NYSBA

Staff Memorandum

EXECUTIVE COMMITTEE
Agenda Item #22

REQUESTED ACTION: None, as the report is informational in nature.

The Committee on Resolutions will present a report with respect to the following: (1) Task Force on the Future of the Legal Profession; and (2) Task Force on New York Law in International Matters.

First, the Committee on Resolutions reviewed the report and recommendations of the Task Force on the Future of the Legal Profession (which was approved by the House of Delegates in April 2011) to determine how the recommendations contained in the report should be implemented. The committee identified sections, committees, and other entities that should be asked to assist with implementation. The attached chart sets forth the groups that were contacted, the recommendations they were asked to review, and the status of the groups' reviews. Highlighted information reflects information submitted by groups since the last Executive Committee meeting in November 2011.

Second, the Committee on Resolutions reviewed the report and recommendations of the Task Force on New York Law in International Matters (which was approved by the House of Delegates in June 2011) to determine how the recommendations contained in the report should be implemented. The committee identified sections, committees, and other entities that should be asked to assist with implementation. It also made plans relating to the creation of an informal working group that would coordinate aspects of the initiative involving joint implementation. The attached chart sets forth the groups that were contacted, the recommendations they were asked to review, and the status of the groups' reviews. Attached to the chart is a status memo (with attachments) from the International Section, which is one of the primary groups that was asked to assist with implementation.

Committee Chair David P. Miranda will present the report at the meeting on January 26, 2012.

NEW YORK STATE BAR ASSOCIATION
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COMMITTEE ON RESOLUTIONS

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January 17, 2012

TO: Members of the Executive Committee

RE: Task Force on the Future of the Legal Profession

Dear Executive Committee Members:

In June 2011, the Executive Committee approved a plan for the implementation of recommendations contained in the report of the Task Force on the Future of the Legal Profession. The Committee on Resolutions subsequently sent letters to appropriate sections, committees, and other entities requesting assistance with implementation. Many of the entities responded by sharing their plans, and we reported their responses to you in November 2011. Since that time, we have received additional responses, which are highlighted in the enclosed chart.

Sincerely,

David P. Miranda

Enclosure

New York State Bar Association
Resolutions Committee
Implementation of Recommendations Contained in the Report of the Task Force on the Future of the Legal Profession
Feedback from Implementing Entities

The following entities have provided responses regarding implementation. Responses received since the November Executive Committee meeting are highlighted below in the column entitled "Recommendations and Responses."

Implementing Entities	Recommendations[1] and Responses
A. American Bar Association State Delegation	11/22/11 – The delegation reported that it sponsored an ABA resolution regarding *U.S. News & World Report* rankings in February 2010. The resolution was adopted, as amended, by the ABA House of Delegates. It was assigned to the ABA Ethics 20/20 Commission, which studied the issue and recommended that no action be taken at this time. This recommendation will be presented to the ABA House of Delegates for a vote in August 2012. 1. Meet with *U.S. News & World Report* representatives to propose changes to its ranking methodology. (8, 73)
B. Committee on Lawyers in Transition	9/23/11 – The committee reported that it is taking steps to implement the recommendations through the development of relevant panel presentations, a mentoring program, and other initiatives. 1. Encourage lawyers to consider certain enumerated alternative careers, such as working with software developers to systematize legal processes. (32-33) 2. Collaborate with others to develop model new-lawyer training programs. (70) 3. Study certain topics regarding mentorship, career navigation, cost, and learning assessment. (65) 4. Address concerns regarding limitations on accreditation for programs that focus on skills such as business development and networking. (64) 5. Address concerns regarding limitations on accreditation for programs relating to job searches. (64) 6. Study and make recommendations regarding how to assist new lawyers' transition to practice through use of

[1] Fuller explanations of the bulleted items can be found in the Report of the Task Force on the Future of the Legal Profession at the designated pages (listed in parentheses). The Report can be found at the following link: www.nysba.org/FutureReport.

	mentorship programs, CLE programs, and model training programs. (7-8, 69-70)
C. Committee on Legal Education and Admission to the Bar	9/9/11 – The committee reported the following: (1) that it already is taking some of the requested actions; (2) that fuller explanations will be provided in an upcoming analysis of the Report of the Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence; and (3) that additional resources would be needed to implement some of the recommendations. 1. Monitor proposed changes to ABA accreditation standards. (6, 68) 2. Foster development of assessment tools for lawyers and law students. (46, 47) 3. Work with New York State law schools regarding learning competency-based models. (6, 67-68) 4. Encourage those concerned with professional development to perform assessments of lawyer competencies, and explore the development of assessment tools. (8, 72) 5. Endorse ALI-ABA Summit Recommendations regarding model competencies, support the project, and encourage relevant firms to participate. (5, 40, 67, 68) 6. Encourage the New York Court of Appeals to reevaluate its rules regarding practicality. (6, 68) 7. Encourage the New York Court of Appeals to eliminate the hourly restriction on student hours spent outside the law school classroom. (6, 68) 8. Encourage the New York Court of Appeals to eliminate its limit on credit hours for legal training or clinical courses. (47-48, 48-49) 9. Encourage the New York State Board of Bar Examiners to begin assessing professional skills. (7, 68) 10. Study certain enumerated potential licensing reforms, such as a Uniform Bar Exam. (7, 69) 11. Monitor the issue of law student debt and promote greater transparency regarding the cost of legal education and prospects for employment. (8, 71) 12. Work with ABA on standardized reporting of law school placement data. (71) 13. Dedicate attention to how licensing shapes diversity of the legal profession. (7, 69) 14. Give serious consideration to the analysis and recommendations of the Kenney Report. (52) 15. Help New York State law schools to support the development of practice-ready graduates. (6) 16. Encourage law schools to avoid providing academic credit for certain unpaid student positions. (49) 17. Encourage law schools to require capstone courses in the third year of law school. (49-50) 18. Encourage law schools to provide meaningful placement information to law students and LLM's. (71-72) 19. Encourage greater collaboration between academia and practitioners regarding competency models. (65-66) 20. Encourage law schools to increase educational opportunities about practical uses of technology and project management. (9, 99, 111)

D. Committee on Standards of Attorney Conduct	9/16/11 – The committee reported that it is dealing with the issues in the context of responding to related actions taken by the American Bar Association Commission on Ethics 20/20 Commission. 1. Explore changing models of law firm structure and compensation, make recommendations to the House of Delegates, and propose appropriate amendments to the New York Rules of Professional Conduct and other regulatory standards. (4-5, 35-36) 2. Study and make recommendations concerning ethical and risk management considerations associated with new technologies, such as social networking, third-party hosted solutions, and virtual law firms. (10)
E. Committee on Unlawful Practice of Law	9/14/11 – The committee reported that it already is taking some of the requested actions, and that assisting lawyers to make a strong business case for the need to retain lawyers is beyond the scope of its mission. 1. Reaffirm 2009 NYSBA Report of the Special Committee on Solo and Small Firm Practice. (5, 36) 2. Investigate issues relating to the increased availability of legal information to non-lawyers, and assist lawyers in making a strong business case for the need to retain lawyers to solve legal problems. (5, 36)
F. Electronic Communications Committee	9/11 – The committee reported that it discussed the recommendations and intends to report back with the steps it plans to take. 1. Encourage law firms to support their attorneys' use of technological devices. (86) 2. Explore the potential for tablets to become the primary mobile work machine for many, and encourage members to consider their use. (102-103) 3. Study and make recommendations concerning ethical and risk management considerations associated with new technologies, such as social networking, third-party hosted solutions, and virtual law firms. (10)
G. Law Practice Management Committee	8/18/11 – The committee reported that it planned to discuss the items at its first meeting in the fall. The committee plans to designate a subcommittee to prepare a written response. 1. Commission demographic and economic studies of law practice in New York. (34-35) 2. Create best practices manual and related CLE seminars about alternative fee arrangements and value billing. (5, 36) 3. Reaffirm 2009 NYSBA Report of the Special Committee on Solo and Small Firm Practice. (5, 36) 4. Conduct economic and other research to keep lawyers informed about the changing landscape of the legal

	profession. (5, 36) 5. Support legal employers regarding work-life policies and practices. (9) 6. Encourage lawyers to consider the use of alternative fee arrangements. (2) 7. Encourage small firms and solo practitioners with specialized skills to develop business models that leverage the work product of others and provide specialty services to a wide variety of businesses. (32) 8. Develop a list of best practices for law firms regarding long-term restructuring for sustainability and organic growth. (2) 9. Encourage law firms to integrate services with client operations in ways that dovetail with the client's other business functions. (33-34) 10. Encourage solo and small-firm lawyers to assist clients with self-help efforts. (31-32) 11. Collaborate with others to develop model new-lawyer training programs. (70) 12. Encourage and support legal employers striving to implement work-life policies and practices. (9, 92) 13. Encourage law firms to provide accurate disclosure to recruits regarding hours and work environment. (92) 14. Publicize success stories of legal employers regarding work-life balance, and encourage mentoring by attorneys who are successfully working flexible schedules. (93) 15. Encourage the legal profession to treat work-life balance in a gender-neutral way. (9, 91) 16. Draft a policy encouraging law firms to commit to the value of work-life balance. (9) 17. Encourage law firms to institute a written policy about the importance of vacations and to make other attorneys within the firm available to cover for attorneys who are on vacation. (86) 18. Encourage law firms to have written policies for vacations, and for sabbaticals (if offered). (93) 19. Encourage legal employers to provide those working flexible schedules with the same opportunities as their standard-schedule colleagues. (83) 20. Encourage law firms to implement flexible work arrangements and policies. (92) 21. Encourage law firms to consider increasing quality-of-life initiatives. (89-91, 92) 22. Encourage solo and small-firm lawyers to make plans for taking vacation, arrange for other attorneys to cover matters during those times, and explain emergency coverage plans in retainer agreements. (86) 23. Create model policies concerning the use of mobile technology. (10, 111) 24. Assist firms regarding the efficient handling of e-mail traffic. (10, 111-112) 25. Create model policies regarding responsiveness in the age of mobile computing. (103) 26. Encourage legal employers to use technology to support a healthier work-life balance by facilitating flexible work arrangements. (10, 112) 27. Consider how to leverage NYSBA's resources to assist smaller firms with technology-related issues. (10, 112) 28. Encourage law firms to support their attorneys' use of technological devices. (86)

	29. Encourage law firms to periodically evaluate and redesign their work flow for efficiency. (94) 30. Encourage law firms to engage with clients in mutual dialogue about risk versus cost, based on real data. (97) 31. Encourage law firms to provide "push out" alerts to clients about cutting-edge legal developments. (105) 32. Encourage law firms to increase training opportunities about practical uses of technology and project management. (9, 99-100, 111) 33. Encourage law firms to consider the adoption of system-based approaches to acquiring technology. (9-10) 34. Encourage law firms to use hiring criteria reflecting their need for practice-ready lawyers. (8, 66-67, 71)
H. Lawyer Assistance Committee	9/19/11 – The committee reported that it is implementing the recommendations as requested. 1. Support continued research on mental and physical illness, as well as alcoholism and drug addiction, and encourage the adoption of NYSBA's Model Policy on Impairment. (93) 2. Encourage legal employers to educate attorneys and staff about depression and alcohol and drug abuse and to structure work environments in a way that fosters early recognition and treatment. (80)
I. Resolutions Committee	12/8/11 – The committee corresponded with the New York State Judicial Institute on Professionalism in the Law regarding a request by the institute to meet with NYSBA President Vincent Doyle and President-Elect Seymour James. President Doyle and President-Elect James subsequently met with the institute's chair to discuss opportunities for collaboration with respect to task force recommendations. 8/31/11 – The committee contacted the New York State Judicial Institute on Professionalism in the Law to request assistance. The institute reported that it is studying the task force's report to see how it might be of assistance and that it will turn to this project more fully after another project is completed in November 2011. Encourage the New York State Judicial Institute on Professionalism in the Law to do the following: 1. Explore changing models of law firm structure and compensation. (4-5, 35-36) 2. Encourage those concerned with professional development to perform assessments of lawyer competencies, and explore the development of assessment tools. (8, 72) 3. Recommend that the New York State Board of Bar Examiners begin assessing professional skills. (7, 68) 4. Study and make recommendations concerning ethical and risk management considerations associated with new technologies, such as social networking, third-party hosted solutions, and virtual law firms. (10)

J. Steven C. Krane Special Committee on Student Loan Assistance for the Public Interest (SLAPI)	10/14/11 – The committee reported the following: (1) that it already is taking actions regarding law student debt; and (2) that the promotion of greater transparency regarding the cost of legal education and prospects for employment is beyond the scope of the committee's mission, which focuses on loan repayment assistance. 1. Monitor the issue of law student debt and promote greater transparency regarding the cost of legal education and prospects for employment. (8, 71)

The following entities are still contemplating our requests.

K. Committee on Continuing Legal Education	1. Develop CLE programs, print and electronic publications, and web-based services to teach members how to maximize value to clients. (4, 35) 2. Create best practices manual and related CLE seminars about alternative fee arrangements and value billing. (5, 36) 3. Study current CLE regulations regarding transitional credit and bridge-the-gap programming. (70) 4. Collaborate with others to develop model new-lawyer training programs. (70) 5. Encourage those concerned with professional development to perform assessments of lawyer competencies, and explore the development of assessment tools. (8, 72) 6. Encourage legal employers and CLE providers to improve the effectiveness of their training programs. (72) 7. Study and make recommendations regarding how to assist new lawyers' transition to practice through use of mentorship programs, CLE programs, and model training programs. (7-8, 69-70) 8. Address concerns regarding program effectiveness, attorney participation, and cost. (64) 9. Address concerns regarding limitations on accreditation for programs that focus on skills such as business development and networking. (64) 10. Address concerns regarding limitations on accreditation for programs relating to job searches. (64) 11. Encourage collaboration between clients and law firms on implementing vacations and sabbaticals, in part through CLE programs on negotiating issues relating to successful work-life integration. (93)
L. Committee on Diversity and Inclusion	1. Study and make recommendations regarding how to assist new lawyers' transition to practice through use of mentorship programs, CLE programs, and model training programs. (7-8, 69-70) 2. Study certain topics regarding mentorship, career navigation, cost, and learning assessment. (65) 3. Publicize success stories of legal employers regarding work-life balance, and encourage mentoring by attorneys who are successfully working flexible schedules. (93)
M. Corporate Counsel Section	1. Assist law firms in redefining interaction with in-house counsel, to identify efficiencies in the supply chain for legal services. (28) 2. Encourage law firms to integrate services with client operations in ways that dovetail with the client's other business functions. (33-34)
N. Solo/Small Firm Coordinating Council	1. Encourage small firms and solo practitioners with specialized skills to develop business models that leverage the work product of others and provide specialty services to a wide variety of businesses. (32)

	2. Encourage solo and small-firm lawyers to assist clients with self-help efforts. (31-32) 3. Encourage solo and small-firm lawyers to make plans for taking vacation, arrange for other attorneys to cover matters during those times, and explain emergency coverage plans in retainer agreements. (86) 4. Consider how to leverage NYSBA's resources to assist smaller firms with technology-related issues. (10, 112)
O. Young Lawyers Section	1. Study and make recommendations regarding how to assist new lawyers' transition to practice through use of mentorship programs, CLE programs, and model training programs. (7-8, 69-70) 2. Monitor the issue of law student debt and promote greater transparency regarding the cost of legal education and prospects for employment. (8, 71)

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COMMITTEE ON RESOLUTIONS

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January 17, 2012

TO: Members of the Executive Committee

RE: Task Force on New York Law in International Matters

Dear Executive Committee Members:

In November 2011, the Executive Committee approved a plan for the implementation of recommendations contained in the report of the Task Force on New York Law in International Matters. The Committee on Resolutions subsequently sent letters to appropriate sections, committees, and other entities requesting assistance with implementation. Many of the entities responded by sharing their plans, which are reflected in the enclosed chart.

Sincerely,

David P. Miranda

Enclosures

New York State Bar Association
Resolutions Committee
Implementation of Recommendations Contained in the Report of the Task Force on New York Law in International Matters
Feedback from Implementing Entities

The following entities provided responses regarding implementation. Their responses are highlighted below in the column entitled "Recommendations and Responses."

Implementing Entities	Recommendations[1] and Responses
A. Committee on Civil Rights	The committee reported that it considered the recommendation at a recent meeting and that it has no comment at the present time. 1. NYSBA should consider studying and attempting to alleviate the problem that parties occasionally have difficulty obtaining visas when they need to come to the U.S. solely for arbitrations. (38)
B. Corporate Counsel Section	The section reported that it intends to review the recommendations during a meeting in January 2012 and then report back with an action plan. The section also plans to consider appointing a representative to the informal working group that is being formed to coordinate aspects of this implementation plan. 1. NYSBA should support -- in conjunction with other bar groups -- conferences, programs, presentations, and webcasts to present the conclusions of the Report and to discuss the advantages of New York law and New York as a forum for dispute resolution, involving the following: (a) the state judiciary; (b) New York federal judges; (c) the general counsels of multinational corporations based in the New York area; (d) transactional lawyers in global law firms in New York; (e) foreign and international bar associations; (f) in-house counsel organizations; and

[1] Fuller explanations of the bulleted items can be found in the Report of the Task Force on New York Law in International Matters at the designated pages (listed in parentheses). The Report can be found at the following link: www.nysba.org/InternationalReport.

	(g) American Chambers of Commerce abroad. (42-43, 47) 2. NYSBA should support the ratification of the Hague Convention on Choice of Court Agreements, which provides for the recognition of foreign judgments. (15, 25, 79, 81) 3. NYSBA should encourage parties to consider adapting model contract provisions to the circumstances of particular international agreements. (37, 54-55, 56-58) 4. NYSBA should study the following treaties more closely with a view to recommending U.S. ratification or accession or recommending particular changes: (a) UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules Convention") (79, 80); (b) UN Convention on the Use of Electronic Communications in International Contracts ("Electronic Communication Convention") (80); (c) UN Convention on the Assignment of Receivables in International Trade ("Receivables Convention") (79, 80-81); (d) Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Hague Securities Convention") (79, 81); (e) Hague Convention on the Law Applicable to Trusts and on their Recognition ("Hague Convention on Trusts") (79, 81); (f) UNIDROIT Convention on Substantive Rules for Intermediated Securities ("Geneva Securities Convention") (80, 81); (g) UN Convention on Independent Guarantees and Stand-By Letters of Credit ("Letters of Credit Convention") (79, 82); (h) UNIDROIT Convention on International Financial Leasing ("UNIDROIT Financial Leasing Ottawa Convention") (which relates to leasing of real estate and equipment) (80, 82); (i) 1980 Convention on Contracts for the International Sale of Goods ("Convention on the International Sale of Goods") (12, 79, 82); (j) 1974 Convention on the Limitation Period in the International Sale of Goods; and Protocol (1980) ("Limitation Period Convention (1974) Protocol (1980)") (79, 82); and (k) 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") (12, 79, 82).
C. Dispute Resolution Section	The section reported that it already is acting on most of the requested actions either independently or in

	conjunction with another group lead by Judge Kaye. It is planning to study and report back on implementation. 1. NYSBA should continue to investigate and support the establishment of a permanent Center for International Arbitration in New York -- in collaboration with New York City officials, the Urban Development Corporation, and major real estate developers. (3, 39, 45) 2. NYSBA should support the joint proposal by JAMS and the ICDR to make available for international arbitration proceedings in New York approximately fifty hearing rooms in their respective offices. (45) 3. NYSBA should support establishing a dedicated reporter to publish (periodically and in an accessible format) decisions by New York courts in international business disputes and matters of significance to international arbitration. (45) 4. NYSBA should encourage institutions in New York providing arbitration services (*e.g.*, JAMS, CPR, ICDR, and ICC) to make better known their internal appeal mechanism for parties who agree upon the procedure. (45) 5. NYSBA should support the creation of an independent "Council of New York International Law Firms" affiliated with NYSBA to promote and advance New York law, which could possibly commit greater financial resources to the Task Force's objectives than a bar association. (43, 45) (Note: please consider Crowell & Moring LLP for participation in the council, pursuant to a request by the firm to NYSBA.) 6. NYSBA should support the adoption of the Revised Uniform Arbitration Act for domestic arbitration. (18, 20-21, 46) 7. NYSBA should explore with the New York Judiciary policies, practices, and rules to improve the administration of justice in relation to international disputes, including but not limited to the following: (a) the creation of a degree of judicial specialization, such as a designation of particular judges as specialized chambers to deal with international arbitration matters; (b) the creation of a "rocket docket" in the Commercial Division for expedited litigation for international arbitration-related disputes; and (c) the use of "judicial referee" decisions by New York judges on issues presented to them by foreign courts, rather than by litigants, that require interpretation of New York law. For example, New York and New South Wales, Australia, entered into a Memorandum of Understanding in 2010 permitting such judicial referee decisions. (3, 26-29, 38, 46) 8. NYSBA should develop programs to highlight that the New York international arbitration community follows the "international standard" with regard to discovery, the mix of common law and civil law

	characteristics that arbitration allows, the financial and commercial expertise of New York arbitrators and advocates, the significant advantages of mediation, the stability of New York law, and the advantages of New York as a forum for resolution of international litigation. (42, 47) 9. NYSBA should support -- in conjunction with other bar groups -- conferences, programs, presentations, and webcasts to present the conclusions of the Report and to discuss the advantages of New York law and New York as a forum for dispute resolution, involving the following: (a) the state judiciary; (b) New York federal judges; (c) the general counsels of multinational corporations based in the New York area; (d) transactional lawyers in global law firms in New York; (e) foreign and international bar associations; (f) in-house counsel organizations; and (g) American Chambers of Commerce abroad. (42-43, 47) 10. NYSBA should investigate and develop the use of "ambassadors" (such as the president and officers of NYSBA and other New York bar associations) to continue spreading the message of the Task Force. On this front, NYSBA should coordinate with the following: (a) New York Trade Representatives abroad (currently 16 countries); (b) commercial officers of U.S. consulates abroad; (c) the American Chambers of Commerce abroad; (d) international and local business groups; (e) international bar and law associations; and (f) international meetings of jurists. Furthermore, NYSBA representatives should participate in meetings of UNCITRAL, UNIDROIT, Hague Conference, and similar groups. NYSBA should better communicate specific points about international arbitral practice to promote a much enhanced understanding of the realities of the practice. NYSBA should communicate the advantages of New York as an arbitral forum, with special emphasis on the following:

	(a) it is advantageous to have New York law as the law of the contract; (b) the quality and number of experienced lawyers who are available to handle matters -- whether as arbitrators, mediators or advocates -- is advantageous; and (c) New York City is perceived as a suitable place to stay during an arbitration. NYSBA also should better communicate the following characteristics of New York as an arbitral forum: (a) cost-effectiveness; (b) the importance of mediation; (c) New York courts' support of arbitration; (d) the elimination of exposure to punitive damages; and (e) the availability of appeal. NYSBA should consider studying and attempting to alleviate the concern of some non-U.S. parties that participating in arbitrations in the U.S. could result in their submitting to U.S. jurisdiction. (30, 31-37, 38, 44, 48) 11. NYSBA should investigate with the New York Legislature amending Article VI, § 3 of the New York Constitution to permit responding to certified questions of law from foreign courts, and it should give further consideration to whether it would be useful to enact a statutory provision as to the confidentiality of evidence and awards in international arbitration. (38-39, 48) 12. NYSBA should investigate with the New York Legislature New York's adoption of the UNCITRAL Model Law on International Arbitration. (18, 21, 38, 48) 13. NYSBA should study, through the appropriate NYSBA Sections, whether to recommend the adoption of a modification to the New York General Obligations Law to create statutory limitations on risk allocation in construction contracts. (10, 18, 48) 14. NYSBA should support the ratification of the Hague Convention on Choice of Court Agreements, which provides for the recognition of foreign judgments. (15, 25, 79, 81) 15. NYSBA should encourage other New York bar associations and members of the New York Bar to support practices in New York that appropriately emphasize cost efficiency. (34) 16. NYSBA should encourage judges and attorneys to educate international audiences about the advantages of New York as a governing law and forum when involved in panels and meetings of domestic and foreign bar associations. (43)

D. International Section	The section reported the following: (1) that it already is acting on many of the requested actions; (2) that it has certain ideas for next steps; and (3) that additional resources would be needed to implement some of the recommendations, as detailed in its memo to the Resolutions Committee, a copy of which is attached. 1. NYSBA should continue to investigate and support the establishment of a permanent Center for International Arbitration in New York -- in collaboration with New York City officials, the Urban Development Corporation, and major real estate developers. (3, 39, 45) 2. NYSBA should support the joint proposal by JAMS and the ICDR to make available for international arbitration proceedings in New York approximately fifty hearing rooms in their respective offices. (45) 3. NYSBA should support establishing a dedicated reporter to publish (periodically and in an accessible format) decisions by New York courts in international business disputes and matters of significance to international arbitration. (45) 4. NYSBA should encourage institutions in New York providing arbitration services (*e.g.*, JAMS, CPR, ICDR, and ICC) to make better known their internal appeal mechanism for parties who agree upon the procedure. (45) 5. NYSBA should support the creation of an independent "Council of New York International Law Firms" affiliated with NYSBA to promote and advance New York law, which could possibly commit greater financial resources to the Task Force's objectives than a bar association. (43, 45) (Note: please consider Crowell & Moring LLP for participation in the council, pursuant to a request by the firm to NYSBA.) 6. NYSBA should explore with the New York Judiciary policies, practices, and rules to improve the administration of justice in relation to international disputes, including but not limited to the following: (a) the creation of a degree of judicial specialization, such as a designation of particular judges as specialized chambers to deal with international arbitration matters; (b) the creation of a "rocket docket" in the Commercial Division for expedited litigation for international arbitration-related disputes; and (c) the use of "judicial referee" decisions by New York judges on issues presented to them by foreign courts, rather than by litigants, that require interpretation of New York law. For example, New York and New South Wales, Australia, entered into a Memorandum of Understanding in 2010 permitting such judicial referee decisions. (3, 26-29, 38, 46) 7. NYSBA should encourage international bar association sponsors to invite New York judges to conferences abroad to speak about New York law and the New York courts. (47)

	8. NYSBA should develop programs to highlight that the New York international arbitration community follows the "international standard" with regard to discovery, the mix of common law and civil law characteristics that arbitration allows, the financial and commercial expertise of New York arbitrators and advocates, the significant advantages of mediation, the stability of New York law, and the advantages of New York as a forum for resolution of international litigation. (42, 47) 9. NYSBA should support -- in conjunction with other bar groups -- conferences, programs, presentations, and webcasts to present the conclusions of the Report and to discuss the advantages of New York law and New York as a forum for dispute resolution, involving the following: (a) the state judiciary; (b) New York federal judges; (c) the general counsels of multinational corporations based in the New York area; (d) transactional lawyers in global law firms in New York; (e) foreign and international bar associations; (f) in-house counsel organizations; and (g) American Chambers of Commerce abroad. (42-43, 47) 10. NYSBA should recommend and develop, in conjunction with overseas chapters of the International Section and other New York bar associations, continuing legal education (CLE) programs to promote the Task Force objectives, and should explore the following: (a) a CLE program to train New York lawyers in the substance and culture of commercial international law and practice (NYSBA as a "School of International Practice"), built on the NYSBA International Section's "Fundamentals" of International Practice; (b) programs that highlight the advantages of New York law in international agreements as well as the benefits of selecting New York as the forum for international dispute resolution; and (c) CLE programs for international and out-of-state lawyers in locations where there are substantial international practices (*e.g.*, London, Paris, Geneva, Rio de Janeiro, São Paulo, and Hong Kong). (43-44, 47) 11. NYSBA should investigate and develop the use of "ambassadors" (such as the president and officers of NYSBA and other New York bar associations) to continue spreading the message of the Task Force. On this front, NYSBA should coordinate with the following:

	(a) New York Trade Representatives abroad (currently 16 countries); (b) commercial officers of U.S. consulates abroad; (c) the American Chambers of Commerce abroad; (d) international and local business groups; (e) international bar and law associations; and (f) international meetings of jurists. Furthermore, NYSBA representatives should participate in meetings of UNCITRAL, UNIDROIT, Hague Conference, and similar groups. NYSBA should better communicate specific points about international arbitral practice to promote a much enhanced understanding of the realities of the practice. NYSBA should communicate the advantages of New York as an arbitral forum, with special emphasis on the following: (a) it is advantageous to have New York law as the law of the contract; (b) the quality and number of experienced lawyers who are available to handle matters -- whether as arbitrators, mediators or advocates -- is advantageous; and (c) New York City is perceived as a suitable place to stay during an arbitration. NYSBA also should better communicate the following characteristics of New York as an arbitral forum: (a) cost-effectiveness; (b) the importance of mediation; (c) New York courts' support of arbitration; (d) the elimination of exposure to punitive damages; and (e) the availability of appeal. NYSBA should consider studying and attempting to alleviate the concern of some non-U.S. parties that participating in arbitrations in the U.S. could result in their submitting to U.S. jurisdiction. (30, 31-37, 38, 44, 48) 12. NYSBA should investigate with the New York Legislature amending Article VI, § 3 of the New York Constitution to permit responding to certified questions of law from foreign courts, and it should give further

	consideration to whether it would be useful to enact a statutory provision as to the confidentiality of evidence and awards in international arbitration. (38-39, 48) 13. NYSBA should investigate with the New York Legislature New York's adoption of the UNCITRAL Model Law on International Arbitration. (18, 21, 38, 48) 14. NYSBA should study, through the appropriate NYSBA Sections, whether to recommend the adoption of the 1996 UNCITRAL Model Law on Electronic Commerce. (18, 23, 48) 15. NYSBA should support the ratification of the Hague Convention on Choice of Court Agreements, which provides for the recognition of foreign judgments. (15, 25, 79, 81) 16. NYSBA should encourage judges and attorneys to educate international audiences about the advantages of New York as a governing law and forum when involved in panels and meetings of domestic and foreign bar associations. (43) 17. NYSBA should encourage parties to consider adapting model contract provisions to the circumstances of particular international agreements. (37, 54-55, 56-58) 18. NYSBA should study the following treaties more closely with a view to recommending U.S. ratification or accession or recommending particular changes: (a) UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules Convention") (79, 80); (b) UN Convention on the Use of Electronic Communications in International Contracts ("Electronic Communication Convention") (80); (c) UN Convention on the Assignment of Receivables in International Trade ("Receivables Convention") (79, 80-81); (d) Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Hague Securities Convention") (79, 81); (e) Hague Convention on the Law Applicable to Trusts and on their Recognition ("Hague Convention on Trusts") (79, 81); (f) UNIDROIT Convention on Substantive Rules for Intermediated Securities ("Geneva Securities Convention") (80, 81); (g) UN Convention on Independent Guarantees and Stand-By Letters of Credit ("Letters of Credit Convention") (79, 82); (h) UNIDROIT Convention on International Financial Leasing ("UNIDROIT Financial Leasing Ottawa Convention") (which relates to leasing of real estate and equipment) (80, 82); (i) 1980 Convention on Contracts for the International Sale of Goods ("Convention on the International Sale of Goods") (12, 79, 82);

	(j) 1974 Convention on the Limitation Period in the International Sale of Goods; and Protocol (1980) ("Limitation Period Convention (1974) Protocol (1980)") (79, 82); and (k) 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") (12, 79, 82).
E. Resolutions Committee	The committee reported that – in conjunction with the Task Force on New York Law in International Matters -- it publicized the report to approximately 10,000 targeted recipients. Recipients included the following: (1) managing partners at leading law firms in the U.S., Europe, and Asia; (2) corporate counsel; (3) law school deans, librarians, and professors of relevant subjects; (4) state and federal judges in New York State; (5) international and domestic bar associations; (6) trade associations; and (7) international and domestic dispute resolution organizations. 1. NYSBA should distribute the Task Force Report (via paper copies and the Internet) and encourage better coordination regarding relevant issues among the following: (a) U.S. and foreign law firms with significant international practices; (b) the Association of Corporate Counsel and similar groups; (c) New York bar associations (New York City Bar, New York County Lawyers' Association, and bar associations connected to NYSBA via the New York State Conference of Bar Leaders listserve); (d) international and foreign bar associations; (e) business groups and associations; (f) the judiciary; (g) law school deans, head librarians, and professors of relevant subjects; (h) New York City officials; (i) relevant NYSBA groups (International Section members; Dispute Resolution Section members; Corporate Counsel Section members; and non-resident NYSBA members (outside the U.S.)); (j) New York State-Federal Judicial Council; and (k) International Arbitration Club of New York. (42, 43, 45, 46) 2. NYSBA should work with the Urban Development Corporation, major real estate developers, and governmental bodies such as the New York State Economic Development Corporation and the Office of the U.S. Trade Representative to publicize the conclusions of the Task Force domestically and overseas. (43, 46)

	The committee reported that it invited New York City Bar to collaborate with respect to the below-referenced recommendations. The New York City Bar reported that it has appointed a representative (Louis "Benno" Kimmelman) to serve in the informal working group that is being formed to coordinate aspects of this implementation plan. Invite New York City Bar to collaborate on the following: 3. NYSBA should continue to investigate and support the establishment of a permanent Center for International Arbitration in New York -- in collaboration with New York City officials, the Urban Development Corporation, and major real estate developers. (3, 39, 45) 4. NYSBA should support the joint proposal by JAMS and the ICDR to make available for international arbitration proceedings in New York approximately fifty hearing rooms in their respective offices. (45) 5. NYSBA should recommend and develop, in conjunction with overseas chapters of the International Section and other New York bar associations, continuing legal education (CLE) programs to promote the Task Force objectives, and should explore the following: (a) a CLE program to train New York lawyers in the substance and culture of commercial international law and practice (NYSBA as a "School of International Practice"), built on the NYSBA International Section's "Fundamentals" of International Practice; (b) programs that highlight the advantages of New York law in international agreements as well as the benefits of selecting New York as the forum for international dispute resolution; and (c) CLE programs for international and out-of-state lawyers in locations where there are substantial international practices (*e.g.*, London, Paris, Geneva, Rio de Janeiro, São Paulo, and Hong Kong). (43-44, 47) 6. NYSBA should encourage other New York bar associations and members of the New York Bar to support practices in New York that appropriately emphasize cost efficiency. (34) The committee reported that it invited New York County Lawyers' Association to collaborate with respect to the below-referenced recommendations. The New York County Lawyers' Association reported the following: (1) that it is interested in working with NYSBA on implementation; and (2) that it has appointed a representative (NYCLA Past President Klaus Eppler) to serve in the informal working group that is being formed to coordinate aspects of the implementation plan.

	Invite New York County Lawyers' Association to collaborate on the following: 7. NYSBA should continue to investigate and support the establishment of a permanent Center for International Arbitration in New York -- in collaboration with New York City officials, the Urban Development Corporation, and major real estate developers. (3, 39, 45) 8. NYSBA should support the joint proposal by JAMS and the ICDR to make available for international arbitration proceedings in New York approximately fifty hearing rooms in their respective offices. (45) 9. NYSBA should recommend and develop, in conjunction with overseas chapters of the International Section and other New York bar associations, continuing legal education (CLE) programs to promote the Task Force objectives, and should explore the following: (a) a CLE program to train New York lawyers in the substance and culture of commercial international law and practice (NYSBA as a "School of International Practice"), built on the NYSBA International Section's "Fundamentals" of International Practice; (b) programs that highlight the advantages of New York law in international agreements as well as the benefits of selecting New York as the forum for international dispute resolution; and (c) CLE programs for international and out-of-state lawyers in locations where there are substantial international practices (*e.g.*, London, Paris, Geneva, Rio de Janeiro, São Paulo, and Hong Kong). (43-44, 47) 10. NYSBA should encourage other New York bar associations and members of the New York Bar to support practices in New York that appropriately emphasize cost efficiency. (34)

The following entities are still contemplating our requests.

F. American Bar Association State Delegation	1. NYSBA should support the ratification of the Hague Convention on Choice of Court Agreements, which provides for the recognition of foreign judgments. (15, 25, 79, 81) 2. NYSBA should consider studying and attempting to alleviate the problem that parties occasionally have difficulty obtaining visas when they need to come to the U.S. solely for arbitrations. (38) 3. NYSBA should study the following treaties more closely with a view to recommending U.S. ratification or accession or recommending particular changes: (a) UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules Convention") (79, 80); (b) UN Convention on the Use of Electronic Communications in International Contracts ("Electronic Communication Convention") (80); (c) UN Convention on the Assignment of Receivables in International Trade ("Receivables Convention") (79, 80-81); (d) Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Hague Securities Convention") (79, 81); (e) Hague Convention on the Law Applicable to Trusts and on their Recognition ("Hague Convention on Trusts") (79, 81); (f) UNIDROIT Convention on Substantive Rules for Intermediated Securities ("Geneva Securities Convention") (80, 81); (g) UN Convention on Independent Guarantees and Stand-By Letters of Credit ("Letters of Credit Convention") (79, 82); (h) UNIDROIT Convention on International Financial Leasing ("UNIDROIT Financial Leasing Ottawa Convention") (which relates to leasing of real estate and equipment) (80, 82); (i) 1980 Convention on Contracts for the International Sale of Goods ("Convention on the International Sale of Goods") (12, 79, 82); (j) 1974 Convention on the Limitation Period in the International Sale of Goods; and Protocol (1980) ("Limitation Period Convention (1974) Protocol (1980)") (79, 82); and (k) 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") (12, 79, 82).
G. Business Law Section	1. NYSBA should support establishing a dedicated reporter to publish (periodically and in an accessible format) decisions by New York courts in international business disputes and matters of significance to

	international arbitration. (45) 2. NYSBA should support the creation of an independent "Council of New York International Law Firms" affiliated with NYSBA to promote and advance New York law, which could possibly commit greater financial resources to the Task Force's objectives than a bar association. (43, 45) (Note: please consider Crowell & Moring LLP for participation in the council, pursuant to a request by the firm to NYSBA.) 3. NYSBA should support -- in conjunction with other bar groups -- conferences, programs, presentations, and webcasts to present the conclusions of the Report and to discuss the advantages of New York law and New York as a forum for dispute resolution, involving the following: (a) the state judiciary; (b) New York federal judges; (c) the general counsels of multinational corporations based in the New York area; (d) transactional lawyers in global law firms in New York; (e) foreign and international bar associations; (f) in-house counsel organizations; and (g) American Chambers of Commerce abroad. (42-43, 47) 4. NYSBA should investigate and develop the use of "ambassadors" (such as the president and officers of NYSBA and other New York bar associations) to continue spreading the message of the Task Force. On this front, NYSBA should coordinate with the following: (a) New York Trade Representatives abroad (currently 16 countries); (b) commercial officers of U.S. consulates abroad; (c) the American Chambers of Commerce abroad; (d) international and local business groups; (e) international bar and law associations; and (f) international meetings of jurists. Furthermore, NYSBA representatives should participate in meetings of UNCITRAL, UNIDROIT, Hague Conference, and similar groups. NYSBA should better communicate specific points about international arbitral practice to promote a much enhanced understanding of the realities of the practice. NYSBA should communicate the advantages of New

	York as an arbitral forum, with special emphasis on the following: (a) it is advantageous to have New York law as the law of the contract; (b) the quality and number of experienced lawyers who are available to handle matters -- whether as arbitrators, mediators or advocates -- is advantageous; and (c) New York City is perceived as a suitable place to stay during an arbitration. NYSBA also should better communicate the following characteristics of New York as an arbitral forum: (a) cost-effectiveness; (b) the importance of mediation; (c) New York courts' support of arbitration; (d) the elimination of exposure to punitive damages; and (e) the availability of appeal. NYSBA should consider studying and attempting to alleviate the concern of some non-U.S. parties that participating in arbitrations in the U.S. could result in their submitting to U.S. jurisdiction. (30, 31-37, 38, 44, 48) 5. NYSBA should study, through the appropriate NYSBA Sections, whether to recommend the adoption of the 1996 UNCITRAL Model Law on Electronic Commerce. (18, 23, 48) 6. NYSBA should study, through the appropriate NYSBA Sections, whether to recommend the adoption of a modification to the New York General Obligations Law to create statutory limitations on risk allocation in construction contracts. (10, 18, 48) 7. NYSBA should support the ratification of the Hague Convention on Choice of Court Agreements, which provides for the recognition of foreign judgments. (15, 25, 79, 81) 8. NYSBA should encourage other New York bar associations and members of the New York Bar to support practices in New York that appropriately emphasize cost efficiency. (34) 9. NYSBA should encourage judges and attorneys to educate international audiences about the advantages of New York as a governing law and forum when involved in panels and meetings of domestic and foreign bar associations. (43) 10. NYSBA should encourage parties to consider adapting model contract provisions to the circumstances of particular international agreements. (37, 54-55, 56-58) 11. NYSBA should study the following treaties more closely with a view to recommending U.S. ratification or

	accession or recommending particular changes: (a) UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules Convention") (79, 80); (b) UN Convention on the Use of Electronic Communications in International Contracts ("Electronic Communication Convention") (80); (c) UN Convention on the Assignment of Receivables in International Trade ("Receivables Convention") (79, 80-81); (d) Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Hague Securities Convention") (79, 81); (e) Hague Convention on the Law Applicable to Trusts and on their Recognition ("Hague Convention on Trusts") (79, 81); (f) UNIDROIT Convention on Substantive Rules for Intermediated Securities ("Geneva Securities Convention") (80, 81); (g) UN Convention on Independent Guarantees and Stand-By Letters of Credit ("Letters of Credit Convention") (79, 82); (h) UNIDROIT Convention on International Financial Leasing ("UNIDROIT Financial Leasing Ottawa Convention") (which relates to leasing of real estate and equipment) (80, 82); (i) 1980 Convention on Contracts for the International Sale of Goods ("Convention on the International Sale of Goods") (12, 79, 82); (j) 1974 Convention on the Limitation Period in the International Sale of Goods; and Protocol (1980) ("Limitation Period Convention (1974) Protocol (1980)") (79, 82); and (k) 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") (12, 79, 82).
H. Commercial and Federal Litigation Section	1. NYSBA should support the creation of an independent "Council of New York International Law Firms" affiliated with NYSBA to promote and advance New York law, which could possibly commit greater financial resources to the Task Force's objectives than a bar association. (43, 45) (Note: please consider Crowell & Moring LLP for participation in the council, pursuant to a request by the firm to NYSBA.) 2. NYSBA should explore with the New York Judiciary policies, practices, and rules to improve the administration of justice in relation to international disputes, including but not limited to the following: (a) the creation of a degree of judicial specialization, such as a designation of particular judges as specialized chambers to deal with international arbitration matters;

	(b) the creation of a "rocket docket" in the Commercial Division for expedited litigation for international arbitration-related disputes; and (c) the use of "judicial referee" decisions by New York judges on issues presented to them by foreign courts, rather than by litigants, that require interpretation of New York law. For example, New York and New South Wales, Australia, entered into a Memorandum of Understanding in 2010 permitting such judicial referee decisions. (3, 26-29, 38, 46) 3. NYSBA should develop programs to highlight that the New York international arbitration community follows the "international standard" with regard to discovery, the mix of common law and civil law characteristics that arbitration allows, the financial and commercial expertise of New York arbitrators and advocates, the significant advantages of mediation, the stability of New York law, and the advantages of New York as a forum for resolution of international litigation. (42, 47) 4. NYSBA should support -- in conjunction with other bar groups -- conferences, programs, presentations, and webcasts to present the conclusions of the Report and to discuss the advantages of New York law and New York as a forum for dispute resolution, involving the following: (a) the state judiciary; (b) New York federal judges; (c) the general counsels of multinational corporations based in the New York area; (d) transactional lawyers in global law firms in New York; (e) foreign and international bar associations; (f) in-house counsel organizations; and (g) American Chambers of Commerce abroad. (42-43, 47) 5. NYSBA should investigate and develop the use of "ambassadors" (such as the president and officers of NYSBA and other New York bar associations) to continue spreading the message of the Task Force. On this front, NYSBA should coordinate with the following: (a) New York Trade Representatives abroad (currently 16 countries); (b) commercial officers of U.S. consulates abroad; (c) the American Chambers of Commerce abroad; (d) international and local business groups;

	(e) international bar and law associations; and (f) international meetings of jurists. Furthermore, NYSBA representatives should participate in meetings of UNCITRAL, UNIDROIT, Hague Conference, and similar groups. NYSBA should better communicate specific points about international arbitral practice to promote a much enhanced understanding of the realities of the practice. NYSBA should communicate the advantages of New York as an arbitral forum, with special emphasis on the following: (a) it is advantageous to have New York law as the law of the contract; (b) the quality and number of experienced lawyers who are available to handle matters -- whether as arbitrators, mediators or advocates -- is advantageous; and (c) New York City is perceived as a suitable place to stay during an arbitration. NYSBA also should better communicate the following characteristics of New York as an arbitral forum: (a) cost-effectiveness; (b) the importance of mediation; (c) New York courts' support of arbitration; (d) the elimination of exposure to punitive damages; and (e) the availability of appeal. NYSBA should consider studying and attempting to alleviate the concern of some non-U.S. parties that participating in arbitrations in the U.S. could result in their submitting to U.S. jurisdiction. (30, 31-37, 38, 44, 48) 6. NYSBA should investigate with the New York Legislature amending Article VI, § 3 of the New York Constitution to permit responding to certified questions of law from foreign courts, and it should give further consideration to whether it would be useful to enact a statutory provision as to the confidentiality of evidence and awards in international arbitration. (38-39, 48) 7. NYSBA should study, through the appropriate NYSBA Sections, whether to recommend the adoption of the 1996 UNCITRAL Model Law on Electronic Commerce. (18, 23, 48) 8. NYSBA should support the ratification of the Hague Convention on Choice of Court Agreements, which

	provides for the recognition of foreign judgments. (15, 25, 79, 81) 9. NYSBA should encourage other New York bar associations and members of the New York Bar to support practices in New York that appropriately emphasize cost efficiency. (34) 10. NYSBA should encourage judges and attorneys to educate international audiences about the advantages of New York as a governing law and forum when involved in panels and meetings of domestic and foreign bar associations. (43)
I. Committee on Continuing Legal Education	1. NYSBA should support -- in conjunction with other bar groups -- conferences, programs, presentations, and webcasts to present the conclusions of the Report and to discuss the advantages of New York law and New York as a forum for dispute resolution, involving the following: (a) the state judiciary; (b) New York federal judges; (c) the general counsels of multinational corporations based in the New York area; (d) transactional lawyers in global law firms in New York; (e) foreign and international bar associations; (f) in-house counsel organizations; and (g) American Chambers of Commerce abroad. (42-43, 47) 2. NYSBA should recommend and develop, in conjunction with overseas chapters of the International Section and other New York bar associations, continuing legal education (CLE) programs to promote the Task Force objectives, and should explore the following: (a) a CLE program to train New York lawyers in the substance and culture of commercial international law and practice (NYSBA as a "School of International Practice"), built on the NYSBA International Section's "Fundamentals" of International Practice; (b) programs that highlight the advantages of New York law in international agreements as well as the benefits of selecting New York as the forum for international dispute resolution; and (c) CLE programs for international and out-of-state lawyers in locations where there are substantial international practices (*e.g.*, London, Paris, Geneva, Rio de Janeiro, São Paulo, and Hong Kong). (43-44, 47)

J. Intellectual Property Law Section	1. NYSBA should study, through the appropriate NYSBA Sections, whether to recommend the adoption of the Uniform Trade Secrets Act. (18, 22-23, 48)
K. Judicial Section	1. NYSBA should explore with the New York Judiciary policies, practices, and rules to improve the administration of justice in relation to international disputes, including but not limited to the following: (a) the creation of a degree of judicial specialization, such as a designation of particular judges as specialized chambers to deal with international arbitration matters; (b) the creation of a "rocket docket" in the Commercial Division for expedited litigation for international arbitration-related disputes; and (c) the use of "judicial referee" decisions by New York judges on issues presented to them by foreign courts, rather than by litigants, that require interpretation of New York law. For example, New York and New South Wales, Australia, entered into a Memorandum of Understanding in 2010 permitting such judicial referee decisions. (3, 26-29, 38, 46) 2. NYSBA should encourage international bar association sponsors to invite New York judges to conferences abroad to speak about New York law and the New York courts. (47) 3. NYSBA should support -- in conjunction with other bar groups -- conferences, programs, presentations, and webcasts to present the conclusions of the Report and to discuss the advantages of New York law and New York as a forum for dispute resolution, involving the following: (a) the state judiciary; (b) New York federal judges; (c) the general counsels of multinational corporations based in the New York area; (d) transactional lawyers in global law firms in New York; (e) foreign and international bar associations; (f) in-house counsel organizations; and (g) American Chambers of Commerce abroad. (42-43, 47) 4. NYSBA should encourage judges and attorneys to educate international audiences about the advantages of New York as a governing law and forum when involved in panels and meetings of domestic and foreign bar associations. (43)

L. Real Property Law Section	1. NYSBA should support the adoption of the Uniform Fraudulent Transfer Act. (18-20, 46)

The following committees were provided with the recommendations for informational purposes. When specific legislative proposals are formulated, they will incorporate them into the Association's legislative policy agenda in accordance with usual NYSBA procedure.

M. Committee on Federal Legislative Priorities	1. NYSBA should support the adoption of the Uniform Fraudulent Transfer Act. (18-20, 46) 2. NYSBA should investigate and develop the use of "ambassadors" (such as the president and officers of NYSBA and other New York bar associations) to continue spreading the message of the Task Force. On this front, NYSBA should coordinate with the following: (a) New York Trade Representatives abroad (currently 16 countries); (b) commercial officers of U.S. consulates abroad; (c) the American Chambers of Commerce abroad; (d) international and local business groups; (e) international bar and law associations; and (f) international meetings of jurists. Furthermore, NYSBA representatives should participate in meetings of UNCITRAL, UNIDROIT, Hague Conference, and similar groups. NYSBA should better communicate specific points about international arbitral practice to promote a much enhanced understanding of the realities of the practice. NYSBA should communicate the advantages of New York as an arbitral forum, with special emphasis on the following: (a) it is advantageous to have New York law as the law of the contract; (b) the quality and number of experienced lawyers who are available to handle matters -- whether as arbitrators, mediators or advocates -- is advantageous; and (c) New York City is perceived as a suitable place to stay during an arbitration. NYSBA also should better communicate the following characteristics of New York as an arbitral forum: (a) cost-effectiveness; (b) the importance of mediation; (c) New York courts' support of arbitration; (d) the elimination of exposure to punitive damages; and (e) the availability of appeal.

	NYSBA should consider studying and attempting to alleviate the concern of some non-U.S. parties that participating in arbitrations in the U.S. could result in their submitting to U.S. jurisdiction. (30, 31-37, 38, 44, 48) 3. NYSBA should study, through the appropriate NYSBA Sections, whether to recommend the adoption of the Uniform Trade Secrets Act. (18, 22-23, 48) 4. NYSBA should support the ratification of the Hague Convention on Choice of Court Agreements, which provides for the recognition of foreign judgments. (15, 25, 79, 81) 5. NYSBA should study the following treaties more closely with a view to recommending U.S. ratification or accession or recommending particular changes: (a) UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules Convention") (79, 80); (b) UN Convention on the Use of Electronic Communications in International Contracts ("Electronic Communication Convention") (80); (c) UN Convention on the Assignment of Receivables in International Trade ("Receivables Convention") (79, 80-81); (d) Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Hague Securities Convention") (79, 81); (e) Hague Convention on the Law Applicable to Trusts and on their Recognition ("Hague Convention on Trusts") (79, 81); (f) UNIDROIT Convention on Substantive Rules for Intermediated Securities ("Geneva Securities Convention") (80, 81); (g) UN Convention on Independent Guarantees and Stand-By Letters of Credit ("Letters of Credit Convention") (79, 82); (h) UNIDROIT Convention on International Financial Leasing ("UNIDROIT Financial Leasing Ottawa Convention") (which relates to leasing of real estate and equipment) (80, 82); (i) 1980 Convention on Contracts for the International Sale of Goods ("Convention on the International Sale of Goods") (12, 79, 82); (j) 1974 Convention on the Limitation Period in the International Sale of Goods; and Protocol (1980) ("Limitation Period Convention (1974) Protocol (1980)") (79, 82); and (k) 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") (12, 79, 82).

N. Committee on Legislative Policy	1. NYSBA should support the adoption of the Revised Uniform Arbitration Act for domestic arbitration. (18, 20-21, 46) 2. NYSBA should investigate with the New York Legislature amending Article VI, § 3 of the New York Constitution to permit responding to certified questions of law from foreign courts, and it should give further consideration to whether it would be useful to enact a statutory provision as to the confidentiality of evidence and awards in international arbitration. (38-39, 48) 3. NYSBA should investigate with the New York Legislature New York's adoption of the UNCITRAL Model Law on International Arbitration. (18, 21, 38, 48) 4. NYSBA should study, through the appropriate NYSBA Sections, whether to recommend the adoption of the 1996 UNCITRAL Model Law on Electronic Commerce. (18, 23, 48) 5. NYSBA should study, through the appropriate NYSBA Sections, whether to recommend the adoption of a modification to the New York General Obligations Law to create statutory limitations on risk allocation in construction contracts. (10, 18, 48)

NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL SECTION

MEMORANDUM

To:	Resolutions Committee of the New York State Bar Association	cc:	Vincent Doyle Stephen Younger David Miranda
From:	Michael W. Galligan John Hanna, Jr.		Andre Jaglom Albert Bloomsbury

Subject: Implementation of the Recommendations of the NYSBA Task Force on New York Law and International Matters.

Date: January 10, 2012

The Chair and Executive Committee of the NYSBA International Section delegated to us the preparation of a set of recommendations regarding the implementation of the recommendations of the NYSBA Task Force on New York Law and International Matters. Our discussion will address the recommendations contained in Part III of the Report entitled "The Task Force Recommendations and Conclusions." In the process of addressing these recommendations and conclusions, we will also address some recommendations contained elsewhere in the Task Force Report. The recommendations contained in this memorandum should be read in conjunction with the Memorandum of June 13, 2011 to the House of Delegates from Andre Jaglom et al. regarding the Task Force Report, which already contained many suggestions for the implementation of the Report and which is attached hereto as Appendix A.[1]

We note there has been a suggestion to appoint an implementation committee consisting of representatives from a few of the NYSBA Sections whose fields of specialization are most related to the Task Force recommendations. While we have nothing in principle against this idea, we also are concerned that relegating implementation to a new committee may not be the most direct or efficient way to proceed. We think that the Resolutions Committee or perhaps the Senior Officers of the Association themselves could make direct assignments of specific projects and map out courses of action with the help of the NYSBA staff without having to wait for another report or set of recommendations from yet another special committee. Of

[1] In submitting this Memorandum, we note with great sadness the sudden and untimely death of Joseph McLaughlin, Co-Chair of the Task Force, who played such a leading role in the organization of the work of the Task Force and the development of the Report.

course, the International Section is ready and willing to provide its assistance and support along whatever lines the Resolutions Committee decides to adopt.

Proceeding now to the specific recommendations of the Task Force, please note that Section III is itself divided into three subsections, entitled Support (A.), Coordination (B.), Education (C.) and Study (D.):

A. Support

Recommendations 1,2 and 5 regarding a New York international arbitration center and related matters: The "I Love NY Group," which consists of many NYSBA, City Bar and New York Arbitration Club members and is currently unofficially chaired by Judge Kaye and Edna Sussman, has been meeting regularly to discuss the establishment of a New York International Arbitration Center and related arbitration support issues. Among NYSBA International Section members who are participating are Albert Bloomsbury, Michael Galligan, John Hanna and Steve Younger. Mike and Steve are also members of the "Bricks and Mortar" subcommittee, which met at Judge Kaye's offices for the first time on January 5, 2012. It would seem to be unnecessarily duplicative to set up another committee to address the same topics but we should ensure that the leadership of the DR, Business Law and Commercial Litigation Sections have an opportunity to name members to the "I Love NY Group." The NYSBA leadership might want to discuss some sort of more formal affiliation between the Group and NYSBA but we are not sure that this is necessary at this point. We do think it important that the NYSBA leadership communicates to the Group its support for the Group's efforts and its willingness to play a strong role in the development of the plans and concepts for the Center, including a willingness to engage State government leadership at the executive and legislative levels, if and when it becomes necessary or advisable to adapt some sort of public-private venture as the business model for the Center.

Associated with the idea of establishing a Center is the idea of having a New York international arbitration website, which would be a sort of clearing house for information about all the international arbitration institutions based in New York, their procedures, costs as well as detailed information about the law of New York and international arbitration, up-to-date information about developments in the conduct of arbitrations in New York, the Guidelines for Pre-hearing Disclosure approved by the NYSBA HOD in November, 2010 and the like. The NYSBA Brochure on International Arbitration in New York already contained good materials and even graphics with which to begin to construct such a website. There has also been talk of establishing a "virtual" arbitration forum or site as part of the Center. This may be more integral to the project of establishing the Center itself and might eventually encompass a more

standard type of website. But, it is going to take several years at least to determine a business model for the Center and implement the plans. In the meantime, an international arbitration website sponsored by NYSBA could still play a very useful role. For your interest, we include a link to the Paris arbitration center website as a possible model. http://www.parisarbitration.com/index.php

Recommendation 3 regarding dissemination of the Task Force Report. The Task Force Report is available on the NYSBA website. We note that its recommendation regarding the establishment of a New York Center for International Arbitration has been noted already in an article published on the Practical Law Publishing Limited website (http://arbitration.practicallaw.com/6-102-1348) at the end of last year comparing London, Paris and New York as international arbitration centers. We believe there has also been an extensive dissemination of hard copies although the extent of this dissemination should perhaps be checked with Theresa Schiller or Tiffany Bardwell of the NYSBA staff. The Task Force Report, we feel, should not be looked on as a substitute for good materials such as guides and shorter brochures describing the substantive content of New York contract and commercial law and the New York law on resolution of commercial disputes. These are materials that still need to be developed, as discussed more fully below and in the June 13, 2011 Memorandum.

Recommendation 4 regarding a "reporter" on New York cases relevant to international practice. NYSBA now publishes the New York State Law Digest (David Spiegel, Editor). This is available in a printed as well as a web format. We would suggest that the NYSBA Publications Department seek to identify an editor who would edit a similar Digest of New York cases and developments regarding international practice. It is possible that this could be coordinated with the staff of the New York International Law Review at St. John's University, although their timeline and focus may not necessarily be adaptable to the quicker turnaround required of a monthly bulletin. The Syracuse Law Review also publishes a yearly review of New York law, which at least in some years contained a commercial law section. We might want to encourage the editorial board to ensure that a commercial law component and indeed one on international commercial cases be a regular feature of the Review, which could then possibly be disseminated more broadly on the NYSBA website and perhaps eventually on a website or webpage exclusively dedicated to New York law in the international arena.

Recommendation 6 regarding establishing a Council of New York International Law Firms: The recommendation that consideration be given the establishment of such a Council emerged from the discussion at the NYSBA International Section's Annual Executive Committee "Retreat" on June 5, 2010 at which the NYSBA International Section Executive Committee approved its Resolution of the

same date urging the NYSBA Executive Committee to establish the Task Force. There was a concern that the law firms might be better positioned to engage in a more active "marketing" of New York law than NYSBA itself – both because of certain sensitivities that must be considered by NYSBA in "promoting" New York law because NYSBAS is itself an international bar association with members from many countries as well as New York and other U.S. states – including countries with which New York can be said to "compete" in the international marketplace for governing law dispute resolution – and also because some "marketing" activities may require greater financial resources than NYSBA could afford to spend on such efforts. We think it might be beneficial for the NYSBA President to convene a meeting of representatives from the major law firms to pursue this idea. We also think the idea may need to be coordinated with the "I Love NY Group" because, under some of the models being considered for the establishment of a New York international arbitration center, major New York law firms might be asked to make substantial contributions or investments in the Center. Jeffrey Coleman, partner at Hughes Hubbard & Reed and Chair of the Task Force Subcommittee on Communications, recently expressed to Michael Galligan an eagerness to work on the Council idea and we suspect Christian Swinger, partner at Chadbourne, and Bob Haig, partner at Kelley Dry, both also members of the Task Force Communications Subcommittee, could also be recruited.

Recommendation 7 regarding New York adoption of the Uniform, Fraudulent Transfer Act (UFTA) and the Revised Uniform Arbitration Act (RUAA): This recommendation should be combined with recommendations in Section III(D)(19) regarding adoption of the Uniform Trade Secrets Act (UFTA) and the UNCITRAL Model Law on Electronic Commerce as well as the recommendation contained in Section III(D)(18) concerning possible adoption of the UNCITRAL Model Law on International Arbitration:

These recommendations all bring to the fore a key challenge we face in making sure that New York law is the most attractive law in the world for negotiating, structuring and drafting international transactions: Are we willing to make the effort to convince the New York legislature of the absolutely fundamental role it can play in this effort by establishing procedures and systems for the enactment of the legislation that is necessary to make new York up-to-date, practical and at the cutting-edge? We would recommend that NYSBA launch an effort to establish, as part of New York's governance structure, a commission on New York commercial law, to be composed of New York experts on domestic and international commercial law, that would have the ability to propose to the New York Legislature amendments and modifications to New

York's commercial law statutes and whose proposals would be considered by the Legislature on a "fast-track."[2]

New York was for many years considered to be the national leader in the development of commercial law: New York was the first US state to adopt an arbitration statute, which itself became the model for the Federal Arbitration Act. New York was the first state to imply a covenant of good faith as a term of commercial contracts. Only Pennsylvania was ahead of it in adopting the Uniform Commercial Code. Yet, now, as the Task Force Report points out, the New York arbitration statute has never been updated and courts almost go out of their way to apply the FAA even when it seems clear that they should be looking the New York Act because the New York Act is so antiquated. New York's law on trade secrets has not been systematically adapted to the world of electronic commerce. While not every amendment to the UCC proposed by the National Commission on Uniform Laws is necessarily advisable, to the best of our knowledge, there is no body that we know of that is charged with reviewing these amendments and deciding which should be proposed for legislative action. We think this gap should be remedied.

As to work NYSBA can do on some of these particular pieces of legislation, the new leadership of the NYSBA Intl Committee on International Bankruptcy Law is especially interested in promoting adoption of the UFTA. The DR Section set up last year a special committee to discuss the adoption by New York of the UNCITRAL Model Arbitration Act for international arbitrations. Passage of RUAA has been the subject of much study by NYSBA and the City Bar: the issue here is to make this a NYSBA legislative priority. As to UTSA, perhaps the Intellectual Property Section should be asked to consider bringing a formal proposal to the NYSBA EC to make this also a legislative priority.

B. Coordination

Recommendation 8 regarding better coordination among efforts of NYSBA, the NY Cty Bar, the NY County Bar and other groups: While one could imagine there being established some sort of coordinating committee among these organizations, it might be enough now for the Chair of the NYSBA International Section to make a point of convening an annual meeting of the Chair of the NY City Bar Council on International Affairs (this is the coordinating group for the international law committees of the NY City Bar), the NY County Bar Associations's Committee of Foreign

[2] This idea was first raised by Michael Galligan at the Concluding Plenary of the 2011 NYSBA Global Law Week at the City Bar, which focused on the Task Force Report. Judge Kaye and NYSBA Chair Drew Jaglom expressed support for the idea.

and International Law and any other similar bar association leafders. It should be the practice of the International Section to invite these leaders as guests for the International Section's Annual Meeting Program and Lunch. We suspect that for a long time the City Bar in particular thought of itself as the main player in the field of international law as it affected New York practitioners. The City Bar clearly has a crucial and dynamic role to play. But, in the end, New York law is the law of New York State and, when it comes to making the necessary changes in New York legislation and the New York courts that will enable New York to be the pre-eminent jurisdiction for choice of governing law and dispute resolution, the New York State Bar Association must play a galvanizing role.

While not mentioned in the Task Force Report, we also need to expand the number of county bar associations and specialty bar associations that have international committees or at least some person in their leadership who follows cross-border and private international law issues not only in the commercial area but also family law, trusts and estates, tax, trade and immigration law. These committees and contacts can help bring to the attention of domestic practitioners aspects of international law that they need to be aware of as well as help build a stronger constituency for the types of changes in New York substantive, procedural and judiciary law that are going to be needed to ensure New York's priority in the international arena.

Recommendation 9 regarding coordination with New York governmental bodies: This recommendation essentially repeats one of the purposes that the NYSBA International Section had for the Task Force in its Resolution of June 5, 2010:

> *"(b) To engage such offices of New York State and New York municipalities as may be appropriate in discussion and dialogue for the purpose of exploring ways in which to foster, both inside and outside New York, a better knowledge and understanding of New York law, its relevance to transnational commerce and culture, and the relationship of New York law to other important sources of private transnational law around the world."*

As explained in Michael Galligan's June 15, 2010 Memorandum to the NYSBA EC in connection with the International Section's Resolution, the International Section had been approached by the then-New York State Deputy Commissioner for International Development, Sam Natapoff, about a possible robust collaboration between NYSBA and the EDC's International Department. Mr. Natapoff no longer occupies this position and this might be a good time to explore what interest there may be at the EDC level to take up these considerations again. Because of the lobbying

regulations to which NYSBA is subject, it might be well to involve NYSBA's counsel Richard Rivkin in advising about the parameters that these discussions can take. It seems to us that, due to the political and legal sensitivities inherent in any such collaboration, the contact here should be initially at least between the NYSBA President and the leadership of the EDC. A sound approach might be, for example, for NYSBA to develop its own brochure on the legal aspects of foreign direct investment in New York State, which could be available to EDC as well as the general public. We would like to see EDC become a force in "marketing" the virtues of New York law abroad but the dynamics of causing foreign businesses and lawyers to choose New York law and New York courts may not be the same as "marketing" the virtues of New York as a place of direct business investment.

Recommendation 10 (a) and (b) relating to making New York courts more effective in administering justice in international disputes: The relevance of these recommendations has only become more acute in light of the vigorous efforts that England is making to surpass New York as a center of dispute resolution and specifically to making its courts – not just its international arbitration facilities and institutions– more attractive and effective. An article just published in the December 2011 issue of IBA Global Insight brings this home with great force: http://www.ibanet.org/Article/Detail.aspx?ArticleUid=5DBD1C44-27D2-4568-8DFB-5A61287AC7DB (also attached as Exhibit B). The recommendations, as far as their strict wording is concerned, only deal with "judicial specialization" and the creation of a "rocket docket" in regard to matters of international arbitration. We could ask that a joint committee of the Commercial Litigation, DR and International Sections develop a more detailed set of recommendations. However, we have had the impression that there has been some discussion with Judge Lippman and the OCA already about these ideas. Therefore, we should determine whether any more advanced thought has already been given to this by the Courts, especially as we gather Joe McLaughlin and Judge Kaye were thinking that these changes could be implemented through the OCA rules process and might not require amendments to New York procedural or judiciary law by the legislature.

We want to point out, however, that the focus of the Task Force Subcommittee on International Litigation was not only on the handling of arbitration matters in the Courts. As reported in Section II(B)(2), the Subcommittee viewed as most appropriate for study and proposed action, among other matters, "development of rules for a 'rocket docket' for commercial disputes (including international disputes) in the Commercial Division and in federal court." As the Subcommittee explained in Section II(B)(1), this proposal "would involve a type of 'rocket-docket' in the Commercial Division for expedited litigation that might be attractive to parties in international commercial disputes who do not wish to us the full array of procedures available under New York civil procedure law." This idea of the "rocket-docket" actually

originated with a memorandum for the Task Force (attached as Exhibit C) by Leonard Budow, partner at Phillips Nizer LLP and now co-chair of the NYSBA International Committee on International Contract and Commercial Law, that advocates for the establishment of a chamber of the Commercial Division that would be specifically designed to accommodate not only some of the simplified discovery procedures of the English commercial courts but also those of the Paris Commercial Court and would be designed to be hospitable to civil law as common law litigants and counsel.[3]

In light of the strong efforts being made with the support of the English government and legal community to make the English commercial courts as attractive as possible to international litigants, we think New York needs to consider something that is as bold and even more visionary to make the New York Supreme Court Commercial Division a true competitor to the English and Paris courts. This clearly calls for consideration by specialists in the Commercial Litigation Section as well as the International and Business Law Sections, possibly organized as a special Task Force or Committee for that purpose. The topic will also be the subject of a NYSBA International Section panel at the upcoming New York City meeting of the ABA International Law Section being organized by Jay Safer, partner at Locke Lord & Bissell and Co-Chair of the International Section Committee on International Litigation, and Neil Quataro, partner at Watson Farley & Williams and Executive Vice-Chair of the International Section.

Recommendation 10 (c) regarding the use of "judicial referee" decisions by New York judges on issues presented to them by foreign courts. This recommendation follows up on the ground-breaking Memorandum of Understanding signed by New York Chief Judge Jonathan Lippman and New South Wales Chief Justice James Spiegelman in October, 2010 by which the two Judges set up procedures by which the highest Court of each jurisdiction would be able to provide guidance on the interpretation of specific points of its law at the request of the other Court. It is our understanding that Judge Lippman investigated the constitutional and legal framework for the referral to the New York Courts of questions of New York law from other jurisdictions and developed ideas about a possible amendment to the New York State Constitution that would make such referrals much more easier to accommodate. It would be wise to confer with Judge Lippman about this. Perhaps a special committee of Task Force comprised of members of the International Section and the Commercial Litigation Section could work with the Chief Justice on this issue.

[3] At Mark Alcott's suggestion, Michael Galligan forwarded a copy of this Memorandum to Jonathan Lupkin, Chair of the Commercial Litigation Section, last March.

C. Education

Recommendations 11, 14(b) and 16 dealing in whole or in part deal with making outreach to major international bar associations in an effort to spread the word about the advantages of New York law both on the transactional side and on the dispute resolution side. There are key questions of cost here. Most international bar associations do not pay speakers and New York judges do not necessarily have the financial means to fund extensive trips abroad where organizations like the IBA and UIA usually meet. We believe very much that leaders of the New York State Bar Association should project the presence of NYSBA in the international arena. Of course, the NYSBA President traditionally attends the Annual Seasonal Meeting of the International Section. We note that the President of the Law Society of England and Wales routinely attends the bi-ennial meeting of the American Bar Association here in New York City and it would be interesting if the NYSBA president could put in a similar appearance, perhaps in the years in between the ABA meeting, at the Law Society's annual "International Law Marketplace" meeting in England. It is our understanding that the President of the Law Society is also known to appear at the Annual Conference of the International Bar Association and that the Law Society always has a booth at the Conference. In sum, we think this is an issue that needs to be discussed at the highest levels of the Association because there are obviously issues of resources – both in terms of time and cost – that need to be addressed.

Recommendations 12, 13, 14 and 15 regarding CLE, etc. All of these recommendations concern, in one form or another, educating lawyers here in New York and lawyers, business leaders, judges and public leaders about the nature of New York law, its utility for international business and commerce, and the availability of New York courts and New York arbitral institutions to facilitate the resolution of international business and commercial disputes. Here, there clearly has to be some division and allocation of resources within the Association.

Our June 13, 2011 Memorandum made several recommendations, including the development of better materials explicating the distinctive content of New York commercial law in comparison with the other major competitors for governing law, including England, France, Germany, and China – and perhaps here we should add Hong Kong, which seems to be becoming another key player.[4] The Memorandum also

[4] For the September 2011 Meeting of the Costa Rica Chapter of the NYSBA International Section, Michael Galligan prepared a set of materials comparing key points of New York commercial law with the law of England, France and Germany, together with a set of comparative charts. He hopes to be able to prepare a revised edition of the charts based on comments from Professor Alejandro Garro and others shortly. In late 2011, using the research for the Costa Rica meeting, he also prepared a preliminary draft of a New York law brochure.

recommended that the NYSBA President convene a high-level meeting among law schools, legal publishers and other international bar associations in New York to begin to map out a long-term strategy to develop the knowledge and literature that will enable everyone to make a more informed and forceful advocacy for New York law in the international arena.

A key institutional question for developing the types of CLE programs that the Task Force recommends, particularly in Recommendation #14, is the degree of resources the NYSBA CLE Department can and is willing to commit to this effort. As the Task Force points out, one way of beginning to develop greater CLE for international practice is to begin to "spin off" from the Fundamentals of International Practice developed by the International Section (with the initial cooperation of the CLE Department in 2009) a set of "Mini-Fundamentals" concentrating on key areas of transactional, litigation, arbitration and individual client practice. The CLE Department's resources for web casting and the like could also be critical in developing CLE resources for the growing number of New York qualified attorneys in many of the major financial capitals of the world who also need CLE programming and credits. In terms of providing programming on the advantages of New York law beyond New York, we are making our first effort at the upcoming bi-ennial ABA International Section Meeting in April with a NYSBA International-sponsored program on "New York Law in the International Competition for Governing Law."

D. Study

Recommendation 17: Please see the discussion above regarding Recommendation 10(c) and also the June 13, 2011 Memorandum.

Recommendation 18: Please see the discussion above regarding Recommendation 7.

Recommendation 19: Please see the discussion above regarding Recommendation 7. We should not overlook, however, the recommendation of the Substantive Law Subcommittee of the Task Force at Section II(A)(1)(j) that NYSBA continue its support for the U.S. ratification of the Hague Convention on Choice of Court Agreements. We believe, as discussed in the June 13, 2011 Memorandum, that this should become a NYSBA legislative priority. We believe also that, among the Treaties discussed in Part 3 of Appendix I to the Task Force Report ("Treaties Mentioned in Part 2 that N.Y.S.B.A. Should Study More Closely with a View to Recommend U.S. Ratification or Accession") that special attention should be given to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules") and the Hague Convention on the Law Applicable to Trusts and on

their Recognition. The Rotterdam Rules represent many priorities urged by the U.S. delegation and also address many issues regarding electronic technology in the documentation related to the shipping and delivering of goods. The International Section and the Trusts & Estates Sections have devoted considerable attention to promoting U.S. ratification of the Hague Convention on Trusts; the widespread recognition of trusts could also enhance the use of "business trusts" in international commercial transactions.[5]

[5] New York also desperately needs a business trust statute to ensure that it offers a complete menu of commercial law rules and principles. It is reliably reported that New York is losing considerable business to Delaware because Delaware does have a well-respected business trust statute.

Appendix A

NEW YORK STATE BAR ASSOCIATION
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MEMORANDUM

To: House of Delegates of the New York State Bar Association

From: Andre Jaglom,
International Section Chair

Albert Bloomsbury
Michael W. Galligan
John Hanna,
International Section Members of the
NYSBA Task Force on New York Law on
International Matters

Subject: Report of the NYSBA Task Force on New York Law in International Matters

Date: June 13, 2011

At the request of the Executive Committee of the New York State Bar Association, and also in keeping with an authorization by the Executive Committee of the NYSBA International Section at its meeting on May 14, 2011, we would like to present the following views regarding the Final Report of the NYSBA Task Force on New York Law in International Matters.

A. We would first like to express our appreciation to the Executive Committee for its decision a year ago to establish the Task Force. The Task Force Report well explains the importance of its mission and subject matter:

> The expansion of global business and trade is the foundation of both developed and developing economies. The importance of providing legal support for the continuation of that expansion cannot be overemphasized -- indeed, it is the absence of the rule of law that often leads to political instability and economic distress. New York is at the forefront of providing that legal support for global business expansion through the use of its law and its choice as a forum for arbitration and judicial dispute resolution. (p.3)

We would also like to express our thanks and appreciation to the leadership of the Task Force, including Co-Chairs Joseph McLaughlin and James Hurlock, Subcommittee Chairs Sherman Kahn, James Carter, Daniel Kolb and Jeffrey Coleman, special advisors the Honorable Judge Judith Kaye and Edna Sussman, and to all the members of the Task Force who worked so diligently on the Report. The Task Force produced an impressive set of recommendations and a Report with material that is both informative and thought-provoking in a very short period of time.

B. The Task Force observes that "[n]o one group could effectively carry out the Task Force Recommendations." It goes on to say that its "intention is to identify projects and issues that call for coordination, education, study or support and to encourage the continued, but focused, efforts of the many experienced international practitioners, experienced arbitrators and mediators and knowledgeable judges in New York" (p. 3) We would like first to address questions of implementation for several of the Task Force recommendations:

1. The Task Force recommends as a proposal worthy of study and further action "the development of rules for a 'rocket docket' for commercial disputes (including international disputes) in the Commercial Division [of New York Supreme Court] and in federal court" (p. 29). The Task Force explains that such a special "docket" or chamber "might be attractive to parties to international commercial disputes who do not wish to use the full array of procedures available under New York civil procedure law. Such parties might elect, through a clause in their contracts or otherwise, procedures modeled on those available generally in international arbitration, such as use of written witness statements in place of affirmative testimony at trial, limitation of pre-trial discovery procedures (incuding generally an absence of oral depositions), waiver of jury trial and possibly limitations on grounds for appeal." (p. 27, see also p. 75)

We think this recommendation is worthy of particular consideration because the factors most cited for why international parties do not elect New York as a forum for dispute resolution (and often as a result, also do not choose New York as governing law) are "U.S. litigation time, cost and anomalous aspects such as punitive damages...and U.S. style discovery" (p. 73). These perceptions often color the views of international parties when comparing New York against other leading jurisdictions for arbitration. The establishment of such a "docket" or chamber would show that New York can accommodate different philosophies and approaches to dispute resolution and also underscore the

support in New York contract and commercial law for party autonomy and choice. The Executive Committee might wish to establish a joint committee or working group, including members of the International Section, the Commercial and Federal Litigation Section and other interested Sections, to develop this proposal further.

2. The Task Force recommends the establishment of New York International Arbitration Center. It notes that, "[w]hile there are suitable facilities available through the providing organizations in New York City and in the various New York law firms and other facilities...it would nevertheless be a helpful and appropriate response to steps taken in other centers such as London, Zurich and Singapore for New York to have such a facility" and "would strongly buttress a showing of New York's support for International Arbitration."

We strongly endorse this recommendation for the reasons cited by the Task Force Report. We understand that some preliminary steps to achieve this goal have been taken and that the Mayor of New York City has even voiced support for it. The Executive Committee might wish to establish a joint committee or working group, including members of the International Section, the Dispute Resolution Section and other interested Sections, to develop this proposal further. The Task Force also recommended exploration of designating certain judges of the Commercial Division of New York Supreme Court to domestic and international arbitration matters. (p. 29, p. 46). Perhaps this idea could be pursued in tandem with the study of the possible establishment of an international chamber of the Commercial Division.

3. The Task Force recommends study and action, among other changes to New York law, the adoption of (1) the Uniform Fraudulent Transfer Act, (2) the Revised Uniform Arbitration Act, (3) the UNCITRAL Model Arbitration Act (for international arbitrations), (4) the Uniform Trade Secrets Act, and (5) the UNCITRAL Model Law on Electronic Commerce. We support these recommendations and suggest that the Executive Committee consider establishing one or more joint committees or working groups, including members of the International Section, the Business Law Section, the Intellectual Property Section, the Dispute

Resolution Section and other relevant Sections, to develop these proposals further.[1]

As first raised at the May 13, 2011 NYSBA Global Law Week Plenary Panel on the Task Force Report, the Task Force Report's recommendations for legislative reform underscore the importance not just of keeping New York law as up to date as possible in matters of international commercial law but in matters of domestic commercial law as well. New York has been known historically as a "driver" of U.S. commercial law in general and we should make renewed efforts to ensure that New York continues to play that role. At the Plenary, there was positive response to a suggestion that New York State establish a standing Commission on Commercial Law to monitor the state of development of New York's commercial law and to make periodic recommendations to the New York Legislature for statutory reform. We recommend consideration of this suggestion to the Executive Committee.

4. The Task Force recommends that, "[i]n order to protect the judgments of our own courts, the Subcommittee recommends continued support for the ratification of the Hague Convention on Choice of Courts Agreements as further described in Appendix I." Appendix I, "Treaties Relevant to International Business in New York," contains recommendations for U.S. ratification or accession to a number of international treaties, to many of which the United States is a signatory but not yet a party, in areas of private international law, as well as recommendations for further action by the United States in connection with treaties to which the United States is a party, such as the Convention on the International Sale of Goods and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Ratification by the United States of treaties that it has signed is very challenging because of the constitutional requirement that the U.S. Senate gives its advice and consent (by a two-thirds vote). The U.S. Supreme Court has confirmed that treaties are the law of the land in matters that are traditionally governed by state law as well as those governed by Federal law. Missouri v. Holland, 252 U.S. 416 (1920) (Holmes, J.) Concerns related to maintaining the proper balance between federal and state power sometimes make ratification of treaties that deal with matters of private law particularly challenging. Thus, it is particularly appropriate for state

[1] We understand that a working group of the Dispute Resolution Section has begun working on consideration of possible New York adoption of the UNCITRAL Model Arbitration Act.

bar associations to take a leading role in advocating for U.S. ratification of treaties that will make the private law of the United States more conducive to the development of international trade, commerce and development. In 2008, NYSBA decided to add federal legislation to its legislative agenda. We recommend that NYSBA consider making the ratification of the Courts Convention and other treaties described in Appendix I a part of its federal legislative agenda.

5. The Task Force recommends that the New York Court of Appeals undertake to replicate the precedent of New York's 2010 Memorandum of Understanding with the Supreme Court of New South Wales about the reciprocal referral of questions of law in each other's jurisdictions (p. 28, p. 46). It also recommends work on an amendment to Article VI, Section 3 of the New York State Constitution to permit a formal procedure for certified questions of law from foreign courts (p. 28, p. 46). Chief Judge Jonathan Lippman made a very well reasoned and even impassioned address on the problems of accurately establishing foreign law upon the occasion of the signing of the New York at the NYSBA International Section Annual Seasonal Meeting in Sydney, Australia in October 2010.[2] We recommend that NYSBA continue to work with the Office of the Chief Judge on identifying additional opportunities for such agreements and that a working group of the Association, including members of the International Section and the Commercial Litigation Section, also explore with the Office of the Chief Judge the prospect of an enabling amendment to the New York State Constitution for the certification by foreign courts to the courts of New York State of issues of New York law.

6. The Task Force recommends "the creation of an independent 'Council of New York International Law Firms' affiliated with the N.Y.S.B.A. "to promote and advance New York law, which could possibly commit greater financial resources than a bar association" (p. 45). See also p. 43. The International Section suggested that the Task Force might wish to consider such a proposal at the time the International Section recommended the establishment of the Task Force. We continue to believe this avenue should be explored, perhaps building on the cooperation the International Section garnered from many of New York's

[2] Reprinted as "New York to Sydney: Navigating Currents in International Law," International Law Practicum (NYSBA, Vol. 23, No. 2: Autumn 2010), pp. 75-78.

leading international law firms for the recently-concluded 2011 Global Law Week.

7. The Task Force makes a number of recommendations about education (pp. 43-45, 47-48), including that NYSBA develop, in conjunction with the N.Y.S.B.A. international chapters and other New York bar associations, Continuing Legal Education (CLE) programs to train New York lawyers in the substance and culture of commercial international law and practice (N.Y.S.B.A. as a "School of International Practice"), building on the NYSBA International Section's "Fundamentals" of International Practice and expanding the "Fundamentals" and CLE programs for international and out-of-state lawyers in locations where there are substantial international practices such as London, Paris, Geneva, Rio de Janeiro, Sao Paolo and Hong Kong. We are grateful for the acknowledgement of our "Fundamentals" program and recommend that the Executive Committee commission the NYSBA CLE Department to work with the International Section and other interested Sections and Committees of the Association to carry out this recommendation.

8. The Task Force recommends that the President and officers of NYSBA and other New York bar associations continue to spread the work of the Task Force and that NYSBA coordinate with the New York Trade Representatives, U.S. consulates, and various private business groups and international bar associations. We heartily endorse this recommendation. It is very noticeable that the President of the Law Society of England and Wales always attends the biennial Spring Meeting of the American Bar Association's International Section in New York City. We believe that the highest representatives of NYSBA should be carrying the message about the importance of New York law to the other major legal and financial centers of the world as well.

9. The Task Force recommends that "NYSBA representatives should participate in meetings of UNCITRAL, UNIDROIT, the Hague Conference on Private International Law and similar groups" (p. 48, also 44). We are grateful that the Executive Committee at its January 2011 meeting approved NYSBA's application to become an NGO at UNCITRAL, which has since been approved by UNCITRAL. We are also grateful for the cooperation of the NYSBA executive staff in facilitating the naming of NYSBA's delegation to the 44th Plenary Session of UNCITRAL later this month. We look forward to the approval of NYSBA's application for NGO status before the UN ECOSOC and DPI and are exploring avenues for

participation in UNIDROIT and the Hague Conference, which we hope the Executive Committee and the staff will continue to support.

C. We now wish to address some issues and recommendations not directly addressed in the Task Force and it objectives make more salient.

1. The Task Force Report points out many of the generally praiseworthy characteristics of New York law and New York courts – objectivity, respect for freedom of contract, private party autonomy, highly professional judiciary and bar and so forth. At this point in history, they do not necessarily make New York unique and therefore, by themselves, do not necessarily provide enough guidance as to what distinguishes New York law from the law of other common law jurisdictions such as England, Ontario or Hong Kong or the law of civil law jurisdictions in Asia, Europe and Latin America. We think it is still important to understand the extent to which New York law, in its substance, does have distinguishing and even unique characteristics and in what ways it could so in the future. Not only did the Task Force not have the time in which to conduct this more in-depth study, but the Task Force found itself with a remarkable paucity of materials to assist in such an effort.

2. There does not appear to be any legal treatise currently extant on New York contract or commercial law (other than the relevant volumes of New York Jurisprudence 2d and perhaps some materials on New on New York contract and commercial law encapsulated in some of the chapters of Haig et al. on Commercial Litigation in New York State Courts). We believe this gap should be closed as soon as possible. This is not just a matter of scholarly or academic concern: international practitioners the world over need easily accessible resources with which to familiarize themselves with the substantive rules and principles of the laws that they advise their clients to adopt. Civil law jurisdictions like to claim that civil law is easier to learn because "the law is all in the Code:" while this claim no doubt overly simplifies a more complex reality, it also underscores the need for concise and accurate guides to the substantive norms and rules of New York law so that international practitioners can better understand and appreciate them.

There is also a dearth of material that explains to the international practitioner the differences and distinctions between New York law and the law of other jurisdictions that compete in the global

market for choice of law and choice of forum. It is said that an overwhelming majority of the transnational contracts are drafted in English and that, of these, the majority are governed by either English or New York law. Yet there is little in the legal literature that would help a practitioner understand to what extent English and New York law are the same and on what basis they differ. There is also very little available on the differences between New York law, on the one hand, and, on the other hand, German law, French law or the laws of other jurisdictions likely to emerge more strongly in the global marketplace such as the laws of China and Brazil.

We recommend that the President of the New York State Bar Association, with the cooperation of the International Section, other relevant NYSBA Sections and other leading New York international bar associations and committees, convene a high-level meeting among law schools, legal publishers and other international bar associations in New York to develop a long-term plan of legal research and publication in order to remedy the gaps identified here and to provide the international legal community the tools that can enable legal practitioners the world over to better understand New York law and to make informed choices about the choice of law in international commercial transactions. This research and publication will also provide the New York bar with a better base of knowledge to determine ways in which New York law could profitably incorporate rules and concepts adopted in other jurisdictions to improve the efficacy and practicality of New York law.

3. We should also like to see added to the list of possible improvements in New York law recommended by the Task Force for further study and consideration of (a) amendments of New York law (i) to better coordinate the relationship between the Convention on the International Sale of Goods, which the United States has ratified and to which it is therefore a party, and (ii) the provisions of Article 2 of the New York Uniform Commercial Code (Sale of Goods) and (b) to update the New York law provisions on foreign money judgments (NY Judiciary Law Section 27), as well as the adoption into New York law of the Uniform Unsworn Declarations Act. Some more details about these suggestions are included in Appendix A to this Memorandum. [3]

[3] There is a suggestion at pp. 73 to 74 of the Task Force Report that New York might consider adopting a series of statutory forms for certain contractual undertakings to address concerns sometimes heard from lawyers from civil law jurisdictions about the length or complexity of New York contracts.

4. Choices of law and choices of forum can be the most important clauses in an international contract and in many cases they are the practical mechanisms through which the global competition for governing law and choice of forum is "lost" or "won." Yet, these are often the clauses that receive the least amount of careful drafting attention. Appendix C and Appendix D to the Task Force Report contain some sample clauses for the choice of New York law as governing law, New York courts as forums for dispute resolution and New York arbitration and ADR. We think NYSBA should set out to compile a more comprehensive set of clauses that might be a regularly updated publication of the Association. There should be an aim to expand the variety of options and areas of coverage. There should, for example, be examples for choice of law devoted to the international sale of goods (the interaction of the CISG and Article 2 of the NY UCC mentioned above), intellectual property protection, and security interests, among others. In the area of choice of forum, there could be more options for controlling pre-trial discovery, which would provide New York practitioners with the opportunity to "level the playing field" with procedures adopted from jurisdictions often held up as more attractive for their more restrictive approaches such as London and Paris. Arbitration clauses could address reasoned vs. unreasoned opinions and the ability of an arbitrator to act as a "wise person" ("amiable compositeur").

5. The Task Force Report contains as Appendix K the NYSBA Brochure on choosing New York for international arbitration. We commend the brochure and especially the initiative of the Dispute Resolution Section on this project. We recommend that plans be put in place to develop similar brochures on choosing New York law as the governing law for international transactions and for choosing New York courts.

6. Finally, while the International Section's original recommendation for the Task Force (Appendix B) clearly contemplated significant attention to the commercial and trade law, the focus was not only on a international transactions but international relationships and not only on international commerce but also on international culture. These are significant areas of New York law that also touch on international life. Trust law is in fact one of the most significant areas of the law where choice of law issues are drivers of business. With the spread of international trade and business comes the international movement of people, with all the issues of personal, family and estate law that

accompany persons with ties to more than one country. Issues of criminal law, health law and human rights also abound. The Executive Committee may wish to consider a possible role for a complementary Task Force on these issues – perhaps on "New York Law and the International Person." Nor can all of these issues be looked at only from a state law level, as the discussion of international treaties above indicates. Federal law – in such areas as corporate governance, corporate tax and immigration – have a great impact on the standing of New York in the international legal as well as financial markets. National policy about the resolution of product liability claims (including the inter-action of contingency practice and the "American rule" regarding legal fees), we are told over and over, impacts not only on the choice of New York law but on choices by non-US investors and businesses to enter the U.S. markets in the first place. Finally, there are the special issues dealing with New York's nearest "foreign" neighbor, Canada. All of these topics are ripe for future consideration by the Association.

D. In conclusion, it is our pleasure to recommend the adoption of the Task Force Report. The recommendations of the Task Force compose a demanding but very timely program of action. These recommendations, supplemented with some of the additional suggestions we have noted here and others than will certainly develop over the months and years ahead, can form a strong platform on which to build New York's future as the premier center of international law in this still-young twenty-first century.

Appendix A

Additional Suggestions for Further Study and Reform,

1. Study Whether to Amend NY UCC Section 1-105 to Improve Coordination Between NY UCC Article 2 and the Convention on the International Sale of Goods

Consideration should be given to the enactment of amendments to NY UCC Section 1-105 (choice of law under NY UCC) to provide express rules for coordinating the application of NY UCC Article 2 (Sale of Goods) with the Convention on the International Sale of Goods ("CISG"), to which the United States is a party.

The CISG, pursuant to the terms of the U.S. ratification of the Convention, governs contracts for the sale of goods between parties of different countries whenever each party has its place of business in a country that has ratified the Convention, unless the parties have elected that the Convention rules should not govern their transaction ("opt-out" provision).

There are two areas where such coordination appears to be appropriate.

The first area has to do with the construction of choice of law clauses in transactions where the Convention rules, absent an "opt-out" provision, could apply. It would help to avoid confusion if New York courts could be guided by a statutory rule of construction. Such a rule of construction, consistent with the Supremacy Clause of the U.S. Constitution, would confirm that a choice of New York law for a transaction from countries that are parties to the Convention would mean that the Convention rules prevail except in matters not addressed by the Convention. Any intention to exclude the Convention rules would require an express provision that New York law be applied without regard to the Convention ("New York law without application of the CISG") and could not be implied by the mere selection of New York as the governing law of jurisdiction.

The second area of coordination would enable parties to an international sales transaction with connections to New York to provide for the application of the Convention rules to their transaction even if each party does not have a place of business in a country that has ratified or acceded to the Convention. (Under the Declaration deposited with U.S. ratification of the Convention, the United States is bound to apply the Convention rules only in cases where all the parties to a transaction have their places of business in countries that are parties to the Convention.) Such a

provision would fulfill an assurance contained in the U.S. State Department's legal analysis accompanying President Reagan's request for the U.S. Senate's advice and consent to U.S. ratification of the Convention, that parties wishing to apply the Convention in circumstances that the U.S. Declaration would exclude could do so by contract.[4] NY UCC Section 1-105 adopts a very generous approach to party autonomy by allowing parties to a transaction that has New York connections to select the law of a state or country other than New York to apply to their transaction. So far, however, it has not been amended to allow parties to adopt the substantive rules of the Convention to international sales transactions where the Convention rules would not apply due to the U.S. Declaration. To enhance the status of New York as a jurisdiction for which autonomy of contracting parties is a primary value, consideration should be given to modifying New York's UCC to incorporate this option.

2. Study Whether to Amend NY GOL To Provide That the Date For Converting Foreign Currency Money Judgments Issued By New York Courts Should Be The Date Of Payment rather than the Date of Judgment.

Section 27 of the New York Judiciary Act provides that New York courts may issue money judgments in currencies other than the U.S. dollar but requires that, for calculation in dollars, the amount of the foreign currency must be converted into dollars using the conversion rate on the date the judgment is issued. Converting the amount of the judgment into dollars on the judgment date places the risk of the dollar depreciating against the currency of the judgment on the judgment creditor and thus threatens to cause the judgment creditor substantial loss of the value of his or her remedy; substantial appreciation of the dollar against the judgment currency between the date of judgment and the date of payment could, on the other hand, conversely confer a windfall on the judgment creditor. Shortly after the enactment of the current version of Section 27, the Uniform Foreign Money Claims Act was approved by the National Commission on Uniform Laws, under which foreign money judgments are converted into U.S. dollars on the date of payment.[5] It would appear that New York adoption of this rule would better protect the justified expectations of a claimant on an obligation denominated in a non-U.S. currency of being paid in that currency.

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[4] See http://www.cisg.law.pace.edu/cisg/biblio/Reagan.html (Appendix B to the State Department analysis).

[5] See http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/ufmca89.pdf

3. Study Whether to Amend NY CPLR to Incorporate the Provisions of the Uniform Unsworn Declarations Act

The Uniform Unsworn Declarations Act provides a mechanism to enable Affidavits and other documentation to be taken, acknowledged or certified without notarial participation.[6] The Act applies only to documents executed outside the United States and provides relief from the considerable difficulty non-U.S. declarants may have in obtaining appointments at U.S. consulates to have their affidavits taken or documents acknowledged. Similar rules have been adopted under Federal law for Federal proceedings, pursuant to 28 U.S.C. Section 1746. This seems to be a timely response to the considerable increase in delays in appointments at U.S. consulates abroad for the certification of documents and should be carefully considered for adoption into New York procedural law as well.

[6] http://www.law.upenn.edu/bll/archives/ulc/cufda/2008final.pdf

Appendix B

RECOMMENDATION BY THE INTERNATIONAL SECTION OF THE NEW YORK STATE BAR ASSOCIATION OF RESOLUTION TO BE ADOPTED BY THE EXECUTIVE COMMITTEE OF THE NEW YORK STATE BAR ASSOCIATION REGARDING THE PLACE OF NEW YORK LAW IN INTERNATIONAL LIFE

Keeping in Mind that,

The pre-eminence of New York State in the financial, commercial, and cultural life of the world has provided a powerful impetus for the adoption of New York law as the governing law of countless cross-border financial, commercial, fiduciary and personal transactions and relationships, causing New York law to become a pre-eminent standard of private international law;

The status of New York law as an international legal standard carries with it a corresponding responsibility to make New York law as strong, flexible and useful as possible for the ordering of cross-border business and personal transactions and to make New York itself as effective and efficient a forum as possible for the resolution of cross-border private disputes;

Maintaining and strengthening New York law as an international standard not only renders a service to the international legal community but also benefits New York itself by making New York a more attractive environment for investment in New York from around the world and as a site from which to launch business, commercial and cultural endeavors both within and without New York;

NOW THEREFORE, the International Section of the New York State Bar Association recommends the Executive Committee of the New York State Bar Association to resolve to establish a Task Force on "New York law in International Life," such Task Force to consist of such representatives of the membership of the New York State Bar Association (including without limitation representatives of the International Section) and its constituent county and municipal bar associations as the President of the New York State Bar Association should deem appropriate, the purposes of such Task to be:

1. (a) To undertake such study or studies as it may deem advisable to gain a more critical understanding not only of the strengths of New York law as an international standard but ways in which New York law could become more effective and useful for the ordering of private transnational transactions and

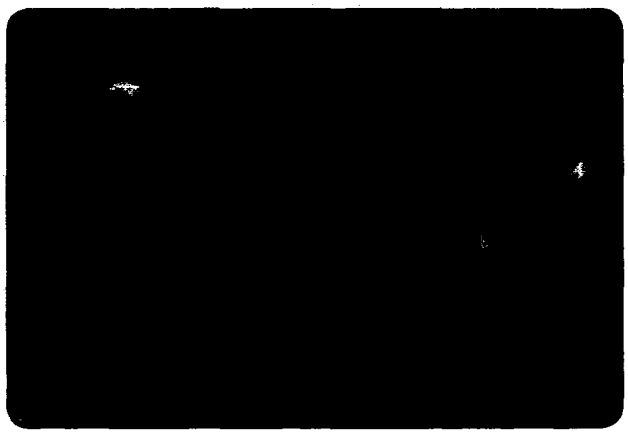
relationships and New York a more effective and efficient forum for the resolution of cross-border disputes, and to develop such recommendations for the modification and supplementation of New York law as may be appropriate for these ends;

2. (b) To engage such offices of New York State and New York municipalities as may be appropriate in discussion and dialogue for the purpose of :exploring ways in which to foster, both inside and outside New York, a better knowledge and understanding of New York law, its relevance to transnational commerce and culture, and the relationship of New York law to other important sources of private transnational law around the world.

E. (c) To call upon the entire New York State Bar Association membership and staff (including without limitation the International Section and its Chapters and Committees) to assist with these efforts."

June 5, 2010

Appendix B



Rolls Royce justice

At £300m, the new Rolls Building offers cutting-edge commercial dispute resolution – but at a hefty price. Is the building emblematic of the world's leading centre for legal services?

NEIL HODGE

London's new £300m state-of-the-art court complex – the Rolls Building – opened its doors in October. The government wants to make the UK the world's pre-eminent destination for swiftly resolving international legal disputes, while making the country's legal services market as lucrative as its financial services sector in the process.

When the project was launched five years ago, it was claimed the Rolls Buildings would develop into 'the biggest dedicated business court in the world'. Consequently, the Ministry of Justice (MoJ) and UK Trade and Investment have been promoting British courts as the gold standard for resolving international disputes, hoping to profit from their excellence.

'The provision of modern, high-quality services for all parties will present the opportunity to market the facility at a global level in order to maintain the unrivalled work of the high court and English law,' said justice secretary, Ken Clarke. In a speech to TheCityUK in September, he added: 'The UK may no longer be able to boast that it is the workshop of the world... but the UK can be lawyer and adviser to the world.'

The UK's legal sector is already a significant earner, generating £23.1bn in 2009 – equivalent to 1.8 per cent of GDP. It contributed £3.2bn in exports, triple the level of a decade ago. Of commercial arbitration cases, 90 per cent of those handled by London law firms involve an international party, and – anecdotally –

'Four out of five cases that are dealt with in the Commercial Court have one party that is based outside the UK. In half of all cases neither party is UK-based.'

Ted Greeno
Herbert Smith

they mostly come from Russia and Eastern Europe. Court 26 is currently hearing a dispute between a certain Boris Abramovich Berezovsky and a former colleague, Roman Arkadyevich Abramovich.

The Rolls Building – which brings under one roof the Chancery Division, the Admiralty and Commercial Court and the Technology and Construction Court – is the largest specialist centre for the resolution of financial, business and property litigation anywhere in the world and has judicial expertise in areas such as asset recovery, banking and financial services, company law, construction, insolvency and reconstruction, intellectual property and patents, professional liability, property, shipping, technology, and trusts. It will also be used for mediation and arbitration, both increasingly popular alternatives to the traditional confrontation and expense involved in litigation.

The curvaceous, 11-storey building in Fetter Lane, close to London's Royal Courts of Justice, contains 31 courts, including three 'super-courts' configured to accommodate big, high-value disputes, as well as four courts configured in 'landscape' format for multiparty cases. The building also has 55 consultation rooms that clients can use – a facility sorely lacking in the old premises, according to lawyers' testimony.

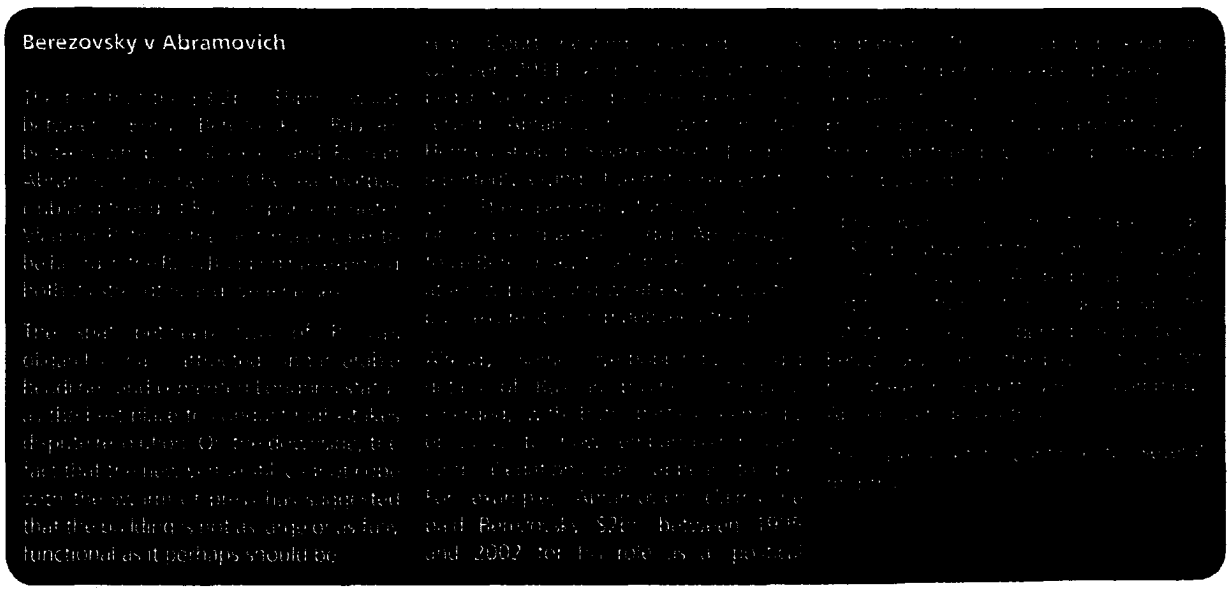
The MoJ is also keen to trumpet the building's investment in cutting-edge technology, such as full Wi-Fi connectivity thoughout, in-court facilities for parties to use their own IT (including electronic presentation of evidence and cabled broadband), in-court video conferencing facilities, and a new electronic filing system intended to make the facility mostly paperless.

An embarrassment of riches

St Dunstan's House, also in Fetter Lane, is the Rolls Building's predecessor, and few will mourn its passing. Facilities at St Dunstan's were 'unacceptable and an embarrassment to lawyers and their clients', according to Lord Gold, head of David Gold Associates and formerly a senior litigation partner at Herbert Smith. 'For the first time in many years, the Rolls Building will demonstrate to the clients we bring into England that we actually care about them,' he says.

Yet while lawyers praise the new facilities and the much-needed investment, most believe that it is London's long-established reputation as a leading litigation centre that will continue to attract clients rather than the new building and its mod cons.

Masood Ahmed, senior lecturer at Birmingham City University's School of Law, says that the Rolls Building's development 'recognises the well-established fact that the



UK (in particular London) is an epicentre for business and has, for many years, been a key centre for international commercial parties to resolve their disputes'.

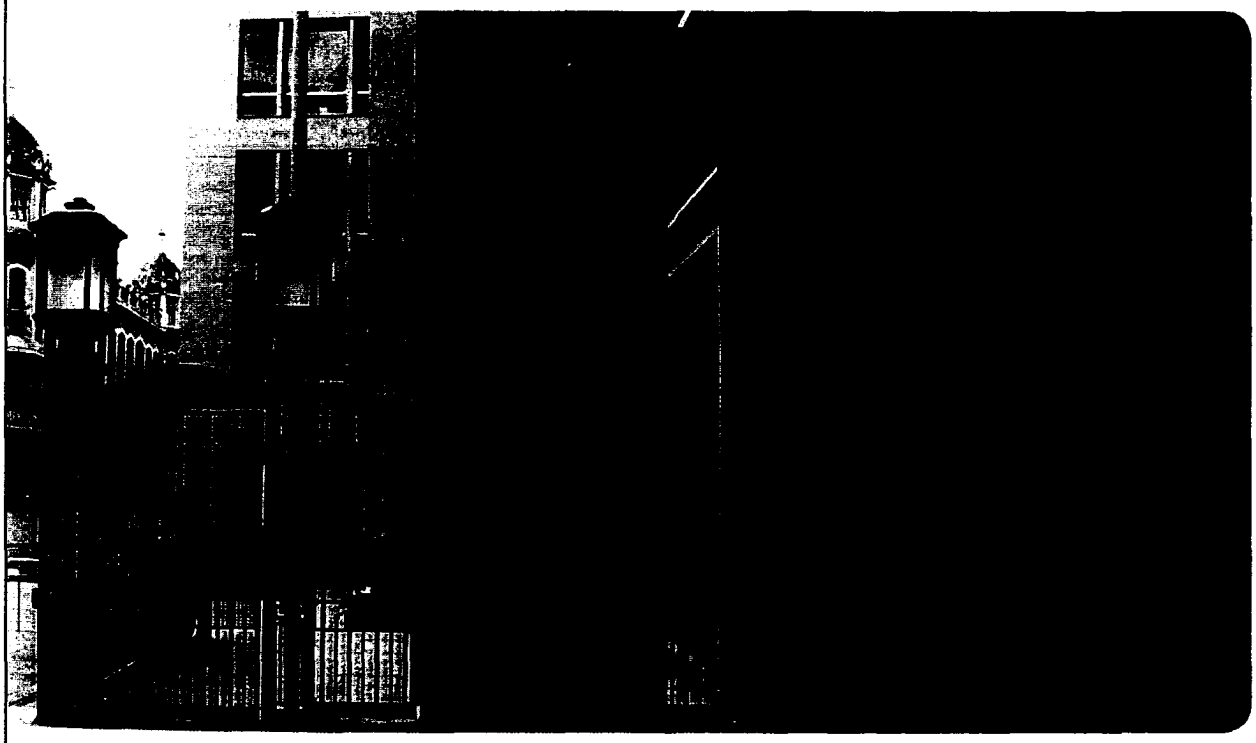
Ahmed also believes that the UK has the status and reputation as a safe and neutral forum for the resolution of international business disputes. Added to that, the judiciary in the UK is recognised as the very best in the world in handling and resolving some of the most complex commercial cases. 'The Rolls Building brings together the geographical significance of the UK as a key centre for international business with the best legal minds in the world to make it a leading centre for the resolution of disputes,' Ahmed explains.

Aside from the quality of the judiciary, clients also appreciate the enforceability of their judgments. Jeremy Cole, head of the investigations and fraud team at Hogan Lovells, says that the UK has the best armoury of interlocutory 'weapons' – such as freezing and search orders – anywhere in the world. 'In an extreme case you can go to the judge in the middle of the night and get an order to freeze the defendant's assets. This ensures that there are assets available to enforce against if at the end of the case you are successful,' says Cole.

Katie Papworth, solicitor in the commercial disputes group at Thomas Eggar, echoes these claims, underlining the English courts' history and extensive jurisprudence. 'We have good Commercial and Chancery judges coupled with a sound and robust system of law. Further, there is a substantial amount of case law relating to litigation cases in England which makes it very appealing for litigants to bring cases here, even more so if the rule of law in their own countries is unpredictable or if judges are inexperienced in handling these types of cases.'

Papworth also points out the frequency with which international companies use English law when they draw up commercial contracts with other parties. 'English law is used a lot in commercial contracts and English jurisdiction clauses are very popular when foreign companies go into business with one another,' she explains. 'It can provide additional assurance for both parties, because without a jurisdiction clause from the outset it can be very difficult to seek recourse in a foreign court. Either party would need to demonstrate that England was the most appropriate forum, and should hear a case between two foreign litigants where foreign jurisdiction would normally take precedence,' she adds.

There are other advantages, besides the judiciary. Ted Greeno, senior partner in the dispute resolution department at Herbert Smith, says that 'as well as having experienced judges and barristers, London has a great network of expert witnesses, shorthand note-takers, translators and so on



which the city has built up over a long time. Litigants therefore have the reassurance that everything they need to conduct their case can be found in one place,' he says.

This offering is vital, considering the uniquely international character of the Commercial Court. 'Four out of five cases that are dealt with in the Commercial Court have one party that is based outside the UK. In half of all cases neither party is UK-based', Greeno explains. As a neutral forum, the UK Commercial Court has all the necessary expertise and experience to conduct complex dispute litigation cases.

Greeno also highlights how much claimants appreciate the adversarial approach, whereby both parties must disclose the documents that may favour the other party as well as the documents that support their own case. 'While this may seem counter-intuitive, claimants tend to believe that this approach ensures fairness and that a reasonable judgment is more likely as it is based on all the evidence at the judge's disposal and has been cross-examined by both parties,' says Greeno.

Rules of attraction

Some lawyers also believe that UK courts are more 'predictable' in their behaviour, which means that foreign litigants are taking less of a gamble in terms of time and costs, particularly when compared to other litigation-friendly jurisdictions like the US.

Tim Strong, partner in the financial disputes practice at Taylor Wessing, says that the US does not have a specialist commercial court for dealing with dispute litigation cases, and that its wide-ranging discovery process can slow proceedings down as both parties try to locate documents. Strong says that there are other reasons why litigants favour the UK court over the US. For one, the US uses juries in civil cases, and the UK does not; also crucial is the issue of punitive damages.

'Parties bringing a dispute to court want predictability about how the case is going to be conducted and so juries and the issue of punitive damages awards – which may bear no resemblance to the actual costs of the case – may be seen as too big a gamble. For many litigants, there is just too much to lose by bringing a dispute to a US court,' says Strong.

The coming years may see a shift in the nationalities bringing disputes to the UK. Steven Philippsohn, senior partner at PCB Litigation and a member of the IBA's Litigation Committee, suggests that in the

near future the Rolls Building may see a rise in the number of Chinese parties bringing disputes to be settled in the UK.

'The Chinese Government and many of the country's largest companies have been investing heavily in infrastructure projects in emerging markets like Africa. Unfortunately, an increase in investment activity often has an impact on the amount of fraudulent activity within these contracts. As a result, we may see more disputes coming out of these kinds of deals which may mean that parties from China will seek legal redress in the UK.'

Rule Britannia

Not everyone believes that the UK's attempt to lure international litigants to London is good news. Dimitry Afanasiev, chairman of Russia's largest law firm Egorov Puginsky Afanasiev & Partners, explains: 'Currently, we have the bizarre situation whereby English law is effectively the operative law in Russian business transactions. Even purely domestic transactions are governed by foreign law even to such an extreme that when one Russian is selling a house in Russia to another Russian, that is often an offshore company transaction that is governed by English law.'

In the mid- to long term, this is bad for Russia. 'Unless Russian law is going to apply to business transactions here, Russian lawyers and judges are not going to gain the experience and sophistication', says Afanasiev. 'English courts are going to be overloaded with essentially domestic Russian disputes on matters so alien to any English judge that he or she is not going to know how to do away with the case, and there is not going to be any rule of law in Russia,' he adds.

So why do Russians take their disputes elsewhere? 'Afanasiev is clear: 'The problem with Russian law is enforcement: people are reluctant to have deals governed by Russian law because they fear having to appear before a Russian judge who could be unsophisticated and/or possibly corrupt, and I'm not sure which is the worst of those two options,' he says.

One of the ways in which the Russian Government is attempting to address this problem is through the creation of a modern, sophisticated international court of arbitration, similar to the London Court of International Arbitration, with independent and well-paid arbitrators.

'We are also helping the government to re-write the Russian Civil Code by deleting unnecessary imperative clauses that unreasonably restrict freedom of contract,' says Afanasiev. 'It needs to be simplified and liberalised and Russia should look at other countries that have legal systems built on the same Napoleonic code – such as France, Germany and the Netherlands – and consider the possibility of following the way in which they have adapted it,' he says.

'If implemented, both initiatives are going to be a big leap forward in the development of Russian law, and a small collateral benefit for Russian law firms will be that there will be more demand for Russian lawyers,' Afanasiev adds.

Vassily Rudomino, senior partner at Alrud and Co-Chair of the IBA's European Regional Forum, is also clear about why Russians take their disputes to the UK. Foreign companies insist on having jurisdiction clauses in their contracts because they distrust Russian courts, which means that dispute resolution needs to take place abroad, and usually in London under English law. Furthermore, Russian businesspeople have such strong personal links with London now that it is easy to establish a link that enables them to bring a case before an English court.

'The problem with Russian law is enforcement: people are reluctant to have deals governed by Russian law because they fear having to appear before a Russian judge who could be unsophisticated and/or possibly corrupt'.

Dimitry Afanasiev
Egorov Puginsky Afanasiev & Partners

But Rudomino believes that the tide is beginning to turn. 'The Moscow Commercial Court hears a lot of dispute litigation cases now and there are hardly any reports of unfair trials or corruption, which is welcome news. This is creating greater confidence in the Russian legal system and there is some evidence to suggest that Russian companies want to resolve disputes in Russia now instead of England.'

Follow the leader

Some believe that the primacy of the English courts in international disputes will force other countries to examine their legal systems, and push for appropriate reform to boost confidence. Philippsohn says that 'there is certainly a well-recognised belief that at least 60 per cent of the work

in the commercial and chancery divisions is Russian and Eastern European, and that that figure is unlikely to go down.' He adds that 'if the Russians were able to create a greater degree of confidence in their own legal systems then parties would be more comfortable litigating there. At the moment, parties feel more comfortable resolving their disputes in the English court rather than their own domestic courts.'

Timothy Dutton QC, head of Fountain Court Chambers and former chairman of the Bar Council, hopes that 'if word gets back to litigants' domestic courts that disputes have been resolved to very high standards in England then courts in other countries will want to find out why and may embark upon a process of reform'. There are already examples of this occurring. One example is Kazakhstan, where the judiciary has positively tried to adopt English process in commercial cases.

Other states have taken what they think will work from the UK system too, such as Dubai and Qatar. Both are building financial services centres that have the same type of regulatory oversight as in the UK. 'As a consequence of modelling their financial regulation and compliance on the UK system, they are also adopting a broadly English legal model', says Dutton. 'In Dubai, the former Court of Appeal judge Anthony Evans has helped to set up a court, and a local London Court of International Arbitration, so that the country has the skills and expertise to resolve local commercial disputes, while Lord Woolf has carried out similar work in Qatar,' he says.

Given the weight of professional opinion, it appears that London's status as the jurisdiction of choice for commercial disputes is only set to grow, and that the Rolls Building will enable the courts system more comfortably to deal with a burgeoning caseload. While some jurisdictions may bristle at the thought of high-profile – and high-value – cases being exported to London, practitioners both in the UK and abroad believe that regions like Russia and Asia will conduct more of their own dispute litigation cases as confidence in their own legal systems and enforcement improves.

Neil Hodge is a freelance journalist specialising in legal and business issues. He can be contacted at **neil@neilhodge.co.uk**.

Appendix C

Memo

To: Michael Galligan

Fr: Leonard N Budow

Re: Impediments to Adoption of New York Law for International Commercial Contracts

Date: Monday, February 22, 2011

A. Background.

New York is the financial and infrastructural gateway for multi-national businesses launching commercial operations in the United States. Prior to such a launch there usually are incremental steps of business development leading to the actual launch vehicle. These steps expose non US nationals and their counsel to New York's jurisprudence and often times to its court system. This initial exposure often times causes a delay in adoption of a launch vehicle and a search for alternative modes of dispute resolution including but not limited to use of private international law, ex-US nationals home jurisdictional law and venues designed specifically to avoid the New York and US Federal Court systems. This leads to loss of credibility and influence of New York jurisprudence.

B. Issues Presented.

(1) Is New York jurisprudence or its applicable process the bar to wider adoption and application in multi national contracts?
(2) If process is the issue, what standards and modalities may be adopted to facilitate the substantive adoption of New York law?
(3) Would wider designation of New York law have a positive practical affect both on the Courts of New York and New York's standing as a multi-national hub for launch vehicles in the United States?

C. Discussion:

I submit that a multinational perspective would enhance the prestige of the New York bar and courts by adopting an experiment symbiotically integrating the fruit of New York substantive law with an expedited procedure more recognizable to the members of the international legal community.

The debatable premise is that businessman and their counsel have an aversion to the US modality of contract drafting and dispute resolution. Empirically based on experience,

the need to circumvent the lengthy and often times tedious US contract in commercial dealings becomes an impediment to commercial dealings. However, after initial exposure and understanding, the specification and freedom to contact virtually any and all terms and conditions subject to practical norms and conventions becomes a surmountable obstacle which eventually becomes an asset.

Further the substance of New York jurisprudence, the scope, depth and sophistication of its judicial precedent, is an attractive component for businessman seeking certitude in a foreign jurisdiction. Nonetheless there is a constant mantra by foreign counsel seeking to avoid contract application to New York law.

The key to understanding this barrier and impediment is viewing the issue from the worst case scenario formulation: dispute resolution. For a business man, (one would say both US and non US but for now let us remain focused on the non US national business man), to avoid being ensnared in a costly, timely and serpentine litigation in New York courts has become the lodestar of good planning even though it often times is a mere chimera. Our court system, (along with our Federalism and tax policies), are ineluctably the banes of wider adoption of New York substantive law as well as the barrier to launching business via branch offices and subsidiaries in New York.

I submit the resolution is in adopting a form of rocket docket, emulating many aspects of the French Tribunal de Commerce ("TDC") and for a specialized part a virtual automatic pro hac vice for lawyers/avocats/barristers etc. based on proof of qualification in the jurisdiction of the non US nationals' domestication. Reciprocity would be a desirable albeit a non essential element. This would open the process to the key element of any representative population in the formulation of contracts and designation of applicable law: the legal representative.

A rocket docket[1] part for International Contracts could be established for Contracts which designate that the substantive law applied is New York. This would ensure that the pendency of any claim would move swiftly avoiding the business trauma that a non US national might face in enforcing its rights.

A New York TDC would eschew any form of jury trial. The Court would be composed of one Judge and two magistrates with a specialization in commercial law matters as well as application of normative conventions. The preference would be that the magistrates be somewhat conversant with civil law.

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[1] The rocket docket is commonly associated originally with the famous Judge Albert Bryan of the USDC for Eastern Virginia. The USPTO has also designated its expedited examination process as a rocket docket.

Commencement of the process would start with the equivalent of a mise en demuere, simply put a registered demand letter. This Demand Letter starts the clock with regard to the commencement date of the action and associated penalties such as interest.

If an expert is demanded (demande d'expertise) it would facilitate the expedited resolution by delivery of a preliminary report to the tribunal. The expert would dictate the discovery he deems necessary to produce a report for the TDC. This report along with a cycle of conclusions and response obviate the bane of all commercial litigations: the discovery fishing expedition.

This special part for dispute resolution would be designated in contract. Such a process invites the expertise of counsel from jurisdictions outside of the United States. The principals although would still need and desire local counsel to be lead counsel would have the benefit of its "home" counsel to ensure the spirit of the matter is accurately reflected in the presentation. Pray envision how attractive New York process would be to a foreign national if it knew the mere commencement of an action could begin in its own jurisdiction with its own counsel.

D. Conclusion.

Why Stockholm for Arbitration? Why Paris for the ICC? New York law is a cornucopia of sophisticated precedent and practice. We house some of the finest members of the bar in the world. Without sacrificing any traditional practices by adopting a rocket docket using processes which have been proven to work in commercial law settings, we would show that New York, as opposed to being sclerotic and xenophobic, is swift and open to members of the international community.

Michael Galligan

From: Michael Galligan

Sent: Wednesday, February 23, 2011 7:25 PM

To: 'McLaughlin, Joseph T.'; jhurlock46@gmail.com; Kolb, Daniel F.; Paul Saunders; Coleman, Jeffrey R.; Kahn, Sherman W.; carterj@sullcrom.com

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Subject: Proposal for a Special Chamber of the Commercial Division of NY Supreme Court

During a telephone call with Joe and Jim last fall, I raised the question of whether it would be possible that the Commercial Division of New York Supreme Court could have a special chamber (whose jurisdiction parties could specifically elect in any forum-selection clause favoring the courts of New York State) that would operate under procedural and evidentiary rules more closely aligned with the procedural rules for NY administrative hearings than NY judicial hearings/trials. My thought was that, in this way, New York could offer an alternative to the formal trial and pre-trial proceedings about which we hear so many complaints from our clients and colleagues abroad. This option might not only help to remove a barrier to the more frequent use of New York as a governing law in international transactions but also give greater credibility to the efforts of the New York arbitration community to convince the international business and legal communities that the New York dispute resolution community knows how to conduct itself using "international standards."

Entirely independent of my idea and with absolutely no prior discussion between us on this topic, my partner, Leonard Budow, who also now serves as a co-chair of NYSBA International's Committee on International Contract & Commercial Law, recently volunteered an even richer and more intriguing idea - envisaging a special chamber (Len calls it a "rocket docket") of the commercial division of New York Supreme Court that would operate under procedures much more closely approximating those of the Tribunal de Commerce of Paris. In this way, Len suggests, New York could offer the international legal community - including legal professionals from the many countries of the world that operate under a civil law system and tradition - an option to elect New York law as governing law with a dispute resolution forum that works under expedited rules and procedures much closer to the legal traditions to which they are accustomed. I invite you to read and consider Len's memorandum. Len's memorandum, I think, invites us to to consider ways of making a bold statement to the world legal community that New York is willing to do more than just "tinker" with its existing system and to make a major effort to address the need for fair, honest and expeditious court proceedings in ways that incorporate the best ideas from the civil as well as the common law traditions. I am sure Len would be happy to meet in person or by phone with anyone who would like to pursue this idea further.

Michael

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