Our Europe Committee presented three outstanding programs at the New York Spring 2014 meeting, respectively on current developments in European Union financial and securities regulation (Stéphane de Navacelle, Bob Calmes, Patrick Del Duca), what corporate counsel seek from the outside lawyers that they hire (Pat English), and contrasting civil and common law deposition styles (John Lakin, Anna Engelhard-Barfield, Stéphane de Navacelle). At the forthcoming Buenos Aires October 2014 meeting, we will present a program on contrasting European and Latin America approaches to deal-making. We contemplate as well an active social program for Europe Committee members in Buenos Aires, and seek a volunteer to guest edit the Buenos Aires special edition of our newsletter analogous to this effort on the New York meeting led by Committee Member Emma Doherty.

This month is the time to propose Europe Committee programs through the co-chairs for the 2015 Washington DC spring meeting. Reach out with your ideas for supportive coaching to implement them!

The ABA House of Delegates will consider at the upcoming ABA August 2014 annual meeting in Boston a resolution and report that originated in a collaboration of our Europe Committee with the US Lawyers Abroad Committee. The resolution, now endorsed by our Section and the Section of Science and Technology Law, advocates law reform in respect of cross-border recognition of signatures. Committee members interested in follow up with the Uniform Law Commission, UNCITRAL, and the Hague Conference on Private International Law are invited to contact one of Vice-chair for policy Werner Kranenburg or the Co-Chairs.

The Co-Chairs welcome outreach from any Europe Committee member who desires to step forward to participate in the work of the Committee. Join us on our monthly calls, the times of which are distributed through the committee listserve! Let us know if you will be at the Section August leadership retreat in Boston so that we can be sure to meet you.

Patrick Del Duca, Pat English, and Wilhelm Ziegler, Europe Committee Co-Chairs

A Note from the Editor

This hot topic issue of EUROPE UPDATE offers a glimpse and brief retellings by our section members of various presentations, panel discussions, and events they attended and/or presented at the recent ABA Section of International Law Spring Meeting in New York, New York. Hopefully, these summaries provide insight to those who were unable to make the meeting, as well as a refresher for those attendees able to attend the Spring Meeting.

We welcome our Europe Committee members who wish to serve as guest editors to organize future Hot Topic editions. Michael L. Balistreri (michael.balistreri@rhi.com), Editor in Chief Shannon Dilley (dilleyshannon@gmail.com), Editor
EUROPE UPDATE

About the Europe Committee

The Europe Committee seeks to engage lawyers conducting practices that touch Europe, including the various European countries, the European Union, and the institutions of the Council of Europe. It nurtures a community of lawyers sophisticated in cross-border matters, comparative law, and the continuously emerging transnational law of Europe, public and private. The Europe Committee’s activities include the sponsorship of programs at the Section of International Law’s seasonal meetings, hot topics teleconferences and newsletter presentations by experts on emerging developments of European law, exploration of legal policy and law reform topics, contribution to the Year in Review issue of The International Lawyer, and co-sponsorship of Section of International Law standalone and other programming.

The Europe Committee’s membership is its most important asset. We encourage all Committee members to be involved in Committee activities and to communicate freely suggestions and ideas.

Upcoming Events

2014 ABA Moscow Dispute Resolution Conference

September 19, 2014 at the Pan Radisson Royal Hotel, Moscow Russian Federation

The ABA’s Sixth Annual Conference on the Resolution of CIS-Related Business Disputes — A “MUST ATTEND” conference for Litigators, Corporate Counsel, Arbitration Practitioners, Judges, Academics, Business Executives and Policy-Makers! Topics will include various discussions in the context of CIS, as well as the merger of the Supreme Commercial (Arbitrazh) Court and Supreme Court of General Jurisdiction, the new Russian IP court, and In-house Counsel Perspectives on it all.

2014 SIL Fall Meeting

October 21-25, 2014 at the Hilton Buenos Aires, Aires, Argentina

Over 70 substantive continuing legal education sessions with world-class speakers; cutting edge programming on the latest international legal and ethics issues; networking opportunities with counterparts, decision makers and potential clients from around the world who are active in international practice areas; an entire year’s worth of CLE credits; special programming for young lawyers, law students, and legal educators; and special Buenos Aires related events. Interested in attending? Visit the official site for the event here:

http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=180106

2014 ABA North America Regional Forum

November 17-18, 2014 at the Pan Pacific Vancouver Hotel, Vancouver B.C. Canada

This one-and-a-half day conference will feature two parallel tracks on best practices for international companies doing business in North America and for North American companies working internationally. It will begin with a joint ethics plenary on Privilege across Borders in the E-Commerce Age and will be followed by a series of panels presented by international legal experts on the latest in key topics such as privacy issues, enforcement of judgments, antitrust and compliance. This program will also offer a unique forum for international lawyers to explore and expand their networking activities as well as meet colleagues from all over the world.

Committee Leadership 2013-2014

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Pat English
Wilhelm J. Ziegler

Immediate Past Chair
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**New York Spring Meeting Guest Editor’s Highlights**

by Emma Doherty

“New York, New York; so good they named it twice” – an endorsement unanimously supported by the Europe Committee members who attended the American Bar Association’s Section of International Law Spring 2014 Meeting in New York. The Meeting included the classic mix of education and networking opportunities with interesting panels, fascinating speakers, busy receptions, and fun social events. Attendees had the opportunity to partake in events in unique locations including a reception in the New York Stock Exchange and an evening on the USS Intrepid aircraft carrier.

In addition to networking events for all conference attendees, there were opportunities for the Europe Committee members to meet at Committee events including the Breakfast Meeting and monthly Committee Business Meeting. The highlight of the New York Meeting for many Europe Committee members was the opportunity to catch up with friends and meet new members during the fun event hosted by the Europe Committee and the International Joint Venture and M&A Committee. The social evening was once again organised by the Europe Committee’s “Fun Officer”, Co-Chair Pat English.

After attending the opening-networking event in the Waldorf Astoria, over 30 members of the Europe Committee gathered at the Manhattan side of the Brooklyn Bridge. Surrounded by the noise, lights, and yellow taxicabs of the city, old friends greeted each other and new connections were made. We walked the bridge and enjoyed the views of the Manhattan skyline at night. People shared stories about previous trips to New York and even college days spent in the city. We were then treated to pizza in Grimaldis, a famous New York pizzeria frequented by celebrities – even Frank Sinatra! Grimaldis was followed by New York cocktails in the Clover Club.

The committee events were completed by a very enjoyable dinner at Robert De Niro’s restaurant, the Tribeca Grill, which was hosted by the International Joint Venture and M&A Committee which was kind enough to once again extend an invite to all members of the Europe Committee.

Thank you to all of the reporters who contributed articles for this edition of the newsletter and to the editors.

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Apple, Google, Starbucks: Tax issues Keeping Directors Awake reported by Sunita D. Doobay

Apple, Google, Starbucks: Tax issues Keeping Directors Awake was a well-attended and informative session chaired by Patrick Marley of Osler Hoskin & Harcourt LLP (Canada), Pia Dorfmueller of P&P Pöllath +Partners (Germany), Mary Kim Elkins - General Counsel of Eaton Corporation, Larissa B. Neumann of Fenwick & West LLP (USA) and Bartjan Zoetmulder of Loyens & Loeff (Netherlands) on April 02, 2014 at the ABA Spring Meeting.

The focus of the presentation was on the recent Base Erosion Profits and Profit Shifting (BEPS) study from the OECD and the response by countries to perceived loss of revenue through BEPS activities.

Tax authorities have been forced to take BEPS activities into consideration after public protests against companies such as Starbucks, Google, and Apple that took place in 2012 and 2013.

In the United Kingdom, protesters launched an informal boycott against Starbucks when it was discovered that the company in 2011 had sales of approximately $600 million but nevertheless reported only $13.46 million in corporate tax from the time it had started operations in the U.K. 14 years ago. Similar public outrage in the U.K. was directed against Google which had paid only $16 million in taxes for the period from 2006 to 2011, despite earning approximately $18 billion in the same period. In the United States, Americans were incensed to learn that Apple was holding $102 billion offshore in a lower tax jurisdiction rather than holding it in the U.S. which would result in higher taxes.

It is important to note that Starbucks, Google and Apple did not engage in tax evasion but rather legitimate tax planning. After all, it is not possible to shift profits from a higher tax jurisdiction to a lower tax jurisdiction without the respective tax legislation such as the Internal Revenue Code of the U.S. or the Income Tax Act of the U.K. allowing it. For example, both legislations contain preventative measures for certain tax minimizing transactions. Transfer pricing provisions prevent transfer payments such as royalties or payments for goods to be at a price lower than the price that would be paid to a third party. Similarly, thin capital rules prevent the payment of interest to a non-resident where the subsidiary has been capitalized with very little equity.

Tax planning in shifting income from a high tax jurisdiction to a low tax jurisdiction often involves the usage of the double Irish structure. A simplified version of the structure is as follows: A U.S. corporation with IP would transfer its IP at arm's length terms to an Irish Company managed in Bermuda. The U.S. corporation would retain the right to the IP for the U.S. market. The Irish company would be managed in Bermuda thereby under common law resulting in the Irish Company to be deemed a Bermudian tax resident company. However, for U.S. purposes, the Irish company would be deemed Irish as it was incorporated in Ireland – important as Ireland has a tax treaty with the U.S. while Bermuda does not. Bermuda’s corporate income tax rate is zero. The Irish company holding the IP would license the IP to a second Irish Company controlled in Ireland. At the time this structure was active, the Irish transfer pricing.

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regime was weak and often the licensing fee between the two companies would not be at arm’s length thereby allowing the Irish company holding the IP to pull the profits out of the second Irish company. This second Irish company would then license the IP to all jurisdictions except the U.S. The second Irish company would be subject to an Irish tax rate of 12.5% which is the highest tax rate on revenue earned from licensing minus the royalty fee paid to Bermuda. If the IP was for software the royalty withholding would be zero for royalty payments made to Bermuda from Ireland. For U.S. tax purposes, the Irish company would be disregarded under the check the box rules and will be seen as the part of the Irish IP company.

It is important to note that
Starbucks, Google and Apple did not engage in tax evasion but rather legitimate tax planning.
After all, it is not possible to shift profits from a higher tax jurisdiction to a lower tax jurisdiction without the respective tax legislation… allowing it.

being part of the Irish IP company.

As a result of the outcry, it should be noted that Ireland has fortified its transfer pricing regime and that a company now incorporated in Ireland may in the future be deemed an Irish taxable resident. But it is not only Ireland that has reacted. The Netherlands, often part of the double Irish structure in the past, has introduced substantive requirements in order for a corporation to enjoy its treaty networks. Similarly, German legislation has tightened it thin capitalization rules.

However, it not only the above hybrid structure which has the OECD and governments concerned, but also the digital economy to which the standard definition of a permanent establishment has not foreseen. Generally a country is able to tax revenue generated from a permanent establishment where such permanent establishment is found in that country. However, with the new digital economy, how does one define what a permanent establishment is? Is it where the customers are situated? Where the orders are taken?

The General Counsel for Eaton Corporation discussed the difficulties faced by multinational corporations and the heavy cost that comes with compliance. In particular, transfer pricing studies and reports are costly and can be frustrating when dealing with unilateral advance pricing agreements in multiple jurisdictions and where there are disagreements on the methods chosen.

Editor’s Note: Few things seem to stir public outrage during a weak economy like the issue of corporate tax avoidance. Significant ink and airtime have been devoted to the investigation of this strategy, and as this program reiterated, this is not an illegal practice. That said, increasingly, jurisdictions are bowing to public pressures and beginning to tighten both tax legislation and transfer pricing to, at a minimum, appear not to shift the economic burden in their economies to the populous. Additionally, as favourable tax regimes slowly dry up and manufacturing continues to occur in lower cost markets, the issue of repatriating profits back to the parent company residing in less favourable tax jurisdiction has become increasingly vexing.
“Attorney-Client Privilege Versus Concept of Professional Secrecy in Continental Europe”
reported by Gabrielle F. Culmer

This was an elaborate and detailed analysis by the panelists, and one of the most interesting of the day, fittingly held in the Starlight Terrace North Room at the world renowned Waldorf Astoria in midtown Manhattan.

The program was chaired by Miguel Angel Melero of Cuatrecasas, NY, and Brigitte R. Gambini of Gambini International Law Office, NY, who was also the Moderator.

The speakers were Emmanuel Adda of Cegedim Inc, N.Y., Heather B. Bush of Bureau Veritas I&F North America, FL, Jeff E. Butler of Clifford Chance, NY, Anne Laure Gosset of ALSTOM Transport, France, and Dirk Sievert of Noerr, NY. They provided an in depth legal analysis of the important considerations for their jurisdictions on attorney-client privilege and the differences between it and professional secrecy in continental Europe. Ms. Gambini and Mr. Melero provided useful legal expertise as they moderated the panel.

The program started by defining attorney-client privilege and followed that in the EU, the professional secrecy is a fundamental right of the European Court of Justice; however, there were complex legal issues where different jurisdictions are concerned. It also addressed the issues of confidentiality of advice and legal opinions and the differences in the tools to protect confidentiality. In addition, they addressed the benefits provided to in-house counsel, the complex law of privilege, and determined which laws govern the existence of the privilege.

According to the presentation by Heather B. Bush, privilege in the U.S. is designed to encourage the free flow of information and it protects the essence of confidential communication which is inadmissible. In-house counsels have the same protection. However, the inclusion of a third party can destroy that privilege.

Emmanuel Adda concentrated on the professional secrecy in Europe and outlined the 1982 case of Australian Mining and Smelting Europe Limited v European Commission 155/79 Rec. 1982 and the two pronged test which is made for the purpose of the interest of the client’s rights of defense and emanates independent lawyers. His presentation also differed in that in-house counsels do not have privilege in Europe and noted in-house counsel friendly member states.

However, Mr. Adda continued that documents prepared for the purpose of seeking legal advice by in-house counsel are protected according to Case C-550/07 P, Akzo Nobel Chemicals Ltd. and Aekros Chemicals Ltd. v European Commission in 2010.

He stated that, in Hilti Aktiengesellschaft v European Commission Case C-53/92 P, the court extended privilege to include internal notes. He added that this is limited to EU case law and it also applies the same rule beyond complex matters.

Mr. Adda’s presentation was informed, detailed and precise. Anne Laure Gosset was able to add the perspective from France. Adda also stated that in-house friendly states are Ireland, UK, Malta, Netherlands, Belgium, Norway, Greece, Portugal and Poland. However this does not include France, however, in France, the outside counsel benefits from “absolute professional legal privilege.” He continued that the privilege right covers communications and

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tipped on a practical side not to mix legal matters with other subject matters. Also, he recommended that when working with counsel in Europe to engage outside counsel.

Dirk Sievert stated that Germany’s stance was also cited as being very similar to that of France. He also explained that according to procedural law, the procedural duty to give evidence is superseded by the right of client secrecy. He continued that disclosure is a criminal offense and one can be prosecuted. It governs knowledge obtained from the client as well as from third parties and obtained in connection with the attorney’s profession. He stated that the client can waive the protection and then reclaim it. Sievert’s presentation was extensive and knowledgeable.

When considering the conflict of laws, he stated that there was a right to refuse to give evidence. The right of secrecy is part of German procedural law. In France it was reiterated that the procedure cannot be waived.

Jeff Butler, in a very fluent and coherent presentation, concentrated on the choice of law and how the courts resolve the choice of law problems. He stated the U.S. court approaches the application the law of the forum test and some courts have adopted the Lex Fori. He stated that the allocation of privilege is an evidentiary rule and continued that this can end up being simplistic in certain circumstances.

He continued with the law of decision approach, to apply the law which applies to the claim at issue, which was considered to have the same problem of unfair results as there may be multiple claims. In additional, He addressed the Restatement (Second) of Conflict of Laws, § 139, (1971) and applying the local law of the state with the most significance, with the problem being if there is no privilege in either one, then there is really not any privilege.

The presentation then shifted to the interest analysis as being the law of the country with the most direct compelling interest, with factors including the location of the communication, the domicile of the client and also the licensing of the attorney. It was also addressed that the “touching base” approach was seen to be helpful as it treats the subject of the advice as the key factor however, the problem would be the subject of the advice not relating to the jurisdiction.

The interesting and informative panelists wrapped up with a lively question and answer session and all were grateful for their knowledge. I wish to extend a special thanks to the panelists for their own legal insight.

1 Article 6(2) Treaty of European Union.
2 Adda, Emmanuel, Power Point, ABA International
3 §43a, paragraph 2, Federal Lawyers Act, BRAO.
“The Good, the Bad and the Ugly: Intersection of Civil Law and Common Law Deposition Styles in Cross-Border Matters”
reported by Pat English

Out of the many sessions from the Spring Meeting, this was one of the most popular talks with standing room only! The panelists represented a wide range of jurisdictions: Judge John F. Lakin (12th Judicial Circuit Court, Sarasota, Florida), Anna Englehard-Barfield (Attorney, Hamburg, Germany), Stéphane de Navacelle (Navacelle Avocats, Paris, France) and Duncan Speller (WilmerHale, London, UK). The panel was chaired by Salli Swartz (Artus Wise, Paris, France).

Judge John Lakin kicked off the session by playing a short video demonstrating how not to conduct oneself during a deposition. The video showed a deposition where the lawyers became engaged in a blazing row that eventually deteriorated to fisticuffs. It was comedic in nature until attendees realised that it was a real-life example. Many of the attendees were aghast at the lawyers’ conduct in the video and it was the perfect way to ensure that the panel had everyone’s full attention.

During the session, the panelists compared common law and civil law systems regarding the taking of oral testimony and highlighted the many differences. The session focused on the procedural differences faced by counsel when dealing with cross-border matters in the U.S., U.K., Germany and France in particular. The panelists provided practical tips on the taking of evidence abroad and explored differences between arbitration, civil, and criminal procedures. It was generally agreed that it is best to seek voluntary production of the evidence as early as possible.

The panelists relied on factual examples to explore a wide range of issues including: court intervention, the appointment of a judge or master to oversee the procedure, and the issues faced by the courts in dealing with international law and international enforcement of court orders regarding depositions.

The discussion was very practical in nature and even included a discussion on how to manage time-zone issues. The panelists also agreed that it is best to avoid waking the appointed judge in the middle of the night where possible!

In addition, the panelists provided unique insight into the procedures in their individual jurisdictions. One of the topics was the possibility of relying on attorney-client privilege. Stéphane de Navacelle explained that in France, attorney-client privilege cannot be relied on by in-house counsel and that interview preparation is not just frowned upon, it is a criminal act. Duncan Speller raised an interesting conflict issue when a company’s employee is involved in giving testimony and whether a conflict occurs when an employer chooses and hires the employee’s counsel.

The session was interesting and engaging with insightful (sometimes heated!) debate on the topics. Following the discussion, the panel invited questions; there were many. After the Q&A session, the talk ending with two practical tips from each panel member. The one all panel members agreed on, “no case is worth your reputation and lawyers should conduct themselves accordingly.”

Salli Swartz leads the Panellists in this well attended session with standing room only for late arrivals

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“‘YES YES” means “NO NO”

Soft Skills in East-West Negotiations -
How to Avoid being Lost in Translation”
reported by Orsolya Gergenyi

The routine conventions of everyday life, such as dress code, punctuality, greetings and business card etiquette, are easy to learn, and the violation of them by foreigners is not normally a serious matter. However, acting in accordance with them shows respect and it helps to start a good relationship. Even if we are aware that in certain regions comfortable personal space is a lot smaller than in Europe or North America, we may find ourselves unconsciously backing away from our counterpart or vice versa. Even if we learn that in certain countries punctuality is not important, that finishing a discussion with a friend one runs into by accident is more important than showing up on time to the business meeting, we may nevertheless feel offended if our business partner is late.

Customs, mannerisms and courtesies are, however, just the visible tip of the iceberg! What is difficult to see and comprehend and what influences our approach, are all below the surface. "Culture profoundly influences how people think, communicate and behave. It also affects the kinds of transactions they make and the way they negotiate them."

Japanese and Chinese have a more formal style of negotiation than the Americans and most Europeans. A negotiator with a more formal style insists on addressing counterparties by their correct titles and “avoids personal anecdotes and questions that touch on the private or family life”. In Japan, the use of the first name at the first meeting is an act of disrespect, and greetings in general are taken very seriously in Asia. For instance, business cards embody social status, and should be handled with respect, handed over with both hands and examined thoroughly. Be aware that it is considered offensive to make notes on a business card!

It is surprising to the West that "actual down-to-the-table business only comes into the picture once a personal relationship has been established and the fundamental elements of trust and respect have been set." Do not talk business at the first meeting in China. The Chinese may continue the negotiations for a long time and sometimes - to the disappointment and frustration of the Westerners - begin the discussions all over again even if certain clauses had already been agreed upon. The reason behind this is

THE CULTURAL DIMENSIONS

(Geert Hofstede)

1. **Power Distance:** how society deals with inequality
2. **Individualism v. Collectivism:** sense of self v. group
3. **Masculinity v. Femininity:** competitiveness / acquisition of wealth v. relationship building and quality of life
4. **Uncertainty Avoidance:** extent to which cultures socialize members to accept ambiguous situations
5. **Long-Term Orientation** (formerly called Confucian Dynamism): attitudes toward time, persistence, status, saving face, respect for tradition, reciprocation of gifts and favors
6. **Pragmatic v. Normative:** truth depends on situation / context v. absolute truth
7. **Indulgence v. Restraint:** free gratification of v. suppressing human drives related to enjoying life

(http://geert-hofstede.com/national-culture.html)

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that the West is accustomed to a linear flow of discussion, but the East has a holistic approach to the negotiation process: nothing is really settled until everything is agreed upon. So how do you know that you are approaching an agreement? Good signs are: questions begin to focus, higher level executives show up at the meeting, the Chinese delegation talk increasingly among themselves in Chinese, they call for more meetings or ask questions about "extras" such as training abroad. Be aware that it is a very common and accepted Chinese tactic to threaten to do business elsewhere and the Chinese are very good at using silence as a negotiating tactic.

Japanese companies tend to take a lot of time to negotiate because decisions are made after getting consensus among people in such companies. It is always a good idea to send the Japanese delegation the agenda of issues to be discussed in advance of the meeting to allow them enough time to agree among themselves. Once they have made up their mind, the decisions are implemented very quickly and efficiently. "In cultures that rely heavily on indirect forms of communication, such as the Japanese and Chinese, reaction to your suggestions may be gauged by interpreting seemingly vague comments, gestures and other cues." The circuitous, indirect way in which Japanese negotiators express disapproval has often led foreigners to believe that their proposals were still being considered when the Japanese had long rejected them. No answer or no reaction normally means a negative response. But it is not always as simple as that: changing the subject, asking another question, using ambiguous or vaguely positive expressions with slight negative implications also probably mean a refusal. And it is all well-meant, since it is rude in Japan to say no!

So prepare yourself, be aware of how your own negotiation style may come across, but most of all, be

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**CHINESE NEGOTIATION ELEMENTS**

1. **Personal Connections (Guanxi)**
   Importance of business relationship among friends, relatives and close associates. Favors are always reciprocated. Not returning a favor is immoral.

2. **The Intermediary (Zhongjian ren)**
   Trusted business associate, who creates personal link to business partner. They raise business issues first, not the parties. "Nontask Sounding" - finding the personal links to the target.

3. **Social Status (Shehui dengji)**
   Importance of formalities, obedience and deference to superiors. Importance of meeting of equals, sending negotiators whose rank at least equals that of their Chinese counterpart.

4. **Interpersonal Harmony (Renji hexie)**
   Attempting to do business without first establishing harmony is rude. Friendship and positive feelings must be created before starting to talk business. Chinese rely more on good faith than on written contracts, and insist on satisfaction with the spirit of the deal.

5. **Holistic Thinking (Zhengti guannian)**
   Issues are discussed simultaneously, the whole package is more important than the details. Nothing is settled until everything is agreed. Already agreed elements may be reopened for negotiation.

6. **Thrift (Jiejian)**
   Importance of economizing, bargaining over price. Make offers with ample room for negotiation and expect long bargaining over price.

7. **"Face" or Social Capital (Mianzi)**
   It defines a person's place in his social network, it is the most important measure of social worth. A broken promise or display of anger causes mutual loss of face - end of the deal! Do not cause embarrassment or loss of composure.

8. **Endurance, Relentlessness (Chiku nailao)**
   Prizing hard work and endurance. Prepare diligently for negotiations and long bargaining sessions. Ask many questions and show patience.

(John L. Graham and N. Mark Lam - Harvard Business Review)
patient and allow sufficient time to build a relationship before you start talking business in Asia!

The author had the pleasure to chair the panel sponsored by AIJA (the International Association of Young Lawyers - the only global association of lawyers aged 45 and under) with the participation of Ramesh K. Viadyanathan, Advaya Legal, Mumbai, India, Leopoldo Pagotto, ZISP Law, Sao Paulo, Brazil, Haixiao Zhang, Zhong Lun Law Firm, Shanghai, China, Kenji Hirooka, Bigham McCutchen LLP, Tokyo, Japan and Mel Schwing, Yulchon, Seoul, South Korea as speakers during the Section's Half Year Conference in New York in April on this topic. The article is based on and the quotes are from the general report of Ramesh and Leopoldo originally prepared for the 2012 AIJA Congress, which was distributed to the participants together with the slides the panel used in New York. A short panel discussion or a few pages are not enough to cover all that matters, but our goal was to raise awareness. The slides and the general report started and finished with quotes from Sun Tzu's Art of War, but maybe we should add one more, "In the practical art of war, the best thing of all is to take the enemy's country whole and intact; to shatter and destroy is it not so good. So, too, it is better to capture an army entire than to destroy it, to capture an entire regiment, a detachment, or a company, rather than to destroy them."

(Sun Tzu Art of War)

The panel from “How Not to Get Fired! A Unique Insight from In-House Counsel and Experienced External Lawyers on What Multinational Companies Expect from their Outside Counsel”, moderated by our reporter, Pat English (far left), and the panellists, Alyson Lawrence, Daniel Glazer, Craig S. Comeaux, Benjamin Singer, and Neil Culkin.
“How Not to Get Fired! A Unique Insight from In-House Counsel and Experienced External Lawyers on What Multinational Companies Expect from their Outside Counsel”
reported by Emma Doherty

The American Bar Association’s Section of International Law Spring 2014 Meeting in New York presented many interesting sessions. It was evident that the topic: “How Not to Get Fired! What Multinational Companies Expect from their Outside Counsel,” was of real interest for attendees of this session. The event was well-attended with a mix of in-house counsel and external lawyers in the audience. The panel consisted of the following representatives from multinational companies: Craig S. Comeaux (Argo Group), Neil Culkin (Google), Alyson Lawrence (Johnson & Johnson) and Benjamin Singer (Gilt Groupe). Daniel Glazer (Fried Frank, New York) represented the external lawyers and Pat English (Matheson, Ireland) chaired the discussion.

The session provided a unique insight into exactly what in-house counsel expects from outside advisers. In-house counsel panellists provided practical tips and highlighted items that in their experience, external lawyers sometimes overlook. They also told individual horror stories by way of warning to the outside advisor attendees.

The panel discussed absolute requirements and prohibitions from a client’s perspective. Many of the tips served as useful reminders of best practice. Not surprisingly, some of the requirements are: to provide a realistic estimate of fees, avoid any nasty billing surprises, and ensure that matters are appropriately staffed. The panellists said that from their perspective, they should be made aware of who is working on particular matters; it is unacceptable to first learn the names of fee earners working on your matter when the bill narrative arrives. The in-house counsel panellists felt strongly that the onus lies on external counsel to staff matters appropriately in the first instance but stated that they are generally quick to point out any instances where they believe that better service or efficiencies could be obtained. Finally, all panellists stressed the importance of the outside advisors understanding their clients’ business so that they could add value by making useful suggestions rather than merely providing yes or no answers to questions asked.

Members of the panel discussed the importance of not deviating from client protocol when working with in-house counsel. The panelists stressed the importance of knowing who your client is and not acting on instructions from members of the business team unless they are specifically authorised to engage the advisor. One panellist gave an example of a situation encountered where an advisor deviated from protocol by working directly with a business contact on a matter that nearly resulted in a reportable SEC event. A critical suggestion was to not issue advice in a format that is difficult to access or digest, as in-house counsel needs to be able to review advice quickly and often on mobile devices. Plain English should be used and an executive summary should be included. Neil Culkin said that too often they receive advice that is branded “TLDR” which is too long and they do not read.

Communication was a common theme during the discussion with many of the panellists having experienced situations where clients failed to communicate with them at an appropriate stage. For example, Alyson Lawrence indicated that where there is a proposed change of staff on a matter, the legal team expect to be consulted in advance of any transition being implemented and of course, the clients do not expect to bear the cost of any transition or cost associated with training new staff. Communication was also identified as being critical in circumstances where work falls outside the scope of the original estimate or where the fee quoted has been exceeded.

An interesting Q&A session followed the panel’s discussion. The session was a valuable opportunity to obtain direct insight and feedback from experienced in-house counsel.

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For those of us who are interested in the area of human rights law, the spring meeting of the ABA’s International Law Section offered an opportunity to participate in panel discussions covering a wide range of topics relating to subjects as diverse as protecting cultural heritage sites during armed conflict to protecting our elderly population.

The program opened with a session relating to the protection of cultural sites during armed conflict; focusing on the present situation in Syria and Mali. During this session, participants learned that the 1954 Hague Convention for the Protection of Cultural Property, as well as Protocols I and II to that Convention, are the main international agreements providing for the protection of cultural heritage sites during armed conflict. We also learned that while the Rome Statute of the International Criminal Court makes it a war crime to intentionally direct “attacks against buildings dedicated to religion, education, art, science or charitable purpose [and ] historic monuments . . . provided they are not military objectives,” the efficacy of the Statute is limited by the fact that the Court’s jurisdiction reaches mainly signatory states. The good news with respect to Mali is that it is a signatory to the Rome Statute and the Office of the Prosecutor is currently investigating offenses committed in violation of that Statute, including crimes relating to the destruction of cultural heritage sites. Syria, however, is not a signatory state. Thus, the Court does not have jurisdiction to investigate violations of the Statute committed during the on-going armed conflict there unless the case is referred to it by the United Nations Security Council. A referral is not likely given the fact that at least one Permanent Member of the Security Council is likely to veto any resolution referring the matter to the International Criminal Court.

Since the International Criminal Court is unlikely to obtain jurisdiction over violations of humanitarian law committed during the on-going armed conflict in Syria, is there a basis for the international community or a single country to intervene in that conflict? During the program entitled “Is Humanitarian Intervention Criminalized by the International Court’s Crime of Aggression,” the panelists discussed the evolving international norm known as “Responsibility to Protect,” or “RtoP” or “R2P.” This principle recognizes that where a State fails to protect its citizens from serious international crimes, including genocide, crimes against humanity, war crimes and ethnic cleansing, the international community has a responsibility to intervene. As the panelists pointed out, however, the continued viability of this justification for humanitarian intervention may be at risk. The International Criminal Court is about to gain jurisdiction to prosecute the crime of aggression. Thus, States who intervene in an armed conflict on humanitarian grounds may find themselves subjected to investigation and prosecution by the International Criminal Court for the crime of aggression as early as 2017.

What I have taken away from these two sessions is that while developing international norms, in theory, should make it possible to hold rogue states responsible for violating international human rights laws, as a practical matter, it is still difficult to intervene in armed conflicts to prevent such atrocities from being committed, as well as to investigate and prosecute those responsible after the conflict ends.

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