Welcome to the YIN Newsletter, Summer edition! We are excited to share with you so many contributions from our members. You provided us with articles ranging from how technology affects our work to the influence a Supreme Court Justice can have in young attorneys with his latest book.

You too can influence other members of the committee and young attorneys in general, by getting engaged with YIN. Some of you have actively participated of the committee meetings, met the leadership, probably attended the Spring meeting, leadership retreat, or intend to attend the Fall meeting; and we want to hear how those experiences impact you and your career. This is one of the means we expect to use to keep you engaged, and why not? Feature you as well! Newsletters are a great way to build awareness about your expertise or issues that matter to the legal community, so please continue to send us your articles, write-ups and ideas.

As we were finalizing this issue, the Section’s Leadership gathered for the Annual Retreat in California. From October 18-22, the Fall Meeting will take place in Tokyo, Japan! If you can’t make it to Japan, the America’s Forum will be in Bogotá, Colombia from November 14-16.

With those reminders, let’s start our ABA year on a good note with our Summer Newsletter. Happy reading!
The contract is ready for signature! Now, what does that mean?

By Martha Bucaram and Bryan Schmitt.

You land your dream job and get to work on a client’s international business transaction with their Japanese customer. Through the epic late-night negotiations brought on by the 12 hour time difference, you diligently checked for the items you remember from that long-ago Contracts class: Consideration? Check. Parties clearly identified? Check. Quantity and Price? Check. Add in your brilliance in mastering the cultural differences and you are confident you nailed it.

It was high pressure and down to the wire, but you closed the deal just at quarter-end! You upload the document for electronic signatures and then send instructions to the other party’s counsel. Just as you are ready to break out the champagne, it happens: the other party’s counsel replies from Japan that they expect a bound contract with a company chop.

After a frantic internet search to figure out just what a company chop is (an official company seal or stamp), your heart sinks deep in your chest. Your client’s deal won’t close this quarter despite all of your hard work because the parties had different expectations regarding the signing of the document. The Japanese customer expected a bound contract with company seals on each page while you expected to complete this step using electronic signatures through a verifiable online process.

While our scenario happened in Japan, this situation isn’t unique to a specific country or region. In Brazil, for instance, the signatures of documents from abroad many times have to be notarized or require the signature of two witnesses. For some companies in Mexico, a physical copy of the original document signed in handwritten form may be the only way to satisfy their legal department’s requirements.

If your work involves parties from different countries, or even between companies in the same jurisdiction but with different levels of technological maturity, you may find yourself explaining the concept of electronic signatures. Even if familiar with “electronic signatures,” the term may mean very different things to the respective contracting parties. According to the U.S. Federal ESIGN Act passed in 2000, an electronic signature is an “electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” Many countries, however, differentiate between three different levels of electronic signatures: Basic, Advanced and Certificates.
Are electronic signatures common and accepted or frowned upon in your home country?

Online commerce is commonplace in many of our everyday lives and electronic signatures are becoming more commonplace in the US. In fact, Utah was the first jurisdiction in the world to enact a Digital Signature Act as early as 1995, which was later used by the American Bar Association (ABA) to issue a guide on electronic signatures. It may surprise you though to know that the Convention of the United Nations on the Use of Electronic Communications in International Contracts did not enter into force until March 1, 2013—just a few years ago.

Many countries have either adopted the model clauses from the UN Convention above, or have written their own laws approving electronic signatures. A few simple internet searches will reveal a number of resources to help guide you in determining the acceptance of electronic signatures in your foreign counterpart’s country.

One cautionary note: do not stop at your first search that tells you electronic signatures are accepted. Verify that your document type is accepted; in many countries wills, trusts, transactions involving real property, and others are excluded. To avoid last-minute confusion, or worse—client disappointment, our recommendation is to go a few steps further and address the method the parties will use to sign the contract in your negotiations. Finally, be sure to include in the contract itself (1) the parties’ acceptance of electronic signatures; and, (2) what level of electronic signature will be used. (Some jurisdictions even require this.)

If you add these extra items to your contract negotiation checklist, you will not only meet the legal requirements for contracts, but also your client’s expectations for a smooth and hassle-free closing.

Practicing Law in Dubai

By Raymond Kisswany

In April 2014, I left my job as an insurance and commercial disputes lawyer in New York City and boarded a flight to Dubai, United Arab Emirates to start a new job with a boutique law firm. I arrived knowing only one friend already living here. I was immediately impressed by two things, the futuristic skyline and the sweltering heat. My initial two months were not easy as I had not fully appreciated all the things that go into moving countries (even having done it before).
It took me a solid month to find a short-term studio apartment. It was also difficult since my wife was still back in New York. We had agreed that I would come to Dubai and give it at least six months before we came to a decision about staying.

By late June 2014, I was headhunted by a leading full service law firm, Hadef & Partners, after meeting my now boss at a conference. He has since become my mentor and, dare I say, friend. I joined Hadef's Maritime, Transport & Trade team which is under the umbrella of the firm’s Dispute Resolution department. Immediately, I loved the work I was doing and it could not compare to the repetitive nature of my work in New York. In August 2014, my wife was recruited by a leading law firm’s banking and finance team in Dubai and she joined me later that year. We moved into our current apartment, an apartment that I have now lived in longer than any other place in the past ten years!

As luck would have it when I started working at Hadef, I landed on what became a landmark maritime case which centered on the concept of a “wrongful ship arrest.” Based on this case, I wrote an article for the International Bar Association’s (“IBA”), The Mirage of a Wrongful Vessel Arrest Claim in the UAE.¹

In another interesting twist, in November 2014, a multinational marine fuel reseller, OW Bunker & Trading A/S (which had a Dubai subsidiary, OW Bunker Middle East DMCC) (“OW”), went into liquidation. The fallout of OW’s liquidation had, and continues to have, major ripple effects on the global maritime market affecting ship-owners (debtors to OW) and physical suppliers (creditors of OW). All of my firm’s cases involving OW (currently 20 and counting) ended up on my desk. Before I realized it, I developed an “expertise” on the subject becoming an avid author for multiple publications on the OW saga, e.g., OW Bunker’s Liquidation Highlights the Need for Interpleader Proceedings in the UAE² as well as other more general topics (e.g. Shipping & International Trade Law)³ and Recoverability of Lawyers’ Fees in Arbitration.⁴

Early this year, I was the lead lawyer on another landmark case where we successfully defended our ship-owning clients in an OW related case before the Dubai Court of First Instance. That case is now before the Dubai Court of Appeal awaiting judgment. Judgment in Dubai Court May Alleviate Chaos Surrounding the OW Bunker Liquidation.⁵

Furthermore, as a result of Dubai’s maritime proximity to Iran, I developed a practice area advising clients concerning the potential impact of regulations of the Office of Foreign Assets Control (O.F.A.C.) on insurance claims, underwriting and subrogation.

Practicing in New York, a lawyer is mostly able to resort to well established case law and legislation similar to the case he/she is dealing with. Dubai, on the other hand, is an emerging legal system. The UAE is about to celebrate its 45th birthday in December 2016. Legislation is new with many statute articles untested in the courts. I almost always find myself working with law school style hypotheticals when advising clients while simultaneously recognizing the novel nature of the issues at hand. This creates an extremely exciting environment, if, of course, you are unshaken by questions without clear answers.

Dubai is a challenging but very rewarding jurisdiction in which to practice law. Every day I am faced with clients’ inquiries and disputes that fall into “new legal territory.” At the same time, there is nothing more exciting to me than truly devising innovative solutions to new and untested problems.

One of the most important lessons I learned over the course of the past two years as a lawyer in Dubai is that there is absolutely nothing wrong with not knowing the answer. However, it is very wrong to not critically analyze the question in order to legitimately attempt to determine the answer and, if after such analysis you still cannot pinpoint the answer, you must engineer your own.

Dubai is a place where creative out-of-the-box thinkers flourish and it is a place where I hope to continue to grow as a lawyer.

The Benefits to FINRA Registration for Professionals Working with Private Securities

By Alexander M. Ritchie

Background Leading to Increased Regulation

Since the crash of 2008 there has been an uptick in the amount of regulation on individuals in the securities industry. Eight years on, a great deal of business has again resumed and there is great potential to be made connecting parties to help facilitate transactions. However, there are additional requirements and issues an attorney needs to be aware of for themselves and clients to ensure they do not run afoul of the rules in place; specifically, they need to be familiar with the rules governing parties who receive fees contingent on a successful deal or transaction. Working as an attorney in the finance or securities field can often favor or require an attorney to become licensed with FINRA to qualify for certain positions and allow one to be paid for specific services dealing with securities. While there are severe consequences to violating the regulations put in place by FINRA, there are also great benefits in additional fees and protection that justify serious consideration as to whether registration with FINRA is fruitful for one’s legal career in the financial and securities sector.
Types of Fees and Payment and Benefits of Becoming Licensed

The typical scenario is a professional knows two people in their network who might have cause to do business together. This professional makes the introduction and for their help in bringing the deal to fruition expects compensation for their assistance. There are typically two ways a person is paid when helping with an investment or transaction. The first is that a person is paid a flat amount or a percentage, typically a consulting fee, for the introduction that is not contingent that an investment is made. The person making the introduction in this case would be considered a finder. A finder is limited to only making the introduction and can in no way promote securities or negotiate on behalf of the parties. A finder can receive compensation for their introduction and does not have to be registered with FINRA. The second way is when a person expects to be paid a flat amount or percentage fee contingent on the investment being made. Here the person making the introduction would be considered a placement agent. A placement agent who is paid contingent upon the investment being made is required to be registered with FINRA in order to receive payment under these circumstances. Failure to be registered can result in severe consequences for the person making the introduction as well as the other parties to the deal.

Dangers of Not Being Licensed

Very often those who are assisting in deals involving securities are under the impression they are permitted to receive a fee from a transaction simply because they facilitated or introduced the parties. When acting as a finder, and payment is not contingent on the investment being made, this is correct. When you are paid because the investment occurred, registration is required. The person needs to be licensed with FINRA and with a registered broker dealer. If one were to receive payment under the latter and they are not licensed, FINRA has the power to claw back any fees received and potentially file charges against the individual. Further, such a situation would possibly permit FINRA to place the entire transaction under investigation, suspending the investment and incurring unnecessary costs, attention, and due diligence upon the other parties in the transaction.

Benefits of Registration and Protection of FINRA

There are great benefits to registration that can justify the costs of time and fees for the sake of one’s career and business. Most companies prefer to use placement agents because of the additional services they can provide in supporting the closure of a deal. Where companies only have need to use a finder they typically prefer a finder who is registered as well. Further, registration permits one to receive fees as a percentage of the investment. This compensation is almost always greater in amount than what one would receive as an unregistered finder. For example, where a company may be seeking $10 million in equity for their company from a particular type of investor, a typical finder may receive a fee of $10,000-$20,000 for helping to develop this investment. A licensed placement agent could receive anywhere from 2-7% of the amount of equity invested for their role. In this example, the licensed agent would receive at minimum ten times and up to twenty-five times the amount the unregistered person would receive. Additionally, sometimes a small percentage of shares in a company can also be offered as compensation which can afford even greater value over the long term.

About the author

Alexander M. Ritchie is an attorney licensed in California and New York and is general counsel for Private Capital Investments LLC. He works with family offices internationally on direct deals and co-investments. He holds the Series 63 and 82 Securities Licenses.
Being registered also affords the protection and enforcement of a strong U.S. regulatory body. If one assists in an investment and the required party fails to compensate the registered agent, the agent is permitted to bring the matter to the attention of FINRA, who can arbitrate the matter. The support of such an organization in contract enforcement can be much more cost effective and powerful than pursuing enforcement separately through the judicial system and can serve a preventative function against any potential bad actors in a deal.

Process to Become Licensed

The process of becoming registering with FINRA and becoming licensed can be costly in both time and fees in the short term. One must take one or more regulatory exams. While financial professionals working with public securities are required to take the dreaded Series 7, those focusing on a more limited pool of investments can become a limited representative and take a more specialized exam like the Series 62 focusing on corporate securities or the Series 82 which focuses on private securities offerings. Also, almost every state requires a person becoming registered to also take the Series 63 to be registered at the state level. The total time required to study for an exam can range from 1-3 months depending on the type and number of exams for which one is sitting. One also has to be sponsored by a registered broker dealer to sit for the exams. The types of broker-dealer ranges from those who work with full-time agents to those who recruit more independent professionals doing the occasional deal so a little research can reveal a broker-dealer fitting someone’s specific need.

Summary

In summation, FINRA registration can be a costly process and seem an additional burden to those already maintaining legal licenses with state and federal entities. However, when one is actively working in the financial and securities sector, the benefits of additional fees from investment and enforcement protection from FINRA may justify such a short term cost for the long term benefit.

From Germany to Hong Kong: Reflections on Legal Academia in Germany, Hong Kong and the United States

Interview with Dr. André Janssen, international law professor at the City University of Hong Kong

by Dr. Caroline I. Esche

CIE: Dear André, fourteen years ago we both worked at the Institute for International Business Law at the University of Münster in Germany. You had just started the lengthy process of “Habilitation”, through which German Ph.D. lawyers qualify as full professors based on a major research thesis. Last year your thesis was finally published. Now you work as a professor in Hong Kong, which is highly unusual for a German lawyer. Why did you choose to accept a position so far away?

AJ: This has to do with the current state of the German academic job market. On the one hand, German legal academia is slowly becoming more international. Several of my colleagues now work in other European countries. On the other hand, in the past 25 years there has never been such a shortage of open positions in Germany.

CIE: Is this because German professors are retiring later these days? If I remember it correctly, the German civil service law required public officials such as faculty at state universities to retire at the age of 65.

AJ: This has changed. Now professors may work past the age of 70. Besides, their successors can now be selected six years before they retire. This means that many positions are already filled up to six years in advance, which is bad news for somebody like me who only recently finished his “Habilitation”.

About the author

Dr. Caroline I. Esche is an international business attorney based in Washington, DC. She is licensed in Germany and in several US jurisdictions. She can be reached at cesche@transatlanticbusinesslaw.com.

Dr. André Janssen is a professor of international law at the City University of Hong Kong. His publications and further information can be found at http://www6.cityu.edu.hk/slw/people/people_janssen.html.
Another factor that has changed the legal market is the affirmative action program, in which equally qualified women are given priority.

How did I land specifically in Hong Kong? I knew the dean, Geraint Howells. He advised me to apply, because they were looking for internationally qualified people like me.

CIE: What exactly do you teach? I suspect that German law is not a hot topic.

AJ: That’s right. I teach primarily international business law, but also English contract law and European private law, all in English.

CIE: Don’t you consider it a bit of a pity that you don’t do much German law anymore? Just by looking at your immense publication list, one can see that you are a true expert.

AJ: In a sense, yes. However, I regularly give lectures and attend conferences all over Europe. Besides, China is preparing a German-style civil code. They ask me quite often to talk about the intricacies of German law. But if I don’t return to Germany within the next three years, the people who decide about professorships will most likely doubt that I know much German law anymore. And there will be many supremely qualified new candidates.

But I am very happy in Hong Kong. When I first got here, I asked myself why I am doing this at all? Now I ask myself, why should I return to Europe?

CIE: You know, that’s exactly how I felt about moving to the United States eight years ago. But I still miss the European urban lifestyle: the sidewalk cafés, cycling on wooded bicycle paths, the farmer’s market, browsing in a neighborhood bookstore.

AJ: These are the things that I miss in Hong Kong, too. But there are tremendous advantages here: students are very international and they pay close attention in class.

CIE: Judging from my own experience as a law student in Germany, I guess students in Hong Kong are more motivated, too.

AJ: Yes, they are, also because they pay a very high tuition, around 12,000 Euro per year.

CIE: I wish I had had to pay a tuition of 12,000 Euro per year. My three-year JD degree at Columbia Law School cost $250,000. And I cannot honestly say that the quality was higher than my free law education in Germany. In hindsight I see how much value the German government provides.

AJ: Exactly, I have the same experience: the farther I go from Germany, the more I appreciate what it offers.

In Hong Kong I also like that students consider faculty as their mentors and seek out their advice.

CIE: Yes, this is one aspect that I didn’t like in German higher education at all: professors are unreachable and are shielded from students by their staff. One positive aspect, though, was that legal education in Germany is very practice-oriented. From day one the assignments are about fictional clients who seek your advice on their problems. Whereas in the United States, you can load up on courses like Feminist Legal Theory and Global Constitutionalism that do not teach practical skills.

AJ: Yes, there are such courses in Hong Kong, too, but they are trying to introduce more practical courses.

CIE: You are in your early forties, and are already the author or editor of 12 books, and the author of 25 book chapters as well as over 40 articles. Do you think that an academic career in Germany requires this many publications?
AJ: No, I don’t think that it is necessary to publish so much. More important is the prestige of the journal. Different countries value different journals. In Germany some people were not impressed by my publication in the Cambridge University Press. In Hong Kong Australian journals have the highest standing.

CIE: When I came over to the United States I noticed that American academics’ work is a lot more interdisciplinary than the work of German legal scholars. Traditionally, German scholars have restricted their arguments to the structure, coherence and history of the legal system, the rulings of courts, the wording of the statutes and the legislative intent behind these statutes. In the United States, by contrast, legal factors are often discussed in the context of sociology, economics and political science. Are there any such tendencies in Europe now?

AJ: Yes, some, for instance in the field of behavioral economics. For example, the European Commission has long promoted extensive information requirements imposed on manufacturers. The Commission has now taken into consideration studies that show that people do not really absorb information longer than seven bullet points presented on the instruction leaflet provided with a product.

For us European lawyers it is surprising to see how little US lawyers work with statutes. I have actually met American students who said: “I don’t do black letter law.”

CIE: It is obvious that you have invested a tremendous amount of effort in your academic career. What factors have led to your commitment to academia?

AJ: After I completed my Ph.D., I had job offers from two global law firms. However, the compelling factor was the idea of academic freedom. Apart from the lecture requirements, academia allows you to pursue your own interests.

CIE: Indeed, when you are already a tenured professor. But your example and that of many other brilliant young German scholars shows that the road to tenure is long, tedious and fraught with obstacles.

AJ: Yes, in hindsight it takes too long and in Germany the structure of academic tenure is too inflexible. But now I have come to the end of the process.

CIE: And I am not really sure about the freedom part, either. Scholars have to “publish or perish,” network constantly, and generally fulfill everybody’s expectations. I have the impression that as an attorney I have more freedom than you do. Well, let’s add that I don’t practice in a large law firm.

AJ: Another difference to the German system was that when I got to Hong Kong, I was asked right away how much money I earned. This was very unusual for me.

CIE: Since German academics are public officials whose salaries are determined by a statute.

AJ: When I told the university leadership how much money German professors make, they said that they would not work for so little money. This is also the reason why many outstanding young German scholars try to find positions abroad. This makes me very sad. Mostly they go to Switzerland, Austria or Great Britain. For a German academic, it is very difficult to get a job in the United States.

CIE: In my experience, one of the reasons is that Germans are too modest and are not accustomed to the superlatives required in the wording of an application in the United States. A German professor might write “Dr. Janssen has a good grasp of the subject,” which is about the highest praise that you can expect.

On a different topic, I have noticed that generally, American scholars’ work tends to be much more isolated, with scholars working on their own or perhaps in very small groups. By contrast, the European Commission finances a large number of research networks that enable scholars to work together across several countries.

AJ: Yes, a lot of European legislative initiatives are prepared by international studies about the law in various EU member states. A large player is the European Research Council that spends a lot of money on such studies. An example for this is the Common European Sales Law, which made it to a draft but has been withdrawn because of political opposition.
I personally profit to this day from the research networks in which I have participated. We publish together, organize conferences and generally work together very closely.

CIE: How do you see the current state of European integration? Has a point of saturation been reached at which no closer integration can be expected?

AJ: The European Commission pursues certain topics currently, such as the regulation of cloud computing or “Industry 4.0” regarding things like 3D printing. Generally, however, as we know, the European Union currently faces many political problems such as a vote on “Brexit” and the refugee crisis. These problems have diverted the political attention away from integration and led to the strengthening of extreme right parties.

CIE: Now we see some smaller EU member countries that project the current major political differences also on the area of civil law integration.

AJ: Some people describe this as political blockade. So there are many problems that paralyze Europe. The European spirit unfortunately has been somewhat damaged.

CIE: Yes, but we owe a lot to the European integration. Americans sometimes ask how long the Euro is going to last. I always tell them that outsiders probably do not fully appreciate just how strong the political will is in many European countries to maintain the Euro.

AJ: That is my opinion, too. The European Central Bank is now doing things that the German Bundesbank would never have done to sustain the currency.

CIE: And this is going to be expensive.

AJ: Yes, it will be expensive, but you cannot have a united Europe for free. Germany will pay the most money, but will also profit a lot. For example, Germany, with its AAA credit rating, has been able to borrow money at almost 0% interest rate.

CIE: This low interest rate may also be the result of global economic factors, not just European ones. But it is certain that Germany is a comparatively small country that needs the larger European market.

AJ: Indeed. And because of the importance of the European integration Germany must also become comfortable with a leadership role within the European Union.

CIE: André, thank you for our conversation.

AJ: Thank you.
All the while faking your expert like confidence in subject matter you have had little pragmatic exposure to. Sounds chaotic, I know, and if you are like me, you know too. That said, through all the bumps and hurdles provided by private practice, I have always found a level of comfort in participating in the American Bar Association (ABA).

I joined the ABA during my 3L year. If you are a law student and not yet a member, I implore you to join. When I first learned about the ABA, it appeared to me as this huge amorphous organization and I had no idea where to even start. After a little research I learned that the ABA is composed very broad Sections and then those Sections are composed of Committees. The Committees are composed of Co-Chairs, Vice Chairs, and Steering members. These are all appointments awarded based primarily on dedication shown to the Committee and participation. In my 3L year I joined the Section of International Law, specifically the Asia Pacific Committee.

The SIL Asia Pacific Committee is dedicated to providing a forum for all ABA members with an interest in the Asia Pacific Region, excluding China and India. When I attended the first teleconference for the Committee, I immediately volunteered to assist with the Committee's Year In Review publication. This was a great opportunity to begin getting my name published in a scholarly article while showing aptitude and interest to my fellow committee members. To my surprise, the following year I was appointed as a Committee Steering group member. Since then, I have continued and deepened my involvement in the Asia Pacific Committee where I am now serving as a Vice Chair. Further, as part of my involvement in the ABA SIL APAC committee, I was appointed as a Council Member to the ABA Rule of Law Initiative for the Asia Pacific region.

For me, involvement in the ABA means the opportunity to connect and contribute. Throughout my few years of involvement I have had the opportunity to attend Section meetings, Committee teleconferences, and participation in listservs. I have made connections with other colleagues who I would never have had the ability to connect with through day-to-day practice. Additionally, I have been able to contribute to many causes I believe in, for example through my work with the Rule of Law Initiative.

That said, the ABA is not perfect. The ABA still has a long way to go in assisting young lawyers. The creation of the Young Lawyers Division is almost akin to asking all the young lawyers to stand in a corner and talk amongst ourselves. My two cents suggests that there should be more intra ABA competitions, mentorship matching programs, and fellowships. The goal should be to intertwine young attorneys with willing senior counsel.

As a young attorney, you know as well as I do that the legal landscape has dramatically changed from what our senior colleagues faced. Since 2008, the paradigm has shifted. With the level of saturation in the legal market, the alternative sources for legal advice, and many other factors, it is vital for us young attorneys to seize every opportunity we can. Being active in the ABA is just that type of opportunity. If you are wondering where to start, join a committee and send an introductory email to one of the co-chairs. They will be thrilled to have you aboard and active.
Why All US Attorneys Should Read Justice Breyer’s New Book

By Laurel Lichty

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.


U.S. Law and Globalization

The interplay of the laws of nations is not a new dilemma. Contractual formalities, customary business practices, and notions of justice and human rights have been clashing and harmonizing for centuries with peaks and valleys in forward progress. Justice Breyer’s insight from the Supreme Court of the United States demonstrates that international commercial attorneys and international legal scholars are now closer than ever on both a vocational and practical level. The application of international law and the law of other countries are increasingly being mentioned in U.S cases.

In my career, I have straddled the academic and corporate camps, and I felt a cathartic sense of centeredness as the application of foreign law in the U.S courts was discussed at the World Bank event. Although I was born and raised in the United States, I completed a law degree in England before I studied law in Washington, D.C. I perceived that as a student in London my law school experience would be more inherently “international.” I had been enthralled by the interplay of the law of nations since studying the economics of the transatlantic slave trade as an undergraduate student in California. Justice Breyer devotes a chapter of his new book to the Alien Tort Statute and Human Rights, the 1789 law that captured my attention through the lens of African-American history. To the audience at the World Bank, he poignantly asked, “Who are today’s pirates?”

Today’s complex interdependent world operates daily beyond the theory, history and academic arguments of whether international law is in fact law. To those caught between the laws of nations — whether a refugee seeking asylum, a parent fighting for child custody across borders, or a same-sex couple separated by visa status — this outdated academic argument does not provide immediate relief. However, the Supreme Court’s role in tackling these problems is more apparent then ever before.

It is no longer only international law firms dealing with cross-border litigation that are interacting with the laws of other nations in their legal practice. We are entering a new era where even family law attorneys need to stay abreast of developing international law and the application of foreign law in U.S courts in order to stay relevant.

Justice Breyer explains in his introduction that he “emphasizes and re-emphasizes two general themes” throughout his book.¹ The first is that the Supreme Court’s work in determining the application and limits of its authority can be a force for good.² The Supreme Court can strengthen the rule of law in our world. As he stated at the book launch event, “There are those that believe in the rule of law, and those that don’t.” The second theme is the need for harmonization or “comity.” In his discussion at the World Bank, Justice Breyer aroused laughter by saying, “Comity is a wonderful word because no one knows what it means.”

What Does this Mean for the Future of Litigation in U.S. Courts?

In the realm of cross-border corporate law, understanding the implications of and being prepared for the potential application of foreign law in U.S. courts is increasingly a necessity.

I spoke to Kwaku Akowuah, counsel with Sidley Austin LLP, who will became a partner on January 1, 2016.

“Justice Breyer’s central theme particularly resonates for those of us who are in global law firms, frequently representing companies that have operations in many countries,” Akowuah said. “For example, we are currently involved in an antitrust case in New York, in which the key legal question turns on the meaning of Chinese economic regulations, and the degree of deference that a U.S. court owes to China’s official interpretation of those regulations. That case squarely raises questions about the meaning of foreign law and how U.S. courts should interact with foreign legal institutions.”

In his book, through case examples accompanied by U.S. legal history, Justice Breyer discusses investment treaties and international arbitration and how they have entered the Supreme Court. He does not take a position on the increase in arbitration in the United States generally. Justice Breyer predictably judiciously presents what the proponents and critics say, the pros and cons, noting its increase in the U.S. as a source of dispute settlement. He also differentiates international commercial arbitration, disputes wherein one party may be a nation-state. Justice Breyer asks, “Is it desirable to vest so much decision-making authority in tribunals, which unlike courts, are not even indirectly accountable to any electorate?”

International arbitration does pose a conundrum in the realm of legal theory. Mutually agreed upon rules of dispute resolution supplant the law of the nations with nexus to the dispute. International arbitration, however, is also incredibly practical. The International Chamber of Commerce (ICC), the United Nation Commission on International Trade Law (UNCITRAL), JAMS (historically Judicial Arbitration and Mediation Services Inc.) and the World Bank’s International Center of the Settlement of Investment Disputes (ICSID), among others, are providers of a neutral forum and a service that is in growing demand. These organizations offer sets of rules that make commercial and investment agreements possible that otherwise would not happen. They offer an alternative to the possibility of cross-border litigation that is often, but not always, successful at keeping legal disputes outside of individual court systems that could be partial to one or another party. The increase in investment treaties and international arbitration can be seen as an example of the need for rule standardization.

2Id. at p. 6.
3Id.
4Id. at p. 7
5Id. at p. 180.
6Id. at p. 181.
Can Legal Harmonization Bring Global Harmony?

Susan Karamanian, Associate Dean for International and Comparative Law and Policy at George Washington University Law School, was an invited discussant at the World Bank event. I asked her thoughts after the event.

"The book dispels the notion that the Supreme Court of the United States is not focused on international law or foreign law," Karamanian said. "As Justice Breyer documents, the increased flow of goods, services, people, and information across borders by necessity has the court working on a wide range of international matters. The key cases are analyzed and their international implications are addressed. The critical issue going forward is not whether the engagement will continue but how the court will use international law or foreign law in a disciplined and structured way."

Justice Breyer, both through the discussion of his book in person and articulated in the epilogue, invoked in me a strong sense of pride in my American citizenship. Both in his emphasis of harmonization of law and the advancement of the rule of law, I was struck by how Justice Breyer appealed to what I heard as a very patriotic notion. I understood him to say that, as Americans, we have a responsibility to listen and interact with the law of other nations in order to contribute to and work with other nations to find solutions to the world’s most pressing problems. In a world wrought with ills that transcend country borders, harmonization may contribute to harmony.

This article first appeared in Law360.

7Id. at p. 282.

8Id.

Pathways to Employment in International Law Program a Success! By Audrey Lustgarten

In March, YIN and the Immigration & Naturalization Committee co-sponsored an ABA Pathways to Employment in International Law program at Emory Law School in Atlanta, GA. The ABA Pathways program is a unique program that brings law students together with a panel of experienced legal practitioners to explore opportunities for employment in international law. We were fortunate to have an amazing group of attorneys from diverse backgrounds who were able to provide students with advice and guidance on gaining practical experience and improving legal and networking skills. I moderated the program and our speakers included Glenn Hendrix, a partner with Arnall Golden Gregory and former Chair of the ABA Section of International Law, our own Martha Bucaram, YIN Co-Chair and Sr. Contracts Specialist at Manhattan Associates, and Kristin Aquino-Pham, Associate, Greenberg Traurig LLP. The program was very well received by Emory law students – we had a packed room and questions went on well after the panel ended. We hope to sponsor more Pathways programs in the future so if you or someone you know would like to help plan one at your alma mater or local law school please let me know!
Role of International Intergovernmental Organizations/Institutions in Promoting the International Rule of Law

By Alexia Solomou and Dr. Hong Tang

The United Nations (UN) is one of the largest international intergovernmental organizations in the world. It was founded in 1945 and it is currently made up of 193 member states. Its founding document is the UN Charter, which is considered a treaty under the US Constitution. The central role of the UN in global governance especially in promoting “the rule of law at the national and international levels” and in ensuring equal access to justice for all was recognized by Goal 16 of the “Sustainable Development Goals” in 2015.

The UN Secretary-General has defined the rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.” The rule of law requires measures to adhere to certain principles, such as supremacy of law, equality before the law, and accountability to the law. (S/2004/616).

Two of the six major organs of the UN are the ICJ and the Security Council (see the attached UN System Chart). The ICJ is the principal judicial organ of the UN. The Security Council is mandated to promote the establishment and maintenance of international peace and security. It has primarily done so by the establishment of various peacekeeping missions throughout the world and by making the rule of law a central element of their mandates. As it will be explained below, the ICJ and the Security Council play a significant role in promoting the international rule of law.

The ICJ is located in The Hague, The Netherlands. It functions in accordance with a Statute, annexed to the UN Charter. It is composed of 15 independent judges, each of a different nationality, serving 9-year terms, reflecting the main forms of civilization and the principal legal systems of the world.

The ICJ performs two tasks. First, it decides disputes between states on the basis of international law. These are known as contentious cases. Only states, members of the UN are entitled to apply and to appear before the ICJ in contentious proceedings. The ICJ can entertain a dispute only if the States concerned have accepted its jurisdiction (special agreement, compromissory clause, reciprocal compulsory jurisdiction declarations, forum prorogatum. Its judgments are final and cannot be appealed. Second, the ICJ gives advisory opinions on any legal question referred to it by duly authorized organs and specialized agencies of the UN.

The ICJ upholds and promotes the rule of law at the international level. When deciding legal disputes, it does so, on the basis of public international law, including international conventions, international custom and general principles of law, while using judicial decisions and the work of highly qualified publicists as subsidiary means of interpretation. The international rules that the ICJ applies range from diplomatic protection and sovereign immunity to human rights and international environmental law. When applying international law, the Court has the power to decide a case ex aequo et bono, i.e. on the basis of equity and fairness, two of the substantive characteristics of the rule of law.
One of the core principles of the rule of law that the ICJ has advanced is that of legal certainty. It has done so in at least two ways. First, it has developed a jurisprudence constante on the principles of interpretation it adopts, on the basis of the Vienna Convention on the Law of Treaties 1969. When states submit their disputes to the ICJ they can predict with certainty that the treaties on which they rely will be interpreted in good faith, according to the ordinary meaning of its terms, in their context and in light of the treaty’s object and purpose. Second, Articles 59-60 of the ICJ Statute provide that judgments are final and binding on the Parties, that is they have the force of res judicata. This is based upon two principles: 1) the stability of legal relation requires that litigation come to an end and; 2) it is in the interest of each party that an issue which has already been adjudicated be not argued again.

The Security Council consists of 15 member states of the UN. Among the Council membership, 5 states (USA, UK, France, Russia and China) are permanent members, while 10 other states each serve a two-year term. The Security Council has contributed to the promotion of the international rule of law by establishing ad-hoc international tribunals and mandatory sanctions regimes, aiming to ensure accountability, ending impunity and advancing compliance of international law.

In response to the serious international crimes having taken place worldwide, the UN, mainly through the Security Council, created several International Criminal Tribunals (ICTY, ICTR, MICT, STL, SCSL, and ECCC). These international ad-hoc tribunals aim to prosecute those most responsible for genocide, crimes against humanity and other serious violations of international criminal law and to bring justice to thousands of victims and their families.

In addition, the Security Council has referred situations to the International Criminal Court. It referred two situations to the ICC: Sudan (2005) and Libya (2011). The ICC, however, is not part of the UN system, but rather, was established by the Rome Statute of the ICC 1998.

Apart from the establishment of international ad-hoc tribunals, sanctions regimes have been put in place by the Security Council on the international enforcement front. These aim to apply pressure on a state or a state-like group to comply with the objectives set up by international law and the Council. The Security Council has established 26 sanctions regimes since 1966. These range from comprehensive economic and trade sanctions to more targeted measures, such as travel bans, arms embargoes, financial and diplomatic restrictions, and bans on specialized teaching or training. For example, on March 2, 2016, the Security Council unanimously adopted a resolution imposing additional legally binding sanctions on North Korea in response to North Korea’s continuing violations of international law and Security Council resolutions.

In conclusion, the contribution of the Security Council to the international rule of law is that it establishes various international criminal tribunals and imposes sanctions regimes, most notably by legally binding and enforceable resolutions. ICJ judgments, which apply rules of international law in an equal, fair and predictable manner, may also be enforced by the Security Council. Both of these organs of the UN have made a positive contribution to the international rule of law by building effective, accountable and inclusive institutions and by peacefully setting disputes respectively.