Our Section’s London October 2013 meeting offered our Europe Committee members a solid slate of substantive programs, seasoned by a scintillating series of Europe Committee social events. Led by a “shaken, not stirred” evening of British Bondian acculturation, followed the next day by a dinner with our Merger & Acquisition Committee friends, and capped by breakfast and committee business meetings on subsequent days, the Committee social events instigated by co-chair Pat English and Immediate Past-Chair Florian Jorg facilitated the consolidation of relationships among Europe Committee members. New Europe Committee Member Jim Cornwell accepted the challenge of guest editing this special edition on the London meeting of the Europe Committee Hot Topics newsletter. His achievement here reflected confirms the collegial and welcoming character of the Europe Committee, as well as providing a flavor of both the breadth of programming and the acumen of Europe Committee members participating in the debates in the presentations.

The Europe Committee is preparing for the April 2014 New York City meeting of our Section that will feature Europe Committee programs on (i) developments of European financial law as examples of the European legislative instruments, the directive and the regulation, and (ii) staying on the right side of inhouse counsel. Now is also the time to propose Europe Committee programs for the October 2014 Buenos Aires meeting.

This newsletter sets forth the Report and Recommendation on cross-border signature reform adopted by our Section’s Council at the October 2014 London meeting. The Europe Committee working group under coordination of Europe Committee vice-chair for policy Werner Kranenburg that collaborated with our friends in the US Lawyers Abroad Committee towards this achievement is to be congratulated (and emulated—Europe Committee members are warmly invited to step forward with additional policy initiative proposals). The co-chairs welcome outreach from each 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 listserv!

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

A Note from the Editor
This hot topic issue of EUROPE UPDATE provides summaries by our section members of various presentations, council meetings, and events they attended and/or presented at the recent ABA Section of International Law Fall Meeting in London, England. Further, the resolution supporting modernization and simplification of the requirements and procedures related to verification of signatures in cross-border contexts, i.e., verification of signatures affixed to documents signed in one country for use outside that country’s borders adopted on October 19, 2013 by the Council has been included in its entirety for your information and review.

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
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

Join the ABA Section on International Law at MIPIM in Cannes

The ABA SIL has entered into a cooperation agreement with Le marché international des professionnels de l’immobilier (MIPIM) and will have a booth inside the main pavilion at MIPIM, the leading international real estate fair held in Canne, France. The booth will be in Palais des Festivals, Booth Number 06.30 Level -1 and staffed by members of the Cross Border Real Estate Practice Committee. Also, they are organizing a major program to be held Thursday, 13 March Rebuilding the Market: From “bad banks” to better Real Estate Players, their role in revitalizing the real estate investment market in Europe. ABA members will receive a substantial discount on the registration fee. The fair dates are 11-14 March 2014. More details will be sent to members soon.

Programs at the 2014 Spring ABA Meeting in New York City

While the London Meeting has just wrapped up, the upcoming Spring ABA SIL meeting in New York City from 1-5 April 2014 at the historic Waldorf Astoria is slated to be another informative event,

and includes the following two programs sponsored by the Europe Committee:

- “What’s New in European Financial Sector Regulation?! An Introduction to the Latest EU Developments”; and
- “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”

More details will be sent to members soon.

The registration cut-off dates to keep in mind for those planning on attending the Spring Meeting are the following:

17 February 2014 Early Bird Registration Deadline
10 March 2014 Hotel room block Deadline (at the Waldorf Astoria)
19 March 2014 Pre-Registration Deadline

The official page for the Spring Meeting can be found here:

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London Memories of a Guest Editor
by Jim Cornwell

“Sir, when a man is tired of London, he is tired of life; for there is in London all that life can afford.” - Samuel Johnson, The Life of Samuel Johnson LL.D Vol. 3.

Certainly when the approximately 1,100 members of the Section of International Law of the American Bar Association gathered at the London Hilton on Park Lane they were neither tired of London nor tired of life. After four days of education, meetings, receptions, networking, social events and other activities they may have been physically tired but certainly neither tired of London nor of life.

I am an attorney practicing in America and licensed in Virginia as well as England and Wales and a shareholder in the law firm of Sands Anderson PC. For the previous 40 years the main focus of my practice has been the representation of Virginia local governments - counties, cities and towns - as general counsel under legal service contracts. As part of that practice I have handled contractual matters, regulatory proceedings, and litigation in state and federal courts, drafting and enforcement of ordinances, tax collection, economic development incentives, environmental law and election law.

I joined the SIL and the Europe Committee to be educated on current issues involving the practice of law across borders. I came to the Fall Section meeting seeking to develop contacts to expand the work of my firm. Our ultimate goal is to provide both inbound and outbound services. I left the Fall meeting with not only a tall set of business cards of contacts made at the meeting, but also with a new group of friends made at the Europe Committee events who provided advice and encouragement in my quest.

What I found most striking about the SIL was the reception I received from the Section members and particularly the members of the Europe Committee. There was a genuine feeling of openness and welcome from the members. I certainly enjoyed the social events of the Europe Committee. The “shaken, not stirred” cocktail party at Duke’s and the Committee Dinner were memorable.

I trust you will enjoy this edition of the newsletter which seeks to give you a taste of the Fall conference and I thank the reporters who contributed articles that I believe you will find informative.

Above, Gabrielle M. Buckley, Section Chair, and Jim Cornwell (guest editor of this Hot Topic edition) share a moment at the 2013 Fall Meeting of the ABA Section of International Law in London.

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A Tribute to English Restraint: One Reporter’s Select Impressions and Account of the Council’s Meeting of October 19 and Consideration of the Notarial Reform Recommendation reported by Laurence P. Weiner

The following recounts the ABA SIL Council Meeting that occurred at the London Meeting on October 19, 2013 beginning at 9:00 am, including the issue of notary reform. (NB– The final text of the notary reform resolution approved at the meeting is set forth at the back of this issue.)

Call to Order, Madame Chair Gabrielle Buckley

The Chair asked, “What is the Council”? She answered her own question by saying that it is “critical to the mission of the Section. It is charged with developing policy of the Section and of the ABA.”

The Chair noted the success of the Fall Meeting in London. She expressed thanks to the co-chairs of the meetings and the Section’s staff.

Distinguished Guests, Liaison Officer Adam Farlow introduced and welcomed the following persons to address the Council: Lord Mayor of London Elect, Fiona Woolf. Only the second woman to ever hold that office since its creation in 1189, Lord Mayor Woolf explained that she is charged with the role of promoting the services sector situated in the UK (i.e., not necessarily based in the UK). “There is much to do together and there remain a number of protectionist barriers.” She commended the Section of International Law for its efforts.

Jim Silkenat, current ABA President. Mr. Silkenat stressed the need for government funding of legal education. He noted that judicial funding continues to be a problem and that “cuts have been huge over the last year.” He highlighted specific themes that will be addressed by the ABA this year under his stewardship, including immigration, gun violence and voter violation.

William Hubbard, President-Elect of the ABA. Mr. Hubbard noted the celebration of “Magna Carta 800” to be held in Runnymede on June 15, 2015 and the ABA’s participation in commemoration activities. He also announced his call “taking a step back and a hard look at the legal profession once again for the first time since the pound Conference of 1976,” which had been organized by U.S. Supreme Court Justice Warren Berger. “This will be a top-down approach to strengthen the profession,” he said.

Anita Schläpfer, AIJA President addressed the Council and pledged continued cooperation with the ABA Section of International Law.

Chantal-Aimée Doerries, Co-Chair of the 2013 Fall Meeting and Chair of the Bar Council of England and Wales, commented that the barristers’ relationship with the ABA Section of International Law is “greatly valued” and expressed her concern that extreme funding cuts “will affect the most vulnerable activities of the Section, such as Rule of Law and Access to Justice Programs.”

POLICY DISCUSSIONS

Madam Chair Buckley then announced the hearing of the only action item: Section Recommendation & Report on Attestation and Verification of Signatures in Cross-Border Practice, Laurence Wiener, Linda Murnane

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The Chair recognized Laurence Wiener, Co-Chair of the US Lawyers Practicing Abroad Committee, to address the Council on the report and recommendation to have the ABA support modernization and simplification of the requirements and procedures related to verification of signatures in cross-border contexts. Linda Murnane, who, along with Patrick Del Duca, has been a driving force in the R&R, was unable to appear at the Council meeting. Council Member Del Duca appeared telephonically, overcoming an eight-hour time difference in doing so.

Mr. Wiener noted that the R&R was developed by the Section’s Europe Committee and the U.S. Lawyers Practicing Abroad Committee. Its origin was rooted in real, practical needs identified by the empirical experience of the more than 400 members of the USLAC living throughout the world and reflects an effort spanning six years. While the Council had, at its last meeting in August, suggested that the drafters of proposal revise the recommendation to include specific proposals, the current draft put forth was purposefully limited in scope so as to elicit a broad platform of support. The R&R deliberately refrained from giving prescriptive advice, though it suggests the possible amendment of the Revised Uniform Model Law on Notarial Acts by enabling a cloud-based attestation process as one such possible action.

The floor was opened for debate and Council Member Ron Bettauer stated for the record his support of the policy action, subject to a slight modification of the text to clarify that future action could “for example, by modifying the U.S. and foreign uniform model laws to take advantage of cloud-based and other technological progress and increase reciprocal recognition among jurisdictions.”

Judge Lorraine Arkfeld added a number of useful suggestions to the text, which she described as “nits,” all of which are acceptable to the drafters of the R&R. Council Member Whitney Debevoise expressed some concern as to what the Council was asking of the House of Delegates, as the recommendation did not contain a specific recommendation. The Chair asked that further comment be limited and that “some action be taken.” Council Member Josh Markus then asked for the floor and said, “Madame Chairman, you want to take action. Well, I have an action. . . . I voiced some concerns about this resolution . . . but . . . I think the proponents did a very good job to address them and, with Ron’s proposed amendment, as modified by Glenn’s and Lorraine’s suggested edits, I recommend the Council adopt the resolution.” A motion was made to approve the resolution. The motion was seconded and passed with one abstention and the rest affirmative votes.

Immediately afterward, various Council members approached this Reporter to share their congratulations and to recognize the efforts of the R&R’s proponents.

OTHER BUSINESS

The meeting continued with further reports on the following:

- Policy Projects (Yee Wah Chin);
- Law School Liaison (Jody Prescott);
- Government Liaison (Max Trujillo);
- Vice-Chair’s Report (Lisa Savitt); and
- Chair-Elect’s Report (Marcelo Bombau)

Madame Chair Buckley adjourned the Council Meeting at 12:05 p.m.
The program followed an interactive Q&A format based on a straightforward evolving fact pattern. The discussion was led by Moderator Joseph Raia, Gunster (Miami, Florida). He asked the speakers to advise a hypothetical client in Florida who discovers it is the victim of a fraudster (e.g., disloyal employee) and whose first concern is recovering stolen funds which have been traced to their respective jurisdictions.

Saverio Lembo, Bär & Karrer SA (Geneva) spoke for Switzerland, Caroline Abela, WeirFoulds LLP (Toronto, Ontario) for Canada, Ibtissem Lassoued (Al Tamimi, Dubai) for United Arab Emirates and, finally, Robert Hunter (Herbert Smith, London) for the United Kingdom.

Mr. Raia asked Mr. Lembo about the effectiveness of criminal versus civil remedies and the pros and cons of the alternatives. The answer started with a practical tip: a Swiss counsel must be able to advise on both procedures, if counsel suggests that it has to be one or the other then it is likely that client has knocked at the wrong door.

Civil attachment under Swiss law requires a claim that is both mature and unsecure, likeliness that debtor has assets in Switzerland and a sufficient nexus to Switzerland – the latter condition may be a combination of several conditions which alone are not enough (e.g., payment in Switzerland, existence of a Swiss bank account). Swiss courts want to avoid fishing expeditions, Mr. Lembo explained. Civil attachment can be obtained in one day by an ex parte decision and usually requires posting of a bond of 10% of the amount allegedly stolen. Civil attachment has the effect of freezing the account but does not allow access to account activity information.

To be able to collect additional information about account activity, you have to go through the criminal route and convince a prosecutor – no longer a judge, that you have a criminal case. Your counsel’s first role will be to convince the prosecutor that you are not simply trying to bend the criminal procedure for private purposes. The prosecutor will have extensive power to determine the facts including gathering any relevant account information, information about the account owner (irrespective of whether debtor is the legal owner of the account or not) and account activity. Also, bank secrecy does not apply when a crime has been – or is suspected to have been – committed. Mr. Lembo suggests that the criminal route is the right one under the fact pattern presented.

With respect to Canada, Ms. Abela explained that, contrary to Switzerland, if an attorney says that he/she is competent both in criminal and civil law, then you have likely knocked at the wrong door. Under the fact pattern, Ms. Abela would favor starting with a Mareva injunction, i.e., a civil action which will allow you to speedily freeze the assets. Client will have to show, among other things, grounds for believing the defendant has assets in the jurisdiction and real risk of removal of assets. A blanket order will allow the client to know if there are additional assets in the bank. A Mareva injunction does not require that Canada has jurisdiction over the matter, it can be used to preserve the status quo. Not providing the court with full and frank disclosure of all information regarding the matter could result in the Mareva being set aside.

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From the criminal perspective, if it is likely that a crime was committed, the Crown will rely on the fraud unit which carries out investigations of major frauds. Unless the police has a specific reason to move forward, i.e., that it is no just a private matter, it is likely that the investigation will proceed slowly. If the matter proceeds to the Crown, the Crown can rely on the criminal code to freeze the assets and take the lead on the matter.

Ms. Abela recommends starting with a Mareva injunction (the standard of proof is more easily met than under criminal rules) and, if the client has limited funds, taking the criminal route.

Ms. Lassoued explained that the United Arab Emirates has a civil law system similar to Switzerland and that in the proposed example, she would advise to follow the criminal route as civil procedure would likely not provide satisfactory remedies. The claimant would have to file a criminal complaint for compensation as a civil claimant to a criminal procedure. Ms. Lassoued explained further that little information is actually officially filed with the authorities as 80% of the UAE population is composed of expatriates from over different 200 countries and that there is no income tax.

Mr. Raia inquired about how things could get started in the UAE. Ms. Lassoued explained that the prosecutor needed to be convinced that the facts warranted the opening of a criminal investigation. The prosecutor is normally required to be provided with original documents which would have to be translated and legalized if they are not in Arabic. In addition, she explained that a freezing order could be obtained from the DIFC Courts pursuant to a foreign judgment. In fact, a judgment from the UK had served as the basis for the freezing of funds in a judgment rendered by the DIFC Courts (as opposed to onshore Dubai Courts) just a few days before the Section meeting.

Mr. Hunter explained that, in the United Kingdom, criminal authorities would not normally get involved in this situation as corporate entities would likely be able to access information needed and would favor keeping control on the proceedings. An injunction from a civil court will likely be obtained quickly; in an instance of particular urgency Mr. Hunter was able to get one by phone. Two different injunctions could be requested, a Mareva injunction that applies to the debtor’s assets and a separate proprietary injunction to attach ownership to the funds on the account. With respect to the latter, should the funds be removed from the account, two courses of action would be available, one against the bank for letting the money go and one against the company owner/beneficiary of the account for ordering the transfer of the funds.

Under UK rules, the client can ask the bank to provide all information relevant to the funds and their transfers. Under the constructive trust theory, the client has a legal right to track the money down and can only be stopped by a bona fide purchaser. Even in the case of a bona fide purchaser client would have a right against what was given in return for the property at stake. In some instances, if the proceeds of fraud were mixed with other money then the client may make the case that all the transfers out of the account are client's money. In the UK, civil remedies are more powerful than criminal ones.

The panelists explained, at Mr. Raia’s request, what claimant would have to show to the courts to ensure that proper compensation can be provided to whoever is inappropriately hurt by the freezing order. In the UK, the last audited account may be enough for a bona fide company, it always is a bit more complicated for an individual. Ms. Abela explained that a letter of credit may be enough in Canada. Mr. Raia commented that in Florida, to get similar remedy from a civil court it is likely that client will have to post...
bond, sometimes as much as twice the amount of the risk.

Mr. Raia added to the hypothetical by suggesting that the company in Florida has its creditors at the door and asking speakers whether filing for bankruptcy would impact their advice to client, e.g., by filing for bankruptcy client might keep creditors at bay but client may lose control to bankruptcy trustee.

Mr. Lembo explained that the situation would have little impact on his advice under Swiss law. With respect to the burden of proof under criminal law, you may have little evidence of the fraud at first but can still get the criminal investigation started if you can show it is likely that a crime occurred. Evidence must increase as the criminal procedure progresses, the civil party has to play an active role and support the prosecutor’s work. If the criminal investigation does not move at a normal pace, the person whose assets are frozen will be able to request that the assets be unfrozen. In order to avoid this risk, Mr. Lembo recommended that a client put in place a civil attachment as a safety net.

A US bankruptcy would not be recognized by Swiss courts, so it will likely be a race between creditors. To avoid the race, creditors in a US bankruptcy would have to file in Switzerland for recognition of the bankruptcy by Swiss courts. Such recognition would be allowed only if several conditions were verified including: assets in Switzerland, an enforceable US decree in bankruptcy, reciprocity between the foreign country and Switzerland (it is the case with respect to the US) and the absence of violation of Swiss public order. If the foreign bankruptcy is recognized in Switzerland, then all Swiss assets will be included.

Ms. Abela explained that the appointment of a trustee in a foreign jurisdiction would eliminate the rights of client in Canada (provided there is recognition in Canada). The requirements for the recognition of the US bankruptcy order by Canadian courts would include the absence of prejudice to a Canadian claimant, that it is not against public policy and that reciprocal recognition exists in the foreign country – which is the case with the US. They may be tactical reasons why claimant would want a trustee appointed but, Ms. Abela warned, claimant would be well advised to finish what is started, i.e., there is no point getting a judgment for recovery just before a trustee is appointed. There is a possibility for creditors to get organized to defend their interests directly and avoid the trustee by leveraging the Mareva injunction. This would be possible only if the creditors agree with one another.

Ms. Lassoued explained that the appointment of a trustee in the US would not affect client’s assets in the UAE were there is no insolvency law. Not all foreign judgments are enforceable – under the fact pattern there would be no recognition as there is no bilateral treaty between the US and the UAE. The civil route would be the most effective one.

Mr. Hunter explained that client must have a sufficiently arguable case that the bank has the money to get an account frozen in the UK. In the absence of any opposition or anyone to put up a fight, then creditors probably can differ having the trustee in bankruptcy appointed and get the money directly. Things will be more complicated if the fraudster attempts to turn things around and attack the creditor’s ability to sue. Usually courts have a low threshold for standing but creditors may want to have a liquidator appointed in the UK in support to the US bankruptcy. If there is a dispute with a third party there are arguable cases in which a creditor acting on his/her own behalf would want everything formalized and have other creditors as joint claimants.

Mr. Raia added to the hypothetical by asking what would change if the assets were traced to a separate jurisdiction and client does not yet have a final
judgment from a country in which there is a judicial cooperation treaty but never the less needs to collect information on money transfers.

Mr. Lembo explained that in Switzerland client would have to start criminal proceedings to get more than just a snapshot of a given account. The bank would then have to provide records over the past ten years. Once the information has been added to the criminal file, client acting as a civil party in the criminal procedure will have access to it and can transfer it abroad.

Ms. Abela explained that the US/Canada MLAT would likely apply to the hypothetical and, if client has reasonable grounds, information could be obtained even in the absence of a final decision. The RCMP can get disclosure orders under the criminal code. Ms. Lassoued explained that in the absence of court proceedings in the UAE it would be very difficult to get access to financial information. There is no bank secrecy as such, but disclosing confidential information is a criminal offence. If the bank was to receive an instruction from the UAE central bank, then it would very likely comply. The anti-money laundering unit of the central bank would be a good place to start, although information – if any – found will not necessarily be shared with client. An alternative could be to ask civil courts to appoint an expert to access the account information and provide a report. That report could be the basis for a request for additional information.
Where In The World Is Your Evidence? The Challenges of Gathering Electronic Information Worldwide For Litigation, Arbitration and Investigations

reported by Rob Corbet

This international panel discussion, chaired by Kenneth Rashbaum, and including the following speakers: Juliana Abrusio, Rob Corbet, Joe Raia, was set against a fact pattern whereby a multinational client’s General Counsel received subpoenas from the U.S. Securities and Exchange Commission seeking emails and other data over a four-year period across the company. The US parent company also received an order from a U.S. federal court directing compliance with litigation demands for production of email, texts and other personally identifiable data from the company’s facilities in China, France, Ireland and Brazil.

The session was lively and interactive. The panel examined the inherent tensions that exist between the immediate pressures faced by clients and their counsel in identifying, gathering, reviewing and transferring all potential evidence for the cases described and the legal, technical and regulatory challenges that restrict the processing and transfer of data across borders.

The complexity involved is huge. For example, we learned that the disclosure and discovery obligations in common law countries like the US and Ireland vary significantly from those in civil law jurisdictions like Brazil and mainland Europe. Further, the application of the broad rules governing the processing and disclosure of personal data in the EU are different in the context of criminal investigations than in civil cases. We heard of the emerging caselaw in Europe, Brazil and the US where the courts have struggled to balance the data protection and privacy rules enshrined in EU data protection laws against the principle that that courts should be able to determine cases based on the best available relevant evidence. The conversation bounced from an analysis of how metadata and IP addresses can be introduced in evidence through to discussions about BYOD (Bring Your Own Device) and the implications of the Snowden affair for European and US privacy laws.

The audience became heavily involved in the discussion, including some memorable contributions from Circuit Judge John F. Larkin of the Twelfth Judicial Circuit in Florida who spoke of the difficulties in keeping juries free of external influence during trials at a time when most people carry the Internet in their pockets.

Expertly moderated by Ken Rashbaum, the Panel offered practical guidance about how best to approach consent in the context of evidence gathering while also looking at legal tools like the Hague Convention and the Mutual Legal Assistance Treaty as a means of traversing the difficult territory involved.

Delegates left the session informed and entertained in relation to an emerging area that will continue to constantly evolve.

Panellists (from left to right), Rob Corbet, Juliana Abrusio, Kenneth Rashbaum and Joe Raia

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On the first day of the ABA SIL Fall Meeting in London, an attentive group of lawyers and law students listen to a panel discussion on REITs for Cross Border Investment in Real Estate: Is it Time? REIT stands for real estate investment trust. It is a vehicle to encourage investment in real estate by reducing taxation on the distribution of profits. One advantage of investing in a REIT rather than directly in real estate is that it is more liquid since shares in the REIT can be sold quicker than selling the real estate asset. The program chair and moderator was Ricardo León Santacruz, an attorney at Sánchez Devanny in Monterrey, Mexico.

Europe trails Asia with Real Estate REITs

Despite the introduction by the OECD of amendments to the OECD Model Tax Treaty, which provide guidelines for the taxation of REIT distribution, European countries have not developed real estate REITs as substantially as they have been developed in Asia. Foong Yuen Ping, a Partner at Allen & Gledhill in Singapore, highlighted the diversity and quantity of real estate REITs in Singapore. There are 29 separate REITs in the following separate sectors: Retail, Office, Hospitality, Serviced Apartments, Industry, Logistics, Health Care, and Diversified. 38% of the Singapore REITs invest in property outside of Singapore.

The session started with a presentation by Peter Castellon, a partner at Proskauer Rose in London, who was substituting for Peter Fass, considered the godfather of REITs, but who was unfortunately unable to travel to London due to an injury. Castellon gave an overview of the history and basic structure of REITs. In the U.S., REITs are usually not subject to federal or state income tax. Most REITs in the US are established in the State of Maryland. There are restrictions on what assets a REIT can own. Usually at least 75% must be real estate. Also, REITs are required to distribute a high percentage of its return on investment to shareholders, typically 90%.

Jeremy Cape, a Partner at Dentons in London, discussed REITs in the UK. To date only 28 have been established. The key aspect in the UK is that the REIT itself is not subject to taxation. Cape felt that more investors should consider the REIT structure in the UK, even if they were non UK residents, because of the tax advantages.

Giovanni Gregoratti, Managing Director, Real Estate & Lodging Group Investment Banking at Citigroup in London, explained that the slow growth of REITs in Europe was due to the financial crisis. Whereas the US moved quickly to foreclose on toxic assets in order to clean up the real estate mess caused by subprime mortgages, Europe is still in the process of recovering. The UK and Ireland have been more aggressive than the rest of Europe in cleaning up the mess. While large sums of equity have been raised in Europe, few distressed properties have been available as banks have been reluctant to sell such properties at a large discount. He predicts that an increase in the number of real estate transactions in Europe will lead to a large increase in the activity of REITs in Europe.
To negotiate a real estate joint venture requires attention to many items. Phil Skinner, a Partner at Arnall Golden and Gregory in Atlanta, Georgia, the program chair/moderator of this program held on the final day of the London Fall Meeting, explained that with the marriage of a joint venture between a developer and an investor, love doesn’t come until the joint venture makes money.

Skinner led an interactive discussion between the four panelists and the audience on the key elements which must be considered before taking the vows of a joint venture. Jan Buechsenstein, from the General Counsel Division of Credit Suisse in Zurich, discussed what Credit Suisse looked for in a developer for a recent large office building project in Canada. They married a smaller developer because they were impressed with his personal concept for a unique development. They made sure that there was a key player provision in the JV agreement; if anything happened to this developer, they could replace him with another developer, although the developer and his family would still retain financial participation in the project.

The author of Cross Border Real Estate Practice, Terry Selzer, Head of Cross Border Transactions at Husen Advokater in Copenhagen, Denmark, emphasized that the most important element necessary for a successful joint venture marriage is trust. There was agreement amongst the panelists that although the investor might have greater negotiating power than the developer, it was important not to fleece the developer, since during the development the investor must rely on the developer’s trust that the development will be carried out according to the plans of the joint venture. Selzer spelled out four issues that must be consider before the negotiations: 1. Are there restrictions on foreign ownership in the country where the property is? 2. How safe and stable is the country where the property is located? 3. Are there other restrictions (zoning, labor laws, etc.) that will have a negative affect on the project? and 4. How flexible are currency exchange rates and the regulation on capital flow out of the country?

Douglas Harrison of Stikeman Elliott in Toronto led the discussion of various dispute resolution provisions to be considered for a joint venture. While arbitration may be the norm for disputes about the overall agreement, there is often a stage process where parties must try to resolve the dispute before seeking arbitration. Also, many development issues need immediate decisions during construction and disputes over these are usually referred to some type of expert, or independent third party, for a timely decision.

Candice Blackwood, at partner at Berwin Leighton Paisner in London, discussed the use of public private partnership JVs in the health care industry in the UK. She pointed out that in the UK the typical structure used for a joint venture is a limited liability company.

There was agreement that in cross border joint ventures one must be aware of the difficulty of translating legal terms. In most real estate joint venture, while the main framework agreement might be in English, the agreements affecting the real estate must be in the language of the country where the real estate is located.

A highlight of this program was that there was a real interaction with the audience and many questions and points were raised by the attentive audience which the panelists answered and discussed in greater detail.

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The panel (moderated by Bart Legum, Paris, with panelists Ted Edelman, New York, Helen Mountfield QC, London, and Paul Starrett, California) discussed important cross-border litigation issues, encouraging the audience to address issues early on, carefully assess risks involving a foreign jurisdiction, look for solutions while questioning whether “legal imperialism” takes place. Legal differences are closely connected to deep-seated cultural and philosophical differences.

The first discussion point concerned discovery of data in foreign countries, i.e., which laws and technological challenges exist, such as data protection, data protection export, blocking statutes, etc. The European perspective on data privacy is more restrictive. The French employment law has provisions which do not allow an employer to access the portion of an employee’s e-mail that is personal information. Using local counsel and applying national secret laws (for example in China and Korea) is advisable. A review of the data in the jurisdiction was recommended. The many levels of data recovery require precise planning of data collection, including a budget and time-line.

US Agencies such as the SEC are “at least as inflexible as US Courts”. Law firms looking for guidance will be told that they have to solve their own problem - with the SEC claiming that there is no precedent. On the other hand, citing a French Blocking Statute to an US Judge will probably work and protect the French client. The theme "big data in big cases" invited a discussion about efficiency and speedy trials demanded by the rules of civil procedure. The high corporate cost burden of litigation was put in perspective and the question posed: "Do we need to do the business of dispute resolution in the US better?", "What is best practice?" and "What is the most efficient way to get data?" Consensus was that the amount of discovery in arbitration still pales in comparison to the amount in litigation. With more data than ever produced on a daily basis in the US, the amount available is completely unthinkable. "Any and all" have become dirty words. The development of stronger ethical rules for disclosure and analytics to reduce costs was suggested. An attorney from Dubai noted only the US demanded "huge amounts of documents within a short time."

US Courts have not abided by the Hague Evidence Convention, treating the Convention as "optional" rather than "mandatory". Civil law tradition sees the function of taking evidence as an official function that private parties should not interfere with. In Switzerland, Art. 271 Swiss Penal Code makes it a crime to collect evidence for use by foreign authorities. Still, US Courts and the majority of ABA members do not desire to change the existing perception towards “foreign” data/evidence.
“Doing a Cross Border Deal: Ethics and the M&A Lawyers”
reported by Rene Alva

On Wednesday October 16, 2013 as things were starting on the second day of the ABA SIL Fall Meeting in London, in the Grand Ballroom 3 of the London Hilton on Park Lane, many international lawyers gathered for this program, which was sponsored by the International M&A and Joint Venture and the International Private Equity Committees as well as the Young Lawyers Interest Network.

The panel for such program was integrated by Messrs. Jeff Kerbel (Bennett Jones, Toronto, Canada), as Moderator, Joseph Basile (Weil, Gotshal & Manges, LLP, Boston, USA), Marcelo Bombau (M&M Bomchil, Buenos Aires, Argentina), Jeremy McClane (Harvard Law School, Boston, USA) and Ms. Frances Murphy (Slaughter and May, London, UK); each speaker having different credentials and backgrounds, allowing the attendees to have a certain insight to the different approaches on how a lawyer may need to take certain ethics differences into account when doing an international deal.

As an introduction to the program, the panelists opted to first provide a theoretical explanation on how the primary principals of ethics are taught to law students within their own legal systems; helping attendees understand how ethics

As a very didactic manner of letting the audience grasp the many ethics issues that may arise in a very simple international business transaction, members of the panel had prepared a hypothetical case that provided scenarios to which we could relate regardless of which side of the negotiations table we may be on, there were situations both from a seller’s and buyer’s perspective (the case consisted of a hostile bid of a U.K. company for a US company) and from the reaction of the attendees, it was evident that many of us had been in situations similar to those of the case and could easily relate therewith.

During the program and while discussing the scenarios of the case, the panel, through its moderator, made this program a dynamic one by allowing the attendees to participate with comments and questions at any point in time, even by letting us share our own experiences in cases in which an ethical issue may have arisen. Making the program participatory between the panelists and the attendees permitted us to have a better knowledge on what kind of ethical issues we may face in other latitudes in the world while doing a transaction with clients that operate in different countries; especially since what we may believe to be an important issue to be reported may be deemed nonmaterial by other counsel who we may be working with.

The program accomplished its purpose of giving international lawyers knowledge of ethical issues that one may face as counsel of an international company, targeting an international transaction in which many jurisdictions are involved.

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“Where Did All the Women Go? The Discrepancy Between Gender Neutral Hiring and the Lack of Female Leadership in International Law Firms” reported by Gretchen Bellamy

When entering the legal profession, the number of diverse entry-level attorneys is substantial. However, as lawyers become more senior within their practices, the number of diverse/women senior attorneys drops.

There are several perceived problems (career barriers) that were discussed namely, lack of flexible working schedules; organization culture; infrastructure not modern; limited opportunities for promotion; attitudes against women.

These career barriers are not due to some inherent fault of men or their deliberate attempts to keep women down.

The question that needs to be asked is why are things going backwards? Clearly, it is not merely a matter of time passing before women will be promoted or be seen as equals because a significant period of time has already passed.

There are a number of solutions that could be used to combat the loss of women at the top in firms. Those include offering flexible working schedules coupled with performance measure that are sophisticated and clear. It is also necessary for firms to look at what they needs in terms of partnership versus workforce. Firms should discuss targets, as opposed to quotas (which are imposed). Other solutions are client-driven, such as working for corporations as in-house counsel. Keep in mind that 20% of the women entering law firms become partners. The question is why aren’t women getting to the point in their career where they would be considered for partner; and instead are leaving before they get to that point. Looking at the statistics of the percentage of women with law degrees versus the percentage in the workforce working as lawyers is disheartening.

There should be strategic management in diversity and inclusion programs. Bear in mind the barriers to partnership are. They are either the individual creating her own barriers or the processes (unconscious bias, where talent is sought, skewing trends toward men). Less than 10% of women are equity partners. Men are ten times more likely to become partner. Sixty-percent of new partners would have to be women to reach the 2020 goal of 30% women partners. It has been shown that to have a balanced team, it must have at least 30% of either gender represented.

There needs to be a review the talent mechanism as well as the identification process.

Women should also be advocating for each other. Should women be raising their hands and promoting themselves? Women should look at successful people and mimic what makes them successful. Many times, the issue is a lack of confidence in the women. There is a negative correlation of assertive women with promotion.

Norway has a statutory requirement that 40% of board membership must be women.

The final message the panelists left the audience with, was, in light of all these issues, shouldn’t there be other markers of merit?

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In what was undoubtedly one of the most uniquely presented programmes at the Fall Conference, this diverse panel of international in-house and outside counsel metaphorically “jousted” in a *Jeopardy!* style “quiz-bate” on the most commonly discussed law firm management strategies for in-house and general counsel, including the ethical management issues that their use may trigger.

The panellists’ teams, *Veritas Est Aeterna* and *Veni, Vidi, Vici*, were comprised of in-house counsel and outside counsel, respectively. *Veritas Est Aeterna* included Ian Brown, Senior Legal Adviser, 3M Corporation, London; Dr. Christopher C. King, Hunter Douglas, NV, Luzern, Switzerland; Roger Williams, Philip Morris International Management SA, Lausanne, Switzerland; and Isabelle Mayer, Moet Hennessy Europe. While *Veni, Vidi, Vici* included Susan de Silva, Bird & Bird, Singapore; Wolfgang Kapek, Taylor Wessing, Vienna, Austria; Kayra Ucer, Hergün Bilgen Özeke Attorney Partnership, Istanbul, Turkey; and Peggy Kubicz Hall, Greene Espel PLLP, Minneapolis, Minnesota, United States

With the in-house counsel winning the toss, they chose to open on the topic of Engagement and Billing. First up to bat for the team was Roger Williams, who juxtaposed the pressure on in-house counsel to reduce legal spend, in contrast with the outside counsel's need to increase revenue. Revealing some useful insider knowledge to the assembled audience, illustrated by his own experiences, Roger chose to focus in the common middle ground whereby both parties should aim to achieve a scenario that results in value adding and cost effective solutions for the client. In riposte, Kayra Ucer was exceptionally gracious in accepting most of Mr. Williams’ points! She also warned of the ever increasing danger of firms competing on price which she contended damaged the reputation of the profession and leads to lower quality services. With such collegiality on show during round one, it was unsurprising that the audience (including Kayra!) voted for Team *Veritas Est Aeterna* who leaped into a 300 point lead. The next topic for debate involved the often prickly issue of Matter Management, and the extent to which in-house counsel should be involved in dealing with the day to day running of the matter, as well as the amount of substantive work that they undertake. Notwithstanding Ian Brown’s insights and illuminating contribution, outside counsel carried this round and scored 400 points.

During the third round, Kayra Ucer was again flying the flag for the outside counsel against Isabelle Mayer on the prickly issue of who should control staffing matters, when the fire alarm went off, requiring a mass exodus. It is a testament to the quality of the panel that after returning, the audience size had increased! Notwithstanding the interruption, Kayra chalked up another 500 points for the outside counsel team.

The next few rounds on the topics of client interaction management via in-house counsel, and the complex considerations involved in assessing conflicts, as well as when it was appropriate to rely on and reject waivers, each produced interesting contributions from Roger Williams, Chris King, Wolfgang Kapek and the other panel members as the tit-for-tat exchanges the format required inspired interesting debates. The
audience remained engaged; and like emperors of old in the Roman Coliseum, dispensed their judgment quickly on the merits of each contribution as the rounds passed.

Our quiz master extraordinaire, William Black (doing a very passable impression of Alex Trebek) was manipulating the very advanced game board (!) with style and precision, and kept up the pace as the teams charged into the penultimate round. There, Dr. Christopher King gave a very reasoned and fair analysis of who should take responsibility for strategy in a matter, pointing out that shared responsibility was key. Although opening with the line: “I violently disagree…”, Susan De Silva demonstrated stunning sportsmanship by again agreeing with the opposition. This reporter is sure that the in-house lawyers were thinking that they have never had such amenable outside lawyers! Unsurprisingly, the in-house team picked up another 300 points.

After a close battle, it came down to FINAL JEOPARDY to see who would risk it all in the final challenge to claim victory. The complex, multi-part question laid before the teams was whether blanket waivers were a good thing, should the client be flexible in granting permissible waivers, and how should general counsel treat waivers in the context of partner moves? Peggy Kubicz Hall led the in-house team into the fray and contended that while waivers were a useful technique for large firms to manage conflicts, such waivers must be carefully managed and given in writing. Her experience was, that outside of the United States, scepticism attended these forms; meaning that a certain degree of sophistication in the documentation of waivers is required. She also felt that pressure should not be brought to bear in requesting such waivers. In reply, Isabelle Meyer for the in-house counsel team urged caution and impressed on private practitioners the importance of not attempting to minimize the potential consequences of a conflict in an aim to secure work in the short term. The key is to provide as fulsome information as possible in explaining the situation to their client, so that an informed decision could be reached. Having gambled their total points to date, the in-house counsel won this round and galloped to victory on a final score line of 1,300 points to 900!

Congratulations to Team Veritas Est Aeterna for “winning” this match, and commiserations to Veni Vidi Vici. The thoroughly enjoyable format should be re-visited for future topics and perhaps, there is scope for a re-match in Buenos Aires?

Panelists (L-R) Ian Brown, Isabelle Mayer, Wolfgang Kapek, Kayra Ucer, Dr. Christopher C. King, Micheál Grace (our reporter), Peggy Kubicz Hall, Susan de Silva, Roger Williams, and William Black (Moderator)
RESOLUTION

RESOLVED, that the American Bar Association supports modernization and simplification of the requirements and procedures related to verification of signatures in cross-border contexts, for example, by modifying uniform and model laws to take advantage of cloud-based and other technological progress and by increasing reciprocal recognition among jurisdictions.
REPORT

This resolution supports modernization and simplification of the requirements and procedures related to verification of signatures in cross-border contexts, i.e., verification of signatures affixed to documents signed in one country for use outside that country’s borders. As explained below, the existing requirements and procedures are based on treaties concluded in 1961 and 1963, as well as statutory frameworks, that do not take fully into account modern developments in best practices, particularly the use of electronic communications. For practical reasons associated with timelines for implementation and the priorities of state actors, treaty revision is unlikely to be the preferred path forward. Yet, the regulation of signature verification and notarial practice touches on territorial sovereignty, and reciprocal recognition of modernized and simplified procedures will be a key element of successful and appropriate reform. A key aspect of this resolution is to assure cross-border recognition, while avoiding placing those involved in the verification process in jeopardy of infringing foreign territorial sovereignty.

BACKGROUND

National legal systems have long accounted for the need to verify the authenticity of signatures issued in one country for use in another. These systems rely on verifying the identity (and sometimes capacity) of a signatory through a notary public or other individual similarly exercising governmental authority to witness and attest to the act of one affixing one’s signature. These systems of verification, witnessing and attestation increase public trust in the authenticity of the act and reduce the risk of another governmental authority questioning the legitimacy of the act.

Within the United States, this verification, witnessing and attestation process is implemented through a notary public, under frameworks established generally by state law. Within civil law systems, the role of attestation is merely one aspect of a civil law notary’s function. In the civil law countries, as well as in some common law countries, the responsibilities of notaries are much greater than those of a US notary public, such notaries being subject to greater regulation, having greater educational qualifications, and charging greater professional fees. Whether in civil or common law jurisdictions, the verification of identity is accomplished predominantly by the attesting person’s examination of identity documents to verify that the signatory is the person who he or she claims to be. In many countries, the notary may also be asked to examine corporate.

documents necessary to establish the signatory’s power and capacity to execute the instrument.

National legal systems vary in determining when signatures must be verified through exercise of public authority. In the United States, verified and authenticated signatures are typically required in connection with conveyances of real property interests to be recorded in public records and in connection with transactions requiring sworn oaths. Various civil law jurisdictions require verification and authentication for these acts and for various others, including formation of corporate entities, donations and the giving of a security interest, even over collateral that is not real property.

Two treaties provide widely-used frameworks in connection with the cross-border recognition of attestation and verification of a signatory to a document: the Hague Convention of October 5, 1961, Abolishing the Requirement of Legalisation for Foreign Public Documents, and the Vienna Convention on Consular Relations of April 24, 1963. Both of these treaties predate the widespread use of electronic signatures and, as a result, their current application does not yet embrace fully the opportunities afforded by widely accepted technological developments of the global market economy. Note however, the Hague Conference on Private International Law’s e-APP program, implemented in part in over 150 jurisdictions, provides for the issuance of electronic apostilles and online registers. This program was undertaken based on the conclusion of the 2003 Special Commission of the Hague Conference recognizing that the Apostille Convention could be applied to electronic media without amendment, http://www.hcch.net/index_en.php?act=text.display&tid=37.

In the more than 50 years since the ratification of the two seminal treaties, the emergence of the internet, the electronic “cloud” that hosts information in a secure environment, and the acceptance of electronic signatures admitted by best business practices warrant the modernization and simplification of the requirements and procedures related to verification of signatures in cross-border contexts.

EXISTING INTERNATIONAL AGREEMENTS

The Hague Convention of October 5, 1961, Abolishing the Requirement of Legalisation for Foreign Public Documents (more commonly referred to as “The Hague Apostille Convention”), is currently in force in 104 countries. The treaty provides for the recognition of public documents, including the attestation of signatures if defined as such in the law of the state in which they are executed, by means of an apostille, a certification issued by a governmental authority which authenticates the public nature of the seal and signature of the person executing the document. Through The Hague Apostille Convention, an attestation of a signature by a California notary
public, for example, shall be recognized in any country party to the Convention, provided the attestation is presented to the relevant authorities accompanied by an apostille completed in accordance with Convention requirements, pursuant to which a recognized authority affirms the authenticity of the seal and signature of the California notary public that executed the document.

Non-treaty mechanisms predate The Hague Apostille Convention with respect to the recognition of extraterritorial attestations of signatures. The so-called “legalization” of a signature may be accomplished outside the Conventions by the certification of an attestation by an official of the country in which the signature is given and attested, subsequently authenticated by a consular official from the country in which the attestation is to be used. As an example, if a document is witnessed by a notary in Canada, which is not party to The Hague Apostille Convention, for use in Mexico, the attestation would require an attestation by a Canadian official within its foreign ministry followed by “legalization” of a Mexican consular official in Canada.

The Vienna Convention on Consular Relations (“Vienna Convention”) of April 24, 1963, defines a framework for consular relations between independent countries. The treaty, in force in 176 countries, defines permissible consular intercourse as part of its objective to further business and economic relations between countries. Consistent with that goal, consular officials may, within the consular district in which they exercise their functions, attest to the validity of signatures for 2. Due to the increasingly global nature of law practice, law students have begun to participate globally in internships and externships in law firms, international organizations and other opportunities which are intended to make these students more responsive to the increasingly global demand for legal services not restricted to one’s own national borders. When those law students later apply for admission to practice in a state of the United States, the relevant authority typically requires the applicant to obtain an affidavit from their former international “employer” describing work performed and whether they met at least minimum standards expected for a law student. Many of these interns are supervised in the international setting by attorneys or legal professionals whose professional licenses (if they are required to have one) or other legal credentials are not furnished by an authority in the United States. Those bar applicants who seek to take the New York State Bar examination, for example, are required to have that statement “notarized,” consistent with the U.S. understanding of a “notary’s” function. For countries in which the person giving an attestation is a degree-bearing, licensed professional equivalent to an attorney, the solemnity of the act, the professional responsibility—and the fees that necessarily follow—are typically far greater than in the U.S. If we consider that a multilateral institution such as an international tribunal may have as many as 80 to 90 interns rotating every three months, the “notarial” burden is significant. Adding to this burden is a cost charged by a local notaris (for attestation in the Netherlands) of between €50 and €300, far exceeding the budgetary constraints of a publicly-funded institution, its individual staff attorneys or the volunteer interns. These circumstances force an honest assessment of whether the cost may deter U.S. law students from accessing important educational opportunities or publicly-funded entities from giving these students the chance. The problem worsens as some publicly-funded entities report that on occasion they are unable to obtain appointments with U.S. consular officials due to security restrictions or workload limitations to perform the attestation.
purposes of their country’s legal system. In general, within the legal systems of countries in which this treaty is in force, the provisions of domestic law that would otherwise accord a monopoly to the domestic attestation process do not apply to consular officials in the exercise of their functions. The Vienna Convention does not expressly deal with cross-border recognition of notarial acts; rather, it merely provides that the performance of notarial acts is a recognized consular function. It is the law of the state in which the document is to be used that gives effect to a notarial act performed by one of its consular officials. In the United States, that is generally a matter for state codes and rules of evidence, e.g. California Civil Code §1183.

THE CASE FOR MODERNIZATION AND SIMPLIFICATION

The increasingly transnational marketplace does not confine itself to the established mechanisms of verification of the validity of signatures, and the attestation of such verification through public authorities. Movements of goods and services, and capital across borders have long presented challenges in providing and recognizing attestations of the validity of signatures across borders.

A basic example of the need for modernization, in addition to the challenges of commercial, property and family matters, extends even to the role of legal interns. The cost barrier and the absence of a viable alternative highlight an “access to justice” issue for persons endeavoring to serve these multilateral entities.

Secure electronic signatures are increasingly employed for the conclusion of contracts of many types. The United Nations Convention on the Use of Electronic Communications in International Contracts (2006), which applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different countries, seeks to overcome barriers in domestic legislation and international treaties to the use of electronic signatures. The American Bar Association adopted resolutions urging U.S. ratification of this convention in 2006 and 2008. Private sector, for-profit businesses and services such as Symantec, McAfee, Rightsignature, Echosign (Adobe), DocuSign, Silanis Technology, Sertifi, and others, provide various technical and operational frameworks for assurance of the validity of an electronic signature.

The United Nations Centre for Trade Facilitation and Electronic Business (“UN/CEFACT”), part of the Economic Commission for Europe (“ECE”), is in the process of updating its Recommendation 14, “Authentication of Trade Documents”, to promote elimination of unnecessary signature requirements in trade documents or, in the alternative, conversion to

electronic signatures. And, the International Telecommunications Union (“ITU”) has been engaging in an EU-funded project to enact a wide variety of electronic commerce (including e-signature) laws in countries in the Caribbean, Africa, and the Pacific.

Increasingly, domestic legislation contemplates recognition of such electronically signed documents for legal purposes within a country. UNCITRAL’s two model laws, the 1996 Model Law on Electronic Commerce and the 2001 Model Law on Electronic Signatures, have been adopted in a limited, but growing number of countries.

In the United States, the Uniform Electronic Transaction Act (“UETA”), promulgated by the Uniform Law Commission in 1999, has been the basis of legislation in each of the states (indeed 47 states, the District of Columbia and Puerto Rico), with the exception of Illinois, New York and Washington, which have legislated independently. UETA applies only where the parties agree to conduct a transaction by electronic means, and provides for the legal equivalence of electronic records and signature to their paper counterparts. As to the required activity of a notary public, UETA provides that “[i]f a law requires that a signature be notarized, the requirement is satisfied with respect to an electronic signature if an electronic record includes, in addition to the electronic signature to be notarized, the electronic signature of a notary public together with all other information required to be included in a notarization by other applicable law.” It does not eliminate the other requirements of notarization, such as presence of the notary in the room with the person signing the document or verification of the person's identity.

The federal Electronic Signatures in Global and National Commerce Act (“E-SIGN”), enacted in the United States in 2000, also includes the following provision on notarization and acknowledgement:

“If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.”

(This E-SIGN provision is superseded by state law for states that have adopted the 1999 version of UETA.) In addition to promoting the use of e-signatures, contracts and records domestically, E-SIGN requires the Secretary of Commerce to promote the acceptance and use of electronic signatures internationally, and to take a nondiscriminatory approach to electronic signatures and authentication methods from other jurisdictions.
The historical justification for the existing restrictions related to attestation and verification of signatures seems tied to a world of restricted communications, isolated legal systems, and limited literacy even among merchants. In the current globalized economy, such limitations increasingly burden economic activity and place potential restraints on trade. The question is whether, in today’s 21st century market place, prior solutions remain adequate. Whether the circumstances in which notarization is required can be constrained should be evaluated and the legal mechanisms governing notarization merit revisiting.

Within the United States, the Revised Uniform Law on Notarial Acts of the Uniform Law Commission and the Model Civil Law Notary Act of the National Association of Civil Law Notaries would serve as foci of normative modernization and simplification. What follows is an example of how the Revised Uniform Law on Notarial Acts might be modified in the sense of the current proposed resolution.

Further update the Revised Uniform Law on Notarial Acts as follows (new and deleted text is shown as respectively underscored or stricken through):

Update Section 6 to read:

SECTION 6. PERSONAL APPEARANCE REQUIRED.

(a) If a notarial act relates to a statement made in or a signature executed on a record, the individual making the statement or executing the signature shall appear personally before the notarial officer.

(b) Provided that any jurisdiction in which an appearing individual is located not deem any appearance or associated notarization by electronic means as here contemplated an act in infringement of its territorial sovereignty (as evidenced by its adoption of this subsection (b) or as recognized by the United States Department of State), such personal appearance may be accomplished by electronic means that allow the notarial officer: (i) properly to identify the individual making the statement or executing the signature, (ii) to be satisfied that the individual is competent and has the capacity to execute the record, and (iii) to be satisfied that the individual’s signature is knowingly and voluntarily made.

Update “Comment” of Section 6 to read:

Comment

Subsection (a) provides a general rule that expressly requires that when an individual is making a statement or executing a record with regard to which a notarial act will be performed by a notarial officer, the individual must appear before the officer to make the statement or execute the record.
Thus, an individual who is acknowledging a record or verifying a statement on oath or affirmation before a notarial officer, or an individual whose signature is being witnessed or attested by a notarial officer, must appear before the officer to perform the specified function. See *Vanura v. Katris*, 907 N.E.2d 814, 391 Ill. App. 3 350 (2009) which involved a notary public who performed notarial acts without the individual signing the instrument personally appearing before the notary.

To provide assurance to persons relying on the system of notarial acts authorized by this Act, notarial officers must take reasonable steps to assure the integrity of the system. It is by personal appearance before the notarial officer that the individual making a statement or executing a record may be properly identified by the notarial officer (see Section 7). It is also by personal appearance before the notarial officer that the officer may be satisfied that (1) the individual is competent and has the capacity to execute the record, and (2) the individual’s signature is knowingly and voluntarily made (see Section 8(a)).

Under the general rule provided in Subsection (a), personal appearance does not include an “appearance” by video technology, even if the video is “live” or synchronous. Nor does it include an “appearance” by audio technology, such as a telephone. At the time that this act was being drafted, those methods of “appearance” did not provide sufficient opportunity for the notarial officer to identify the individual fully and properly; nor did they allow the officer sufficient opportunity to evaluate whether the individual has the competency or capacity to execute the record or whether the record is knowingly and voluntarily made.

Notwithstanding the foregoing, technical progress has established some electronic means, including streaming video technology, that enable the notarial officer to discharge the above mentioned duties and obligations of the notarial officer. Therefore, Subsection (b) posits an exception in which the notarial act may be performed with personal appearance via such electronic means; provided that, the jurisdiction in which the individual so appearing is located has recognized such an appearance not to be an infringement of its territorial sovereignty.

The electronic means adequate to enable the notarial officer to discharge the required duties potentially include video technology, mechanisms of electronic signature that inherently certify the identity of a signatory and the signatory’s competence, and audio technology, all provided that the notarial officer can discharge the officer’s duty and obligation, and exercise the officer’s rights, under this Act.

The requirement of reciprocity between the jurisdiction in which the notarial act is performed and the appearing individual is located would be satisfied by adoption of this Subsection (b) or recognition of such reciprocity by the United States Department of State.
Update Section 27 to read:

SECTION 27. RULES.

(a) The [commissioning officer or agency] may adopt rules to implement this [act]. Rules adopted regarding the performance of notarial acts with respect to electronic records may not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification. The rules may: . . .

(x) include provisions to ensure the reliability of the electronic means to be used for personal appearance:

The purpose of this illustrative modification is to accomplish notarial acts in which the individual whose signature is to be notarized (the “Applicant”) is not physically present before the notarial officer, but rather personal appearance is instead achieved via electronic means.

To fulfill this purpose, the existing requirement of an Applicant's personal appearance that is considered to require a physical presence before a notarial officer would be relaxed provided that certain conditions are satisfied. Such conditions include the reliability of the electronic means to be used for the notarial act and the reciprocity between jurisdictions where the notarial officer and the Applicant are respectively present when the notarial act is performed. The electronic means for this purpose must enable the notarial officers to discharge their duties and obligations and perform their rights properly under the Revised Uniform Law on Notarial Acts. Such electronic means would be considered potentially to include live or synchronous video technology, and in case of the affixation of an electronic signature, also audio presence. As to the provision for reciprocity, this modification is intended to enable the Applicant to obtain a notarization regardless of the Applicant's location, that may be within the state where the notarial officer is located and the notarial act is to be performed, or in another state or country, all without exposing the Applicant or the notarial officer to sanction by a jurisdiction that might deem all or part of the conduct to be an infringement of its territorial sovereignty.

On an international level, the modernization and simplification of norms pertaining to the attestation and verification of signatures might, if member states approve, be undertaken through negotiations at the Hague Conference on Private International Law, with a view toward complementing the work currently underway in respect of implementing electronic apostilles. Other international fora that present opportunities for useful normative development and reform include supranational and regional organizations, such as the European Union, the Organisation pour l’Harmonisation en Afrique du Droit de Affaires (“OHADA”), the South African Development Community (“SADAC”), the InterAmerican Juridical Committee, the Organization of American
States (“OAS”), the Association of Southeast Asia Nations (“ASEAN”), and the United Nations Economic and Social Commission for Asia and the Pacific (“UNESCAP”).

Focuses of any attempts to modernize and simplify the authentication and verification of signatures would be to incorporate concepts such as mutual recognition of the work of anyone authorized under domestic law to attest and verify signatures, and to develop new concepts to update the authentication and verification process.

**EXISTING AMERICAN BAR ASSOCIATION POLICY CONCERNING THE UNIFORM LAW COMMISSION’S REVISED UNIFORM LAW ON NOTARIAL ACTS AND CONCERNING SECURED LENDING**

The American Bar Association’s House of Delegates (“HOD”) recognized the value of re-examination of the legal frameworks supporting verification and attestation in 2011 when it endorsed the Uniform Law Commission’s Revised Uniform Law on Notarial Acts promulgated for consideration by state legislatures in 2010. Similarly, in 2011, the ABA HOD adopted a policy for the promotion of efforts to improve the legal frameworks globally for the conduct of secured lending, a subject matter with respect to which the formalities in many jurisdictions dealing with the identity of a signer can obstruct the efficient conduct of secured lending. This Resolution provides the opportunity to support the update of the legal frameworks for the verification and attestation of signatures across borders, and supports the existing ABA policies in this respect.

**CONCLUSION**

The traditional concepts of notarial verification and attestation of signatures under domestic and international law merit modernization and simplification to recognize the emerging technology and advances in transnational commercial practices. Modernization and simplification of the procedures for cost-effective and timely verification and authentication of signatures will reduce the outmoded impediments to economic activity.

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Reception at the Tate Britain Museum
The Europe Committee continuously seeks qualified professionals prepared to contribute their time and talents to continue developing a more active Committee. This is a prime opportunity to become involved with a community of lawyers that share an interest in Europe and European law, who are fellow American Bar Association members.

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