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New York International Chapter News

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of the New York State Bar Association

Message from the Past Chair


Andrew D. Otis

Looking back on my year as Chair of the International Section, I feel both a sense of accomplishment and of gratitude. It was an active and productive year for both me and the Section. Together, we made progress on many of the Section's core missions and achieved some significant milestones. One of the benefits of being Chair is that you get to take credit for many of the accomplishments of others. So, let me describe some of the achievements of the past year and thank those who were responsible.

The Section's long list of successful meetings continues to grow, thanks to our many active members.

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Message from the Chair


Glenn Fox

Having assumed the position of Chair of the NYSBA International Section as of 1 June 2013, I want to take this opportunity to introduce myself as such to our Membership. I would also like to take this opportunity to thank Andrew Otis for his excellent leadership as our Chair over the past 12 months. He leaves the Section strong and invigorated and I know he will play an active role in the coming years.

I am looking forward to working with our new Executive Committee over the next year and with all of our members and to seeing many of you at our various events. Our planned events for 2013-14 will provide op-

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Inside

NYSBA

A Message from the Past Chair

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In October, 2012, we held a very productive seasonal meeting in Lisbon, Portugal. Prior to the meeting, we held our first Section meeting on the African continent: a day-long pre-meeting in Casablanca, Morocco. The meeting featured several excellent speakers and was well attended by New York lawyers. Many thanks to Mehdi Bennani, Abd El Karim Khoukhi and Mouhamed Zaanouni for their efforts in organizing the meeting. In addition to the lovely facility in which it was held, highlights of the Lisbon meeting included excellent addresses by Professor Antonio Borges and United States Ambassador to Portugal Allan J. Katz. In addition to the usual array of informative programs and enjoyable social events, the meeting also featured memorable dinners generously hosted by local law firms. Many thanks to program co-Chairs Pedro Pais de Almeida and Neil Quartaro for all of their efforts to make the meeting a success. And, of course, a special thanks to the indomitable Rita Menano Osorio without whose organization skills, good humor, and generous family the meeting could not have occurred.

In January, 2013 the Section held its Annual Meeting in New York where, in addition to a fascinating panel on compliance issues, the Section presented its annual award for Distinction in International Law and Affairs to the diplomatic corps as a group. United States Deputy Secretary of State William J. Burns accepted the award and former diplomats Robert B. Oakley and Phyllis Oakley were also honored. Deputy Secretary Burns' moving and thoughtful acceptance speech is linked on the Section's website (www.nysba.org/international) under past events. The Deputy Secretary's presence at our meeting would not have occurred but for the strong relationship that the Section has built with the State Department Office of Private International Law. More on that relationship and the Section's relationship with the United Nations and the United Nations Council on International Trade Law (UNCITRAL) later.

In March, 2013 the Section held in Milan its largest and most successful European regional Chapter Chairs meeting to date. Many thanks to Italy Chapter Chair Marco Amorese for hosting us both in Milan and in lovely Bergamo for an excellent and very well attended program on the fashion industry and two fantastic social events.

My year as Chair culminated with the Section's second bi-annual Global Law Week in May, 2013. This was not only an impressive showcase of the New York international legal community, it was also very well attended by many Section Chapter Chairs from around the world. Thanks to Global Law Week Co-chairs Mat Kalinowski and Enrique Lieberman for their dedication and hard work in producing this almost weeklong showcase for New York law and to Constantine Economides for taking over and improving the Fundamentals of International Law program. Thanks also to Michael Galligan, the "father" of Global Law Week whose steady encouragement and unrivaled connections made the program a premier event not only for the Section but for the New York international legal community. The program culminated in a fantastic and, as far as I know, unprecedented plenary event moderated by former New York Court of Appeals Chief Judge Judith Kaye and featuring now-retired State Department Assistant Legal Advisor for Private International Law Keith Loken and the UNCITRAL Director, Renaud Sorieul.

The Section had many very successful meetings but they only describe a portion of the Section's activities over the past year.

The Section has become an active and respected Non-Governmental Organization at the United Nations and especially before the UNCITRAL. This is due in large part to the boundless energy and encyclopedic knowledge of Contract and Commercial Committee Co-chair Albert Bloomsbury and to the invaluable contributions by Microfinance and Inclusion Committee Co-chairs Azish Filabi and Julee Milham. Thanks also to those many Section members and others who volunteered their time to represent the Section at various UNCITRAL plenary and working group sessions.

In September 2012, the Section submitted a statement to the United Nations High Level Meeting on the Rule of Law and was honored to send Albert Bloomsbury and UN and Other International Organizations Committee Co-chair Nina Laskarin to attend the meeting.

In March 2013, Brazil acceded to the United Nations Convention on the International Sale of Goods, in part due to the efforts of former Section Chairs Michael Galligan, Carl-Olof Bouveng, and Drew Jaglom, and Albert Bloomsbury, Brazil Chapter Chair Isabel Franco and Austria Chapter Co-chair Otto Wächter over the course of three years of working with local bar associations in Brazil to convene meetings of prominent jurists on the topic.

The Section also became active at the NYSBA House of Delegates with Section delegates Drew Jaglom, Michael Galligan and John Hanna representing the Section in negotiations over the content of the NYSBA Task Force on Nonlawyer Ownership of law firms and a related HOD resolution. We were able to negotiate suitable resolution language at the December 2012 NYSBA HOD meeting but realized that there was a lack of understanding within the NYSBA of the potential impacts on New York as a legal market of current New York nonlawyer ownership rules

and ethical opinions. Thus, I created a Section task force on nonlawyer ownership, Co-chaired by Drew Jaglom and United Kingdom Chapter Co-chair Jonathan Armstrong, that will gather information from relevant Section Chapters to develop materials that will help fellow NYSBA members thoroughly understand the impact of current laws and ethical opinions on the cross border practice of law.

Last but by no means least I want to thank the Section's tireless liaison Tiffany Bardwell. In her first full year as the Section's liaison she learned the Section's business very quickly and provided invaluable assistance organizing the Section's meetings and, along with Executive Vice Chair/CIO Thomas Pieper, reorganized the Section's website to become much more user friendly.

Ultimately, the success of the International Section depends on the thousands of contributions of dedicated volunteers who believe in the Section's mission and are willing to contribute their time. I want to thank all of you who spoke on a panel, helped organize a meeting or contributed to a publication. I urge all of you to continue to spread the word among your friends and colleagues that the International Section of the NYSBA is a vibrant and important world-wide group of international lawyers that they should join.

As you can see, it was a busy year and we made much progress. It was my pleasure to serve as Section Chair and I am grateful for the time and effort that you all contributed to the Section and our profession. I leave you in the very capable hands of Section Chair Glenn Fox and wish him and you a productive 2013-2014.

I hope to see all of you at future Section events.

Andrew Otis
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A Message from the Chair

(Continued from page 1)

portunities for our members in the US and in our network of chapters throughout the world to be involved in Section activities. Among the activities planned for the coming year are the following:

- Joint UIA Seminar on Anti-Corruption and Anti-Money Laundering, September 2013, New York
- Seasonal Meeting, 23–26 October 2013, Hanoi, Vietnam
- Annual Meeting, 27 January–1 February, 2014, New York, New York
- European Chapters Meeting, March 2014, Paris
- ABA International Section Spring Meeting 1-4 April 1-4 2014 (NYSBA International will run the Fundamentals/Boot Camp Program on 1 April 2014)
- Launching of the Latin American Council—NYSBA

I hope that all of you will take advantage of the above programs as well as the activities of our many committees and chapters. If I can be of any assistance or guidance, please feel free to contact me.

Regards,
Glenn
Glenn.Fox@bakermckenzie.com

From the Editor

Dunniela Kaufman

After a short hiatus, it is with great pleasure that I bring to you this edition of the *Chapter News*. As this publication strives to keep you abreast of what our Section, committees and members are up to, it was very rewarding to return to this post to compile this edition, which includes updates from a number of our Committees. What I hope will become evident as you read through the contributions is that our Committees are active and enthusiastic, and our global reach continues to expand. In addition to a myriad of substantive articles, this edition contains an article entitled "Canada Corner," which is brought to us by the re-invigorated U.S.-Canada Committee, as well as updates from the International Microfinance and Financial Inclusion Committee and the International Arbitration and ADR Committee. I also encourage you to read Albert Bloomsbury's extensive contribution, which provides a thorough update on the progress of the Section's Third Mission and the role that the Section and the International Contract and Commercial Law Committee are playing in advancing this mission through active participating in international fora. As always, I hope that reading what your fellow members are up to will inspire you to get involved.

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Canada Corner

Brought to You by the Newly Invigorated U.S.–Canada Committee

Committee News and Events

A. Re-emergence and Inaugural Meeting

During this year's AGM in New York City, a newly invigorated U.S.-Canada Committee met for its inaugural meeting on January 23, 2013 at the offices of Dunnington Barthlow & Miller LLP. At the meeting, the group reaffirmed the Committee's focus on the commercial aspects of a Canada/U.S. cross-border practice.

While still in the nascent stages of its re-emergence after a long period of dormancy, the Committee has ambitious plans to be a regular contributor to this publication and to become actively involved in future NYSBA International Section events.

B. Global Law Week Presentation

An impressive start to the Committee's ambitions was the presentation on May 16, 2013 at the Canadian Consulate of New York. As part of the International Section's *Global Law Week* in New York City, the U.S.–Canada Committee's presentation, titled *Navigating Foreign Investment Restrictions in International Mergers and Acquisitions in the United States, Canada and Beyond,* focused on foreign investment restrictions in light of the decision by the Canadian government to approve China's CNOOC (Chinese National Overseas Oil Corporation), a state owned enterprise (SEO), acquisition of Nexen Inc., a Canadian oil and gas company, while simultaneously vowing to shut the door to such SEO investments in the oil and gas area in the future.

The Consul General of Canada in New York provided a short welcome and introduction to the presentation. The event was of great interest to international M&A practitioners and International Section members alike.

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Focus on Employment Law

Canada's Supreme Court Keeps the Door Open for Overtime Class Actions

Employment law in Canada generally differs from U.S. employment law in several important respects but the two jurisdictions now have something in common: overtime pay class actions. Several high profile suits have been brought against U.S. technology and telecommunications employers in recent years and now Canadian bank employees are getting in on the action. The Supreme Court of Canada recently denied the defendant employers leave to appeal an earlier decision of the Ontario Court of Appeal certifying the claims as class actions.

Last summer, the Ontario Court of Appeal said that *Fulawka v. Bank of Nova Scotia* and *Fresco v. Canadian Imperial Bank of Commerce* could proceed as class actions because there were common issues relating to whether the employer's policies and procedures in each case prevented bank employees from claiming the overtime pay for extra hours to which they were entitled under federal employment standards legislation. (The federal code was applicable because banking is a federally regulated industry in Canada. Provincial employment standards legislation would apply to most other sectors except transportation and telecommunications.) The certification decision is seen as significant because of the huge potential class of bank-employee plaintiffs from across Canada and because of the potential for similar claims to be advanced in other sectors.

The representative plaintiff in *Fulawka* was a personal banking representative who brought her action on behalf of more than 5,000 current and former sales staff employed by the Bank of Nova Scotia as personal bankers, financial advisors or other front-line customer service employees. Similarly, the representative plaintiff in *Fresco* was a head teller who brought her action on behalf of 31,000 customer service employees of the Canadian Imperial Bank of Commerce.

The defendant banks in both cases had policies that required class members to get approval from a manager before they could be paid for overtime while requiring them to work extra hours. The plaintiffs in both cases alleged that these practices made it virtually impossible for employees to claim overtime pay. They also alleged the banks' record-keeping systems were inadequate for tracking overtime hours actually worked.

The Ontario Court decided that both cases raised common issues for the potential class of plaintiffs and that a class action was the best procedure for resolving allegations of "systemic defects" related to overtime pay, although the extent of the employers' liability to each plaintiff would have to be separately determined. Both banks sought to appeal the Ontario decision but required leave of the Supreme Court before their appeals could proceed. As is its custom, the Supreme Court did not give reasons when it denied both banks' applications for leave on March 21, 2013.

The Supreme Court's decision means that these and other overtime class actions will now proceed apace through the courts across Canada, as nine of the ten provinces have now enacted class action legislation. As in the U.S., class action certification relieves individual employees from having to find a lawyer and pay legal and court costs directly before their claims can be heard.

As these actions can be extremely expensive and protracted regardless of the ultimate outcome, employers with Canadian employees should review their overtime policies and procedures to make sure they are complying with the relevant federal or provincial employment laws. In particular, employers may want to address overtime requirements and entitlements in employment contracts and avoid setting fixed hours of work for managers and other employees not normally paid overtime.

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Focus on Privacy

Employee Privacy Rights Using Work Computers

In its most recent privacy decision, *R. v. Cole*, 2012 SCC 54, the Supreme Court confirmed that employees may have a reasonable expectation of privacy with respect to the information stored on their work computers, even where an employer has computer use policies in place.

The accused in *R. v. Cole* was a high school teacher who had been issued a laptop by the school board for which he worked. The school's policies stated that all data stored on work-issued equipment remained the property of the board but that employees were permitted to use school computers for incidental personal purposes. While doing system maintenance of Mr. Cole's laptop, a board technician discovered nude photographs of an underage female student which Mr. Cole was alleged to have downloaded from a computer used by another student in the school's computer lab. The technician reported his findings to the school principal, who turned the laptop over to the police.

In determining whether the pictures and other data found on the laptop were legally admissible as evidence to support criminal charges, the Court had to consider whether Mr. Cole's *Charter* rights were infringed when the laptop was given to the police without a search warrant. The *Charter* protects individuals against unreasonable search and seizure and requires improperly obtained evidence to be excluded if admitting that evidence would bring the administration of justice into disrepute.

In considering whether Mr. Cole's *Charter* rights were violated by the warrantless surrender, the Court had to determine whether he had a reasonable expectation of privacy with respect to the information stored on the laptop.

The Court said that informational privacy is an important interest because it relates to our ability to determine for ourselves when, how and to what extent information about us is communicated to others. Any computer that is used for personal purposes contains details about the user's financial, medical and personal situation, and reveals the user's interests, likes and habits. The Court said that it was reasonable to think that this biographical information should be private.

The Court also considered whether the ownership of the computer and the context in which it was used reduced an employee's expectation of privacy. The Court noted that the employer's policies and workplace practices could, in some circumstances, reduce a reasonable employee's expectation of privacy but the fact that employees were permitted to use their computers for incidental personal purposes meant that highly personal information could be stored on those computers. Therefore, notwithstanding the employer's policies, the employee did have a privacy interest in the laptop, and the surrender violated his *Charter* rights. In the final analysis, however, a majority of the Court found that the evidence was admissible on the facts of this case.

Although it was a criminal case, the Supreme Court's decision in *R. v. Cole* has some important implications for private sector employers. The Court's analysis indicates that employees can reasonably expect that personal information found on their work computers should remain private, even if the employer owns the equipment and has policies claiming ownership rights to electronic data. An employer's policies with respect to computer and network equipment may reduce an employee's expectation of privacy but will not usually eliminate it.

This means that even private-sector employers (who are not subject to the *Charter*) should think twice before allowing the police and other regulatory bodies to search their computer equipment without a warrant if there is a possibility that the search may reveal employees' personal information. While the tort of invasion of privacy is still very new in Ontario, it is conceivable that an employee might seek legal recourse against an employer that intentionally or recklessly disclosed his or her personal information without consent (see article herein entitled "Ontario Recognizes Its First Privacy Tort").

The Court's decision in *R. v. Cole* also acknowledges that the line between personal and work-related use of connected devices—such as smart-phones, tablets and laptops—has become increasingly blurred. As more and more work-related information is found in the Cloud or on social media sites liked LinkedIn and Twitter, the employer's ownership of the physical infrastructure has become much less important in evaluating privacy interests.

An employer's ability to assert ownership and control over computer equipment used by its employees will depend on the circumstances and the "operational realities" of the workplace environment. In some cases, it may be appropriate to review written policies and procedures restricting personal use of workplace computers and monitor employee compliance. This may help to reduce a reasonable employee's expectation that personal information found on work computers will remain private.

However, attempting to restrict employees from *all* personal use of workplace computers is increasingly unrealistic and often counter-productive, so it is likely impossible to eliminate all employee privacy interests in electronic data. Employers seeking to monitor employees' personal internet usage or personal email for legitimate business reasons may wish to seek legal advice before proceeding.

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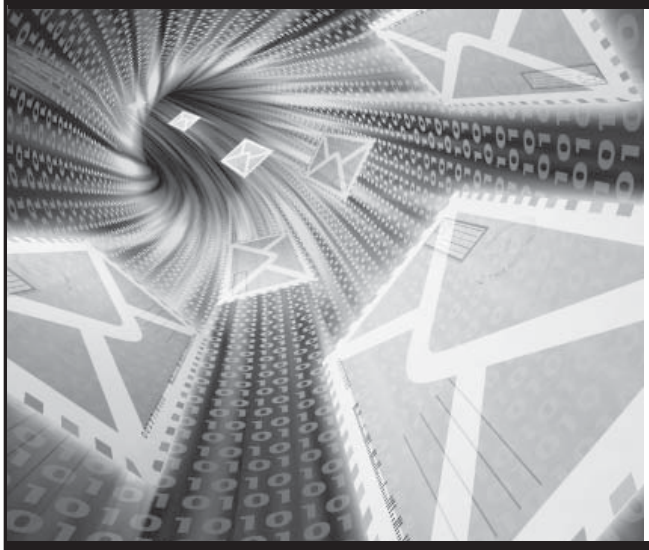
Request for Contributions



Contributions to the *New York International Chapter News* are welcomed and greatly appreciated. Please let us know about your recent publications, speeches, future events, firm news, country news, and member news.

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Contributions should be submitted in electronic document format (pdfs are NOT acceptable).

www.nysba.org/IntlChapterNews

Legal and Investment Updates from Various Member Countries

Doing Business in Africa—New Regional Institutions Bring International Arbitration to Sub-Saharan Africa

Over the past two decades, many African countries have recognized that one of the keys to encouraging investment and business development is to implement effective dispute resolution mechanisms. Accordingly, many African countries have signed bilateral and multilateral treaties providing for international arbitration, acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and adopted national arbitration legislation. Of course, experienced businesspeople have long relied on international arbitration—both *ad hoc* and institutional—to circumvent recourse to national courts in the event of a dispute. While many are familiar with institutional arbitration at the International Chamber of Commerce ("ICC"), London Court of International Arbitration ("LCIA"), or the American Arbitration Association through its division, the International Centre for Dispute Resolution ("ICDR"), experienced businesspeople working in Africa might be less familiar with regional arbitral bodies. Although there are numerous regional arbitral institutions on the continent, this article will highlight three more internationally focused institutions under the auspices of: the Organisation for the Harmonisation of Business Law in Africa ("OHADA"),[1] the East African Communities ("EAC") Treaty, and the new Kigali International Arbitration Centre ("KIAC").

Background

The crux of any arbitration is an agreement between the parties to arbitrate a dispute; this is often included in a contractual dispute resolution clause. When parties enter into a new business venture, negotiating a contractual dispute resolution clause isn't always at the top of the list. Although perhaps it should be in any context, a well-drafted dispute resolution clause should be at the heart of any business agreement in Africa, where, from the perspective of a foreign counterparty, dispute resolution can be incredibly difficult. Of the 185 countries the World Bank ranks on Ease of Doing Business, the last 20 on the list are nearly all Sub-Saharan African countries, along with Iraq, Uzbekistan, and Haiti, falling behind Afghanistan. There are, however, some success stories, including Mauritius, South Africa, and Tunisia, countries which rank in the top 50, with Rwanda not far behind at 52.[2] Additionally, Transparency International consistently ranks African countries among the worst for corruption in the public sectors, which yields obvious concerns about the impartiality and fairness of any national judicial process.[3]

While many international companies are eager to begin operating and investing in Africa, concerns remain with the effectiveness of available dispute resolution mechanisms, particularly alternative dispute resolution ("ADR") or, dispute resolution outside of the local courts. African countries are not strangers to ADR. Indeed, in many rural areas, mediation and conciliation have been the traditional methods of dispute resolution. In this vein, numerous African countries have adopted national arbitration legislation—often taking guidance from international rules such as the United Nations Commission on International Trade Law ("UNCITRAL") Model Law and the UNCITRAL Arbitration Rules.[4]

Despite the availability of national alternative dispute resolution mechanisms, most foreign investors (including African companies transacting across borders) would prefer to choose a more "international"—or perceived "impartial"—forum. Fortunately, many African countries have signed bilateral investment treaties ("BIT"s)—including nine with the United States—and are signatories to the International Centre for the Settlement of Investment Disputes ("ICSID") Treaty. However, a BIT or agreement to arbitrate under ICSID only allows investors to bring a state party (i.e., the government of a state) before an arbitral tribunal, and only to resolve disputes related to an investment as defined by the applicable agreement.

Therefore, the question remains, what institution and/or set of rules should a foreign counterparty designate in the contractual dispute resolution clause? It may be that the well-known international arbitral bodies (such as the ICC, LCIA, ICDR and others) are the best choice, and situated in a neutral forum outside of the African country in which business is being done. However, there are alternatives, particularly relevant for counterparties across different African countries. This article will briefly outline the rules at three of relatively unknown arbitral institutions in Africa:

- The Court of Common Justice ("CCJA") under the OHADA Treaty,
- The East African Court of Justice ("EACJ") under the EAC Treaty, and
- The Kigali International Arbitration Centre ("KIAC").

Before we compare these institutions, it is worth listing the signatories to U.S. BITs, the New York Convention and ICSID, as briefly described above.

Bilateral Investment Treaties

As is true elsewhere in the world, many African countries have signed Bilateral Investment Treaties ("BITs") with other countries, including the United States. According to the Office of the United States Trade Representative, the BIT program's basic aims are:[5]

- To protect investment abroad in countries where investor rights are not already protected through existing agreements (such as modern treaties of friendship, commerce, and navigation, or free trade agreements);
- To encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and
- To support the development of international law standards consistent with these objectives.

One of the ways that these aims are achieved is to give private individuals and corporations the right to submit any dispute related to "covered investments" (as defined in the BIT) to international arbitration.

As of January 2013, the United States has signed BITs with the following African countries:[6]

- Cameroon
- Congo, Republic of
- The Democratic Republic of the Congo ("DRC")
- Egypt
- Morocco
- Mozambique
- Rwanda
- Senegal
- Tunisia

This short list obviously leaves most African countries without US BITs.

New York Convention

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") is one of the key instruments in the field of international arbitration. In sum, the New York Convention requires signatory states to recognize private agreements to arbitrate and to enforce arbitration awards made in other state parties. This means that, with limited exceptions, the signatory states must enforce arbitral awards obtained elsewhere. A significant number of African states are parties to the New York Convention,[7] including:

Algeria	Madagascar
Benin	Mali
Botswana	Malta
Burkina Faso	Mauritania
Cameroon	Mauritius
Central African Republic	Mozambique
Côte d'Ivoire	Niger
Djibouti	Nigeria
Egypt	Senegal
Gabon	South Africa
Ghana	Tanzania
Guinea	Tunisia
Kenya	Uganda
Lesotho	Zambia
Liberia	Zimbabwe

Regional Arbitral Institutions—OHADA, EAC, and KIAC

As discussed above, experienced businesspeople and practitioners familiar with international arbitration will likely be familiar with arbitration under BITs, ICSID, the UNCITRAL Rules, or through international institutions such as the International Chamber of Commerce ("ICC") International Court of Arbitration,[8] the London Court of International Arbitration ("LCIA"), and the American Arbitration Association ("AAA") International Centre for Dispute Resolution ("ICDR"), among others. However, parties might also consider selecting institutional arbitration through one of Africa's own institutional arbitration centers.

OHADA

The Organisation for the Harmonisation of Business Law in Africa ("OHADA") is an organization established by treaty (the "OHADA Treaty") signed in 1993 and revised in 2008. Currently, 17 West African countries are members.[9] The aim of OHADA is to facilitate business among the member states by creating a system of uniform law, including by the creation of a common dispute resolution mechanism. Under OHADA, there are two mechanisms for arbitration.

First, the OHADA Treaty created the Common Court of Justice and Arbitration ("CCJA"). Under Article 21 of the OHADA Treaty, individuals may submit contractual disputes to arbitration under the Rules of the CCJA ("CCJA Rules"). The contract parties must be residents in one of the member states, or the contract must be executed or enforced in the territory of one of the member states.[10] The CCJA does not settle disputes itself, but instead, like other international arbitration centers, provides the institutional procedures.

Second, parties may choose *ad hoc* arbitration under the Uniform Arbitration Act ("UAA"). The UAA is based on the UNCITRAL Model Law, French law, and Swiss law.[11] Similar to the UNCITRAL Model Law, the UAA Rules govern arbitral proceedings, but do not provide for an institutional framework. The UAA Rules apply to arbitration where the seat of the arbitral tribunal is in a member state.[12] Since the UAA Rules govern *ad hoc* rather than institutional arbitration, we will focus here on the CCJA.

- How are proceedings commenced?
  - A request to arbitrate is submitted to the Secretary-General of the CCJA, and must contain information about the claims and the grounds on which they are based along with the required filing fee (Article 5).[13]
- How are arbitrators appointed?
  - Parties may agree to appoint one arbitrator; if they fail to agree, the CCJA will appoint one. Parties may agree to appoint three arbitrators, in which case each party appoints an arbitrator and the third arbitrator is appointed by the CCJA unless the parties agree otherwise (Article 3).
- Defense
  - The defendant(s) shall send their answer to the Secretary General within 45 days of notice of the arbitration containing information about the parties, confirmation (or non-confirmation) of the existence of an arbitration agreement referencing CCJA arbitration, and a statement of defense (Article 6).
- Costs
  - Filing fee payable by claimant (Article 5).
  - The final award will decide the costs and which party should bear the costs of: arbitrators' fees, CCJA expenses, and "normal costs" incurred by the parties as determined by the arbitrator(s) (Article 24).

East African Court of Justice

The EAC was established by treaty (the "EAC Treaty") in 2000. Article 9 of EAC Treaty established the East African Court of Justice ("EACJ").[14] Under Article 32 of the EAC Treaty, parties may refer arbitration to the EACJ when pursuant to a contractual dispute resolution clause designating the EACJ as having arbitral jurisdiction or, by agreement after a dispute has arisen. In 2001, the EACJ drafted Rules of Arbitration ("EAC Rules"), which govern proceedings referred to EACJ arbitration; these were updated in March 2012.[15] Interestingly, the language of the Tribunal is English (EACJ Rule 22).

- How are proceedings commenced?
  - A party must notify the respondent in writing of its request to arbitrate and then submit the request to the EACJ Registrar; the request must contain a statement of the relief sought, a description of the dispute, copies of relevant agreements (including the arbitration agreement) and advance payment of administrative expenses (Rule 3).
- How are arbitrators appointed?
  - The EACJ appointing authority will appoint a tribunal, or Sole Arbitrator if the parties so agreed, from among the Judges of the EACJ (Rule 8).
- Defense
  - The respondent must file a statement of defense within 30 days (Rule 5). Respondents have an opportunity to submit counterclaims. The arbitral tribunal may still proceed with arbitration if the respondent does not submit a defense (Rule 7).
- Costs
  - No fees are payable to the arbitrators, but parties must pay administrative expenses and other costs of arbitration (Rule 37).
  - Filing fees are calculated in accordance with a fee scale (Schedule to the EACJ Rules).[16]

Kigali International Arbitration Centre

The Kigali International Arbitration Centre ("KIAC") was created in 2011 but opened in the summer of 2012. Similar to the ICC, ICDR, and LCIA , the KIAC does not resolve disputes itself, but instead administers the resolution of disputes in accordance with the rules of the KIAC ("KIAC Rules") published in May 2012.

- How are proceedings commenced?
  - A party requesting arbitration must submit a written request including details about

the parties, the dispute, and any contract on which the dispute is based, including the relevant arbitration agreement, along with the registration fee (Article 5).[17]

- How are arbitrators appointed?
  - A party requesting arbitration may include a proposal for the appointment of a sole arbitrator, or the claimant's designation of an arbitrator for a three-person arbitral tribunal (Article 5). A respondent's submissions in defense may respond to the proposal for the appointment of a sole arbitrator, or designate an arbitrator for a three-person arbitral tribunal (Article 6).
  - Where parties have not agreed to the number of arbitrators, the KIAC will appoint a sole arbitrator or a three-person arbitral tribunal if considered necessary to resolve the dispute (Article 12).
- Defense
  - Within 14 days of receipt of the request for arbitration, respondent may submit an answer containing a confirmation or denial of the allegation, a brief statement of counterclaims, and comments in response to statements contained in the request for arbitration (Article 6).
  - The answer may also include a statement of defense and other information or documents the respondent considers appropriate or may contribute to the efficient resolution of the dispute (Article 6).
  - Failure to send an answer does not preclude a party from submitting a defense or counterclaim, but does preclude the respondent from nominating an arbitrator (Article 6).
- Costs
  - The arbitrator(s) shall determine the costs—including arbitrators' fees and administrative costs—in the final award and may consider the extent each party has conducted the arbitration in a "cost-effective manner" to decide how to apportion costs (Article 42).[18]
  - Filing fees calculated in accordance with a fee scale (Table 2 to the KIAC Rules).[19]

Conclusion

Although these institutions are all relatively new, and untested for U.S. investors, they might provide viable options to consider, particularly as investments in Africa increase in the upcoming years, and more importantly, for contractual arrangements among companies across Africa.

Note: This article originally appeared in the Nixon Peabody LLP firm newsletter. It is reprinted with permission.

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Endnotes

1. OHADA is known by its French acronym, *Organisation pour l'Harmonisation du Droit des Affaires en Afrique.*
2. http://www.doingbusiness.org/rankings (accessed January 9. 2013); see also http://www.doingbusiness.org/data/exploretopics/enforcing-contracts (One of the measures of the "Ease of Doing Business" includes mechanisms for enforcing contracts through dispute resolution).
3. See e.g., Transparency International's Corruption Perceptions Index, available at: http://cpi.transparency.org/cpi2012/results/.
4. The following African countries have adopted the UNCITRAL Model Law as their law on arbitration: Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia, and Zimbabwe,available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (accessed January 9, 2013).
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7. http://www.wipo.int/amc/en/arbitration/ny-convention/parties.html (accessed January 9, 2013).
8. See for example, our prior alert here: http://www.nixonpeabody.com/123168.
9. The 17 member states are: Benin, Burkina Faso, Cameroon, Comoros, Congo, the Democratic Republic of the Congo, Ivory Coast, Gabon, Guinea-Bissau, Guinea, Equatorial Guinea, Mali, Niger, the Central African Republic, Senegal, Chad and Togo, available at: http://www.ohada.com/etats-membres.html (accessed January 9, 2013).
10. http://www.ohada.com/traite/10/4/title-iv-arbitration.html (accessed January 9, 2013).
11. See Dr. Martha Tumnde, Arbitration: The Anglophone Cameroon Experience, Revue camerounaise de l'arbitrage (Feb. 2010), available at: http://www.ohada.com/doctrine/ohadata/D-11-46.html.
12. http://www.ohada.com/actes-uniformes/658/659/chapter-i-scope-of-application.html.
13. CCJA Rules, available at: http://www.ohada.com/reglements/666/667/chapter-one-the-functions-of-the-common-court-0f-justice-and-arbitration-in-matters-of-arbitration.html.
14. For further information on the EACJ, please visit the EAC website at: http://www.eacj.
15. http://www.eacj.org/docs/ARBITRATION_RULES_2012.pdf (accessed January 9, 2013).
16. $100 where the total amount in dispute does not exceed $10,000; $100 plus 1% of the amount in dispute in excess of $10,000 up to $50,000; $500 plus 0.75% of the amount in excess of $50,000, up to $100,000; $875 plus 0.5% of the amount in dispute in excess

of $100,000, up to $250,000; $1575 plus 0.125% of the amount in dispute in excess of $250,000, but not to exceed $10,000. *See id.*

17. http://international.lawsociety.org.uk/files/KIAC%20arbitration%20rules%202012,%20published%20on%2028.05.12.pdf.

18. At the outset of the arbitration, the KIAC may also fix an advance on costs payable by both claimant and respondent (Article 41). *See id.*

19. $750 where the total amount in dispute does not exceed $50,000; $750 plus 0.5% of the amount in dispute in excess of $50,000 up to $100,000; $1,000 plus 0.5% of the amount in excess of $100,000, up to $200,000; $1,500 plus 0.167% of the amount in dispute in excess of $200,000, up to $5,00,000; $2000 plus 0.8% of the amount in dispute in excess of $5,00,000; $4000 plus 0.4% of the amount in excess of $750,000; $5,000 plus 0.2% of the amount in excess of $1M; $7,000 plus 0.2% of the amount in excess of $2M; $9,000 plus 0.2% of the amount in excess of $3M; $11,000 plus 0.2% of the amount in excess of $4M; $13,000 plus 0.2% of the amount in excess of $5M. *See id.*

* * *

Investing in Africa: The Financial Hub of Mauritius

It is now well known that numerous African countries have been, and promise to continue to be, among the fastest growing economies in the world. As a result, investors are recognising the tremendous potential in sectors such as natural resources, mining, agriculture, consumer goods, telecommunications and manufacturing. However, it is not always clear how to structure investments in such a way as to promote commercial and fiscal advantages while minimising risk.

The island nation of Mauritius is becoming increasingly well-known in the context of African investments, including investment holdings in the area of private equity. Strategically located in the Indian Ocean between Africa and Asia, Mauritius also acts as a premier financial hub for other geographic regions, such as India.

I. Main Attributes

Mauritius is a stable, democratic country with a strong yet reasonable regulatory regime coupled with a diversified economy and sound banking sector. It has ranked first on the Ibrahim Index of African Governance from 2007 to 2012.

Other attributes include the time zone (GMT+4) and a deep pool of qualified and cost-effective professionals. Mauritius is bilingual (English/French), which is a considerable advantage when dealing with African countries. Further, the country has close cultural/commercial ties with Europe, India, China and Africa.

Mauritius has a hybrid legal system, which is based on both the common law and the French-based civil code. Also noteworthy is that the Privy Council in the United Kingdom is the final court of appeal. The country is also a member of various African organisations including the African Union (AU), the Common Market for Eastern and Southern Africa (COMESA), and the Southern African Development Community (SADC).

II. Business Formation

There are two kinds of companies in Mauritius that are ideal for international business, Category 1 Global Business Company ("GBC1") and Category 2 Global Business Company ("GBC2," which is not tax resident in Mauritius and does not benefit from its tax treaties). The GBC1 is tax resident in Mauritius—with residence involving a number of requirements—and benefits in particular from the range of tax treaties, as described below. Applications for the GBC1 and GBC2 (as well as other licenses as may be required) are submitted to the Mauritius regulator, the Financial Services Commission (by a licensed management/trust company, which also oversees administration of the entity).

Other entities available in Mauritius include funds and protected cell companies (PCCs). In addition, the jurisdiction offers trusts and foundations, pursuant to applicable legislation. Limited partnerships may also be established in Mauritius, for example, in the context of investment holding structures.

III. Taxation

a. General

Mauritius offers a tax-efficient regime with 37 double taxation avoidance ("DTA") agreements,[1] which serve to avoid the same revenues being taxed twice.

The jurisdiction also benefits from other tax advantages in the context of global business, such as no capital gains tax, no withholding tax, no exchange controls and free repatriation of capital.

A GBC1 is subject to 15% tax; however, benefits from a tax credit may result in paying tax in Mauritius at 3% or possibly less.

b. Tax Agreements with African Countries

Mauritius currently has DTA treaties with 14 African countries (Botswana, Lesotho, Madagascar, Mozambique, Namibia, Rwanda, Senegal, Seychelles, South Africa, Swaziland, Tunisia, Uganda, Zambia and Zimbabwe). Treaties have been signed (and are awaiting ratification) with Republic of Congo, Egypt, Kenya and Nigeria. Treaties awaiting signature are with Gabon and Ghana. Additional treaties are currently being negotiated with Algeria, Burkina Faso, Malawi and Tanzania.

Capital gains taxes in African countries tend to be in the range of 30%-35%. However, the DTA treaties with Mauritius usually provide taxing rights for capital gains to the country of residence of the seller of the assets. Ac-

cordingly, in such a situation, where a GBC1 holds and sells a stake in a company located in the other treaty country, there would be no capital gains tax payable in either country (since Mauritius has no capital gains tax).

In addition, many African nations impose withholding taxes on dividends, interest and royalties paid to non-residents. The DTA treaties with Mauritius typically reduce such withholding taxes, potentially saving tax of up to 20% depending on the kind of withholding tax and country at issue.

IV. The Investment Promotion and Protection Agreements

As a final consideration for Mauritius as a financial hub in connection with African investments, Mauritius has entered into numerous Investment Promotion and Protection Agreements ("IPPAs"), which are potentially of great importance to investors seeking to invest in developing markets in Africa and Asia (a number of IPPAs still await ratification[2]). IPPAs are bilateral agreements and incorporate features such as:

- guarantee against expropriation
- free repatriation of capital and investment returns
- structure to settle disputes between investors and contracting state
- most favoured nation rule regarding treatment of investment, compensation for loss due to war, armed conflict, riot etc.

V. Conclusion

A Mauritius structure should be considered when investment in an African jurisdiction is contemplated. Using Mauritius as a financial center avails investors of its significant commercial and tax benefits, while also helping to minimise risk.

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Endnotes

1. Treaties are in place with the following countries: Bangladesh; Barbados; Belgium; Botswana; People's Republic of China; Croatia; Cyprus; France; Germany; India; Italy; Kuwait; Lesotho; Luxembourg; Madagascar; Malaysia; Mozambique; Namibia; Nepal; Oman; Pakistan; Qatar; Rwanda; Senegal; Seychelles; Singapore; South Africa; Sri Lanka; Swaziland; Sweden; Thailand; Tunisia; Uganda; United Arab Emirates; United Kingdom; Zambia; and Zimbabwe.
2. IPPAs in place with African countries include Burundi, Madagascar, Mozambique, South Africa and Senegal.

* * *

"EC Proposal for a Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing"

Introduction

Money laundering is defined by the European Commission ("EC") as "the conversion of the proceeds of criminal activity into apparently clean funds, usually via the financial system[…]by disguising the sources of the money, changing its form, or moving the funds to a place where they are less likely to attract attention."[1] The current Directive 2005/60/EG deals with money laundering and terrorist financing and, with regard to the proposal by the EC, should soon be amended by a new Directive.

The EC recently drafted a proposal for a 4th Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing in order to respond to modernized ways of illicit actions (the "4th AMLD"). As a result, a broadened set of rules, in particular applying to credit and financial institutions, lawyers and others, shall reflect the revised 40 international anti-money laundering and counter-terrorist financing standards of the Financial Action Task Force ("FATF Recommendations").[2]

Summary of the FATF Recommendations

The revision of the international standards by the FATF was conducted to combat new and emerging threats and clarify and strengthen many of the existing obligations, while maintaining the necessary stability and rigor of the FATF Recommendations.

Another criterion for the revision was to strengthen the requirements for high risk situations and allow member jurisdictions to take a more focused approach in areas where high risks remain or implementation could be enhanced. At first, countries are directed to identify, assess and understand actual and potential risks of money laundering and terrorist financing. As a second step, they are directed to adopt suitable measures to diminish the identified risk. This risk-based approach allows countries, within the framework of the FATF requirements, to adopt a more flexible set of measures in order to target their resources more effectively and apply preventive measures that are commensurate to the nature of risks.[3]

What was the reason for drafting a proposal for a 4th AMLD?

A recent study published by the United Nations ("UN") has estimated an amount of funds available for money laundering representing about $1.6 trillion per year, equivalent to approximately 2.7% of the global gross domestic product ("GDP"). Unfortunately only 1% of

laundered funds are intercepted by law enforcement and actual seizures amount only up to 0.2%. These figures underscored the need for a strengthened legal framework to combat modern strategies of money laundering and terrorist financing. Consequently, this study became the impetus behind the revision of the existing international standards of the FATF in February 2012. The EC based its proposal on this revision in order to comply with the international standards.[4]

The European Union ("EU") has the ability to establish binding legal rules in the form of a Directive or Regulation for its Member States by way of an ordinary legislative procedure through the European Parliament and the Council. The proposal of the EC for a 4th AMLD has, in a second step, to pass such a procedure to become effective.[5] Lastly, in order to comply with a Directive, Member States have to check whether their legal system is already in line with the Directive, or if amendments of the existing national law are necessary.

By acknowledging the international standards of the FATF, the EC needed to amend the 3rd AMLD to reflect the recent changes to global standards, including the FATF Recommendations. Thus, a revision of the 3rd AMLD becomes necessary to enhance the risk-based approach to anti money laundering compliance and supervision. The risk-based approach will require the addressees of the Directive to become familiar with current potential risks and visualize the need to adapt their anti-money laundering/counterterrorism system. This will result in increased effectiveness and less costs.[6]

The World Bank affirms that an effective framework for anti-money laundering has domestic and international benefits, hence, the costs for affected entities are seen to be considerably outweighed by the benefits associated with the prevention of money laundering and terrorist financing.[7]

Due to the inconsistency of the existing legal framework of the EU with the FATF Recommendations,[8] further modifications need to set forth a consistent interpretation of EU rules by the Member States, e.g., by interpreting the requirements to identify the beneficial owner of a legal entity, and abolish inadequacies (not robust and flexible enough to respond to the evolution of illicit actions) and loopholes between national laws.[9]

Thus, the EC has set up a proposal for a 4th AMLD in order to provide for a stable and effective legal framework to combat recent developments of money laundering and terrorist financing.

What are the suggested amendments to be set out in the 4th AMLD?

The 4th Directive, as part of a broader set of rules including Directive 2006/70, Regulation 1781/2006 and 1889/2005, as well as the EU Council Decision 2000/642, is aimed at the prevention of money laundering and terrorist financing. This legal framework contains numerous provisions on specific issues, e.g., dealing with politically exposed persons ("PEPs"), the traceability of transfers of funds, the declaration of cash entering or leaving the EU and the cooperation between the Financial Intelligence Units ("FIUs").

There is a wide range of arguments that support the implementation of a 4th AMLD including:[10]

- strengthening the internal market,
- safeguarding the interests of society from criminal and terrorist acts,
- safeguarding the economic prosperity of the EU by ensuring an efficient business environment and contributing to financial stability by protecting its soundness, and
- proper functioning and integrity of the financial system.

As a result, the main focus is on providing for a stable and effective internal market by securing the financial system from illicit cash flows. Stability should be granted by reassuring that payments originate from sound business and are not received from, or contribute to, criminal activity.

Consequently, the aim of the Directive is to force credit and financial institutions, lawyers, notaries, auditors, real estate agents, casinos and dealers in goods, when payments are made in cash in excess of €7.500,- (reduced from €15.000,-), to focus on customer due diligence. Customer due diligence is an instrument that ensures knowledge about customers and a better understanding of the nature of their business. Depending on the risk associated with certain situations, an enhanced or simplified due diligence has to be carried out. Additionally, tax crimes should be included in the scope of the 4th AMLD by being acknowledged as predicated offences.[11]

The proposal of the 4th AMLD consists of clarifying rules concerning mechanisms for identification of beneficial owners, adequate controls and procedures on customer due diligence and provisions dealing with PEPs. Furthermore, the extended scope will also address the gambling sector and lower the limit for general cash payments of goods or services from € 15.000,- to € 7.500,- ("Catch-all clause"). Thirdly, the Member States of the EU are directed to strengthen cross-border cooperation between national FIUs, which function as "revealing authorities" of suspicious money laundering and terrorist financing activities.[12]

In the field of fighting money laundering and terrorist financing the European Securities and Market Authority ("ESMA"), the European Insurance and Occupational Pensions Authority ("EIOPA") and the European Banking Authority ("EBA") were established as the new European

Supervisory Agencies. One of their main tasks will be to issue guidelines on the risk factors to be taken into consideration and/or the measures to be taken in situations where simplified due diligence measures are appropriate (Article 15 of 4th AMLD).

Scope of the 4th AMLD and FATF Recommendations

The United States of America ("USA"), as a member of the FATF, will not be bound by the 4th AMLD but is obliged to comply with the FATF Recommendations. The scope of the 4th AMLD will be limited to the Member States of the EU, e.g., Austria, Germany, France, United Kingdom ("UK"), Greece, Poland and Czech Republic.

The FATF binds its member jurisdictions on the basis of international law. "Mutual Evaluations" are conducted to analyze each member jurisdiction's arrangements for preventing criminal abuse of the financial system; hence, the FATF assesses levels of implementation of the FATF Recommendations.[13]

The last Mutual Evaluation of the USA was published on 23rd June 2006. The major findings of this Evaluation commended the USA for having a comprehensive legal and institutional framework for investigating, supervising, regulating and prosecuting money laundering and terrorist financing. However, the evaluation also recommended that non-financial businesses should be more widely covered by the scope of such provisions. Furthermore, the evaluation identified customer identification requirements in relation to the identification of the beneficial owner of a company as weak.[14]

On the 26th of June in 2009 the FATF issued a Mutual Evaluation on Austria stating that the crime level in Austria is among the lowest in the EU. Because of, and in order to keep that situation stable, authorities have designed and are implementing comprehensive anti-money laundering and counterfeiting terrorist financing systems, flanked by well-developed federal administrative and supervisory bodies. The FATF Secretary stated at the Financial Crime Symposium, held in London and hosted by the Law Society of England and Wales on 15th May 2012, that the public and private partnerships in the UK are an important mechanism in the fight against financial crimes.[15]

As the amendments of the international standards were due in February 2012, Mutual Evaluations in several countries need to be carried out in order to assist the Member States with harmonization.

Outlook

The predicted overwhelming positive effects of this harmonization will not be immediately evident as all Directives have to be implemented into national law. The actual 3rd AMLD was enacted on the 25th October 2005, published on the 25th November 2005 and entered into force on the 15th December 2005 (Article 45, 46). All Member States of the EU were forced to comply with the Directive by adjusting their law within the following two years (at least until 15th December 2007). The same time frame should apply for the 4th AMLD (Article 61, 62).

Conclusion

With the proposed 4th AMLD, a new set of rules will require the addressed entities to develop internal audit systems to comply with customer due diligence and the beneficial owner identification requirements. As a result specialized entities (e.g., lawyers and consultants) will be required to prove whether changes are necessary and, as required, set up internal audit systems that fulfill the criteria of the 4th AMLD.

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See

- EC, Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (Feb. 2013)
- Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of financial system for the purpose of money laundering and terrorist financing
- EC, Memo—FAQ: Anti-Money Laundering (Feb. 2013)
- EC, Press Release—Anti-Money Laundering: Stronger Rules to respond to new threats (Feb. 2013)
- EC, Commission Staff working document—Executive summary of the impact assessment (Feb. 2013)
- FATF, International standards on combating money laundering and the financing of terrorism and proliferation—The FATF Recommendations (Feb. 2012)
- FATF, Third Mutual Evaluation report on anti-money laundering and combating the financing of terrorism—USA (23rd June 2006)
- http://www.fatf-gafi.org

Endnotes

1. EC, Memo—FAQ: Anti-Money Laundering (Feb. 2013) page 1.

2. In 1989 the FATF was established as an inter-governmental agency to supply its member jurisdictions (e.g., Austria, Brazil, China, Germany, Hong Kong, India, Luxembourg, Russia, Singapore, Switzerland, United Kingdom, United States) with international standards for fighting money laundering, terrorist financing and other threats to the integrity of the international financial system. Its work is focused on identifying vulnerabilities within national law and subsequently set up individual Recommendations. See http://www.fatf-gafi.org/pages/aboutus/.
3. FATF, International standards on combating money laundering and the financing of terrorism & proliferation—The FATF Recommendations (Feb. 2012) page 8.
4. EC, Commission Staff working document—Executive summary of the impact assessment (Feb. 2013) page 2.
5. Article 288 iCw 289 Treaty on the functioning of the EU ("AEUV").
6. EC, Memo—FAQ: Anti-Money Laundering (Feb. 2013) page 4-5.
7. EC, Commission Staff working document—Executive summary of the impact assessment (Feb. 2013) page 6.
8. FATF, International standards on combating money laundering and the financing of terrorism & proliferation—The FATF Recommendations (Feb. 2012) page 11-30.
9. EC, Commission Staff working document—Executive summary of the impact assessment (Feb. 2013) page 4.
10. EC, Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (Feb. 2013) page 2.
11. EC, Memo—FAQ: Anti-Money Laundering (Feb. 2013) page 1.
12. EC, Press Release—Anti-Money Laundering: Stronger Rules to respond to new threats (Feb. 2013) page 2.
13. http://www.fatf-gafi.org/topics/mutualevaluations/.
14. FATF, Third Mutual Evaluation report on anti-money laundering and combating the financing of terrorism—USA (23rd June 2006) page 299.
15. http://www.fatf-gafi.org/documents/documents/publicandprivatesectorpartnershipinfightingfinancialcrime.html.

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Costs Reforms to the Civil Justice System in England and Wales

Three years from Lord Justice Jackson's comprehensive Review of Civil Litigation Costs, Her Majesty's Government has implemented his key recommendations through statute and statutory instrument to effect changes to the Civil Procedure Rules. These changes came into effect on 1st April 2013. Two of these changes have arguably the greatest potential to impact the conduct of litigation by those representing or suing banks and financial institutions in high value cases: Damages Based Agreements, which are a type of contingency agreement, and offers to settle.

Contingency Agreements: The Historic Position

Before the 1st of April, a claimant who did not wish or could not afford to pay his or her solicitor's fees on the traditional hourly rate basis (the number of hours incurred on the case multiplied by the pre-agreed hourly rate), was permitted to enter into a Conditional Fee Agreement ("CFA") with the solicitor.

The CFA is in essence a no-win no-fee agreement. Under its terms if the claimant won the case, the solicitor could charge a percentage uplift on the hourly rate fee, known as the success fee. The successful claimant could then ask the court to assess and order the defendant to pay not only the hourly rate, costs and disbursements, but also both the success fee and the premium which the claimant might have paid for an insurance policy to pay the defendant's legal fees if the claimant had lost the case.

Although a CFA was available, a claimant's ability to enter into a contingency agreement equivalent to those used in the United States was severely limited. A contingency agreement enables a lawyer to recover his or her fee from the damages paid by the losing defendant if the case is won. The level of the fee is not dependent on the number of hours incurred. It is calculated as a percentage of the damages won. In England and Wales such agreements were only available for cases before Employment Tribunals or in cases which had not reached the stage of proceedings being issued at court.

The Brave New World

All this changed on 1st April. Now if a claimant enters into a CFA, he or she can no longer ask the court to order an unsuccessful defendant to pay the success fee, nor the insurance policy premium. The claimant can only recover the solicitor's hourly rate costs and disbursements. While the reforms removed this windfall, they introduced a further option for the funding of commercial proceedings before the courts of England and Wales: the Damages Based Agreement ("DBA").

The essential recovery basis of the DBA mirrors that of a United States style contingency agreement; a percentage basis of the damages won. Although there is similarity between the two recovery systems, it is there that these two systems part company. The distinction between the two lies in the fact that a successful litigant in England and Wales is entitled to recover many of his costs and disbursements. His United States counterpart does not have that entitlement, although in some states there are some limited exceptions. A corollary issue for an English claimant is a rule known as the "indemnity principle," which prevents the court from awarding him any more costs than he has agreed to pay his solicitor.

So the question for Lord Justice Jackson, the DBA working party, which advised on implementation, and ultimately for the drafters of the legislation and the amended CPR provisions was how to calibrate the solicitor's entitlement to receive a percentage of his client's damages, with the client's entitlement to receive its costs from the losing party.

Requirements for the New DBA

Under the implementing legislation and amendments to the Civil Procedure Rules, an unsuccessful defendant will still be liable to pay most of the successful claimant's costs where the claimant has entered into a DBA with his or her solicitor. How the solicitor deals with those costs depends on the terms of the DBA.

If the contingency fee percentage of damages agreed to is higher than the recovered costs, then the claimant must bridge that gap by paying the solicitor the difference out of the damages received.

Conversely, if the agreed recovery percentage is lower than the amount of the costs recovered from the defendant, then because of the continuing application of the indemnity principle the defendant can only be ordered to pay to the claimant, and the claimant's solicitor will only be entitled to receive, the agreed recovery percentage.

Other requirements for an enforceable DBA include a maximum receivable by the solicitor of 50% of the damages including any counsel's fees disbursement and VAT. The DBA must also contain the reasoning for setting the amount of the percentage recovery at the amount stated.

There is no obligation to disclose the existence of a DBA. That could make it difficult for the defendant's lawyers to assess the appropriate strategy in any given case. Their task is made more difficult because of the enhanced penalties imposed on a defendant who refuses to accept a claimant's Part 36 offer of settlement and loses the case at trial.

Part 36 Offers of Settlement

The Part 36 offer mechanism enables a party to litigation to make an offer of settlement to the other party.

The claimant can offer the amount that it is prepared to accept, together with the payment of its costs to settle its claim. For its part, the defendant can state the amount that it is prepared to pay to the claimant in order to settle the claim, which must include an offer to pay the claimant's costs subject to their being agreed or assessed by the court. If that claimant's offer is not accepted, and at trial the claimant is awarded the amount of its offer or more, then there are penalties assessed against the defendant.

There are also penalties for a claimant who refuses to accept a defendant's Part 36 offer and at trial is ordered to pay more than the amount that the defendant was prepared to accept. In either case the offer is not revealed to the trial judge until after his or her decision is handed down. The thinking behind this is that the recipient of the offer ought to have accepted the offer rather than run the case to trial.

After 1st April the additional penalties for an unsuccessful defendant failing to beat a claimant's Part 36 offer for damage awards above £1,000,000 are that the defendant must pay 7.5% of the first £1,000,000 awarded and 0.001% of any amount awarded above that figure. There are also interest payments on damages awards below £1,000,000. That suite of additional penalties can be expected to concentrate the mind of the defendant and its advisers. Before April 1st a claimant failing to beat a defendant's Part 36 offer was subject to fewer penalties than a defendant failing to beat a claimant's offer. The reforms did not introduce any new penalties.

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The Recast of the Brussels Regulation

The origins of the Brussels Regulation are to be found in the Brussels Convention dated 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters. This Convention was seen as an important step towards greater judicial cooperation between several European countries. This Convention was then replaced by the EC Regulation No. 44/2001 dated 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters. This Regulation is the cornerstone of the European legislation on cross-border litigation and judicial cooperation throughout the European Union currently in force.

After ten years of being in force, the European Commission conducted scientific studies on the Brussels Regulation with a view to seeking improvements and to supporting its goal of greater cooperation between the Member States. To this end, the Commission issued a draft proposal for a new Regulation on 14 December 2010 entailing many key improvements. Two years after this draft proposal, the Brussels I recast regulation finally reproduced some features initiated by the Commission and left aside others. Finally, the amendments brought by the European legislator have been described as two-fold; political and technical.[1] This recast of the Brussels Regulation[2] will enter into force on 10 January 2015. The present article details some of the main features.

Arbitration in the Recast Regulation

Over the last years, the place of arbitration in the Brussels I Regulation has been much argued among scholars,[3] notably after the West Tankers case[4] and the Heidelberg report. The point of departure was that the Brussels I Regulation excluded arbitration matters from its ambit. This position was supported by the Court of

Justice of the European Union in the Marc Rich and Van Uden cases.[5] However, in the West Tankers case,[6] the Court of Justice held that an action on the merits brought before a judge, even if such action would incidentally entail the challenge of an arbitration clause as void, falls under the ambit of such Regulation. The West Tankers case has been largely criticized because this has been seen as opening the gate of anti-suit injunctions and depriving the judge of the seat of arbitration of his powers. In the recast, the European legislator has paid heed to these latest developments.

As a consequence, arbitration remains outside the scope of the recast Brussels I Regulation (Article 1(2)(d)) but recital 12 to the recast Regulation fleshes out what this means in practice. First, a ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or unable of being performed should not be subjected to the rules as to the recognition and the enforcement laid down in the recast Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question. In practice though, this has been described as possibly leading to some difficulties in particular circumstances, notably if two decisions on the same cause of action, one by an arbitral tribunal and the second by a domestic court, are contrary.

Secondly, the same recital makes it clear that the recast Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

The Abolishment of Exequatur Procedures

One of the main features of the recast lies in the riddance of the exequatur procedures. Pursuant to the principle of mutual trust between the Member States of the European Union, the objective of Brussels I recast is that a judgment given in a Member State should be recognised in other Member States without any specific procedure. In addition, if the judgment was to be enforceable in the Member State of origin, according to the new articles 36 and 39, it should be enforceable "*without any declaration of enforceability being required*." The exequatur procedures are thus abolished. The rationale behind this is mainly political. The European Commission's aim was to promote a deeper integration within the European Union and to limit the refusal of enforcement in cases where the rights of a party have been flouted.

The Brussels I recast system of circulation of judgments will be based on the issuance by domestic courts, upon the request of one party, of a certificate, using a standard form. Such certificate will indicate several mentions, notably if the judgment is enforceable in the Member State of origin and, if applicable, the conditions of such enforceability. The certificate will have to be served on the person against whom the enforcement is sought before enforcement measures can be initiated and this person would be entitled to challenge the enforcement of the decision.

However, besides the abolishment of the exequatur, the Brussels I recast contains the possibility of a control. Any interested party shall be allowed to apply either for a decision refusing the recognition of the judgment or for a decision acknowledging that there are no grounds for the refusal of recognition. The grounds for such denial are mentioned in article 45 and are strictly limited to the following circumstances: (i) conflicts with the public policy of the Member State addressed, (ii) judgments given in default of appearance if the defendant was not adequately informed of the proceedings, (iii) the irreconcilable nature of the judgment with another decision between the same parties given in the Member State addressed or with a previous decision involving the same cause of action and between the same parties and lastly (iv) the non-compliance of the judgment with the rules of exclusive jurisdiction or the protecting rules of jurisdiction applicable in insurance, employment and consumer matters. It should be noted that the Brussels I recast adds that apart from the latter ground for refusal, the courts of the Member State addressed are prohibited from examining whether the court of origin had jurisdiction.

It is worth noting that the Brussels I recast proposes new actions for the person interested in challenging the recognition or the enforcement of the judgment. On recognition, the Brussels I recast grants the parties two new possibilities. The first one is a preventive action[7] whereby the party may apply for a decision that there are no grounds for refusal of recognition as referred to in article 45 (above-mentioned). The second one is rather curative and consists of a procedure to not recognise the foreign judgment.

The Refusal of Internationalization of Competence

Neither the Brussels I Regulation nor the 1968 Brussels Convention purport to replace all domestic laws regarding international competence. Their aim was rather to establish a uniform regime concerning jurisdictional issues within the European Union—above all to create a truly European judicial space—for disputes being essentially connected to the European Union. As a consequence, the Member States had, at least, two sets of laws regarding international jurisdiction. For example, French judges applied the Brussels I Regulation when geographically applicable (for matters falling under its scope) and in the following cases: localization on the territory of a Member State of the residence of the defendant, an exclusive jurisdiction on the territory of the European Union and where the parties included an agreement on jurisdic-

tion complying with the conditions of the Regulation and chose a Member State for that matter. Furthermore, when third countries were involved (*i.e.,* not Member States) domestic rules of international competence were to be applied.

On the occasion of the Brussels I recast, it had been envisaged to harmonize this system and suppress domestic subsidiary jurisdiction rules when the matters fall within the scope of the Brussels I Regulation. For instance, jurisdiction for torts would have been applicable without reference to the residence of the defendant. To complete this regime, specific cases for particular jurisdiction would have been elaborated.

To date, the Brussels I recast only "internationalizes" the matters of consumer law (article 18 § 1), labour law (article 21 § 2), exclusive jurisdiction cases (article 24, for example, immovable property or proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or association of natural or legal persons), prorogation of jurisdiction (article 25) and provisional, including protective, measures. The choice of truly "internationalizing" jurisdiction has been limited to particular issues.[8]

Conclusion

The question should be raised as to whether a recast of the Brussels I Regulation was absolutely necessary? The current system has proven to be efficient and, when necessary, the case law of the European Court of Justice fills in the gaps. In any case, the riddance of the exequatur procedures should contribute to attaining the objective of free movement of judgments in civil and commercial matters.

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The Costa Rican Free Trade Zone Regime

The Costa Rican Free Trade Zone Regime offers a wide array of business opportunities to foreign investors who want to take advantage of the country's unique characteristics, including doing business in the oldest democracy in Latin America; the availability of a highly educated and skilled workforce; and the tax benefits granted by the Free Trade Zone Regime. Furthermore, Costa Rica has enacted legislation to strengthen the Free Trade Zone Regime pursuant to the regulations set forth by the World Trade Organization. This explains why almost 300 companies, mostly foreign, are currently operating under the Regime through local subsidiaries.

The Free Trade Zone Regime currently in force is comprised of a set of incentives and benefits granted to companies that manufacture, handle, process, produce, trade or provide goods or services for exportation or re-exportation, as well as to those scientific or technological development companies that make new investments in the country. This Regime, originally created to stimulate exporting companies, is governed by the Free Zone Regime Law, Number 7210, and its regulations (the "Law"). Companies that benefit from the Regime must meet certain requirements and establish their operations on designated free trade zones, which are specific areas destined for this purpose.

Companies located within the Extended Metropolitan Area (the more densely populated area, which includes San Jose, the capital city, and nearby Provinces), as defined by the Law, can benefit from an exemption of 100% on income tax during the first 8 years of operation and 50% during the next 4 years. Companies located outside the Extended Metropolitan Area are granted an exemption of 100% on income tax that applies during the first 12 years of operation and 50% during the next 6 years.

Additionally, established manufacturing companies that make a new investment, when and if they meet certain requirements—such as being part of a strategic sector of the economy, as defined by the regulations of the Law— are partially or totally exempt from income taxes, and can benefit from a special income tax rate of 6% during the first 8 years and 15% during the next 4 years, if operations are located within the Extended Metropolitan Area. If located outside the Extended Metropolitan Area, the income tax rate is 0% during the first 6 years, 5% during the next 6 years, and 15% during the following 6 years of operation.

In general, some of the additional tax incentives established in article 20 of the Law are:

- Exemption from payment of all taxes and duties on imports of raw materials required for the operation of the business;
- Exemption from all taxes and duties affecting imports of machinery and equipment corresponding to the beneficiary's operation;
- Exemption from all taxes and duties on imports of fuels, oils and lubricants required for the operation of the business;
- Exemption for a term of ten years from taxes on capital and net assets and the payment of the real estate transfer tax, as of the date of approval of operations of the company;
- Exemption from sales and consumer taxes;
- Exemption from all taxes on remittances abroad;
- Exemption from all taxes on profits, including dividends paid to shareholders in accordance with the following differences:
    a. 100% for companies located in zones of "higher relative development," for a term of up to eight years and 50% for the following four years;
    b. 100% for companies located in zones of "lower relative development," for a term of up to twelve years and 50% for the following six years;
    c. Exemption from municipal taxes and licenses for a term of ten years, depending on the Municipality with jurisdiction over the place of business of the company.

Also, export-processing enterprises that reinvest in the country may receive an additional exemption on the payment of income tax. Furthermore, processing companies—independent of whether they export or meet special requirements—may enjoy other benefits such as the importation of merchandise with tax suspension when the merchandise is submitted to transformation, repair, reconstruction, or assembly within Costa Rican territory.

The Law also provides, pursuant to article 20 (bis), another advantageous alternative to extend the term of the exemptions. The Beneficiaries may obtain from the Government an extension of the incentives if they make a considerable additional investment (i.e. works in progress, non-depreciable real estate, machinery and equipment and software used in the business). If the extension is granted, the incentives will be granted as if the beneficiary is applying for the first time; therefore, the above-indicated incentives under article 20 bis of the Law will be available as of the date of the notification of the approval for the extension or the date of commencement of operations for income tax purposes.

The above-indicated benefits have attracted a very significant number of companies that have focused on specialized manufacturing and services operations, all of which acknowledge the success of the Free Trade Zone Regime.

Finally, It is important to point out that the request to obtain the corresponding authorizations to operate under the Regime is handled by PROCOMER (Office for the Promotion of Foreign Trade), which is part of the Ministry of Foreign Trade (COMEX). The procedure to obtain such authorizations is relatively expeditious and straightforward, as is the setting up of the local subsidiary or selected legal vehicle to operate in Costa Rica.

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Costa Rica: Anti-Corruption Legislation and Enforcement

Costa Rica is a major recipient of foreign investment in the Central American Region. The country received approximately $1.2 billion in direct investment in 2011 from the United States alone. Foreign companies have recognized the opportunities and advantages that the country offers in a wide array of areas, such as its attractive Free Trade Zone Regime—which has captured high tech manufacturing activities and shared services operations—as well as our specialized, bilingual workforce, strategic geographical location and ample network of free trade agreements.

This level of investment requires a thorough analysis of the measures taken by the country to prevent and combat corrupt practices. Surveys conducted by international firms and organizations reflect that, although significant efforts have been implemented, the country must undertake more actions to rank among the top tier countries in transparency. For example, the Latin American Corruption survey conducted by the U.S. law firm Miller & Chevalier shows that 100% of respondents were aware that a company, individual or government official was being prosecuted for making and receiving an illegal payment or gift, and 95% believed the offender was likely to be prosecuted. However, only 50% of the respondents think anti-corruption laws are effective.

Concerning the Transparency International Index, Costa Rica is ranked 50th, above Brazil and China, but below Puerto Rico and Chile. The country should accept the challenge and strive to become, alongside Chile, the least corrupt country in Latin America.

In 2004, the Costa Rican Congress enacted the *Law Against Corruption and Illicit Enrichment in the Public Function*, which establishes both administrative, monetary

and criminal sanctions for companies, individuals and government officials involved in corrupt practices. The maximum prison term under the law is 12 years, and economic sanctions are harsh.

When operating in Costa Rica, companies should consider the following:

1. Costa Rican anti-corruption regulations do not establish a maximum amount that can be paid to a public official. This means that any benefit, regardless of its monetary value, can constitute a corrupt practice. This aspect should be considered not only in connection with a company's policies on gratuities, but also concerning ancillary benefits that may be provided as part of an otherwise authorized situation. For example, if the company is authorized to cover travel expenses for training as part of a government contract, particular care should be taken to avoid ancillary benefits such as (i) covering travel expenses of family members of public officials; (ii) covering expenses that are not directly related to the main purpose of the trip; and (iii) travel to non-business destinations such as vacation resorts. In the past, these kind of ancillary benefits have been determined to constitute a bribe under Costa Rican law.

2. Another factor that should be considered is that Costa Rican law does not allow any kind of payment to expedite or facilitate proceedings at public offices. This is especially relevant when dealing with third-party contractors who claim to specialize in permitting, public bidding or other dealings with governmental agencies. Appropriate diligence should be performed to ensure that no part of the fees charged by these contractors is destined to provide bribes, as the company may be jointly responsible for corrupt practices performed by such contractors.

3. Finally, an additional situation where anti-corruption regulations become relevant concerns donations to public entities. Even in cases where a company wishes to donate to a public entity in good faith, it is important to identify who will be receiving the donation to ensure that the intended purpose will be fulfilled and that no part of the donation will be diverted. This is particularly important if the company regularly deals with that specific public entity, because the public officials may directly or indirectly benefit from the donation and consequently, if the company receives any benefit in the future, the donation could in itself be considered a bribe.

To avoid any contingency with respect to the Law, we recommend that clients become familiar with those actions that could be construed as corrupt practices, and that their offices, employees, agents, and directors become aware of such practices, especially regarding gift, travel and entertainment policies.

Taking into account bureaucratic entanglements to obtain certain licenses, permits and authorizations—which in our opinion is one of the major causes fostering corrupt practices—we recommend that clients become fully familiar with the applicable procedures and estimated time frames, in order to avoid situations that could result in a request for bribes by government personnel or facilitators. Being fully informed is always a valuable tool to avoid situations that could lead to actions sanctioned by our laws.

From a practical standpoint, Costa Rica enacted the above-mentioned legislation as a result of the Prosecutor's Office decision to prosecute, to the full extent of the applicable law at the time, two former presidents of the Republic, one for embezzlement and the other for instigating aggravated corruption practices.

Both presidents were convicted in what today are landmark cases that sent a warning to high government officials throughout Latin America, who for years have enjoyed an "untouchable" status. Furthermore, both the foreign companies and their local representatives that participated in the corruption schemes through the payment of kickbacks to secure government contracts were convicted and the companies charged with economic sanctions up to $10 million.

In recent years, other government officers have been investigated as a result of exposés published by the press, which has played a very active role as a whistleblower of corrupt practices. Such cases also resulted in highly publicized convictions.

Notwithstanding the aforementioned, we are of the opinion that additional efforts must be made to improve our ranking in transparency, especially through the proactive prosecution of government employees and officers at the middle-rank level in certain governmental entities (such as the customs and port authorities), if they are found to have been actively seeking bribes and gifts.

We also consider that the Prosecutor's Office must be assigned sufficient resources to prosecute more cases and obtain more frequent sanctions.

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Ontario Recognizes Its First Privacy Tort

The Canadian province of Ontario's Court of Appeal has, for the first time, finally recognized the right

of a plaintiff to bring a civil action for damages for the invasion of personal privacy, drawing upon U.S. legal concepts in the process.

The case of *Jones v. Tsige*, 2012 ONCA 32 (CanLII) (available at http://www.canlii.org/en/on/onca/doc/2012/2012onca32/2012onca32.html), began in July 2009 when the appellant, Sandra Jones, discovered that the respondent, Winnie Tsige, had been secretly looking at her banking records. The two both worked at the Bank of Montreal (the "Bank") in separate branches but were connected by complicated interpersonal relations (Tsige was involved in a relationship with Jones' ex-husband). Over a period of four years, Tsige had accessed Jones' banking records at least 147 times. Tsige had reviewed Jones' transactions details, as well as her personal information including date of birth, marital status, and address. Tsige did not publish, distribute, or record the information in any way.

Jones ultimately became suspicious of Tsige and complained to the Bank, who found that Tsige had no legitimate reason for viewing the information. The Bank determined what she was doing was contrary to its Code of Business Conduct and Ethics and her professional responsibility. Tsige later apologized for her actions, was suspended for one week without pay by the Bank, and denied a bonus. Feeling that this was an inadequate remedy given that her privacy interest in her confidential banking information had been "irreversibly destroyed," Jones filed a claim against Tsige for C$70,000 for invasion of privacy and breach of fiduciary duty and punitive and exemplary damages of C$20,000.

At issue was whether the province of Ontario recognized the existence of a tort of invasion of privacy. Canada presently has a complex patchwork of private sector, public sector, and sector-specific privacy laws. To date, four provinces (British Columbia, Manitoba, Saskatchewan, and Newfoundland) currently have a statutorily created tort of invasion of privacy. All four statutes establish a limited cause of action, whereby liability will only be found if the defendant acts willfully (not a requirement in Manitoba) and without a claim of right. Moreover, the nature and degree of the plaintiff's privacy entitlement is circumscribed by what is "reasonable in the circumstances." The first motion judge initially found that in Canada there is no freestanding right to dignity or privacy under the Canadian Charter of Human Rights or at common law. He also added that given existing privacy legislation protecting certain rights, any expansion of those rights should be dealt with by statute rather than common law. The judge also felt that Jones had pursued the litigation "aggressively" and failed to accept reasonable settlement offers. Jones disagreed with this result and appealed the judgment.

In Canada, the question of whether the common law should recognize a cause of action in tort for invasion of privacy has been actively debated for the past 120 years. The Ontario Court of Appeal extensively canvassed Canadian, U.S., and English jurisprudence and commentators, including the 1890 *Harvard Law Review* article, "The Right to Privacy," by Samuel D. Warren and future U.S. Supreme Court Justice Louis D. Brandeis, and William Prosser's 1960 article "Privacy." The court particularly focused on the well-known *Restatement (Second) of Torts* (2010) regarding the tort of "intrusion upon seclusion."

The court found it appropriate to confirm the existence of a right of action for intrusion upon seclusion, which it held to be "consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society." The court was also aided by the particular circumstance of this case, with facts "that cry out for a remedy," and characterizing Tsige's actions as "deliberate, prolonged and shocking."

Interestingly, the court explicitly dismissed the idea that it was not open to adapting the common law to deal with the invasion of privacy on the ground that privacy is already the subject of legislation in Ontario and Canada more generally. The court also found that Canada's federal private sector act, the Personal Information Protection and Electronic Documents Act (PIPEDA) which would otherwise apply to organizations subject to federal legislation such as banks, does not speak to the existence of a civil cause of action province and was therefore unhelpful for Jones. Moreover, the remedies available under PIPEDA do not include damages, and it would be difficult to see how Jones could benefit from lodging a PIPEDA complaint with Canada's federal regulator against her own employer rather than the wrongdoer Tsige.

The Ontario Court of Appeal adopted as elements of the action for intrusion upon seclusion the *U.S. Restatement (Second) of Torts* (2010) formulation as follows:

> One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

The key features of this cause of action, as found by the court, were (1) that the defendant's conduct must be intentional (including reckless); (2) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and (3) that a reasonable person would regard the invasion as highly offensive, causing distress, humiliation, or anguish.

The court was very cognizant that it was creating a new tort and made a concerted effort in its written judgment to reassure the Canadian public that this cause of action will not "open the floodgates" to vast numbers of new claims and that the cause of action will arise only for "deliberate and significant invasions of personal privacy." For example, the court explicitly stated that "claims from individuals who are sensitive or unusually concerned about their privacy" are to be excluded (although it remains to be seen what these will look like). The court then deliberately limited the tort to "intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive." The court also cautioned that proof of actual loss is not an element of the cause of action, but given the intangible nature of the interests protected, damages for intrusion upon seclusion will ordinarily be measured by a "modest" conventional sum, especially by U.S. litigation standards.

Having established the existence of the new tort, the court then considered the damages that it should award to Jones for her ordeal. The court canvassed damages under Ontario case law, particularly in the related areas such as nuisance and trespass as well as under the four provincial privacy acts, and in typical Canadian fashion, determined that, absent proof of actual pecuniary loss, the awards for such suffering should be "modest." The court then found that damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be "modest but sufficient to mark the wrong that has been done" and fixed the range at up to C$20,000.

Leaning to the conservative side once again, the court also commented that it would not "exclude nor encourage awards of aggravated damages" but absent truly exceptional circumstances, the plaintiffs should be held to the above-mentioned C$20,000 range. While Tsige's actions were deliberate and repeated and Jones was clearly upset by the intrusion into her private financial affairs, the court found that based on the facts, Jones had fundamentally suffered no public embarrassment or harm to her health, welfare, social, business, or financial position and Tsige had apologized for her conduct. Thus, the court placed this case at the mid-point of the identified range and damages were awarded in the modest amount of C$10,000, with no order as to costs.

While the above damage award to Jones is quite low, especially from an American perspective, the importance of the *Jones v. Tsige* case lies not in the financial gain to Jones—it is the fact that this case opens the doors to future plaintiffs in Ontario to avail themselves of an actual remedy following an "intrusion upon seclusion" event (despite the modest financial payout that recognizes their suffering) rather than watching their perpetrator merely get a slap on the wrist from the applicable privacy regulator. Despite the attempts of the Ontario Court of Appeal to minimize instances of its application, this new tort is clearly of great interest to Canadians and those who do business in Canada and further underscores the growing recognition that Canada's judiciary attaches to the importance of personal privacy and the importance of privacy in Canada more generally.

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Recent OFAC Investigations

A hybrid between an enforcement agency and a tool for carrying out U.S. foreign policy, the Office of Foreign Assets Control (OFAC) has been in the headlines recently as the principal Federal regulator for enforcement of U.S. economic sanctions abroad.

The 2007 *International Economic Powers Emergency Enhancement Act*[1] increased the penalties available to OFAC in enforcement of economic sanctions, which was followed by the Economic Sanctions Enforcement Guidelines in 2009.[2] As a result, the penalties available to OFAC for violations were increased to the greater of $250,000, or twice the amount of the transaction that was the basis for the violation.

OFAC enforcement actions in the past year (2012), have highlighted the increased teeth it now posseses in enforcing the various U.S. sanctions regimes:

1. ING

OFAC settled with Dutch financial institution ING in the amount of $619M. Allegations against ING were based on an alleged violation of Executive Orders or Regulations issued under the *International Economic Emergency Powers Act* ("IEEPA") and the *Trading With the Enemy Act* ("TWEA").[3]

ING had engaged in transactions with Cuban banks designed to evade detection under the US sanctions regimes. It omitted references to Cuba in many of the transactions so that compliance investigations would not detect the violations. It also assisted Cuban banks in processing U.S. travelers checks by using a fake stamp bearing the name of its French branch.

OFAC also alleged that ING violated sanctions against Burma, Sudan and Iran in its transactions.

2. Standard Chartered

OFAC reached a settlement with British bank Standard Chartered in the amount of $132M (part of larger $327M settlement with other Federal agencies), to resolve allegations that it had violated Executive Orders or Regu-

lations under the IEEPA and the *Foreign Narcotics Kingpin Designation Act* ("FNKDA").[4]

OFAC alleged that Standard Chartered had opened accounts for Iranian banks in order to assist them to receive payment and wire transactions, including transactions sent through the US. It also alleged that Standard Chartered had omitted information relating to the banks on its transactions.

3. HSBC

OFAC reached a settlement with British bank HSBC in the amount of $375M in response to allegations that the bank had engaged in transactions violating Executive Orders or Regulations under both the IEEPA and TWEA.[5]

It was alleged that HSBC had provided U.S. dollar clearing services to Iranian Banks, while concealing the details of these transactions from its compliance filters. HSBC was also alleged to have processed illegal transactions involving Burma, Cuba and Libya.

4. Conclusion

These key settlements show that OFAC has been willing to use its enhanced penalty powers under the recent legislation and become a key player in policing international financial transactions. This is especially important for entities and individuals from abroad as OFAC has claimed payment transactions passing through New York come under its jurisdiction.[6]

Overseas clients need to be aware of transactions that come under the purview of OFAC. OFAC can refer sanctions violators for criminal charges, and criminal penalties can include fines from $50,000 to $10,000,000 and imprisonment from 10 to 30 years.[7]

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6. *E.g., see* ING, Standard Chartered, and HSBC settlements.
7. *See, e.g.*, 50 U.S.C. §1705(c) (2007) (International Emergency Economic Powers Act criminal penalties); 21 U.S.C. 1906 (1999) (Foreign Narcotics Kingpin Designation Act criminal penalties).

Chapter News

International Microfinance and Financial Inclusion Committee Update

The Section's International Microfinance and Financial Inclusion Committee (MAFIC) had an extraordinary first year. Last summer, the Committee submitted a paper to the UN Commission on International Trade Law (UNCITRAL) on pricing transparency in microfinance. The paper was well-received and culminated on January 16-18, 2013, with Azish Filabi, co-chair of the Committee, participating as a presenter at UNCITRAL's Second International Colloquium on Microfinance. UNCITRAL's first colloquium on this subject in 2011 explored various legal topics that affect microfinance and micro-entrepreneurs. At this second colloquium, the Secretariat highlighted for further consideration topics relating to: over-collateralization and use of collateral with no economic value; electronic money; dispute resolution and secured lending to micro-enterprises and SMEs.

Research highlights the importance of creating an enabling legal environment for micro, small and medium enterprises that can facilitate their development, particularly in developing and middle-income economies. To this end, Ms. Filabi proposed that UNCITRAL explore price transparency. She further proposed that if a working group on microfinance is established, it draft a legislative guide for implementation of truth-in-lending laws. Hidden prices inhibit economic growth and development, and create unequal information advantages for lenders. Given the economic vulnerability of micro-entrepreneurs, the need for such legislation is even more important as a method to protect borrowers and enable better business planning and financial management. Pricing transparency is therefore one method to increase competition among microfinance service providers and improve access to credit for borrowers. Also presenting on the topic of price transparency was Chuck Waterfield, Founder and President of Microfinance Transparency. Chuck was instrumental in illustrating to the Secretariat and attendees the market forces that contributed to the evolution of non-transparent prices among microfinance institutions.

Other presentations at the Colloquium covered topics including the role of asset-based lending in microfinance, an enabling legal environment for mobile payments, alternate and online dispute resolution mechanisms, and simplified business registration mechanisms.

In other committee news, MAFIC developed a new workstream to keep the committee current by monitoring microfinance legislation and initiatives worldwide. This workstream was led by lawyers from Reed Smith's newly created Social Impact Finance group. The workstream reports presented topics relating to the European Code of Good Conduct for Microcredit, the 2012 State of Microcredit Summit Campaign, and the new microfinance legislation in India.

MAFIC held several educational forums for NYSBA members entitled the "Financial Inclusion and the Law Series." The first was a presentation by Kevin Saunders, Esq. of ACCION International about "Mobile Banking and Access to Finance in Africa," held in conjunction with the International Section's Africa Committee. This program was followed by a presentation on Microfinance and Crowdfunding after the JOBS Act, presented by Julia Kurnia, founder of www.zidisha.org, and Nanette Heide, securities lawyer at Duane Morris LLP. This event was cosponsored by the International Banking, Securities & Financial Transactions Committee.

For future forum topics, we plan to explore the new Benefit Corporation entity becoming popular in the U.S. and its U.K. relative Community Interest Corporations. The forums are via conference call and all are welcome to dial-in! Please contact one of the Committee Chairs if you'd like to receive more information about events (www.nysba.org/mafic).

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"Mediating Cross Border Disputes From the Perspective of the Neutral, Client, and Advocate"

A brown bag lunch CLE program, "Mediating Cross Border Disputes From the Perspective of the Neutral, Client, and Advocate," organized by the International Arbitration and ADR Committee of the International Section, was held on January 29, 2013, at Baker & McKenzie LLP in New York. The program focused on mediation as an efficient and cost-effective means of resolving international commercial disputes, and highlighted strategies to overcome potential challenges in dealing with diverse cultures, legal systems, and languages.

Lorraine Brennan, managing director of JAMS International, moderated the panel. At the outset, she asked the panelists to explain how cultural differences may impact mediation in an international context. Stephen E.

Smith, former general counsel of Lockheed Martin Space Systems Company and now a member of the firm Sherman & Howard LLC in Denver, Colorado, presented the perspective of the client in mediation. He stated that any dispute clause with multiple stages—typically including conciliation, mediation, and binding arbitration—should have well defined time limits because the parties may not agree on the appropriate length of time that should be given to each of these processes. Mr. Smith also pointed out that mediation in Europe may have a different meaning than in the United States. While in the United States a mediator relies on evaluative, as well as other, techniques, the predominant European view is that a mediator should refrain from evaluation. Since a mediator's evaluation may be helpful to get a realistic perspective on a party's position, he suggested that the ADR clause in a cross-border contract should indicate whether the mediator will be permitted to provide an evaluation of the case.

Providing the perspective of the neutral in mediation, Dina Jansenson, senior mediator and arbitrator at JAMS, agreed that expectations as to the role of the mediator may differ when parties from foreign countries are involved. She also discussed the fundamental importance of preparation by the mediator in cross-border disputes. Ms. Jansenson emphasized that preparation includes establishing a relationship with counsel and the parties before coming to the table, and setting forth clear guidelines regarding the process, with particular attention to the role of caucusing. Parties from certain countries, for example, may be concerned that during a private meeting a counterparty may attempt to bribe the mediator. Ms. Jansenson also discussed the technique of the "Mediator's Proposal." This technique involves the mediator conveying a proposal to the parties in writing and having each party respond privately to the mediator. If there is no deal, the refusing party will not know whether the other side has rejected the proposal and the party that has accepted the proposal will be protected. In her experience, this technique is often successful because, by the end of the day, the mediator will have developed familiarity with parameters of proposals that are acceptable to both parties.

Catherine Amirfar, litigation partner at Debevoise & Plimpton LLP, offering the perspective of the advocate in mediation, emphasized the importance of attending mediation with a client authorized to make a decision. For example, she pointed out that in Japanese corporations there are often several layers of decision making, which can hinder progress in the settlement discussions. Thus, she suggested that the ADR clause should provide that the client participating in mediation must have final authority to settle, or even require people with a specific title to be at the table.

The discussion then turned to aspects of drafting the ADR clause that need to be considered in light of different legal backgrounds the parties may have. There was a consensus among the panelists that the clause should contain a confidentiality provision. In addition, the clause should state that evidence used in mediation is excluded from subsequent litigation. The panelists acknowledged that discoverable documents are not protected just by virtue of having been disclosed in mediation, but they agreed that steps should be taken in drafting the ADR clause to ensure that the specific selection of certain documents for mediation purposes is protected.

The panel also examined issues in selecting a mediator for cross-border disputes. Ms. Brennan stated that in Europe the vetting process is not as sophisticated as in the United States. As a result, some parties may be prejudiced against mediators from certain countries. Ms. Jansenson explained that she is often chosen as a mediator because of her language skills and personal connection with Israel and South America. However, she suggested that counsel should interview a mediator and gather references from other lawyers who have worked with him or her to make sure that the mediator will act neutrally.

Providing the client's perspective, Mr. Smith stated that he would prefer a mediator who is sympathetic to whichever aspect of the case—facts or equities—favors his side. He suggested that each party should work with outside counsel on compiling a list of potential neutrals and check with the opposing side. If the parties cannot agree on a name, they should use an institution to choose the mediator. Ms. Amirfar stated that, as a litigator, "you want someone decisive, sympathetic, and smart." She suggested that counsel find out in advance what rules the mediator is comfortable using—for example, whether the mediator will allow confidential submissions.

Finally, the panel discussed issues arising when parties speak different languages. Ms. Brennan cautioned that nuances lost in translation could affect the process. Ms. Amirfar urged lawyers participating in mediation to bring their own interpreter, who should also function as the cultural bridge to the other side's client. Generally, the panel agreed that providing the interpreters with a list of terms of art likely to be used in settling a particular dispute before beginning the mediation will avoid confusion and misunderstanding later on.

The program was instructive in integrating cultural, legal, and linguistic considerations as they relate to mediation of cross-border disputes. Particular examples from real-life situations enhanced the general effectiveness of the presentations. The International Arbitration and ADR Committee hopes to present other advanced programs on this topic in the future.

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Section News

Brazil's Accession to the CISG

Below is a copy of an email sent to the Section from then Chair Andrew Otis, dated March the 7th regarding Brazil's Accession to the CISG. For more on the Section's burgeoning role in the development of international law, see the following article written by Albert Bloomsbury.

Brazil's accession to the CISG (Entry into Force April 1, 2014)

Brazil acceded to the United Nations Convention on Contracts for the International Sale of Goods (CISG) on March 4, 2013 as the 79th State Party to the Convention. The Convention will enter into force for Brazil on April 1, 2014.

For more information please see *UN Journal* March 5, 2013, page 20, http://www.un.org/Docs/journal/En/20130305e.pdf, for the announcement of the accession.

For those who can read Portuguese, you can also check the UN Brazil Information website for a more detailed article (http://www.onu.org.br/brasil-adere-a-convencao-da-onu-sobre-contratos-internacionais-de-compra-e-venda-de-mercadorias/).

NYSBA International Section's Role in This Historic Event

Multiple NYSBA International Section members in New York, Sao Paulo and Vienna worked closely together over the course of three years to promote Brazil's accession to the CISG. Congratulations are due to former Section Chairs Michael Galligan, Carl-Olof Bouveng, and Drew Jaglom, International Contract and Commercial Law Committee Co-Chair Albert Bloomsbury, Brazil Chapter Chair Isabel Franco and Austria Chapter Chair Otto Wächter.

Section actions included meetings with the OAB (Ordem dos Advogados do Brasil, Order of Lawyers of Brazil) and co-sponsoring the CISG Symposium organized by FIESP (Federação das Indústrias do Estado de São Paulo, Federation of Industries of the State of Sao Paulo) in November, 2011 that gathered prominent Brazilian jurists and other influential people in Brazil as well as representatives of the NYSBA International Section.

Thanks are also due to other current and past Section members and volunteers, notably Leandro Tripodi (CISG Brazil Web Site Editor-in-Chief, one of organizers of the 2011 FIESP CISG Symposium), Prof. Eric Bergsten (a former UNCITRAL Secretary, a founder and leader of Vis Moot Competition, and NYSBA's first delegate to UNCITRAL plenary session in 2011), and Prof. Lauro Gama (another organizer of FIESP Symposium).

And we also thank Luca Castellani, UNCITRAL's official who is in charge of promoting UNCITRAL instruments throughout the world, for his guidance.

We wish to give a special tribute to the late Prof. Albert Kritzer of Pace University Law School, a tireless advocate of global commercial law harmonization. The 1998 recipient of the Section's award for Distinction in International Law and Affairs, Professor Kritzer passed away in 2010, as he was working with Prof. Bergsten and UNCITRAL officials to promote Brazil's early accession to the CISG.

This is the latest in a series of notable successes that have grown out of the one of the Section's three missions adopted in 2009: to positively influence the United Nation's development of international law.

The CISG and How Brazil's Accession to the CISG May Affect You

One of the core conventions of international trade law, the CISG, provides a comprehensive and uniform code of legal rules governing the formation of contracts for the international sale of goods, including obligations of the buyer and seller and remedies for breach of contract.

For further information about the CISG on the UNCITRAL website, see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html; and the status of the CISG in various countries is at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

When it enters into force, Brazil's accession to the CISG means that the international sale of goods between parties located in Brazil and other CISG nations, such as the United States, will be governed by the CISG as a default rule unless the sale is specifically outside the scope of the Convention rules (due to the nature of goods or transactions) or the parties explicitly opt out of the CISG in their mutual agreement.

* * *

International Section's Third Mission and the Committee on International Contract and Commercial Law—Monitoring Development of International Law

It has been three years since the Committee on International Contract and Commercial Law was founded in March 2010. One of the objectives of the Committee was to pursue the International Section's Third Mission, monitoring development of international law under the United Nations System. Here, based on my own experi-

ence over the last three years, I propose to reflect on what this Third Mission means for both the Committee and for the Section.

The Development of International Law Under the United Nations

The 21st century globalization demands a coherent global legal framework that works seamlessly with national laws and cross-border commercial contracts and transactions. If such a framework is established, cross-border commercial transactions and investments will prosper under a less treacherous legal environment, which is analogous to riding your car on a smoother, mine-free highway instead of today's unpredictable hazardous terrain. The creation of such a framework is only possible if nations are eager to agree on a multilateral basis to establish common rules and a common framework for commercial law, regulatory rules and judicial harmonization.

The private citizen's contract, even in the most liberal state that respects the sanctity of private property ownership and freedom of contract, is subject to a national regulatory framework. When the transaction crosses the borders, the private parties have to look at multiple legal systems and the regulatory frameworks of all the jurisdictions concerned. That task can be difficult and sometimes impossible depending on the degree of compatibility of the legal systems. Solving this problem requires international cooperation and coordination.

The bilateral approach is easier to implement but has a limitation. The private parties' cost to navigate a jungle of bilateral international arrangements in a truly globalized world is very high. Consider the transactional costs incurred by a multinational entity that sources parts and components from ten different countries in the global supply chain system. To develop a truly universal legal regime that suits an increasingly integrated global economy, nations need to deal with the challenges together under the multilateral approach.

In order to monitor the development of international law under the multilateral framework and think about what is at stake for us and what will come in this regard, we need to understand the current state of public international law. Any new international treaties or legal rules will need to fit into the existing general global framework of public international law.

The United Nations Charter is given special status within public international law. In addition, we must also pay attention to unwritten law, customary international law. Under these fundamental principles, sovereign equality and non-interference in other countries' domestic affairs is still regarded as the most important principles even in the age of the globalization. Even the most powerful nations on Earth cannot ignore smaller countries' sovereignty.

On the other hand, one should also pay attention to another side of the sovereignty and public international law. It is generally accepted that the public international law obligation of a sovereign State can override and extinguish conflicting private citizen's rights created under the national law of the same State, such as the property rights and rights under contracts. Sovereign States are not bound by legal obligations under public international law except for explicit consent to be bound or under the obligation recognized by the customary international law. The flip side of the coin is the principle of *pacta sunt servanda*, i.e., the treaty obligations must be observed by the State which has agreed to be bound by the treaty.

This rigid system may not be the most convenient regime to handle the rapidly changing world under globalization. To fill the gap, the international community is becoming more reliant on "soft law." In the case of UNCITRAL, its Model Law and Legislative Guidance belong to this category. This soft law approach accepts the idea of "national ownership" over domestic matters, including economic and commercial law matters that affect international commerce and economic activities. Under this principle, each nation is responsible for establishing its own legal system and rules to achieve the internationally agreed upon common goals. This is a voluntary regime among nations and it has proven to be an effective way to achieve harmonization of law among willing nations. The recent, unanimously adopted UN Declaration on the Rule of Law (September 2012) may be called the ultimate soft law that binds the entire global legal system under one umbrella.

Additionally, it is also important to understand the reality of the international lawmaking process, especially the dynamics of international treaty negotiations under the multilateral framework. Adoption of a multilateral international treaty takes time and tremendous efforts. It is a difficult process because nations must overcome differences in the context of multilateral negotiations, which must follow very delicate diplomatic protocols. In order to create a global treaty, delegations from the 195 State parties (193 UN member States plus two observer States) need to gather at one place for weeks. I recently had the privilege of observing such a complex negotiation process at the Final United Nations Arms Trade Treaty Conference from March 18 to 28, 2013, which was the climax of the seven-year long process started in 2006 that involved numerous formal and informal conferences of diplomats. It is very expensive to hold weeks of such a large diplomatic conference multiple times over many years, which requires a large number of delegates to travel from all over the world many times and hundreds of hours of services of the secretariat including interpreters and translators for the six UN official languages. The economic burden is very heavy, especially for small nations.

Thus the speed of international law development is dependent on the global political will and how much

nations are willing to invest in this important area. We learned about this very issue from our firsthand experience when we fought to maintain UNCITRAL's rotating meeting pattern between New York and Vienna (Fall of 2011). Through this experience we learned how little resources are allocated to UNCITRAL (approximately $5 million annual budget, which is only 1,000th of the total UN budget, or about 10 millionth of the global GDP), and that prevents UNCITRAL from taking on many important global commercial law harmonization projects at a much faster pace.

Also, it is important to look at the example of successful treaties in global commercial law. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is one of the most successful multilateral commercial law treaties adopted by the UN. It has helped advance global investment, trade and commerce. However, as practitioners, we know very well that the implementation of this relatively successful treaty among the over 140 member States is very uneven, and we have to know the quirky local rules in the real world when we practice law for our private clients.

At the same time, we need to pay close attention to the global lawmaking activities in the non-commercial law area, such as global security, human rights, humanitarian and environmental law treaties, as they are increasingly affecting private contracts and commercial interests. Below I have identified a few interesting examples.

The United Nations Security Council has the power to adopt resolutions to maintain peace and security and such resolutions are legally binding on all the UN member states under the UN Charter. In this regard, it can adopt sweeping sanctions, which may shut down commercial transactions overnight in order to achieve important global security objectives identified by these powerful 15 nations (in this regard, the influence of the P-5, i.e. China, France, Russia, the UK and the U.S., is particularly strong due to their veto power). Not many people are aware that the Security Council in effect has a sweeping legislative power of emergency nature that can broadly affect the global population. In fact, the Security Council sanction resolutions unilaterally create legal obligations of the UN member States under public international law, and the accumulation of the sanction practice over years has developed a unique legal regime with its own jurisprudence touching many areas of public international law. For example, the codes, standards, etc. that have been developed by the Security Council Counter-Terrorism Committee ("CTC" or "1373 Committee") and its Executive Directorate (CTED)) are something that practitioners should be aware of, especially if they give legal advice to financial and transportation industries, traders and non-profit organizations.

As an another example, the Arms Trade Treaty, which was adopted by the UN General Assembly on April 2, 2013, aims to protect human life, human rights and humanitarian laws by directly targeting the flow of goods across borders in commercial transactions and mandating its member States to adequately regulate illicit markets within its jurisdiction to fulfill its treaty obligations. Once it enters into force, this treaty will affect a broad constituency from the shipping industry, distributers and high-tech industry, to the banking sector, the public accounting industry, as well as the legal services industry. There, the public international law sets the floor for member States, and each State implements its international obligations under its national law in the manner best suited for the national condition. That approach follows the national ownership principle.

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which went into force on May 5, 2013, can further restrict the sovereign States' discretion under the national ownership principle in the adoption of domestic law. This Protocol, for the first time, has opened a door for individuals to initiate the international treaty body adjudication procedures to challenge the State parties of the Protocol for the violation of economic, social and cultural rights protected under international law. These procedures are handled by the Committee on Economic, Social and Cultural Rights (CESCR), a body set up by the international treaty, the International Covenant on Economic, Social and Cultural Rights. The Protocol went into force with ten initial member States, but the number will increase over time. This is one of the treaties that practitioners will have to pay attention to even though the United States' accession is unlikely in the near future. At this early juncture, it is hard to predict how this development will affect the paradigm; however, one cannot doubt that the various UNCITRAL soft laws, national legislations of various States, international treaties such as UN Anti-corruption Convention and Arms Trade Treaty, and the World Trade Organization (WTO) trade rules, all have the potential to influence the future development of CESCR case law under the Optional Protocol, which in turn can affect global corporate responsibilities and commercial fair dealings norms in the long run. Another interesting open question is the relationship of this Optional Protocol with investor-State arbitrations, which I will discuss next.

With respect to investment treaties, I want to specifically mention a notable lawmaking initiative that touches the cross-section of public international law and the private party's legal rights in a new way. UNCITRAL's new Transparency Rules on investor-State arbitrations (adopted in July 2013) could potentially set a precedent for the development of future legal regimes that address the situation where the legal rights and obligations that are created under the private contract and rules intersect with the concerns of the sovereign. The United States and several interested civil society organizations wanted to develop expeditious measures to insert a new transparency requirement for investor-State arbitrations under more than 3,000 or so existing bilateral investment treaties

to promote the global public good. However, the U.S. and its allies were not able to convince the other side during the UNCITRAL negotiations (2010 through February of 2013) due to the strong sovereign-rights based concerns of the countries that do not share the value of government transparency. In sum, they supported their position based on the classic principles of public international law that private rules such as arbitration rules and transparency rules cannot modify the State's legal obligations under a treaty, while the U.S. tried to advocate the "dynamic interpretation of a treaty." To my knowledge, this was the first occasion that UNCITRAL handled an agenda that involved the global public interest issue that directly touched the sensitivity of sovereignty, and for this reason it was a really difficult project. The diplomats' and other negotiators' passions often went high and I myself was able to directly observe these tense negotiations at the UNCITRAL Working Group II (February of 2012 and 2013) and learned the lesson of what can and cannot be achieved within the current global political environment of multilateral diplomacy.

How Our Section Has Participated in Advancing Our Third Mission

Following is a high-level summary of the important initiatives of the International Section Executive Committee and of the Committee on International Contract and Commercial Law as well as other noteworthy points from our experience over the past three years that are related to the Section's Third Mission:

1. Supporting UNCITRAL and Its Global Commercial Law Harmonization Effort

The United Nations Commission on International Trade Law (UNCITRAL) was formed in 1966 by a UN General Assembly resolution aimed at gradually harmonizing international trade law. It has been working as a custodian of the 1958 New York Convention to enhance the enforceability of international arbitral agreements and awards. The UN Convention on Contracts for the International Sale of Goods (CISG) was adopted in 1980 under UNCITRAL negotiations.

The NYSBA obtained formal nongovernmental organization (NGO) recognition before UNCITRAL in 2011. The Committee on International Contract and Commercial Law played a pivotal role, together with the Austria Chapter, in assisting NYSBA to obtain this recognition. As a result of the NGO recognition in 2011, we have been able to participate in various sessions of UNCITRAL plenary and working groups meetings, and helped the International Section host events aimed at supporting UNCITRAL's promotion of its instruments and its objective of "gradual harmonization of international trade law." In this regard, we hosted a UNCITRAL-related panel discussions at Panama Seasonal Meeting (September 2011), Prague European Regional Meeting (March 2012), and Global Law Week (May 2013), and at these occasions we invited UNCITRAL Secretariat speakers. The Global Law Week closing event was especially noteworthy as we organized a panel discussion of the two prominent figures in the field, Renaud Sorieul, the Secretary of UNCITRAL and the head of the International Trade Law Division of the UN Office of Legal Affairs, and Keith Loken, the U.S. State Department Assistant Legal Adviser for Private International Law, the official who is responsible for the U.S. government's entire private international law policy matters. This discussion was moderated by a former Chief Judge of the highest court of the State of New York, Hon. Judith Kaye. The event was a great success.

Recently, our Section celebrated Brazil's accession to the CISG as the 79th State party, as our Section, and especially the International Contract and Commercial Law Committee, in conjunction with the Brazil and Austria Chapters, played a supporting role in the global effort to promote Brazil's accession to this important commercial law treaty (the CISG will become effective for Brazil on April 1, 2014 as a result of the accession in March 2013). That effort was led by UNCITRAL Secretariat and the "friends of the CISG," such as the CISG Advisory Council member professors and other world-wide academia. We co-sponsored the CISG Symposium in Sao Paulo organized by FIESP (Federação das Indústrias do Estado de São Paulo, Federation of Industries of the State of Sao Paulo) in November 2011 alongside OBA (Ordem dos Advogados do Brasil, Order of Lawyers of Brazil). FIESP is an influential organization in Brazil, and our members in Brazil, in their double duty, played an important role in the local organization of the event. This event was an important catalyst to boost the Brazilian constituency's awareness of this important treaty. As a result, we have built a working relationship with those global figures in academia and with the UNCITRAL Secretariat.

With Brazil's new membership in the CISG treaty and with its large economic size (the sixth or seventh largest economy in the world in terms of the GDP, similar to the size of the UK and France), the CISG now covers most of the world in terms of the global GDP and is accepted by almost all major U.S. trade partners, with the exception of the UK and India. Any cross-border sales of goods among these 79 CISG member States are technically under the same contract law, the CISG, unless both parties agree to use other law specifically. That should reduce transaction costs, especially for small and medium-size businesses across the globe.

The Committee also worked with the Australia Chapter to promote the UN Electronic Communications Convention (a convention concerning contract formation by means of electronic communications, which went into force on March 1, 2013) by encouraging the necessary legal reform of the State of Queensland, Australia. This is another international convention developed by, and adopted at, UNCITRAL.

Finally, I should mention our Section's ongoing planning for the Seasonal Meeting in Vienna in the fall of 2014, which will cover an UNCITRAL related international law theme. Vienna is home to the UNCITRAL Secretariat, and I hope that our Vienna meeting will further consolidate our relationship with them, and, more importantly, that we can contribute to the furtherance of the goals of UNCITRAL to promote global economic growth through harmonization of commercial law.

2. Hague Convention on Choice of Court Agreements U.S. Ratification

The Hague Conference on Private International Law is a separate international body outside the UN system but it works closely with UNCITRAL and UNIDROIT (another independent international body based in Rome) for harmonization of private international law. In 2005, the diplomatic conference at the Hague Conference adopted the Convention on Choice of Court Agreements (COCA).

This Convention, once it takes effect, will allow private parties to voluntarily agree to settle their commercial disputes at a court within one member State of the Convention and have the resulting judgment enforced worldwide among other parties to the Convention. The COCA was signed by the United States in 2009 and is waiting for the Senate to give advice and consent to the President for ratification. The U.S. State Department has been preparing the domestic implementation legislation necessary for the ratification process since 2009. NYSBA International Section Executive Committee members, including myself, have been actively following this development. Six of us went to Washington in March 2012 for a public hearing of the U.S. State Department Advisory Committee on Private International Law on the topic of how to implement the treaty within the United States at the federal and state levels. With an invitation from the U.S. State Department Office for Private International Law, the International Section submitted a number of papers to that Office to help it develop the necessary legislative package.

3. United Nations Rule of Law Declaration at the General Assembly High-Level Meeting on September 24, 2012

The International Section also stresses the importance of strengthening the global rule of law. The United Nations General Assembly held a High-Level Meeting on the Rule of Law at the National and International Levels on September 24, 2012 and unanimously adopted a historical Declaration for the purpose of setting a comprehensive lineup of important principles for the global rule of law.

The UN was founded in 1945 based on the three pillars, world peace, human rights, and economic development. In 1948 the UN member states adopted the Universal Declaration of Human Rights. This adoption stimulated the development of human rights all across the world. However, the UN as a whole has never developed a comprehensive high-level policy for the global rule of law that covers both public international law, which regulates the relationship among the sovereign States, and the national law and private international law, which affects private citizen's rights among themselves and as against their governments. Therefore, it was a historical move, after 67 years, that the United Nations, for the first time, adopted a comprehensive Rule of Law Declaration at the historic Rule of Law Summit. It is important to point out that the Declaration was adopted by acclamation at the High-Level Meeting, which symbolizes unanimous consent of the leaders of all the 193 UN member states without a single dissent. This will provide significant political weight for future development of the rule of law at the national and international levels.

In this connection, the International Section adopted a position to support UNCITRAL's role in the harmonization of global commercial laws and its contribution to the global economic rule of law. In this regard, we submitted our own statement to the UN at the occasion of the High-Level Meeting. This statement is now posted on the UN Rule of Law Unit's commemorative web site. I myself personally monitored the diplomatic negotiations of the text of the Declaration, which occurred several months before the High-Level Meeting. This allowed me to exchange views with diplomats and other stakeholders, and to develop an initial draft of our statement to the UN. I also had the privilege of attending the historic meeting of the heads of state and government that was held at the UN General Assembly Hall during the UN annual High-Level week. We were among a small number of representatives of global civil society organizations who were invited to that occasion.

4. UN Conference on Sustainable Development (Rio+20) and Public-Private Partnerships (PPPs)

In June 2012, the UN Conference on Sustainable Development took place in Rio de Janeiro, Brazil (Rio+20 Summit), and by consensus of all the UN member States at the High-Level Meeting on June 22, 2012, it adopted an outcome document called "The Future We Want." This document outlines long-term sustainable development goals (SDGs). The SDGs call for simultaneous achievement of sustainable human development, economic development and environmental preservation worldwide.

The SDGs specifically call for the mobilization of global private sector's resources to promote sustainable economic growth through public-private partnerships (PPPs).This is the topic that UNCITRAL is currently looking at as a possible future agenda. When the government needs investment from the private sector for economic development and infrastructure building, there is a need for sophisticated contractual arrangements to allocate risks and responsibilities among stakeholders. Many nations do not have adequate legal culture or capacities for that. Therefore the SDGs and the Rule of Law Declaration are connected through the effective implementation of

the economic rule of law, where UNCITRAL can play an important role. UNCITRAL held a colloquium on PPP in May 2013 in Vienna. The issue will be further discussed at the UNCITRAL 46th Commission session (plenary meeting) in July 2013. Concurrently the diplomats at the UN Headquarters are discussing the implementation of SDGs at the General Assembly Open Working Group that started in March 2013. The result of these developments could create interesting strategic opportunities for the Section.

5. Promotion of Ratification of the Law of the Sea Convention (UNCLOS) by the United States

Based on the International Section's recommendation, the NYSBA Executive Committee approved the policy to promote the ratification of the Law of the Sea Convention (UNCLOS) by the United States in December 2012.

One reason for this initiative was UNCLOS's immense commercial significance for the U.S. and U.S. businesses. Already, 164 out of 193 UN member States are parties to the treaty (as of May 2013, and in addition the European Union is a treaty party of its own right). However, until the U.S. becomes a member of the UNCLOS, American businesses are not permitted to participate in the deep seabed mining regime and American lawyers and legal tradition have little opportunity to influence the future development of the law of the sea in this critical area.

The UNCLOS designated the deep seabed area as the "common heritage of mankind" and the area is administered by the International Seabed Authority (ISA). The ISA has the authority to give licenses to private enterprises to explore the seabed resources. Here it is important to note that the applicant for a license must be somebody who is sponsored by one of the UNCLOS member States. The contract law governing the ISA mining licensing regime is not under any nation's legal rules but instead is governed by the principles of the UNCLOS treaty itself, supplemented by general principles of public international law not inconsistent with UNCLOS.

Until recently, there were no economically feasible technologies to tap into deep water mineral resources, and the lack of U.S. membership in the treaty did not have a practical detriment. However, once such commercial exploitation became a reality, UNCLOS member states, including China, Russia, Brazil, major Western European industrialized nations and Japan, started a competition to apply for ISA licensing. Now there is an urgent need for the United States to join this convention, and until that event occurs, Americans are totally shut out from this modern "gold rush." Unfortunately, the Senate Foreign Relations Committee did not take action in 2012, despite the administration's effort. We are carefully monitoring the political winds in Washington.

Through my participation in the initiatives at the Executive Committee of the International Section as a co-chair of International Contract and Commercial Law Committee, I have had the privilege of playing a role in these exciting international law developments. If you are interested in getting involved, please do reach out to us, the members of the International Section Executive Committee including myself, and become an active member of our Section.

Co-chair, Committee on International Contract and Commercial Law
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"Ethics in International Arbitration and Litigation: Views from the Bench and Bar"

The NYSBA International Section's 2013 Global Law Week demonstrated the breadth and depth of its membership with an insightful and thought-provoking panel discussion on "Ethics in International Arbitration and Litigation: Views from the Bench and Bar." The May 16, 2013 program, held at Locke Lord LLP in New York, included both international and domestic panelists with varied viewpoints who together offered an interesting comparative perspective on the topics discussed.

The panelists were the Hon. Sidney H. Stein, United States District Court Judge for the Southern District of New York, Donato Silvano Lorusso, partner at BLB Studio Legale (Milan, Italy), Szymon Gostyński, founder of Kancelaria Adwokacka Szymon Gostyński (Poland) and Neil A. Quartaro, an attorney at Watson, Farley & Williams LLP, as well as David E. Harrell, Jr. and Jay G. Safer, both partners at Locke Lord LLP.

The program opened with the essential topic of ethics in witness preparation. Judge Stein discussed a newly created protocol for preparation of witnesses appearing before the International Criminal Court ("ICC") annexed by the court in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*[1] in January of 2013. Unlike litigation in the United States, prior ICC ethics rules prohibited a party calling a witness to meet before trial for fear that the witness might be influenced. The new rules allow witness preparation, but establish strong ethical restrictions. Judge Stein explained that, under the new rules, lawyers are permitted to meet with the witness mainly to confirm the accuracy of a written statement, which was likely taken a long time before trial, inquire as to changes or inconsistencies, and remind the witness that he or she must tell the truth. Significantly, attorneys cannot use the meeting to seek new evidence or continue investigation, coach or train the witness, practice questions and answers expected in court, inform the witness of the evidence of

other witnesses, or seek to influence the substance of the witness' answers. The panel then engaged in a comparative analysis of those heightened ethical constraints with the more relaxed regime in the United States.

Next, the panel turned to the ethical obligations of the international practitioner with particular focus on lawyers acting as arbitrators in Italy, and international lawyers practicing in Poland. Mr. Lorusso, of Italy, explained that the Italian Bar Council amended its code of ethics in December 2011 to include provisions addressing arbitrators' probity, fairness, impartiality, independence, confidentiality, and duties of disclosure. Mr. Lorusso cautioned against blindly following precedent in cases about independence and impartiality of arbitrators, stressing that each situation should be considered on a case-by-case basis. He took the position that arbitrators should be appointed by arbitral institutions, while leaving parties with the right to challenge appointments by demonstrating such things as the arbitrator's failure to fulfill the duty of disclosure or guarantee the proper conduct of the proceedings, undisturbed.

Mr. Gostyński, of Poland, explained that a great number of foreign law firms opened offices in Poland after the fall of communism in 1989. These firms employ a large number of foreign lawyers who are bound by the Polish rules of professional conduct as well as the professional rules from their home country. Thus, foreign lawyers practicing in Poland must engage in a comparative analysis of whether their home jurisdiction or the Polish rules are stricter, as the stricter rule must be applied.

The panel then brought the discussion to the application of ethics rules to attorneys representing clients in arbitration in the United States. Mr. Quartaro observed that state ethics codes apply to all lawyers appearing in arbitration. However, enforcement appears to create the problem of the arbitrator being expected to enforce ethical standards against the appointing party. Mr. Quartaro emphasized that enforcement should remain with state bar organizations, because no other entity has similar power over attorneys. Mr. Harrell then focused the discussion on ethical issues relating to communications with arbitrators. He stated the ethics rules of the seat of the arbitration apply to attorneys' communication with the arbitral tribunal. However, guidance may also be found in the International Bar Association's Rules of Ethics for International Arbitrators. Mr. Harrell cautioned lawyers that in the typical mechanism of an appointment by each party, and a third party being appointed by the appointees, lawyers may talk to their respective appointee about the selection of a third arbitrator, but they cannot obtain an agreement from the arbitrator to have that conversation.

Finally, the panel addressed the issue of disclosure requirements for arbitrators and discussed court decisions ruling when arbitration awards should be affirmed or vacated based on claims of impartiality of the arbitrators. Mr. Safer introduced various guidelines from arbitral organizations, such as the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes and the International Bar Association's Guidelines on Conflict of Interest in International Arbitration, as helpful tools in defining disclosure standards. He also commented on the "evident partiality" test adopted by the Second Circuit in cases where a party seeks vacatur of an arbitral award because of an arbitrator's nondisclosure. Mr. Safer explained that, under *Scandinavian Reinsurance Company v. Saint Paul Fire and Marine Insurance Company*,[2] a court should assess four factors when determining whether a party has established partiality: "(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding." Based on those four factors, *Scandinavian Reinsurance Company* held that failure by two arbitrators to disclose their concurrent service in another, arguably similar, arbitration, without more, was not evidence that they were predisposed to favor one party over another in either arbitration, and, as such, did not warrant vacatur of the award. Mr. Safer also discussed a case from the Court of Appeals of Texas, *Karlseng v. Cooke*, that vacated an arbitral award on the grounds that the arbitrator was required to disclose a social relationship he had with an attorney representing a party to the arbitration.[3] Finally, Mr. Safer pointed out that in a federal case from Florida, *Merrill Lynch, Pierce, Fenner & Smith v. Lambros*,[4] by contrast, the fact that an arbitrator and one of the attorneys were fraternity brothers in college was deemed legally insufficient to set aside the arbitral award.

"Ethics in International Arbitration and Litigation" was very well attended by both foreign and U.S. attorneys. The breadth of the panel background, addressing relevant and timely issues, from varied viewpoints in the arbitration and litigation process, was a welcome approach to the CLE. The panelists provided very helpful materials as a supplement to their discussion, and the attendees left the CLE with an array of specific tools that may enhance their professional development. The International Section's organizers are thankful to all the panelists and attendees for making this event a success.

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Endnotes

1. "Decision on witness preparation" (ICC-01/09-01/11-524; Jan 2, 2013; Trial Chamber V).
2. 668 F.3d 60, 74 (2nd Cir. 2012) (quoting Three S Delaware, Inc. v. DataQuick Information Systems, Inc., 492 F.3d 520, 530 (4th Cir. 2007).
3. 346 S.W.3d 85 (2011).
4. 1 F.Supp.2d 1337 (M.D. Fla. 1998).

A Herculean Tribute to Ronald Dworkin (1931-2013)

A State that accepts integrity as a political ideal has a better case for legitimacy than one that does not. It extends the moral dimension of any explicit political decision and fuses citizen's moral and political lives.[1]

Ronald Dworkin recognised that we all have certain moral rights and that there is a law which is in accord with these rights. If the law speaks with one voice, then it has integrity and endorses a set of coherent principles. Dworkin believed that this coherence is essentially a political virtue; an ideal state in a perfect world to which judges should strive when seeking an answer to a legal question. A world where Justice Hercules endows us with all of the right answers to the law's endless conundrums based on rules and legal principles established in our gapless legal universe.

Dworkin believed in rights for individuals and he believed that these rights trumped policies based on community goals. He developed this view after seeing how minorities in communities could be sacrificed for the good of the many. Dworkin believed that government should be there to protect the individual and to recognise their (moral) rights in the community. He believed that it is the role of government to recognise and protect individual rights where there are gaps in the law, or the law is inadequate to protect their interests. Ultimately he said that legality is not purely by social facts, but by moral facts as well.

Dworkin believed that individual rights should not be sacrificed for community welfare and this is where integrity and moral principles should always prevail. Principles relate to rights, whereas policies related to goals. Principles should always hold weight against community goals and community goals should always recognise and validate individual rights.

Dworkin believed that an individual's liberty should only be dealt with by the judiciary and not by government constraint or action. This is because a judge is charged with taking into account individual rights whereas government, by design, can only take into account the goals of the community as a whole. Judges are the guardians of the moral principles within the law whereas legislatures make decisions about policy or collective welfare. When looking through this lens, government decisions are legitimate, unless they violate the principles.

Dworkin's conception of the rule of law as rights-based assumes that citizens have moral rights and duties with respect to one another and against the State as a whole.[2] You should not be able to distinguish from the rule of law and substantive justice; the rule of law should capture and enforce moral rights through substantive justice.

Judges go through a process of developing legal theories when legal principles are tested in hard cases. Dworkin insisted that where the law lacks, and when seeking answers to legal questions, a judge must look to principles…There is a hierarchy of law and principles. Answers that cannot be revealed strictly from rules must be found in conjunction with principles. The judge weighs principles as the fabric to the threads of the existing law and, in a perfect world, is able to come up with the one right answer to a legal question or the "best fit" answer in a gapless legal universe.

When this outcome is reached, Dworkin believed that there is the one right answer to the legal question. Dworkin used a mythical judge, Hercules, to explain that we should always aspire to find the right principles and ensure that we have all of the right information to come to the correct legal answer. Dworkin understood that judges are fallible and can make mistakes by applying the wrong principles, but this does not mean there is not a right answer. He said that judges should seek to be like Hercules so that they have the integrity to reach the correct answers before them.

The Importance of One Right Answer

Dworkin said that the one right answer is out there, judges just may not always find it, but it is important for us to strive to uncover it. This represents the rule of law and what a community will recognise as valid rights and agreed restraints within a community. Judges have an obligation to the community to seek and find the one right legal answer.

The concepts of law, rules and principles are all related and assist judges in applying precedent and principles to find answers to hard cases. It is in hard cases where judges should use their integrity to find a coherent set of principles that clearly and fairly represent people's rights and duties.

Judges interpret legal rules and it is in this interpretation that principles are naturally applied. It is the responsibility of judges to apply these rules with integrity—to come up with the right legal answer so that ultimately they will distribute justice and the community will accept the law as valid (especially in hard cases that require originality).

Dworkin used the analogy of the chess player that distracted his competitor from his move and because there was no set rule about what the referee should do, the referee was required to consider all of the existing rules and his knowledge and experience of the game. He had to come up with an original decision and, in the end, decided to forfeit the game to the other player. The referee interpreted the circumstances and made his decision based on the principle of fairness between the players and what he, as the authorised representative, deemed to be the right and fair answer to the issue at hand.

Judges have an obligation to be consistent with the data they identify in the pre-interpretive stage and choose a justification that is constructive. In an ideal world, this constructive interpretation of the political structure of a moral society represents the integrity of the legal doctrine of the community.

It is important for the law to hold integrity and to strive for the one correct answer to a legal question rather than taking a "checkerboard" approach with statute, where one part of the community is advantaged and another is disadvantaged by an arbitrary rule. Individual rights must be considered and individuals have rights to fair and equitable decisions, even if it is at the expense of community policy. Dworkin said that a State that adopts a "checkerboard" solution lacks integrity as it subjects individuals to unfair rules and can cause injustice by its own laws. He also recognised that the distribution of law is not always even or fair, and so individual rights need to be acknowledged and validated to protect people or minorities from injustice.

Seeking the one right answer to a legal question ensures that the best justice can be served and that individual rights are protected in the community, which Dworkin saw as paramount. "A State that accepts integrity as a political ideal has a better case for legitimacy than one that does not. It extends the moral dimension of any explicit political decision and fuses citizen's moral and political lives."[3]

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Endnotes

1. Ronald Dworkin, Law's Empire (1995).
2. David Dyzenhaus, *The Rule of Law as the Rule of Liberal Principle in* Ronald Dworkin (Arthur Ripstein, ed., Cambridge University Press, 2007).
3. Ronald Dworkin, Law's Empire (1995).

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