave to the holders of a trade secrets a broader and more effective protection than that conferred to them by unfair competition rules. The main differences are: i) trade secrets misappropriation can be claimed against non-competitors; ii) IP infringement search orders and remedies can be sought.

In 2010 art. 99 of the IP Code was amended with a less clear wording the aim of which was to avoid misinterpretation of the scope of protection. In essence, the new wording should make clear what was already clear, namely that third parties are free to develop their own technology and business information even if this information should result identical to other's trade secrets.

According to the above, trade secrets enjoy today a very broad and modern protection in Italy: i) unfair competition protection; ii) intellectual property protection; iii) criminal protection.

Lastly, it is worth mentioning that trade secrets misappropriation cases can be brought before the Italian secialised IP Courts the most important of which is certainly the Court of Milano.

This enable company to develop freely their confidential know-how, exploit it by means of contracts making it an important intangible company asset and protect it effectively against misappropriation cases.

4.- Conclusions.

In the light of the above it appears that trade secrets are well protected in Europe and in Italy. Local and foreign companies may rely on international treaties, European and national law provisions that design a broad and strong protection for their trade secrets.

In order to protect their trade secrets as such it is crucial to adopt all the necessary steps to keep them secret, as required by the several laws examined above, and to adopt and maintain a well designed trade secrets protection company policy and procedure. Also it is important to enter into well drafted NDAs with third parties where time limits for the secrecy obligations are removed or carefully tailored on the specific scope of the agreement considering the overall situation.

As a more general remark, it is worth mentioning that there still is a certain resistance to recognize or qualify trade secrets as an intellectual property right. Trade secrets protection triggers often unnecessary suspiciousness just because it has to do with confidential business information.

None the less, reasoning beyond this unnecessary suspiciousness would allow to identify a precise scope of protection - along with its statue of limitations - for trade secrets and would allow to consider trade secrets an intellectual property right or, in other words, an intangible asset. This would eventually allow transactions concerning trade secrets to be carried out on the basis of a more consistent an logical legal framework closing thus the existing gap between trade secrets transaction principles and trade secrets protection principles.

Avv. Pierodavide Leardi

Attachments:

1) EU Directive 2016/943;

2) EUIPO - trade secrets and patent report 2017;

3) Max Planck Institute comments on the Proposal of the EU Commission for a Directive on trade secrets;

4) AIPPI Resolution - Question Q247 - trade secrets.

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Trade Secrets:
A 180° Change In Protection:

A Comparison of US Law, EU Directive and Latin American Laws

NYSBA International Section
2017 Seasonal Meeting
September 13, 2017

Oren Warshavsky

Trade Secret Protection is Growing

- ***Alice v. CLS and the*** **America Invents Act** significantly limit patent coverage for business methods, business processes and computer implemented inventions.
- PWC estimates trade secret theft impact is is 1-3% of U.S. GDP.
- Trade Secret litigation doubled since 2004

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Two Regimes

- State Law
  - Versions of Uniform Trade Secret Act ("UTSA") adopted by most states (not New York)
  - New York uses common law
- Federal Law
  - Defend Trade Secrets Act of 2016 ("DTSA")
    - DTSA amended the Economic Espionage Act of 1996 ("EEA") to provide for civil remedies for trade secret misappropriation

The Challenges of State Laws

- Different standards, definitions, remedies, and procedures
- Different statutes of limitation
- Challenges to national enforcement
  - Subpoena power
  - Enforcement of judgments
- Challenge maintaining uniform policies in different states

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DTSA and State Law

- DTSA does not preempt state trade secret claims or tort claims
- Similar definitions of trade secret and misappropriation
- DTSA offers additional remedy of *ex parte* seizure
- DTSA includes whistleblower immunity and related notice obligations
- No discovery restrictions (e.g. particularity requirement in California)

DTSA – Definition

"All forms and types of financial, business, scientific, technical, economic, or engineering information . . . whether tangible or intangible . . . [regardless of] "whether or how stored . . ."

If:

(A) "The owner thereof has taken reasonable measures to keep such information secret"; and

(B)"The information derives independent economic value, actual or potential, from not being generally known to… another person who can obtain economic value from the disclosure or use the information"

DTSA – Definition of Misappropriation

"Misappropriation" means either:

- the acquisition of a trade secret of another by "improper means" or
- disclosure or use of a trade secret of another without express or implied consent by a person who:
  - Used improper means to acquire knowledge of the trade secret or
  - Knew or should have known at the time of disclosure that the trade secret:
    - Was derived from or through a person who had used improper means;
    - Was acquired under circumstances creating duty to maintain secrecy;
    - Was derived from or through a person required to maintain secrecy.

DTSA – Definition of Improper Means

- "**Improper means**" includes "theft, bribery, misrepresentation, breach or inducement of breach of a duty to maintain secrecy, or espionage through electronic or other means."

- "**Improper means**" does **not** include "reverse engineering, independent derivation, or any other lawful means of acquisition"

DTSA - Damages

- A plaintiff may claim its **actual** damages plus any unjust enrichment to the defendant, or in the alternative, damages measured by a **reasonably royalty**.
- In cases of willful or malicious misappropriation, exemplary damages also are available up to **double** the amount of actual damages or the reasonable royalty.
- **Attorney's fees** are available to a plaintiff that proves malice/willfulness or a defendant that shows the action was brought in bad faith

DTSA – Injunctive relief

- Injunctive relief availble to prevent ***actual and threatened*** misappropriation.
- Courts may not enoin an employment or other relationship that conflicts with state laws on employee mobility, "without evidence of actual or threatened misappropriation."
  - The law does not follow "**inevitable disclosure**" doctrine.
  - Conditions placed on employment "Must be based on actual or threatened misappropriation and not merely on the information the person knows."

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Immunity

- **Whistle Blower Immunity** - covers *federal and state trade* secret law for individuals disclosing trade secrets to law enforcement officials (federal or state) in connection with a suspected crime.
  - Employer "shall" provide notice of immunity "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information."
  - Failure to do so precludes enhanced damages.
  - "Employee" includes contractors and consultants.
- **Litigation immunity** – covers individuals disclosing trade secrets in a lawsuit, if such filing is made under seal.

DTSA –*Ex Parte* Seizure Orders

- Ex parte seizures of property under "extraordinary circumstances" to prevent the use of the trade secret
- Federal agents to seize property from defendant to be held in the custody of the Court
- An Affidavit or Verified Complaint is Required

DTSA – Ex Parte Seizure Requirements

1) Normal *equitable* relief is inadequate because defendant could **evade/avoid** order;
2) An **immediate and irreparable** injury will occur if seizure is not ordered;
3) The harm to the plaintiff from denial of the seizure outweighs the harm to the defendant's **legitimate interests**, and ***substantially*** **outweighs any third party harm**;
4) The plaintiff is **likely to succeed** on the trade secret claim;
5) the defendant **actually possesses** the trade secret and any property to be seized;
6) the matter to be seized and its location are described with **reasonable particularity**;
7) the defendant would destroy, move, hide or otherwise **make such matter inaccessible to the court**, if the plaintiff proceeded on notice; and
8) the plaintiff has **not publicized** the requested seizure.

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DTSA – International Reach?

- A U.S. corporation or citizen can be held liable for trade secret misappropriation under the DTSA **regardless of whether the misappropriation occurred abroad**.
- An entity can be held liable under the DTSA for **foreign misappropriation** if "an act in **furtherance of the offense** was committed in the United States."
- Personal jurisdiction requires traditional showing.

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TRADE SECRETS

NYSBA International Section

Federico González Peña

August, 8 2017

MEANING OF TRADE SECRETS IN MEXICO, IN COMPARISON WITH US AND EU.

According with Mexican law and regulations, a “trade secret” could be any intangible, process or system that provides an economic advantage or benefit, to its owner.

Sometimes, these concepts are matter of confusion, when talking about Confidential Information, Commercial Information, Reserved Information, Personal Data, Inventions, etc.

In Mexico, all of these concepts have a particular way of protection, but also a different strategy for enforcement.

INFORMATION CLASSIFIED AS TRADE SECRETS

"TRADITIONAL" TRADE SECRETS

Inventions, formulas, processes, know-how information, tecniques, strategies, scientific information, investigation results, commercial information, databases, customer lists, financial information.

"NEW ELEMENTS" TO BE CONSIDERED AS PART OF A TRADE SECRET

Business model, logistic procedures, employee list, product information, commercial estrategies, supplier lists, marketing surveys, sales reports, Budget information, distribution process, training methods, etc.

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Singapore

After the dinner recognizing the Dean of Singapore Management University School of Law for all his efforts between his school and the International Section.

Left: Eduardo Ramos-Gomez, Duane Morris LLP (Co-Chair Singapore Chapter)
Center: Neil A. Quartaro, Watson Farley & Williams LLP (Immediate Past International Section Chair)
Right: Dean Warren Chik, Singapore Management University School of Law

NYSBA 2017 Annual Meeting International Section Awards Lunch and Meeting

Then-Section Chair Neil A. Quartaro, the Honorable Loretta A. Preska, NYSBA Immediate Past President Claire P. Gutekunst, the Honorable Colleen McMahon

Then-Section Chair Neil A. Quartaro and NYSBA Immediate Past President Claire P. Gutekunst presenting the Award for Distinction in International Law and Affairs to Honorable Loretta A. Preska, immediate past Chief Judge of the U.S. District Court for the Southern District of New York.

Section Chair Nancy M. Thevenin and the Honorable Loretta A. Preska

John J. Kenney, NYSBA Past Presidents Mark H. Alcott and David P. Miranda

Chair Neil A. Quartaro thanking past Section Chair Gerald J. Ferguson for his service

Neil A. Quartaro and past Section Chair Paul M. Frank presenting the Albert S. Pergam Writing Competition Award to Frank J. Raymond Mechmann, III

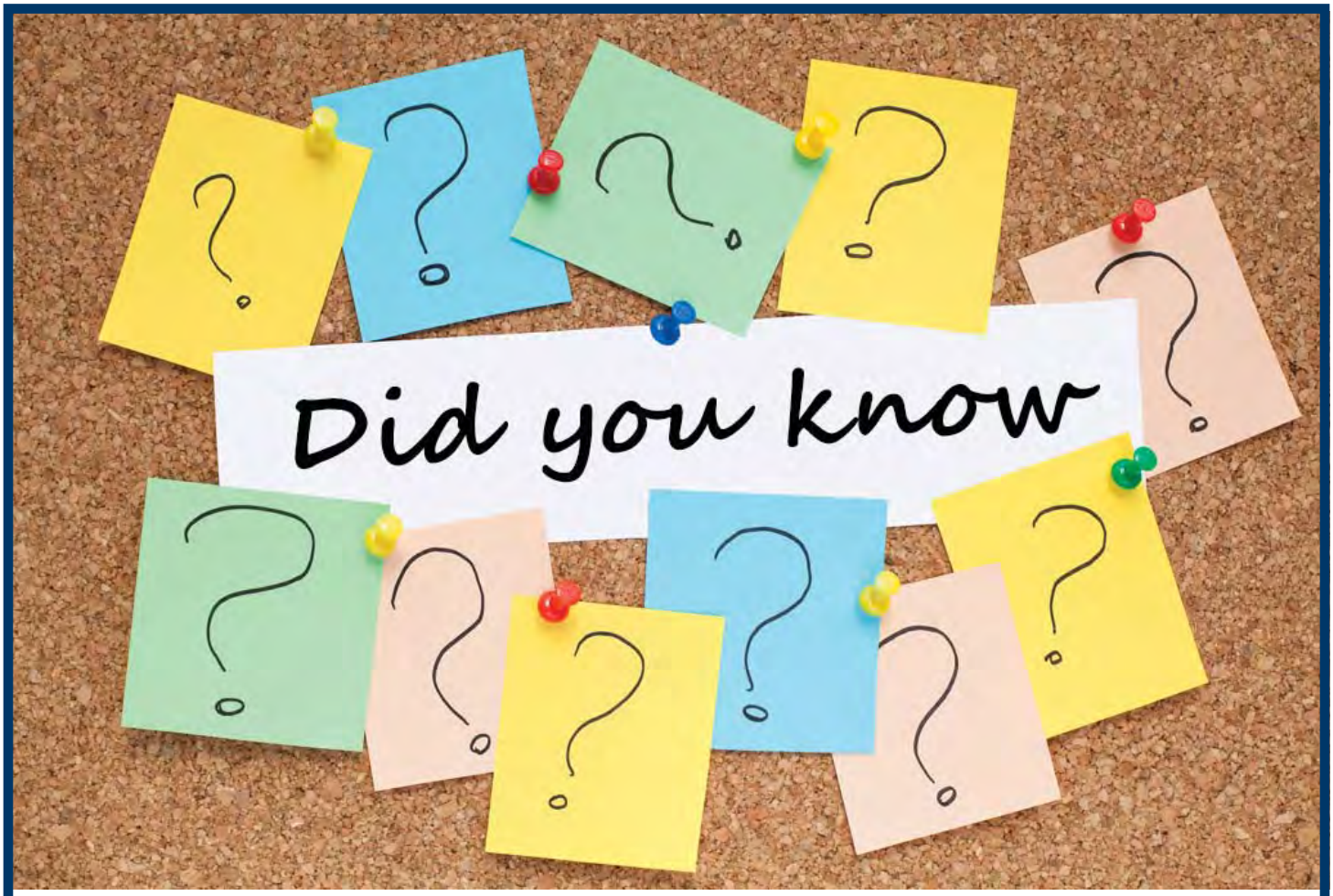
Gerald J. Ferguson, Jay L. Himes, William H. Schrag, Nancy M. Thevenin and the Honorable Loretta A. Preska

Panelists Robert Leo, Patrick Cook, Daniel Brock, Mark Bloom, Carolina Palma

Daniel Brock

Robert Leo

Panelists Carolina Palma, Patrick Cook, Daniel Brock, Mark Bloom, Robert Leo



Did You Know?

The International Section gained nearly 400 new members in 2017! In addition to U.S. members, we have gained members in Australia, Brazil, Canada, China, Colombia, Czech Republic, Dominican Republic, Ecuador, Finland, France, Germany, Greece, Honduras, Hong Kong, Ireland, Italy, Japan, Kenya, Netherlands, Nigeria, Poland, Qatar, Serbia, Singapore, South Korea, Spain, Switzerland, Taiwan, Thailand, Trinidad and Tobago, United Arab Emirates, and the United Kingdom.

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Trade Secrets

TRADE SECRET ENFORCEMENT DISADVANTAGES

- Evidence the existence of an element of commercial or industrial application, which provides its owner a competitive advantage.

- Prove that the subject matter of protection as trade secret, is not of public domain, nor accesible by any means.

- Evidence the implementation of measures to ensure security, confidentiality and restricted access.

Trade Secrets

LEGAL ACTIONS AGAINST TRADE SECRET INFRINGEMENT

- **ADMINISTRATIVE ACTION:** FILED BEFORE IP OFFICE. AN IP RIGHT AS MATTER OF PROTECTION. AIMING TO OBTAIN PRELIMINARY MEASURES AND STOP UNFAIR COMPETITION.

- **CIVIL ACTION:** CONFIDENTIAL INFORMATION AS MATTER OF PROTECTION. TRYING TO MINIMIZE RIKS AND RECOVER DAMAGES.

- **CRIMINAL ACTION:** COMMERCIAL INFORMATION AS MATTER OF PROTECTION. WHEN THE AFFECTED PARTY HAS NO CONTROL OVER THE INFRINGEMENT SITUATION.

CONCLUSIONS

- There is no system for the protection of trade secrets, under the provisions of Mexican law. Authority suggestions and best practices are followed.
- However, there is a sanctioning system for trade secret infringement.
- The legal aciton to be suggested will depend on the nature of the infringement and the desired effect.
- There are both similarities and differences in comparison with USA and EU legal systems.
- The enforcement system in Mexico must improve the efficiency of preliminary injunction, and the flexibility of grounds to prove the existence and infringement of trade secrets.

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Sánchez Devanny presta servicios legales en las áreas de Corporativo y Transaccional; Financiamiento Corporativo y de Proyectos; Comercio Exterior y Aduanas; Inmobiliario, Infraestructura y Hotelería; Fiscal; Laboral, Seguridad Social, y Migratorio; Gobierno Corporativo y Cumplimiento Regulatorio; Energía, Recursos Naturales y Ambiental; Propiedad Intelectual, Entretenimiento y Deportes; Litigio y Medios Alternativos de Solución a Controversias; Salud, Alimentos y Cosméticos; Competencia Económica; Instituciones y Servicios Financieros; Gestión Patrimonial y Planeación Sucesoria; y Datos Personales y de Tecnologías de la Información a clientes públicos y privados principalmente en las industrias Automotriz, Retail, Farmacéutica, Manufactura en general, Inmobiliaria y Energética.

ANTICORRUPTION SYSTEM IN MEXICO

2017 Annual Seasonal Conference of the

International Section of the New York State Bar Association,

Antigua, Guatemala

Panel 15 Compliance Trends and Developments

in Insurance/Reinsurance: A Regional

Overview

September 12 – 14, 2017

THE NEW LEGAL FRAMEWORK ON ANTICORRUPTION AND BRIBERY IN MEXICO

- **The National Anticorruption System, and new legislation:**

On May 27, 2015, the amendments to the Mexican Constitution laying the foundations for the creation of the National Anticorruption System ("**SNA**") were published in the Federal Official Gazette. The secondary regulation for the SNA was enacted on July 2016, and in principle became effective as of July 2017.

The purpose of the SNA is to create the mechanisms for the coordination of the different government authorities at all levels (local, state and federal), in order to establish the minimum basis for the prevention and detection of corruption from private individuals, entities and public officers, strengthen audit and control of public resources and create systematic public policies.

On July 2016, the following secondary regulations of the SNA were enacted and amended:

- **General Law of the National Anticorruption System *(Ley General del Sistema Nacional Anticorrupción):*** setting forth the basis for the coordination of SNA in all government levels;

- **General Law on Administrative Liabilities *(Ley General de Responsabilidades Administrativas)*** *("**LGRA**")*: setting forth the duties and responsibilities of the public officers; defining the term "Serious Administrative Offences" and establishing specific penalties applicable to public officers, private individuals and entities;

- **Federal Audit and Accountability Law *(Ley de Fiscalización y Rendición de Cuentas de la Federación)*** and amendments to the **Law of Tax Coordination (*Ley de Coordinación Fiscal)*** and the **Governmental Accounting Law (*Ley de Contabilidad Gubernamental)***, strengthening the capacity of the **Supreme Audit Office**;

- **Organic Law of the Federal Court of Administrative Justice (*Ley Orgánica del Tribunal Federal de Justicia Administrativa)*** transferring the Federal Court of Tax Justice's authority to the new **Federal Court of Administrative Justice (*Tribunal Federal de Justicia Administrativa)***, which shall be responsible of imposing penalties to public officers, private individuals and entities;

- Amendments to the **General Law of the Attorney General´s Office (*Ley Orgánica de la Procuraduría General de la República*)** creating the **Specialized Prosecutor Office of Anticorruption (*Fiscalía Especializada Anticorrupción*)**, as a separate institution that will investigate and prosecute corruption acts; and

- Amendments to the **Federal Criminal Code (*Código Penal Federal*)** regarding crimes and penalties applicable to public officers, private individuals and entities; and Amendments to the **Organic Law of the Federal Public Administration (*Ley Orgánica de la Administración Pública Federal*)** granting authority in Anticorruption matters to the **Ministry of Public Administration (*Secretaría de la Función Pública*)**.

- **<u>Conventions on Anticorruption, and implications to the SNA:</u>**

Mexico ratified the following Conventions on Anticorruption:

- **United Nations Convention against Corruption (UNCAC)** ratified in 2004. *"The purposes of this convention are: a) To promote and strengthen measures to prevent* and *combat corruption more efficiently and effectively; (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; (c) To promote integrity, accountability and proper management of public* affairs and public property*."*[1]

[1] Article 1 of the United Nations Convention against Corruption.

- **The OAS Inter-American Convention against Corruption** ratified in 1997. *"The purposes of this Convention are: 1. To promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and 2. To promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance."*[2]

- **The OECD Anti-Bribery Convention** ratified in 1999. The purpose of the convention is to establish legally binding standards to criminalize bribery of foreign public officials in international business transactions and provide measures, that shall be implemented by signatory countries, to achieve such objectives.[3]

By signing and ratifying these conventions, Mexico committed to take all appropriate and necessary measures to fight corruption and incite transparency in order to promote foreign investment and foster competition in the economy.

With the creation of the SNA, the Mexican Government has enacted significant and effective measures that the UN, OECD and OAS recommended in the conventions ratified by Mexico. Specifically, the OECD recognized the substantial transformation of the anticorruption system in Mexico and will support the Mexican government in the implementation of these measures.

Accordingly, with the enactment of the new anticorruption legislation, Mexico is harmonizing its legal system with the provisions of the anticorruption conventions ratified, and with the legal systems of countries that have already implemented measures to comply with such treaties, such as the United States (FCPA) and the United Kingdom (Bribery Act). This harmonization will facilitate the cooperation between Mexico and other countries, in the enforcement of sanctions regarding anticorruption matters.

- **Anticorruption Authorities and new Authorities.**

SNA is comprised by four bodies: **(A)** the Coordination Committee that will create the mechanisms of coordination among the members of the SNA; **(B)** the Committee for Citizen Participation, as the entity for participation of the private

[2] Article I of the Inter-American Convention against Corruption.
[3] http://www.oecd.org/corruption/oecdantibriberyconvention.htm

sector, which will contribute with the Coordination Committee to comply with its obligations; **(C)** the Steering Committee of the National Audit System, as the agency responsible for governmental audit coordination in the different levels of government; and **(D)** the Local Anticorruption Systems.

As mentioned above, other authorities with Anticorruption attributions are:

- Supreme Audit Office
- Federal Court of Administrative Justice
- Specialized Prosecutor Office of Anticorruption
- Ministry of Public Administration

IMPLICATIONS FOR THE PRIVATE SECTOR

- **Sanctions and fines.**

The SNA, as a novelty has a direct impact on the liability and conduct of private individuals and entities.

The LGRA defines certain acts from private individuals and entities as "Serious Administrative Offences" and these are subject to penalties. The Serious Administrative Offences include:

- Bribery of public officers, directly or through third parties.
- Unlawful participation in administrative acts;
- Influence peddling;
- Use of false information in administrative proceedings;
- Obstruction of investigations;
- Collusion or arrangements with competitors;
- Misuse of public resources or omissions in rendering accounts; and
- Unlawful hiring of former public officers.

Penalties may be imposed to private entities for acts of corruption when these acts are made by private individual's acting on behalf of such entities, when the private individual pretends to obtain benefits for the entity through these conducts. Prior to the SNA, Mexican law did not contemplate administrative sanctions against private entities for corruption practices of its officers.

The SNA contemplates various penalties for private individuals and entities, as follows **(A)** fines of up to the double of the profits obtained or, in the absence of profits, up to approximately $11 million Mexican pesos equivalent to approximately USD $610,000, at an exchange rate of $18.00 pesos per US Dollar for private individuals or $110 million Mexican pesos for entities equivalent to

approximately USD $6'100,0000, at an exchange rate of $18.00 pesos per US Dollar, and **(B)** ban of up to eight years for private individuals and up to ten years for entities from acquisitions, leases, services or public works, and also the obligation to pay damages caused to the Federal Public Treasury. In the case of entities, they may enter into a suspension of activities for up to three years or be subject to early dissolution.

When imposing sanctions, the SNA will consider as an aggravating factor the failure to report acts of corruption by the administration, the representatives and/or the supervisory bodies, or the shareholders or partners of an entity, when these have had or should have had knowledge of any such acts.

- **Implications for foreign legal entities.**

Foreign legal entities are subject to all provisions of the new SNA, thus, a foreign legal entity could be sanction by the Mexican Anticorruption Authorities. Mexican Authorities could obtain enforcement of the sanctions or fines, through cooperation with the Authorities of the entity's state of origin, in accordance with the provisions of the conventions ratified by both countries on Anticorruption Matters.

MEASURES TO MINIMIZE RISKS FOR LEGAL ENTITIES

When determining the responsibility of entities, the SNA will consider if such entities have implemented an Integrity Policy, which must include at least Organizational and Procedures Manuals, defining the functions and responsibilities of each of the areas, control, monitoring and auditing systems, reporting systems, training programs, human resources policies and a Code of Conduct. If the entity has incorporated these factors of the Integrity policy, the Authority could reduce the sanctions in case that the entity were to be found liable of anticorruption acts.

Each private individual or entity shall be responsible to determine the best practices that apply to their respective business and incorporate them appropriately into their Integrity Policy.

Should you have any questions regarding your obligations under the new National Anticorruption System and the development and implementation of your Integrity Policy, please contact your regular contact at *Nader, Hayaux & Goebel or either of the following partners Yves Hayaux du Tilly L. +52 (55) 4170 3078* yhayaux@nhg.com.mx *and Luciano Pérez Gómez +52 (55) 4170 3035* lperez@nhg.com.mx*.*

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LEGAL MEASURES AGAINST MONEY LAUNDERING AND TERRORISM FINANCING IN THE INSURANCE INDUSTRY IN GUATEMALA

- **The national legislation against money laundering and terrorism financing:**

Guatemala is fully committed to combat money laundering and prevent terrorism, and has several existing regulations for that purpose. Additionally, entities and presidential commissions have been created for this matter.

In December 2001, the Law Against Money or Other Assets Laundering was published and came into force as a first effort to protect the national economy and the solidity of the Guatemalan financial system.

In 2004, the State of Guatemala ratified the Central American Convention for the Prevention and Repression of Money Laundering, Illicit Drug Trafficking and Related Crimes, of which Guatemala, Costa Rica, El Salvador, Honduras, Nicaragua and Panama are parties.

In October 2005, the Law to Prevent and Suppress the Financing of Terrorism was published and came into force.

In 2010, two events took place: (i) the Presidential Commission for the Coordination of Efforts Against Money and Other Assets Laundering, the Financing of Terrorism and the Financing of the Proliferation of Weapons of Mass Destruction in Guatemala (known by the Spanish acronym COPRECLAFT) was created; and (ii) the Asset Forfeiture Law was published on December 29 of that year and came into force on June 29, 2011.

- **Law Against Money or Other Assets Laundering and its Regulation *(Ley Contra el Lavado de Dinero u Otros Activos)*.** Through this law was created the crime of money or other assets laundering, which includes the following penalties: (i) for individuals: prison sentence from 6 to 20 years and a fine equal to the value of the property subject of the crime; and (ii) for legal entities: a fine of USD.10,000.00 to USD.625,000.00, in addition to the criminal liability of its owners, administrators or officials. Through this law, the Special Verification Intendance (*Intendencia de Verificación Especial* know by the Spanish acronym IVE) was created. This entity includes among its functions the analysis of the information and the confirmation of the existence of suspicious transactions and the filing of corresponding complaints. Also, through this law the insurance companies, among others, were established as obligated persons.

- **Law to Prevent and Suppress the Financing of Terrorism and its Regulation *(Ley para Prevenir y Reprimir el Financiamiento del Terrorismo)*.** Through this law was created the crime of financing of terrorism, which includes a penalty of prison sentence from 6 to 25 years and a fine from USD.10,000.00 to USD.625,000.00.

- **Asset Forfeiture Law and its Regulation *(Ley de Extinción de Dominio)*.** Through this law, the State of Guatemala was empowered to identify properties with illegal or criminal origin through a specific procedure, and to confiscate them in favor of the State of Guatemala. Additionally, through this law was eliminated the possibility of issuing bearer shares, for which a term was granted to convert into nominative shares all those shares that had been issued to the bearer. The conversion period expired on June 2013 and currently all shares of Guatemalan companies must be nominative.

- **Money Laundering and Terrorism Financing in the insurance industry**.

  Worldwide, insurance companies can be used to commit fraud and money laundering. One figure is intimately connected with the other. Normally, financial institutions do not suspect about the incomes obtained by claiming insurance since it is a lawful activity. This situation makes the insurance business an attractive business for criminals and organized crime.

  One of the modalities used in the insurance business to commit money laundering is the acquisition of properties of different nature, which are insured and subsequently destroyed to claim insurance. In this way, they obtain licit income through the payment of the insurance, unlike the goods that were of illicit origin.

  In addition, there are other cases where organized crime puts pressure on or extorts third parties to take life insurance policies. Subsequently, the insured persons generally died from violent acts. These cases of organized crime, involve different criminal types like money laundering, murder, kidnapping, among others.

  For the above, there should be mechanisms to facilitate the detection of all those operations that could involve money laundering or terrorist financing, to prevent the insurance business from being used as a means of committing such crimes.

- **Scope of the compliance manuals and the role of the compliance officer in the insurance companies**.

  Guatemalan law imposes to obligated persons (within which insurance companies are) the need to appoint a compliance officer and to create a manual containing the programs, rules and procedures for the detection of suspicious transactions.

  The compliance officer is in charge of monitoring the compliance of the manuals, including maintaining and sending appropriate records and communicating suspicious and unusual transactions to the respective authorities. Guatemalan law establishes that the compliance officer must dedicate his labor time exclusively to the performance of his duties as such and cannot exercise another position or attribution in the company.

Regarding the approval of the manuals, as well as the approval of its extensions or modifications, Guatemalan law establishes that is the Board of Directors or the highest governing body of the company that must approve them. Any extension or modification to the manual must be notified to the Special Verification Intendance, with a copy of the respective document, within a period of five (5) days. Failure to comply with this obligation, as simple as it may seem, could imply a fine from USD.10,000.00 to USD.50,000.00.

As mentioned above, the Special Verification Intendance (IVE), a unit of the Superintendence of Banks, is the lead entity in the verification of suspicious transactions and imposition of fines to the obligated persons. It is important to note that these fines in accordance with the law are allocated 50% for the training of the staff of such Intendance and 50% to increase their budget.

In accordance with the statistics from the Special Verification Intendance, during the year 2016, 1,533 suspicious transactions were detected (of all areas, not only insurance activity), of which 89 terminated in criminal complaints before the prosecution authorities.

The role of the compliance officers of the obligated persons and the existing legislation evidences the progress of Guatemala in its fight against money laundering and financing of terrorism. The Financial Action Task Force (FATF, also know by the Spanish acronym GAFI), an international body that sets international standards (40 recommendations) to combat money laundering, terrorist financing and the financing of the proliferation of weapons of mass destruction, establishes in its Mutual Evaluation Report of the Republic of Guatemala[1], that Guatemala shows a fairly high level of compliance with the technical criteria of the FATF recommendations, except for some areas that require improvements such as the legal classification of the financing of terrorism crime and some preventive measures.

COMPLIANCE AND ILLEGAL INSURANCE INTERMEDIATION AND PLACEMENT IN GUATEMALA

- **Criminal offences of illegal insurance intermediation and illegal insurance placement.**

[1] [1] http://www.gafilat.org/UserFiles/Biblioteca/Evaluaciones/IEM-Guatemala-CuartaRonda.pdf

The Insurance Activity Law (*Ley de la Actividad Aseguradora*), Decree No. 25-2010 of the Congress of the Republic of Guatemala, regulates two criminal offences related to the insurance activity: illegal insurance intermediation and illegal insurance placement.

The crime of illegal insurance intermediation is committed by any individual or legal entity, national or foreign, who sells or places insurance contracts in Guatemala with insurers not authorized to operate in the country. This criminal offence is punishable with a prison sentence of 1 to 3 years and a fine from USD.5,000 to USD.50,000.

The crime of illegal insurance placement is committed by any individual or legal entity, national or foreign, who places or sells insurance in Guatemalan territory, without being authorized to act as insurer in the country. This criminal offence is punishable with a prison sentence of 5 to 10 years and a fine from USD.10,000 to USD.100,000.

With these prohibitions incorporated in 2010, our legislation seeks to avoid the contracting of off-shore insurance in Guatemalan territory, in order to protect the Guatemalans who used to find problems at claiming the benefits in case of non-compliance. One of the major problems faced by policyholders was the dispute of their coverage at foreign courts, whose litigation costs are very high and leave the policyholders virtually defenseless.

- **Prevention measures implemented by the regulatory authority and the insurance companies to prevent the commission of these criminal offences.**

As a measure to prevent the illegal intermediation and illegal insurance placement, the Superintendence of Banks has requested insurance companies to present an affidavit granted by their governing bodies and general managers, stating that the facilities, infrastructure and human resources of the company are not been used to commit any of those actions.

Additionally, the Superintendence of Banks has implemented a format, through which all employees of insurance companies, individually, must declare that they are aware of the illegal placement and intermediation of insurance, which are

prohibited activities in Guatemalan territory and that they undertake not to carry out any of these activities.

The Superintendence of Banks also requires insurers to train their staff regarding the content, scope and legal consequences of such crimes.

ELECTRONIC CONTRACTS: TRENDS AND REGULATORY CHALLENGES TO INCREASE THE INSURANCE PENETRATION IN THE GUATEMALAN MARKET

- **The national legislation relating to the recognition of electronic signatures and communications.**

On September 30, 2008, the Recognition of Electronic Communications and Signatures Law (*Ley para el Reconocimiento de las Comunicaciones y Firmas Electrónicas*), Decree 47-2008 of the Congress of the Republic of Guatemala came into force, and through it, Guatemala recognizes the validity, enforceability and legal effects of contracts and communications, which are in the form of electronic communication. Article 1 of the mentioned law establishes that the law shall be applicable to all types of electronic communications, transactions or legal acts, public or private, national or international.

For the purpose of determining the meaning of "electronic communication", Article 2 of the referred law establishes that “electronic communication” shall be understood as any disclosure, declaration, claim, notice or request, including an offer and the acceptance such offer, by means of data messages".

According the legal provisions referred above, it is necessary to emphasize that the recognition of communications and electronic signatures includes any legal act, except for those specific acts or businesses in relation to which Guatemalan law requires special formalities.

It is important to clarified that the referred law distinguishes between electronic signature and advanced electronic signature as follows:

- Electronic Signature: data in electronic form that are registered in an electronic communication, or attached or logically associated with it, that can be used to identify the signatory in relation to an electronic communication and indicate that the signatory approves the information collected in the electronic communication.

- Advanced Electronic Signature: the electronic signature that meets the following requirements: (i) be bound to the signatory in a unique way; (ii) allow the identification of the signer; (iii) have been created using the means that the signer can maintain under its exclusive control; (iv) be linked to the data to which it refers, so that any subsequent changes of the data are detectable.

- **Legal effects and probative value of electronically signed documents in Guatemala.**

For both scenarios, article 33 of the referred law establishes in relation to its legal value that electronic signature or advanced electronic signature, which may be certified by a certification service provider entity, which has been produced by a secure signature creation device, shall have the same legal value with respect to the data entered in electronic form as the handwritten signature in relation to those recorded on paper and shall be admissible as evidence in the case of a judgment, which shall be valued according to the criteria of procedural law. It excludes from this regulation the provisions relating to death and to the legal acts of family law.

The first challenge for the Guatemalan authorities is the training of judges regarding the scope of the Recognition of Electronic Communications and Signatures Law. In this way, Guatemalan judges could properly apply the law in those cases that involves evidence means with electronic communications or signatures.

As a second challenge, the Superintendence of Banks must create regulations that suit the provisions of the Recognition of Electronic Communications and Signatures Law in the insurance field. To avoid arbitrary interpretations, the Superintendence of Banks must specify the operations where the use of electronic communications and signatures are allowed, as well as the procedure and technical requirements.

- **Frequent problems and limitations in the insurance activities that could be overcome through the recognition of electronic signatures and communications.**

The use of technology, through clear and pre-established standards, can be a very valuable tool in the commercial dynamics of a country. The insurance market is not an exception, since there are frequent limitations in the daily activity of insurance companies, which could be overcome through the recognition of electronic communications and signatures.

The massive commercialization of insurance is one of the great regulatory challenges for Guatemalan authorities. This figure allows a greater penetration of the insurance market, through minimum requirements and without the need for a large infrastructure. The use of electronic communications and signatures would facilitate this type of commercialization, for example by making the signing of the policies more expeditious.

However, the recognition of electronic communications and signatures is not limited to massive commercialization only. This technology can be used in the signing of policies of all kinds of insurance, in the communication of claims, in the cancellation and withdrawal of insurance policies, and all those situations where the handwritten signature can be replaced by a digital signature, promoting a faster and more immediate interaction.

Another example is the statement of facts that the insured must make at the time of contracting life insurance. Article 880 of the Guatemalan Commercial Code force the insurance applicant to declare in writing all the facts that are important for the assessment of the risk. Said statement is a determining element for the insurer for the determination of risk, to the point that article 908 of the same legal body empowers the insurer to terminate the contract in advance if such statement is inaccurate or therein omits important facts. Such written statement may constitute an obstacle in the dynamics of insurance, which would be overcome through the regulation that the Superintendence of Banks must carry out in this regard.

As long as there is no specific regulation by the insurance authorities, we will be subject to the interpretation that the judicial authorities (not specialized in the matter) can make of the current legislation.

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NEW CORPORATE GOVERNANCE RULES IN COSTA RICA

1. Background

In the wake of the 2009 worldwide financial crisis or "great recession", international financial regulation bodies such as the *Basle Committee on Banking Supervision* and the *International Association of Insurance Supervisors (IAIS)* searched for answers to the question "What caused this crisis?" Although the causes were many, uniformly regulators came to the conclusion that lack of sound corporate governance practices was one of the root causes of banks, insurers and other financial services providers getting themselves into deep trouble. Boards of directors that were asleep at the helm, "runaway" CEOs, figurehead audit and risk committees, and a lack of checks on moral hazard, it was said, were to blame for many of the problems.

This led them to re-evaluate existing corporate governance rules and policies as applied in the financial services industries, specifically in the context of risk-based supervision, Basel III and Solvency II-type systems. Costa Rica has not escaped this phenomenon and recently, after following the public consultations process required

before adopting new regulations, Costa Rica's financial services regulator, the *National Financial System Supervisory Council* (known as "CONASSIF" for its acronym in Spanish), enacted a new set of corporate governance regulations that would replace existing rules for banks, insurers, pensions managers and securities market participants.

2. Overview of new regulations

On January 19th, 2016 CONASSIF published a draft regulation on corporate governance. Under Costa Rican law, before adopting any new regulations CONASSIF must publish a draft and hear observations from supervised financial entities and the general public. Sources close to CONASSIF indicated at the time that the main drivers behind the adoption of these new regulations are the banking and insurance superintendents, both of which had been pushing for a modernization of Costa Rica's financial services regulatory system to bring it closer to a risk-based approach.

After receiving multiple observations and commentary from all sectors, finally CONASSIF adopted the new rules in December of 2016, establishing a six-month period for their entry into force. This means that the new corporate governance rules are in effect as of June 2017.

By way of summary, the following are some of the key features of the new regulation:

- The new regulation repeals the existing corporate governance rules adopted in June 2009. In theory, the previous rules had much more of a "checklist" or prescriptive nature, in that they spell out a series of requirements that all companies, regardless of their specific size, industry, scale and risks, must meet. CONASSIF deems that this approach is now *passé*.

- CONASSIF has looked to the Organization for Economic Cooperation and Development (OECD) guidance papers on corporate governance and seeks to establish regulations based on principles rather than rigid checklists. To quote the regulator, "*regulation should provide orientation with respect to the supervisor's expectations in connection with the management of regulated entities and empower the board of directors, as the primary responsible party in charge of the business or entity, in the definition of the manner in which the principles contained in the regulation are satisfied*."
- Despite this intended focus, many in the industry feel that the new regulations still carry a significant prescriptive weight, instead of a more flexible principles-based approach. This had been one of the main criticisms of the draft, but few changes in this sense were incorporated into the definitive rules.
- The regulations apply to all sectors, including State and privately-owned commercial banks, non-bank financial entities, savings and loans associations and coops, currency exchanges, securities traders, mutual fund managers, securitization companies, insurers, reinsurers, insurance brokers and agents, pension fund managers, and, somewhat unexpectedly, non-financial securities issuers.
- One of the main features that distinguishes these proposed regulations from the existing rules is the introduction of proportionality and differentiation criteria, which purportedly allow each supervised entity, depending on it size, ownership structure, business and type of entity, to define its own risk profile and assess the potential impact of its operation on third parties.
- The draft sets forth definitions of the duties of care and loyalty. Although both duties exist in Costa Rica as derived from basic commercial law principles, this would be an attempt put them in black and white.

- The rules provide for a series of duties incumbent upon boards of directors, sets minimum guidance on the profile that candidates should meet to be eligible to hold a position on the board, board member selection, the role of the chairperson, etc. "Fit and proper" rules have become increasingly important in light of two recent State-owned bank scandals in Costa Rica.
- The new rules require companies to define and state their risk appetite through a formal risk appetite statement, including quantitative and qualitative parameters. This then needs to be managed through effective risk management mechanisms, including lines of defense and an entity risk manager. A new compliance unit or function will also be necessary. Internal and external audit rules are also reinforced.
- The new rules require the adoption of a conflicts of interest policy.
- The new rules refer specifically to the role and duties of various committees, including audit, risk, appointments, and compensation.
- Guidance is provided on the duties and qualifications that a general manager must meet, as well as compensation, transparency and accountability parameters.
- Special guidance is provided for corporate governance of financial groups or conglomerates.

3. Critical assessment:

For now, companies that have not already done so would do well by familiarizing themselves with the new requirements, assessing how much their current corporate governance systems and culture would need to adapt in order to comply, and setting up a plan to ensure that the required adaptations can be done with the least amount of cost. Increased levels of board member duties and responsibilities may even prompt a shake-up of current boards of directors. Where companies do not yet have

a risk manager, hiring may become necessary. Overall, a proper "gaps analysis" between the existing corporate governance system and the new, principles-based rules would be useful in order to define a work program for any necessary adaptations.

More generally, the ultimate goal is for corporate governance rules to aid businesses in operating more effectively while taking account of the interest of all of the company's relevant stakeholders. While understandable that local regulators are seeking to modernize existing corporate governance rules, many in the Costa Rican financial services sector wonder if Costa Rica requires state-of-the art rules that will come with a significant cost and administrative burden. With few exceptions, Costa Rica's financial entities have operated soundly for many decades with the existing corporate governance model. The most notable exceptions have been in the State-owned sector (both Banco Anglo and Bancrédito are State-owned bank failures owing, in part, to poor corporate governance).

To use a metaphor, do Costa Rican drivers really need a Ferrari? Can one actually drive a Ferrari on Costa Rican roads? Or would everyone be better served with a decent Fiat or Toyota (less costly, easier to drive, equally effective in getting from point A to point B)? Food for thought.

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Compliance Trends and Developments in Insurance/Reinsurance: A Regional Overview

Alternative Insurance Sales Channels in Central America

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Applicable Laws and Regulations

Under insurance laws and regulations in Central America, only locally licensed insurance carriers or licensed intermediaries (agents or brokers) are permitted to sell insurance. However, during the past decade an exception have been created throughout in order to allow the sale of insurance products through alternative insurance sales channels.

The main purpose for the creation of this limited intermediary figure is to promote the development of inclusive insurance markets across the region. Therefore, alternative insurance sales channels can only sell certain kinds of insurance products that are easy to comprehend and handled for an average consumer.

The following laws and regulations set the main legal framework regarding the sale of insurance products through alternative insurance sales channels in Central America:

- Costa Rica
    - Act 8653, Insurance Market Regulatory Law *(Ley Reguladora del Mercado de Seguros)*
    - SUGESE Agreement 01-08, Regulations on Authorizations, Registrations, and Operating Requirements *(Reglamento sobre Autorizaciones, Registros y Requisitos de Funcionamiento)*
    - SUGESE Agreement 03-10, Regulation on Insurance Commercialization *(Reglamento sobre Comercialización de Seguros)*
- El Salvador
    - Act 844, Insurance Companies Act *(Ley de Sociedades de Seguros)*

- SFF Rule NPS-410, Rules for the Registration of Entities Doing Mass Marketing of Insurance Policies *(Normas para el Registro de Entidades que Promuevan y Coloquen en Forma Masiva Pólizas de Seguros)*

- Guatemala
  - Act 25-2010, Insurance Activity Act *(Ley de la Actividad Aseguradora)*
  - Resolution JM-73-2015, Regulation for the Mass Marketing of Insurance *(Reglamento para la Comercialización Masiva de Seguros)*
- Honduras
  - Act 22-2001, Insurance and Reinsurance Companies Act *(Ley de Instituciones de Seguros y Reaseguros)*
  - CNBS Circular No. 054-2003, Regulation on Other Means for Insurance Commercialization *(Reglamento Sobre Otras Formas de Comercialización de los Seguros)*
- Nicaragua
  - Act 733, General Insurance, Reinsurance and Bonding Act *(Ley General de Seguros, Reaseguros y Fianzas)*
  - Resolution No. CD-SIBOIF-764-1-ENE16-2013, Regulation on the Commercialization of Mass Insurance *(Norma para la Comercialización de Seguros Masivos)*

General Registration Requirements

Even though banks are the most common alternative insurance sale channel in Central America, there are other kinds of companies, such as mobile phone carriers, supermarkets and appliance stores, partnering with locally licensed

insurance carriers within the region in order to become alternative insurance sales channels. The authorization of these companies as alternative insurance sales channels requires registration, through a locally licensed insurance carrier, with the local insurance regulator. [1]

In order to obtain the aforementioned registration, there are several requirements companies applying for it must comply. Although the registration requirements vary per country, the following requirements are the most common ones:

- The main business activity of the company must be other than insurance.
- The company must have the infrastructure that allows the sale of insurance policies.
- The company must sign a commercialization agreement with a locally licensed insurance carrier.
- The company must provide certain documents, including but not limited to:
    - Certificate of Incorporation;
    - Financial Statements;
    - Organizational Structure; and
    - Internal Controls Policies and Procedures.

Monitoring Role of the Insurance Carriers

When partnering with a company in order to register it as an alternative insurance sale channel, the insurance carrier is delegating limited authority to this company whom will be in fact acting as its agent. Therefore, the insurance carrier is responsible for the proper monitoring of the alternative insurance sale channel

[1] http://www.assalweb.org/assal_nueva/docs_grupos/20160426104906.pdf

and is directly liable over any regulatory violation of the channel during the insurance sales process.

An important aspect of the monitoring role of the insurance carrier over its alternative insurance sales channels is achieved through the training of the employees of the channel that will be involved on the insurance sales process. This regulatory requirement serves as a preemptive strategy in order to avoid regulatory violations and also helps to assure that the customers of the channel receive proper orientation regarding the insurance products been offered to them.

Current Situation

The acceptance and development of alternative insurance sales channels varies across the region. Costa Rica and El Salvador seems to be the countries where this limited intermediary figure has been more accepted as there are in both countries a diverse group of companies registered and actively acting as alternative insurance sales channels.

On the other hand, it seems that the alternative insurance sales channels have had a slower acceptance in Guatemala and Nicaragua. There are only a few companies registered as alternative insurance sales channels and products registered as mass marketing insurance products in both countries.

In the case of Honduras, the applicable regulation only allows banks and other financial institutions to register as alternative insurance sales channels. Therefore, the development is limited to this industry.

Some recommendations in order to improve the acceptance and development of the alternative insurance sales channels in Central America include, but are not limited to, the implementation of expedite and less intrusive channels registration processes; the implementation of expedite product registration processes; and the elimination of excessive reporting requirements.

THE EMBARGO AND BEYOND: LEGAL HURDLES TO DOING BUSINESS IN CUBA

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Main Impediments to Doing Business in Cuba

- Embargo
- Libertad (Helms-Burton) Act
- Unsettled Claims
- Country risk under current Cuban legal regime: the rule of law issue

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Complex Spider-Webbing of US Laws Relating to Cuba Over Past 55 Years

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Executive Orders

- 12854 Implementation of the Cuban Democracy Act (Effective Date - July 4, 1993)

Statutes

- Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 18 U.S.C. § 2332d
- Cuban Democracy Act of 1992 (CDA), 22 U.S.C. §§ 6001-6010
- Sections 5 and 16 of the Trading With the Enemy Act (TWEA), 50 U.S.C. App. §§ 5, 16
- Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), 22 U.S.C. §§ 7201-7211
- Helms-Burton Act (To be discussed)

Code of Federal Regulations

- 31 CFR Part 515 - Cuban Assets Control Regulations

Federal Register Notices

- 81 FR 4583 – January 2016 Amendments to the Cuban Assets Control Regulations
- 80 FR 56915 - Sept. 2015 Amendments to the Cuban Assets Control Regulations
- 80 FR 2291-15 – January 2015 Amendments to the Cuban Assets Control Regulations
- 77 FR 71530-12 - 2012 Amendments to the Cuban Assets Control Regulations
- 76 FR 5072-11 - 2011 Amendments to the Cuban Assets Control Regulations
- 75 FR 10997-10 - Amendments to authorize certain types of exportation
- 74 FR 46000-09 - 2009 Amendments to the Cuban Assets Control Regulations
- 68 FR 14141-03 - 2003 Amendments to the Cuban Assets Control Regulations
- 66 FR 36683-01 - Exports of Agricultural Products, Medicines, and Medical Devices to Cuba, Sudan, Libya, and Iran; Cuba Travel-Related Transactions

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Embargo

- At present, the embargo, which limits American businesses from conducting business with Cuban interests, is still in effect and is the most enduring trade embargo in modern history.
- It is administered under Cuban Assets Control Regulations (CACR) (31 CFR Part 515)
- CACR is managed by the Office of Foreign Assets Control (OFAC), which is involved in:
    - Enforcing and administering economic & trade sanctions
    - Terrorism & financial intelligence
    - International narcotics traffickers, weapons of mass destruction, & other threats

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Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 / Helms-Burton Act

- The embargo cannot be lifted until the claims are resolved
- §207(d) of the Libertad Act: "Satisfactory resolution of property claims by a Cuban Government recognized by the United States remains an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba."
- Extended the territorial application of the initial embargo to apply to foreign companies trading with Cuba
- Penalizes foreign companies allegedly "trafficking" in property formerly owned by U.S. citizens but confiscated by Cuba after the Cuban revolution. The act also covers property formerly owned by Cubans who have since become U.S. citizens
    - Foreign companies that do business in Cuba may be prevented from doing business in the U.S.
    - Any non-U.S.(foreign) company that "knowingly traffics in property in Cuba confiscated without compensation from a U.S. person" can be subjected to litigation and may be barred from entry into the U.S. (Title III)

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Marketplace Summary

- Prior policy of encouraging interaction vs. New policy discouraging relations
  - Prior policies included more relaxed export controls and general authorization for acquiring licenses, particularly in the categories of civil aviation safety, telecommunications, agricultural items and commodities.
  - President Trump announced changes to the Cuba Sanctions program intended to discourage relations with Cuba. The announced changes will not take effect until new regulations are issued.
- Some non-U.S. businesses have been doing business in Cuba since the 1990s
  - Spain: more than 200 Spanish firms operate in Cuba; estimated bilateral trade is $1.07 billion per year
  - Canada: pharmaceuticals, mining, hotels
  - Brazil: investment in Mariel port project, almost $700 million

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New Policy & Amendments to OFAC

December 17, 2014

- Policy measures announced to "further engage and empower the Cuban people "
- Facilitated travel to Cuba for Americans
- Expanded U.S. sales/exports to Cuba
- Allowed U.S. financial institutions to open correspondent accounts at Cuban financial institutions to facilitate authorized transactions
- Authorized additional imports and certain transactions with Cuban nationals located outside of Cuba
- Allowed a number of other activities related to telecommunications, financial services, trade, and shipping

January 16, 2015

- BIS and OFAC published changes to licensing policy and license exceptions in the EAR

September 21, 2015

- BIS increased the number of license exception provisions
- Created a new Cuba licensing policy to help ensure the safety of civil aviation and the safe operation of commercial passenger aircraft
- Made the deemed export and deemed re-export license requirements for Cuba consistent with other sanctioned destinations

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New Policy & Amendments to OFAC

January 27, 2016

- Removed financing restrictions for most types of authorized exports
- Increased support for the Cuban people and facilitate authorized exports
- Facilitated carrier service by air and with Cuban airlines
- Expanded authorizations within existing travel categories to facilitate travel to Cuba

January 6, 2017

- Further expanded travel regulation to facilitate travel to Cuba. People-to-People travel allowed without tour guide (self-reporting approved).
- Removed requirement for a specific license from OFAC for U.S. persons providing carrier services to, from, or within Cuba
- Removed temporary sojourn license requirement for aircraft remaining in Cuba for less than seven days

June 16, 2017 (Announced by White House Pending Issuance of Amended Regulation)

- Will prohibit commerce with Cuban businesses related to the military and intelligence services
- Will tighten travel restrictions and require Americans to travel through a licensed tour company and be accompanied by a company representative
- See FAQ's updated July 25,2017 (attached)

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The Issue of the Unsettled Claims

- **Foreign Claims Settlement Commission**
  - Set up in 1971 under International Claims Settlement Act of 1949 to adjudicate U.S. claims against Cuba.
  - Took evidence – documentary proof, witnesses, expert witnesses
  - 5,913 U.S. corporations and individuals have been awarded $1.9 billion worth of claims for factories, farms, homes and other assets
  - With 6.0 percent annual interest, today those claims are worth **$8 billion**
  - The U.S. State Department estimates an additional $2 billion or so in judgments awarded to plaintiffs who have sued the Cuban government in U.S. courts

- **Cuban government has paid lump sum amounts to settle outstanding property claim to several foreign states, including Canada, France, Spain, and Switzerland**

- **Remaining property claimants against Cuban government consists of three groups:**

  1) U.S. National Claimants (Covered by Title V, International Claims Settlement Act of 1949)

  2) Cuban Claimants Still in Cuba

  3) Cuban Exile Community Claimants
     - Because members of this group were nationals of Cuba when their property was expropriated, international law generally would not recognize their right of recovery
     - Jurisdiction over their claims would reside within the Cuban judiciary

  The 2007 Creighton Report recommended establishing a Cuba-U.S. Claims Tribunal, by bilateral treaty or executive agreement. Such an agreement would have international legal capacity, as an arbitral body, to resolve outstanding property dispute issues between Cuba and the U.S. and the respective nationals thereof

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The Importance of Resolving the Claims

- Under U.S. embargo law, claims must be resolved for the embargo to be lifted
- International law recognizes the right of American claimants to be compensated
- Remains to be seen how compensation can be effected, given Cuba's dire economic straits. But it is unlikely to be possible without outside help, in the form of loans from third countries or international organizations
- Compensation to the claimants must be addressed if Cuba wishes to assure potential foreign investors that their investments will be safe. On the contrary, unresolved claims may create a significant obstacle & pose a risk to U.S. companies investing in Cuba, to Cuban companies doing business in the U.S., and to an increased U.S. opening with Cuba.
- A bilateral system such as the U.S.-Iran accords to resolve property claims between foreign claimants and Cuba would be supported by international law

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The Cuban Legal Regime & Rule of Law

- **Foreign Investment Act of 1995 (Law No. 77), Sept. 5, 1995**
  - Allowed for limited presence of foreign capital in Cuba
  - Foreign Direct Investment (FDI) was limited and excluded sectors such as sugar and agriculture
- **Law of Foreign Investment (Law No. 118), March 29, 2014**
  - Offered wider participation of FDI in Cuba (excluding sectors of Health Services, Education Services and Military Services)
  - Allowed FDI to participate in private legal economic structures with Cuban companies of Cuban capital
- **ZED (Zona Especial de Desarrollo Mariel)**
  - Special Economic Development Zone to encourage and promote foreign investment
  - Allows 100% investment

Are these amendments enough?

- General perception that amended laws do not go far enough to protect foreign investment
- Well-publicized and seemingly heavy-handed treatment of foreign investors in Cuba
- Cuban military runs the business in Cuba

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Cuban Court of International Commercial Arbitration (CCACI)

- Main function – supporting Cuban foreign trade and investment
- CCACI has jurisdiction over voluntarily submitted contractual or extra-contractual matters relating to (1) international commercial transactions, (2) JVs or FFCC in disputes involving Cuban individuals or entities and (3) parties to an AEIs or other form of joint businesses with participation of foreign capital
- CCACI is a signatory to both the New York and Geneva Conventions
- However, because CCACI rulings are not made in public, it has been difficult to gauge its performance and impartiality
- Investors fear CCACI bias in favor of Cuban state entities & are concerned over successfully collecting on awards should they prevail
- Lack of transparency and inability to verify which awards have been respected, what has been paid, what amount, and what types of transactions, making investors hesitant to invest

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QUESTIONS?

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OFAC Updated FAQs

1. How will OFAC implement the changes to the Cuba sanctions program announced by the President on June 16, 2017? Are the changes effective immediately?

OFAC will implement the Treasury-specific changes via amendments to its Cuban Assets Control Regulations. The Department of Commerce will implement any necessary changes via amendments to its Export Administration Regulations. OFAC expects to issue its regulatory amendments in the coming months. The announced changes do not take effect until the new regulations are issued.

2. What is individual people-to-people travel, and how does the President's announcement impact this travel authorization?

Individual people-to-people travel is educational travel that: (i) does not involve academic study pursuant to a degree program; and (ii) does not take place under the auspices of an organization that is subject to U.S. jurisdiction that sponsors such exchanges to promote people-to-people contact. The President instructed Treasury to issue regulations that will end individual people-to-people travel. The announced changes do not take effect until the new regulations are issued.

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OFAC Updated FAQs

3. Will group people-to-people travel still be authorized?

Yes. Group people-to-people travel is educational travel not involving academic study pursuant to a degree program that takes place under the auspices of an organization that is subject to U.S. jurisdiction that sponsors such exchanges to promote people-to-people contact. Travelers utilizing this travel authorization must: (i) maintain a full-time schedule of educational exchange activities that are intended to enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities, and that will result in meaningful interaction between the traveler and individuals in Cuba; and (ii) be accompanied by an employee, consultant, or agent of the sponsoring organization, who will ensure that each traveler maintains a full-time schedule of educational exchange activities. In addition, the predominant portion of the activities engaged in by individual travelers must not be with prohibited officials of the Government of Cuba or prohibited members of the Cuban Communist Party (as defined in the regulations). Once OFAC issues the new regulations, new individual people-to-people travel will not be authorized.

4. Will organizations subject to U.S. jurisdiction that sponsor exchanges to promote people-to-people contact be required to apply to OFAC for a specific license?

No. To the extent that proposed travel falls within the scope of an existing general license, including group people-to-people educational travel, persons subject to U.S. jurisdiction may proceed with sponsoring such travel without applying to OFAC for a specific license. It is OFAC's policy not to grant applications for a specific license authorizing transactions where a general license is applicable. Once the State Department publishes its list of entities and subentities with which direct transactions will not be authorized and OFAC issues its regulations, no new transactions, including travel-related transactions, may be initiated with these identified entities and subentities. Prior travel arrangements that may involve these entities or subentities will still be authorized. See FAQ 8.

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OFAC Updated FAQs

5. How do the changes announced by the President on June 16, 2017 affect individual people-to-people travelers who have already begun making their travel arrangements (such as purchasing flights, hotels, or rental cars)?

The announced changes do not take effect until OFAC issues new regulations. Provided that the traveler has already completed at least one travel-related transaction (such as purchasing a flight or reserving accommodation) prior to the President's announcement on June 16, 2017, all additional travel-related transactions for that trip would also be authorized, including if the trip occurs after OFAC issues new regulations, provided the travel-related transactions are consistent with OFAC's regulations as of June 16, 2017. Once the State Department publishes its list of entities and subentities with which direct transactions will not be authorized and OFAC issues its regulations, no new transactions may be initiated with these identified entities and subentities. Prior travel arrangements that may involve these entities or subentities will still be authorized. See FAQ 8.

6. How does the new policy impact other authorized travel to Cuba by persons subject to U.S. jurisdiction?

The new policy will also impact certain categories of educational travel as well as travel under support for the Cuban people, as set forth in the National Security Presidential Memorandum signed by the President on June 16, 2017. In addition, following the issuance of OFAC's regulatory changes, travel-related transactions with prohibited entities identified by the State Department will not be permitted, unless otherwise authorized by OFAC. Guidance will accompany the issuance of the new regulations.

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OFAC Updated FAQs

7. Will persons subject to U.S. jurisdiction be required to apply to OFAC for a specific license to engage in Cuba-related travel and transactions consistent with the other authorized categories of travel?

To the extent that proposed travel falls within the scope of an existing general license, persons subject to U.S. jurisdiction may proceed with such travel without applying to OFAC for a specific license. It is OFAC's policy not to grant applications for a specific license authorizing transactions where a general license is applicable. Once the State Department publishes its list of entities and subentities with which direct transactions will not be authorized and OFAC issues its regulations, no new transactions may be initiated with these identified entities and subentities. Prior travel arrangements that may involve these entities or subentities will still be authorized. See FAQ 8.

8. How do the changes announced by the President on June 16, 2017 affect authorized travelers to Cuba whose travel arrangements may include direct transactions with entities related to the Cuban military, intelligence, or security services that may be implicated by the new Cuba policy?

The announced changes do not take effect until OFAC issues new regulations. Consistent with the Administration's interest to avoid negatively impacting Americans for arranging lawful travel to Cuba, any travel-related arrangements that include direct transactions with entities related to the Cuban military, intelligence, or security services that may be implicated by the new Cuba policy will be permitted provided that those travel arrangements were initiated prior to the State Department listing of the entity or subentity. Once the State Department adds an entity or subentity to the list, new direct financial transactions with the entity or subentity will not be permitted, unless authorized by OFAC.

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OFAC Updated FAQs

9. How do the changes announced by the President on June 16, 2017 affect companies subject to U.S. jurisdiction that are already engaged in the Cuban market and that may undertake direct transactions with entities related to the Cuban military, intelligence, or security services that may be implicated by the new Cuba policy?

The announced changes do not take effect until OFAC issues new regulations. Consistent with the Administration's interest in not negatively impacting American businesses for engaging in lawful commercial opportunities, Cuba-related commercial engagement that includes direct transactions with entities and subentities related to the Cuban military, intelligence, or security services that may be implicated by the new Cuba policy will be permitted after the issuance of new regulations by OFAC, provided that those commercial engagements were in place prior to the issuance of the forthcoming regulations. For example, businesses will be permitted to continue with transactions outlined in contingent or other types of contractual arrangements agreed to prior to the issuance of the new regulations, consistent with other CACR authorizations.

10. Does the new policy affect the means by which persons subject to U.S jurisdiction may purchase airline tickets for authorized travel to Cuba?

No. The new policy will not change the means by which persons subject to U.S. jurisdiction traveling to Cuba pursuant to the 12 categories of authorized travel may purchase their airline tickets.

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OFAC Updated FAQs

11. Can I continue to send authorized remittances to Cuba?

Yes. The announced policy changes will not change the authorizations for sending remittances to Cuba. Additionally, the announced changes include an exception that will allow for transactions incidental to the sending, processing, and receipt of authorized remittances to the extent they would otherwise be restricted by the new policy limiting transactions with certain identified Cuban military, intelligence, or security services. However, consistent with the President's policy announcement, changes will be made to the definition of prohibited members of Government of Cuba that may exclude certain persons from receipt of such remittances.

12. How will the new policy impact existing OFAC specific licenses?

The forthcoming regulations will be prospective and thus will not affect authorized transactions under existing specific licenses, unless explicitly noted.

OFAC Updated FAQs

13. How will U.S. companies know if a Cuban counterpart is affiliated with a prohibited entity or subentity in Cuba? The State Department will be publishing a list of entities and subentities with which direct transactions generally will not be permitted. Guidance will accompany the issuance of the new regulations. The announced changes do not take effect until the new regulations are issued.

14. Is authorized travel by cruise ship or passenger vessel to Cuba impacted by the new Cuba policy? Persons subject to U.S. jurisdiction will still be able to engage in authorized travel to Cuba by cruise ship or passenger vessel. Following the issuance of OFAC's regulatory changes, travel-related transactions with prohibited entities and subentities identified by the State Department generally will not be permitted. Guidance will accompany the issuance of the new regulations.

Chapter News

An Excerpt from the Australian Chapter's Annual Report 2016 and Chapter Plan 2017

By Richard Gelski and Tim Castle, Chapter Co-Chairs

Editorial Note:

By printing excerpts of Chapters' reporting documents, we hope to provide members with access into the past events and future plans of various Chapters. In so doing, we hope to invigorate other Chapters to take action! We also hope to stimulate cross-dialogue and remind people that as they travel, they have fellow Section members to visit, and their events to attend. Please do note, though, that due to the delay in publication, some of the events referenced may be referred to in the incorrect tense.

1. Objective

The Australian Chapter aims to build an engaged community of Australian lawyers interested in New York law as part of the global chapter strategy of NYSBA's International Section.

2. Review of 2016—Reactivation of the Chapter

We recently sought to re-activate the Australian Chapter by hosting an evening seminar entitled "Emerging Developments in Securities Actions in New York: An Insiders Perspective" on Wednesday 19 October 2016. The seminar was presented by Gene Phillips of PF2, a New York consulting firm that has recently established an Australian office. The seminar was held at the Sydney offices of Johnson Winter Slattery, a firm of which Chapter Co-Chair Richard Gelski is a partner.

The seminar was attended by about 40 participants, and was considered by all to have been a great success, from three perspectives: (i) content, (ii) networking opportunities, and (iii) awareness of NYSBA.

The other key highlight from 2016 was our recruitment of Katlyn Kraus to be our Chapter Secretary. Katlyn is a younger New York admitted attorney who is in the process of obtaining local admission in Australia. Katlyn has also prompted some thinking about the attraction of the Chapter for younger practitioners, which is discussed below.

3. Activities Planned for 2017

Our proposed activities for 2017 fall into three groups: seminars, networking drinks and New York CLE. At this stage the activities are planned only for Sydney (where most of our members are based), but we hope to extend these to Melbourne (the second largest member base) during the course of the year:

(a) **Seminars**—We plan to hold two substantive seminars, one in each half of the year, as follows:

1) Feb. 2017—A Joint seminar with the NSW Bar Association entitled "President Trump and the New U.S. Administration—Likely Impact on International Law: An Australian Perspective."

2) Aug. 2017—Seminar topic tba. One possible topic suggested by Sullivan & Cromwell is "The State of the Market for Legal Services in New York."

(b) **Networking Drinks**—We plan to hold bi-monthly networking drinks at the office of a U.S. law firm—which would sponsor those drinks. These would be held on the third Thursday in January, March, May, July, September and November. There would also be Holiday Drinks in December.

(c) **CLE**—It has been suggested that the Chapter could play a valuable role in holding New York qualifying CLEs for U.S. attorneys, which are currently provided in-house. One suggestion is to hold the CLE event on the same evening as, and immedi ately prior to, the networking drinks. This is a work-in-progress.

Our expectation is that, through the course of these events, we will create awareness of NYSBA, ideally increase membership of NYSBA and the International Section, encourage participation at Seasonal Meetings, and develop ideas for other activities in future years.

4. Members

A key focus of our recent October seminar was the identification of the Chapter membership base. The database provided to us by Tiffany consisted of about 350 names of which 50 are current members of NYSBA (not all being members of the International Section). The other 300 others fell into various groups: (i) former members, (ii) non-members who were admitted to the New York State Bar, and (iii) others, principally people who had ordered material online from NYSBA. Many of these people could not be reached due to changes in email addresses, and some were no longer in practice.

Of the 350, over half were based in Sydney, a third in Melbourne, and the remaining sixth in other parts of Australia.

We have prepared our own updated database of names based on those who responded to our email invi-

tation to the October event, either attending or notifying us that they could not attend. This database contains 46 names from Sydney.

Realistically we believe that we could build our numbers to about 100 in Sydney and 50 in Melbourne as regular participants at NYSBA events, and ideally as members of NYSBA and the International Section.

The key to this will be facilitating communication in a market which is already crowded with emails and organisations vying for lawyers' attention. We propose to set up an open LinkedIn Group as a means of facilitating communication with members about Chapter events, as most Australian lawyers already use this platform and look at it regularly.

Over time we will endeavour to transition all members onto the Communities pages on the NYSBA website, and certainly we will monitor those pages and pass on a link to any pertinent information that might be of interest to our Australian members.

5. Younger Members Initiative

One area in which the Chapter can play a role is to provide a welcome service for New York or U.S. attorneys generally who come to Australia to work or for internship. The service would have a dual benefit. For the Chapter it would mean identifying people who could contribute to the life and work of the Chapter, including by attending CLE events and networking drinks. For the individual it would mean having a "familiar face" to meet up with after arriving, to ask questions which may arise on moving to a new country/jurisdiction.

Katlyn Kraus will be giving further consideration to how we can develop and promote this initiative. It might be something that can be done through an appropriate message being placed on the NYSBA website, and could either be left as an Australian initiative or might be something taken up more broadly by the Section.

6. Liaison With New York Visitors

Related to the Younger Members Initiative is a liaison function for the Chapter. Subject to all the usual constraints about availability, we would like to trial a hospitality service for visiting members of NYSBA to Sydney.

The aim would be for one of the members of the Chapter to host the visitor for at least a social coffee meeting during their stay in Sydney. This has the benefit to the Chapter of making contact with the visitor (whether from New York or elsewhere) and also allows the visitor—whether on a work or social visit—to meet with someone local when they are here.

This could be achieved through posting a notice on the NYSBA website emphasising the contact details for the Chapter Co-Chairs and Secretary, and encouraging the visitor to make contact. However, we are open to any other ideas about the benefits or operation of such a service. This article was writen on November 14th, 2016.

Seminar 15 February 2017: How to Navigate as an American in a World of Tax Transparency

Provided by the Swedish Chapter of the International Section

On 15 February 2017, the New York State Bar Association, together with American Chamber of Commerce, Legal Works Nordic and U.S. Tax and Financial Services, hosted a seminar in Stockholm Sweden addressing the tax transparency Americans now face. The seminar attracted parties from the financial sector, corporate sector, and professional tax sector, as well as individual and corporate taxpayers residing in Sweden who are subject to U.S. income taxation. Speakers included Maja Fohlin Gyllner, Majattorney; Björn Nordgren, GE; Ulrika Hansson, Swedish Bankers Association; Galia Antebi, Ruchelman PLLC; Darlene Hart, U.S. Tax & Financial Services; David Daley, USTAXFS, and Ben Roode, U.S. Embassy.

Tax transparency has an enormous effect on not only Americans living abroad, but also on any global trade and business. The FATCA regulations, which came into effect in July 2014, require foreign financial institutions to report U.S. account holders' year-end balances, and certain income and capital gains, directly to the IRS or via their domestic tax authority (if a model 1 intergovernmental agreement is in place between their tax authority and the U.S.). FATCA also requires certain individuals to file Form 8938 where they report financial assets held by them.

This form is not a replacement for the FBAR but an addition to it failing to comply with U.S. income and informational tax obligations may have serious consequences such as being subject to 30% FATCA withholding tax, irrespective of U.S. income tax due, penalties and criminal prosecution. There are still programs available enabling Americans abroad to voluntarily comply with their U.S. tax filing and reporting obligations, minimizing their risks of having to pay penalties and be criminally prosecuted.

During the seminar, the panel of speakers participated and shared their professional experience in the field and problems faced by their organizations and their clients who seek to comply but find some inconsistencies among the FATCA regulations and the local implementation legislation. The OECDs Common Reporting Standards were also discussed, completing the picture of the transparent world we all live in today.

Recent Developments in Germany for Closely Held Businesses and Private Clients

Inheritance Tax Reform of 2016/New Cultural Property Act in 2016

By Dr. Christian von Oertzen and Dr. Manfred Reich

A. Inheritance Tax Reform of 2016

The German Federal Constitutional Court ruled on December 17, 2014 that the relief model for business property that granted tax relief of 85% or 100% of the value of acquired business assets was unconstitutional. The court gave the legislature until June 30, 2016 to amend the relief model for business assets and stated that the unconstitutional provisions will apply until the new provisions take effect.

The coalition's agreement was published on June 21, 2016 and the German parliament gave its approval on June 24, 2016 (BT-Drs. 18/8911). But the representatives of the German federal states rejected the coalition's agreement on July 8, 2016 and demanded further amendments to the proposed relief models. As the amendment deadline of June 30, 2016 was not met, the German Federal Constitutional Court stated on July 14, 2016 that it would discuss an additional decision if the reform process was not finished by the end of September. The representatives of the German federal states and representatives of the German parliament tried to find an agreement on September 8, 2016 and failed at first but found a solution on September 21/22, 2016 (BT-Drs. 18/9690). The reform process had been under way for more than 20 months.

"The management assets are fully taxable at the regular rate insofar as the value of these assets exceeds 10% of the acquired company's assets."

The relief models for business assets are relevant in cases of unlimited, limited or extended limited gift or inheritance tax liability in Germany. The unlimited inheritance or gift tax liability applies especially if the deceased/donor or the heir/legatee/donee has a residence or habitual abode in Germany or is a German who left Germany for not more than five years (10 years Germany/U.S.). The limited inheritance and gift tax liability is applicable if a person who lives abroad has, for example, an interest in a German partnership with business assets or holds a share of at least 10% (alone or with other closely related persons) in a corporation. The extended limited inheritance and gift tax liability can be relevant for Germans who had unlimited income tax liability for at least five years of the last 10 years before leaving Germany. Therefore, the relief models are relevant even for people who do not live in Germany.

The coalition's agreement, published on June 21, 2016, was not changed significantly and the reform became effective with retroactive effect on July 1, 2016. Two relief models are available for persons subject to taxation on the transfer of business assets. According to the standard exemption, 85% of the value of the business assets is not subject to tax. To avoid subsequent taxation, the recipient has to continue to operate the acquired business for a five-year retention period and has to maintain at least 80% of the business's payroll (wage regulation). The second exemption applies to 100% of the value of the business assets. Here, the retention period is seven years and 100% of the business's payroll must be maintained. A heated debate arose on whether there has to be a further requirement to opt for the second exemption. On September 21/22, 2016 it was agreed that the management assets must not exceed 20% of the value of the privileged entity.

In general, all taxable business assets (including the assets of a GmbH & Co. KG) as well as shares in corporate enterprises (shareholdings of more than 25%, alone or with others within a pooling agreement) will profit from the preferential tax treatment. The extent to which interests or shares in holding companies should be excluded from the preferential tax treatment was a subject of great debate. In its agreement published on June 21, 2016, the coalition decided not to implement the proposed holding provisions. This was not changed anymore in the reform process.

According to the decision of the German Federal Constitutional Court, management assets are subject to tax and therefore have to be separated from the preferential business assets. The management assets are fully taxable at the regular rate insofar as the value of these assets exceeds 10% of the acquired company's assets. However, in the future, the management assets will be calculated and totaled at the group company level (consolidated appraisal of management assets). Therefore, all management assets in the company and its subsidiaries will be taken into consideration and have to be valued. There are also special rules for management assets that do not belong for more than two years to the privileged entity.

The relief of 85% or 100% can no longer be claimed independently of the value of the acquired business assets. The German Federal Constitutional Court required the extent of the relief to be limited. A particularly complex tax system applies if the value of the acquired business assets exceeds EUR 26 million (all acquired business assets of the deceased/donor per transferee within a 10-year period have to be taken into account). According

to the "ablation model," the relief is reduced by 1% for each EUR 750,000 that exceeds EUR 26 million. Above EUR 90 million, the relief of 85% or 100% for business assets can no longer be claimed. If the value of the acquired business assets exceeds EUR 90 million or the transferee opts not to use the ablation model, he can only apply for an examination of the need for relief (*Verschonungsbedarfsprüfung*). The transferee is not required to use "privileged" business assets, but he has to use 50% of the value of all other assets that he already owns or that he acquires within a 10-year period to pay the regular rate on the privileged business assets. Furthermore, he has to use 50% of the value of the management assets that he already owns or acquires within a 10-year period and also to pay the regular rate for business assets. The total rate for acquired assets that do not qualify as privileged business assets can be 65% or more. This makes the tax planning complicated for entrepreneurs if the value of the privileged business assets exceeds EUR 26 million.

"The special export restrictions, for example, do not apply to cultural goods by artists who are still alive."

Finally, a special tax relief of maximum 30% exists for family companies. The requirements in the articles of association that have to be fulfilled (for example, limitation on disposal and on distributions or withdrawals) are widely disputed. The provisions in the articles of association have to be incorporated two years before the relevant transfer and have to remain unchanged and regarded for the subsequent 20 years. Family companies are therefore advised to examine their articles of association and amend them if their provisions do not meet the special requirements of tax relief for family companies.

B. New Cultural Property Protection Act in 2016

The reform of the law on the protection of cultural property in Germany became effective on August 6, 2016 (Federal Law Gazette Part I, 1914). As a result, cultural protection legislation in Germany was harmonized and merged into a single act. During the reform process there was uproar on the German art scene: artists, collectors and art dealers alike criticized the proposed legislation and export restrictions. Collectors, art dealers and German artists such as Georg Baselitz removed their works from German museums and took them abroad. But this did not prevent the implementation of special export restrictions for cultural property.

According to the new legislation, an export permit is mandatory for works that exceed certain age and value thresholds. For example, paintings that are older than 75 years and worth more than EUR 300,000 require special permission to be exported and sold outside Germany. The corresponding thresholds for exports and sales of paintings outside the EU are 50 years and EUR 150,000. The competent Germany authority has the power to decide whether a work is so important for German culture that it can be classified as German national cultural property, in which case it may not be exported at all. It was, for example, discussed controversially if an Andy Warhol can be qualified as German national cultural property (discussion in respect of the *Portigon* collection). If the export takes place without official authorization it is illegal. In this case, the German authorities can retrospectively classify the exported cultural good as national cultural property and can enforce its reversion to Germany.

In the future it will therefore be very important for art sellers to be able to prove that cultural goods exceeding the thresholds were exported before August 6, 2016 or authorized by the competent authority to be exported after that date. Purchasers of German cultural property are strongly recommended to request evidence of the authorization before signing the purchase agreement. Cultural goods that were exported before August 6, 2016 were legally exported at that time.

Furthermore, there is a risk that the cultural goods are classified as German national cultural property if they are imported for exhibition in German museums on/after August 6, 2016, for example. In such a case it is very important that the collector receives a certificate or similar document from the competent German authority beforehand that the work will be returned and can be exported after the exhibition has ended (*Bescheinigung freien Geleits*).

The special export restrictions, for example, do not apply to cultural goods by artists who are still alive (such as Gerhard Richter and Georg Baselitz).

Furthermore, collectors who store their important German cultural goods abroad will now need to review their estate planning to receive the special German inheritance and gift tax relief for cultural property after a relevant transfer. The cultural goods have to be exhibited in museums in the EU/EEA (not in UK after Brexit) and—in Germany only—with consent from the competent German authority that the work in question will be returned to storage abroad after the exhibition in a German museum has ended.

Additionally, the German Federal Tax Court published a decision on May 12, 2016 (Federal Tax Court of May 12, 2016, DStR 2016, 1804) that is good news for art collectors because it makes it easier to receive the special inheritance and gift tax relief.

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The Use of Real Estate Trusts for Investments and Holding of Property in Israel

By Dr. Alon Kaplan and Meytal Liberman

Introduction

Trusts in Israel are governed by the Trust Law.[1] In addition, other laws contribute to the enhancement of the various uses of trusts, such as the Agency Law,[2] and the Real Property Taxation Law.[3] This framework is augmented by court cases and rulings of the Israeli Tax Authority.

Real Estate Trusts ("RETs") have been used in Israel for many years and for various purposes, including legitimate tax planning, asset protection and commercial transactions.

For instance, the RET was used in the 19th century by Jewish people living in Jerusalem in order to purchase land and protect their property from confiscation by the Ottoman rulers. This was achieved by placing the property in a Moslem trust known as a *Waqf*, thus ensuring that the Moslem government would not interfere with the ownership rights of the land.[4]

"An example of how this presumption works can be gleaned from a recently published case where a father purchased an apartment in Israel and invested most of the funds required to purchase the property."

Another old example of the historical use of a RET can be found in the establishment of Tel Aviv in 1909. At that time, it was prohibited for Jewish residents to purchase land; thus the land was purchased by a non-resident investor, who acted as trustee for the new settlors.[5]

Taxation of Real Estate in Israel

Under the Real Property Taxation Law, two main taxes are imposed upon a sale of real estate: a capital gains tax on the seller, and a purchase tax on the purchaser. The capital gains tax is calculated in accordance with the increase in the value of the property since its purchase; the time period during which the seller owned the property; and the existence of other real properties owned by the seller. The purchase tax represents a certain percentage of the purchase price. This percentage is set in accordance with other real properties owned by the purchaser.

A sale for the purposes of the Real Property Taxation Law is considered as such, whether it was made for consideration or not. However, it should be noted that the transfer of real estate under inheritance procedure is not considered as a sale, and therefore does not trigger the imposition of any of the taxes mentioned above. In fact, Israeli law does not provide for any estate tax; thus the transfer of any property upon death, including real estate, is not subject to any tax in Israel.

Real Estate Trusts in Israel

The real estate trust in Israel is a legal structure under which real estate is purchased by a trustee, or is transferred to a trustee, and the trustee acts as a nominee or bare trustee for an identifiable beneficiary. Israeli law, namely the Real Property Taxation Law and the Trust Law, provide the legal structure for such a RET.

Under such a structure, the trustee is registered as the legal owner of the real estate but under Israeli tax laws, namely the Income Tax Ordinance[6] and the Real Property Taxation Law, the beneficiary of the real estate is considered as the real owner, similar to a beneficiary of a bare trust in the common law.[7]

An example of how this presumption works can be gleaned from a recently published case where a father purchased an apartment in Israel and invested most of the funds required to purchase the property.[8] The apartment was registered in the name of his daughter. The apartment was used alternatively for the parents and the daughter upon her visits to Israel. After the demise of the mother, the daughter filed a claim against the father demanding the eviction of the father from the apartment, claiming that she had the ownership of the apartment. The court dismissed the claim, recognizing the ownership rights of the father who provided evidence that the apartment was his property held by the daughter as a trustee for the father.

"The Israeli Tax Authority confirmed that the transfer of the real estate property to the trust was exempt from tax, thus recognizing in this case a RET."

Another interesting case was ruled upon by the Supreme Court.[9] In that matter, a trustee was registered

in the Land Registry as the owner of a real estate property. The registration did not reference the fact that the property was held in trust.[10] The trustee was declared bankrupt and a creditor tried to attach the property for the satisfaction of his claim against the trustee. The court was presented with evidence that the property was held in trust for beneficiaries, and, upon accepting this evidence, ruled that the creditor had no right against the real estate property even though the Land Registry did not have any reference to the rights of the beneficiaries.

This was an important precedent reconfirming the concept of holding real estate in trust for a beneficiary, and ensuring beneficiaries' rights against third parties.

Tax Exemption for a Real Estate Trust

A pre-ruling published in 2012 by the Israeli Tax Authority[11] dealt with the transfer of real estate properties into a private trust. In this case, an elderly person created a trust in his favor and in favor of other beneficiaries. The Israeli Tax Authority recognized the establishment of a trust regulated under Section 17 of the Trust Law known as *Hekdesh*. The Israeli Tax Authority confirmed that the transfer of the real estate property to the trust was exempt from tax, thus recognizing in this case a RET.

"This structure may be found particularly useful and efficient for American families that decide to invest in real estate in Israel or have a second home there."

The importance of the ruling is in the clarification given, for the first time, regarding the existence of tax exemption for the transfer of real property by a beneficiary into a RET.

Until this ruling there had been no orderly source showing that when an owner of real property transfers the property to a trustee and becomes a beneficiary of the RET, the transfer is tax exempt. The ruling stated as follows:

> If the creation of a trust (by the settlor/beneficiary) and the vesting of the trust's properties to the trustee, designated until the end of his days to benefit the beneficiary, his welfare and quality of life, while still alive, and after his death, in favor of specific beneficiaries, which the beneficiary determined in the trust document and in the aforementioned will, will not be deemed to be a "sale of a right in land" in the sense of the law.

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Conclusion

The real estate market in Israel is in great demand by both Israeli and foreign investors, and some investors choose to hold properties they purchase in the name of a trustee. This structure may be found particularly useful and efficient for American families that decide to invest in real estate in Israel or have a second home there.

However, if any of your clients are considering using this structure to purchase real estate in Israel, it should be noted that there are some issues of trust, inheritance and tax laws that require proper consultations and clarifications. Therefore, expert advice is recommended.

Endnotes

1. Trust Law, 5739-1979, 33 LSI 41 (1966-1967) (Isr.).
2. Agency Law, 5725-1965, 19 LSI 231 (1964-1965) (Isr.).
3. Real Property Taxation Law (Capital Gains and Purchase), 5723-1963, 17 LSI 193 (1963) (Isr.).
4. Ron Shaham, *Christian and Jewish "Waqf" in Palestine During the Late Ottoman Period*, 54(3) Bulletin of the School of Oriental and African Studies, University of London, 460-472 (1991).
5. Shimon Rubinstein, *Constraints and Hope in the Matter of Land Purchases by Jews in the Land of Israel at the End of the Ottoman Period* (Hebrew), available at http://www.kkl.org.il/files/HEBREW_FILES/machon-mediniut-karkait/karka-41/karka-41-1996-10.pdf.
6. Income Tax Ordinance [New Version], 5721-1961, 6 LSI [N.V.] 120 (1961) (Isr.).
7. *Trusts and Taxes*, available at https://www.gov.uk/trusts-taxes/types-of-trust.
8. Family Case (TA) 19831-04-10 *R. G. v. M. P.* (July 7, 2013), Nevo Legal Database (by subscription) (Isr.).
9. CA 5955/09 *Amster (Receiver) v. Tauber Tov* (July 19, 2011), Nevo Legal Database (by subscription) (Isr.).
10. Such a reference is possible under a procedure named "caveat" under Section 4 of the Trust Law, and Land Law, 5729-1969, 23 LSI 293, §127 (1968-1969) (Isr.).
11. Tax Ruling no. 3324/12, *The Establishment of a Hekdesh—Tax Ruling in Agreement*, available at https://www.misim.gov.il/tmmisuyweb/frmShowLinkedAbs.aspx?num=20120030 (Hebrew).

Book Review: *Trusts and Estate Planning in Israel*

Written by Alon Kaplan
Reviewed by Ziva Robertson

Trusts have formed part of English law for many centuries. They first arose in feudal times, when a landowner called by his lord to go to the battlefield entrusted his property to a relative, only to discover on his return that his land had been appropriated by the relative for himself. The doctrine of equity intervened to protect the interest of the soldier by holding that although the title to the land—the legal interest—was held by the relative, the beneficial owner entitled to enjoy the asset was the soldier. And we never looked back.

"And there is such a lot of it that you could spend years studying it and practising it before you can say with confidence that you truly understand it."

With the growth of the British empire—including the Mandate over Palestine before the Israeli war of independence—the trust concept traveled far and wide, and continued to grow and evolve so as to provide solutions for very modern problems. While retaining many of its original features, the concept has developed a little differently in different jurisdictions. Layer upon layer, it has become an instrument in wealth and estate planning.

Which is why many trust practitioners, in a moment of honest reflection, will admit that Trust Law was their pet hate as students. It is fluid but difficult. It is modern, yet archaic. It is clear in parts, but obscure in others. And there is such a lot of it that you could spend years studying it and practising it before you can say with confidence that you truly understand it.

"This book should take pride of place on the bookshelf of any Israeli private client practitioner who strives for a better understanding of this area of the law."

Few people take the trouble. Alon Kaplan is one. With years of practice and teaching in this area, Kaplan founded the first Israeli branch of STEP, the Society of Trust and Estate Practitioners, which now numbers 150 members in Israel (and 20,000 worldwide). His book, *Trusts and Estate Planning in Israel*, is the fruit of his Ph.D. thesis and research in this complex legal field. In Israel, like elsewhere, trusts constitute a flexible tool for succession planning, tax structuring, charitable giving, an umbrella for corporate holdings and many other uses. Kaplan navigates these complexities with clarity, elegance and erudition and explains the interplay between civil and Rabbinical law; trusts according to Islamic law; the creation of trusts by deeds and by contracts; their uses as testamentary instruments; and, significantly in the current climate, their tax treatment in Israeli law.

As trusts and their uses continue to evolve, it is important for private client and tax practitioners in Israel to understand them, their various uses, their tax treatment, their advantages and their limits. Few Israeli practitioners understand them as thoroughly as Kaplan, and few (if any) modern books have been written about trust law in Israel with the same depth and attention to detail as Kaplan's book. This book should take pride of place on the bookshelf of any Israeli private client practitioner who strives for a better understanding of this area of the law.

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European Preservation Order on Bank Accounts: Cross-Border Debt Recovery Easier for SMEs

By Alessandro Benedetti

As of Wednesday, January 18th 2017, Regulation EU No 655/2014 of 15.05.2014 has, at last, been made applicable. This regulation establishes a European Account Preservation Order procedure that is a uniform procedure in the whole European Union to facilitate cross-border debt recovery in civil and commercial matters (the "Procedure").

This procedure—conceived with the needs of the Small and Medium-sized Enterprises (SMEs) in mind, which lose about 600 million Euros every year because of the difficulties associated with debt recovery—should serve as an additional and optional means for the creditor, who remains free to make use of any other procedure for obtaining an equivalent measure under national law.

"The debtor will only become aware of procedure when notified after the positive declaration of the bank indicating whether and to what extent the funds in the debtor's account or accounts have been preserved."

So, anyone who has a pecuniary claim in civil and commercial matters now has, in cross-border cases, the right to ask the court for a measure to prevent the debtor from withdrawing or transferring the sums of money held in a bank account in another Member State when there is danger that—without the measure—the subsequent enforcement of the claim is impeded or made very difficult.

On this basis, it is clear how the cross-border nature of the claim represents the essential requirement: it is fulfilled when the bank account or accounts to be preserved by the Preservation Order are held in a Member State different from the Member State in which the creditor is domiciled and from the one where the court was seized.

Once the requirement is fulfilled, the Preservation Order is now available to the creditor both before initiating proceedings in a Member State against the debtor on the substance of the matter, or at any stage during such proceedings, up until the issuing of the judgment or the approval or conclusion of a court settlement, and after obtaining in a Member State a measure which requires the debtor to pay the creditor's claim. Clearly, the requirements to obtain a Preservation Order change depending on the time of the application for it: in fact, while in the hypothesis of application *ante causam* the creditor must prove both *fumus bonis iuris* and *periculum in mora*, in the opposite case he must demonstrate only the existence of the second requirement, being exonerated from proving the first one.

Another peculiar characteristic of the procedure consists of its unilateral nature: in fact, the debtor is not notified of the application for a Preservation Order nor are they heard prior to the issuing of the order. The debtor will only become aware of procedure when notified after the positive declaration of the bank indicating whether and to what extent the funds in the debtor's account or accounts have been preserved.

In this context, the protection of the debtor in the case of a Preservation Order asked and issued *ante causam* consists—in addition to his right to seize the court in order to revoke or modify the Preservation Order—first of all, of an obligation of the creditor to provide security for an amount—set by the court from time to time—sufficient to prevent abuse of the procedure under examination and to ensure compensation for any damage suffered by the debtor as a result of the order, to the extent of the creditor's liability; secondly, one should consider the obligation of the creditor, who has applied for a Preservation Order before initiating proceedings on the substance of the matter, to initiate proceedings to obtain a measure which requires the debtor to pay the creditor's claim.

The last essential characteristic—strictly connected to its nature as a uniform procedure for the whole European Union—relates to the provision according to which a Preservation Order issued—usually within 10 days—in a Member State shall be recognised in the other Member States without any special procedure being required, and shall be enforceable in the other Member States without the need for a declaration of enforceability.

In summary, through very short time limits, formalities reduced to the strict minimum and the possibility to catch the debtor by surprise, the European Union wishes to give the creditors—with particular focus on SMEs—a means to make the cross-border debt recovery faster, less expensive and more efficient, deleting useless formalities and high legal costs and preventing the debtors from moving money to avoid paying their debts.

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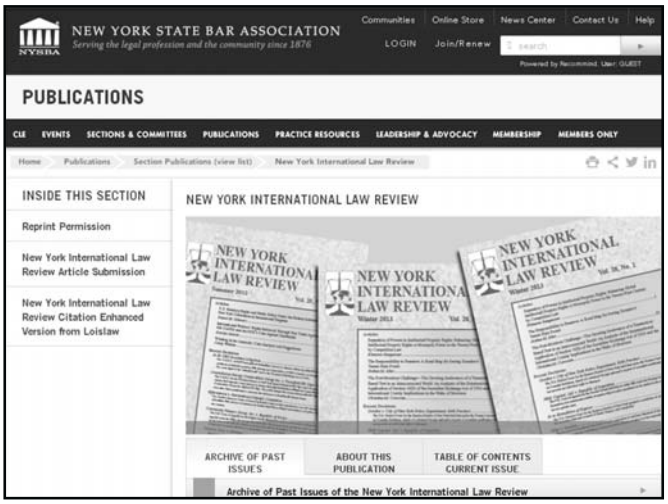

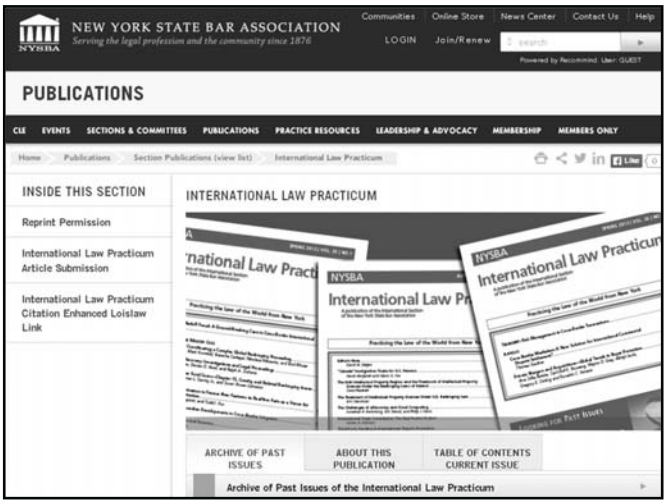

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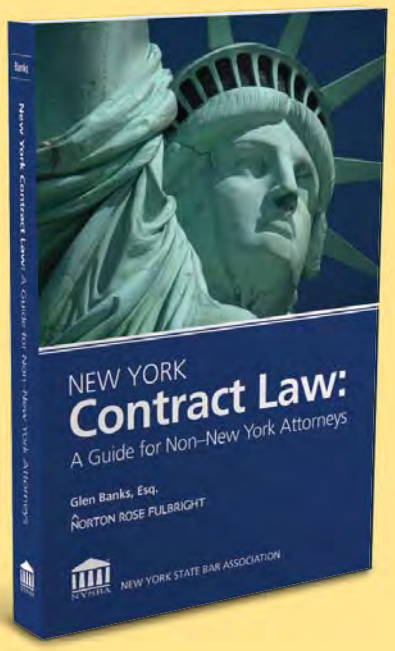

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