ABA SECTION OF INTERNATIONAL LAW

Spring Meeting, New York, April, 2010

SUMMARY

- Civil law and common law are different in many, many ways. Moreover, US common law is significantly different from common law elsewhere. Lawyers underestimate these differences. In particular, evidence and establishing credibility of evidence are different. The degree of certainty one must have before commencing a suit in a civil law country is higher than in the US.

- Arbitration is essentially a civil law process. Whether the place the arbitration is held has a civil law or common law tradition influences the operation of the proceeding. Discovery and evidence taking are major differences, often coming as great surprises to US attorneys. Arbitration rules differ dramatically depending on the administering organization and are often left to the arbitrators to make up as they go along. Potential arbitrators in major disputes belong to an informal club, with its own rules of behavior. Getting into the club is difficult.

- American concepts of attorney-client privilege and conflict of interest are not found in other countries.

- Lawyers in international litigation are remarkably creative and have developed many procedural defenses, for example the "Italian torpedo." A commercial lawyer entering a cross-border contract should assume litigation will result and anticipate where a claim will be brought, what the creative defenses might be and how to enforce a judgment. This may include – at the time of initial contract signing - appointing an agent for service of process and one with the power to sell security. Will a successful plaintiff be able to turn the judgment into exchangeable currency and remove it from the jurisdiction?

- A large number of international treaties, covenants, protocol, reservations and exceptions exist. Not all developed countries are parties, including the US.

- Standards of justice are shared world-wide at the vaguest levels, but as cases become more complex, views vary more and more as to what is "just". Non-governmental organizations (NGO's) can play a role in developing these standards. These standards begin as unenforceable but become more and more accepted and enforced, first in arbitrations and civil law countries. Another source of standards and enforcement is through contracts between commercial companies. For example, the public may punish a business which sells shoes made by child labor. To avoid that result, the company requires by contract that its suppliers not use child labor. The business may adopt an NGO's standards as its own.

- Antitrust laws are ignored at times of great financial distress. Companies may be "too big to fail" but smaller failing companies may be allowed to merge in hopes of surviving. US antitrust laws are enforced by courts. In other countries, regulatory authorities enforce them.

- The next bubble and crisis are coming. Candidates are China, commercial real estate, sovereign debt and pensions. Pension assets have not been revalued, although we know the values have dropped dramatically. So pension benefits are being paid out based on overstated asset values. Pension obligations are determined by applying interest rates which cannot be accurately predicted and which have dramatically different results. Ultimately the taxpayer will pay. The question is whether we can reduce the risk and develop the tools necessary to deal with the crisis.

- China's currency is undervalued by 25-40%. This constitutes an export subsidy. China also has export tariffs on raw materials. These also constitute export subsidies.

- A regulatory authority which can "write a check" like the US Federal Reserve Bank has greater influence on the entities regulated than an authority which cannot, such as the Securities and Exchange Commission. SEC regulations are meaningless if the agency is not given adequate funds and motivated staff to enforce them. Regulatory "flexibility" means uncertainty, which is not desirable in financial markets.

- The relationship among the home country, museums and private collectors for archeological treasures is complex. Without the market (and value) provided by collectors, many objects would not be protected at all. Many countries (for example the UK) have laws on the books but they are not enforced.

- Contractual choice of law may result in one of the parties (in particular a terminated employee) having a chance to pick among the law chosen by contract and one applicable by reason of his home country, the home country of his employer or the country where he performs services. Before selecting a particular court by contract, be sure the court has legal competency to hear the dispute. Also be sure it will not use its rules regarding transfer to pass the case to another court. Be sure the courts of the country where any judgment will have to be enforced will in fact do so.

- Trade patterns in good economic times do not require strong international agreements. In bad times, treaties are put under stress and the absence of treaty protection can be used against the weaker trade partner. Any unusual event may be used to disrupt international trade, such as calling flu "swine flu" and thereby permitting unscientific blocking of almost $1 billion in pork exports.

- In a major bankruptcy, the state is the lender of last resort. But a state has different investment considerations than a normal business or bank. It also has a different rhythm and different agencies, which may not readily cooperate. Its experts may not be experienced in setting commercial terms. A bankruptcy causes a ripple effect, especially if the bankrupt's suppliers are closely integrated in the industry supply chain. A supplier which loses a significant customer may not itself survive, bringing down its other customers, which are dependent on the supplier. In an international bankruptcy, the systems which allowed the enterprise to operate may collapse. The laws of personal liability in one country may create unexpected effects in other countries. The enterprise is integrated but the legal systems are not.

- The most important piece of equipment at a conference is a good sound system. Without it, even native English speakers cannot be understood.

COMMON LAW/CIVIL LAW

Various jurisdictions have different rules regarding attorney-client privilege, in particular with respect to house counsel. For example, in Japan, the legal advisor is often not admitted to the bar, but there is a tradition of respecting the confidentiality of his advice. Japan does not permit pre-trial discovery. Letters of intent are treated with varying degrees of enforceability. Some attorneys select US law to govern these pre-agreement negotiations and specify that they are otherwise not enforceable.

The concept of conflict of interest is not as sensitive in many countries as in the US. In some jurisdictions there may be very few law firms capable of handling a dispute; the same firm may represent various conflicting parties. If a client expects not to find his opponent represented by the same law firm, he may need to get an explicit agreement on this point.

After the end of the Soviet Union, the laws of Austria and Sweden were often used in Eastern Europe. Today, English and other Anglo-Saxon legal systems have gained influence. They are expensive, but the results are quite reliable. The English language has made inroads in the old Soviet client areas. The French are not happy with this development. Swiss law is often used in Serbia and Bulgaria.

When meeting a foreign negotiating team, it is important to determine (accurately) who is the most important member and make frequent eye contact with that person. The importance of age has shifted. Due to economic developments, younger people in China are more frequently the decision makers. A Westerner has to be very careful about the manner of questioning the other side or raising his/her voice.

MERGERS AND ACQUISITIONS

People who bought at the peak of the economic crisis did well. Baron Rothschild is said to have advised to “buy when there is blood in the streets.” It is a buyers’ market today, as seen in prices and in terms of purchase. Purchases are now mainly 1:1 negotiations, not auctions. Buyers are more willing to spend money on a thorough investigation of the target. There may be exceptions in the case of remarkably low prices, but then the buyer may want more conditions to closing and/or tougher representations and warranties. They survive longer and are subject to smaller baskets.

When considering agreeing to exclusive jurisdiction, consider which party is most likely to sue and where the defendant has its assets. Where will the judgment be enforced? What treaty applies to the enforcement of the judgment? The US does not have a treaty on enforcement of foreign judgments, but it is relatively easy to enforce them here under the Uniform Foreign Money Judgment Enforcement Act. The Dutch (for example) are not so likely to enforce US judgments. The US permits discovery and does not require the payment of the defendant’s legal fees, so the US is considered plaintiff-friendly. A party wishing to avoid litigation may prefer exclusive jurisdiction outside the US.

In the interpretation of contracts, the common law is more likely to look at the language and ignore the intent. Civil law countries are also more likely to find pre-contract agreements to be enforceable.

China is seeing a great many mergers of businesses and deals generally. Finding information on a target company and its owners and management may be quite difficult. The government approval process of cross-border

acquisitions may take 7-12 months. So conditions to closing must be thorough, to cover this long period. A potential buyer should consider forming a Chinese company to make the acquisition.

INTERNATIONAL INVESTMENT ARBITRATION

The various arbitration procedures differ in significant ways. Some offer general rules, but provide no administration of the process. This arrangement reduces the fees, but also provides fewer services. ICSID arbitration is administered by the organization but UNCITRAL arbitration is essential ad hoc. It is important to know how the chairman of the panel is selected and how various stages of the process are handled. For example, does a party have to go to the national courts to try to obtain discovery or provisional relief? ICSID does provide discovery and provisional relief. For these remedies under UNCITRAL a party must go to the national courts.

The different arbitration methods also have different jurisdictional hurdles.

How are possible conflicts of interest on the panel regulated? Some arbitration rules leave these questions to the panel itself to resolve, making it very difficult for a party to raise the question. Conflicts of interest are much easier to find today because so much about the arbitrators can be found on the Internet. But there are no clear rules on what constitutes a conflict.

The physical place of the arbitration may be different from the place of the administration.

Depending on the arbitration regime, some arbitration decisions can be appealed to a court, but others require a second arbitration. A party may be willing to arbitrate in a particular city, but that party may not want to go before the civil courts of that jurisdiction.

Even without specific rules, an arbitration panel may be more likely to permit discovery if the panel is sitting in the US. For Americans, the US is their first choice, with Canada and the UK as alternatives. Both those jurisdictions are familiar with (and not hostile to) discovery.

The production of evidence is an area of great dispute and disappointment in arbitration. There are few rules on this subject. The common law tradition is to allege a case and then hope to find documents to support it. The civil law tradition is to have the supporting evidence at the outset.

Privilege and confidentiality are other areas of conflicting legal tradition. These may be influenced more by the place of the arbitration than the rules of the arbitration organization.

Arbitrators belong to an informal club. The members of the panel know that and they will work to find a unanimous decision unless one of the members is not a full member of the club but instead on the fringe.

TRADE PROTECTIONISM

The World Trade Organization (WTO) has 41 signatories. It has a separate agreement on government procurement under the WTO. Recent US fiscal stimulus legislation includes “Buy American” provisions, but President Obama has stated that the US will honor its treaty obligations. The US Office of Management and Budget has been charged with adopting rules to implement this policy. There is a waiver procedure which permits the US to suspend this obligation in certain cases and buy from non-US sources. The waiver must be published in the US Code of Federal Regulation (CFR). Canadian authorities requested that the US grant a country-wide waiver from the applicability of the act. The US refused and used this Canadian request as a stick to force Canadian provinces to be subjected to

free trade provisions of earlier treaties such as NAFTA. This is a result the US had sought for 17 years. As a result, Canada gets access to US financial stimulus money and to some amounts after the stimulus money has been spent. A brief look at a Canadian website indicates that this is a "hot topic" in Canada. Some Canadian interests are very unhappy at this development.

Canada is the US's biggest trade partner and its biggest source of energy. Canada is a bigger market for the US than the EU. Furthermore, it is fully integrated with the US market. Some products cross the border repeatedly before being sold to a 3rd party. The US financial stimulus restrictions held up significant municipal projects for months because key project parts were sourced from Canada, such as large water filters manufactured by GE in Canada.

The "Buy American" provisions cut across well-established supplier relationships. Canadians had enjoyed open access to American markets for years, but Canada did not enjoy any treaty right. Canadian Provinces had ignored NAFTA. The "Buy American" provision changed this and they had to buy in to get assurance of this access.

On the US side, only 37 of the 50 states have agreed to be subject to the NAFTA provisions. The first "Buy American Act" (1933) applies only to goods, not to services.

"Buy China" provisions are not in reaction to the current US position. Chinese rules on this point go back to 2002. The country where the goods are made (not where the owner has its headquarters) determines the country of origin. So goods made for a US company in China are treated as Chinese. China is just beginning to look at the underlying intellectual property to decide where goods are made. So if they are made in China but under license from a German company, the goods are "German".

INTERNATIONAL TRADE IN ANCIENT ART

Until 1969 the US State Department would not help protect foreign archeological treasures. Increased thefts of American autos by Mexicans became a lever used by the Mexican government to force this issue. In 1972 the Mexico-US Treaty of Cooperation was signed to protect pre-Columbian artifacts (and possibly get the return of some stolen cars). Major markets in these items were not included, such as the UK and Switzerland.

A tension exists among the interests of local cultures, private collectors and museums. A policy discussion is ongoing as to whether prohibition on sale archeological protects the sites or only creates a black market. Museums and archeologists have legitimate interests as does the cultural homeland. There are two ways of dealing with these artifacts legislatively. The US lists items which *cannot* be imported. Other countries ban the importation (or exportation) of *all items* and then list exceptions. For example, China blocks the exportation of its entire cultural history, regardless of the value of the particular piece. Ancient coins cannot be legally bought and sold in the US, but this trade is largely unregulated elsewhere. The US State Department views this subject area as largely a diplomatic matter, giving little regard to the interests of museums and collectors.

Consider the UK. It has adopted the UNESCO cultural policy position but has done nothing to implement it. The UK has a criminal law regarding this kind of trade but has not had one criminal proceeding in 17 years.

The looting that occurs is a result of the marketplace. The protections offered foreign countries differ from country to country. The US has a Memorandum of Understanding with Italy (2001). Part of the agreement was the increase of long term art loans from Italy to the US. These have not resulted. These Memos have 5 year terms and then come up for renewal. The one with Italy is currently under discussion.

If objects are found improperly in the US, they are subject to forfeiture. Museums have an affirmative duty to review their objects to locate items looted during the Holocaust, but not with respect to other items.

As to the role of the market, without the value it places on objects, it is less likely that they would be preserved. Items which can be shown to be in the US legitimately are more valuable than those which are not properly documented and could be subject to forfeiture.

CASE LAW UNDER BRUSSELS CONVENTION and BRUSSELS I REGULATION

The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (also known as the Brussels Convention or the EEX Convention) regulates only some judgments. For example, it makes a difference under the Regulation whether the dispute is over a product or services. In *Falco Privatstiftung* the subject was the license of intellectual property, which was found *not* to constitute services. In the *Car Trim* decision, the issue was the degree of detail regarding the performance of the product supplied and whether that resulted in the creation of a service.

A speaker noted the need for certainty (rigidity) as opposed to flexibility and uncertainty due in part to the accession of former Soviet states to the agreement. Those countries desire and/or need the added security of certainty.

Under Article 23, the parties may choose an exclusive forum, regardless of their domiciles. Nevertheless, one of the parties may start an action elsewhere, despite its agreement, perhaps in a jurisdiction it believes will be more favorable to it or faster or slower than the one agreed to. The first case prevails over the agreed jurisdiction until the court in the first case decides otherwise. This is in accordance with the "mutual trust" principle of the Brussels Convention which states that all courts are equally competent – a statement we know not to be true.

The "Italian Torpedo" technique is a means of stalling IP litigation. The infringer brings the case in Italian courts. Once the court has the case, all other EU courts are blocked from taking up the same issue. Since the Italian courts take perhaps 7 years, the party claiming infringement is stuck awaiting a decision. The IP owner may try to get an injunction, but then if ruled against, the owner faces claims for monetary damages. This is based on Article 21 of the Brussels Convention.

The US sees some of these issues (*lis pendens, forum non conveniens*) differently, from a Constitutional perspective and as a matter of "due process." There are different types of jurisdiction in the US, general and specific, so the certainty sought by the Brussels Convention is not so valued. In addition, the US has the concept of *forum non conveniens* – not found in civil law countries or even in the UK. The jurisdiction of the defendant plays a bigger role in the US.

The US generally has no concept of *lis pendens* except in real estate, whereby a piece of real estate sold to a third party may be subject to the results of the suit.

How do US courts react when two parties are already involved in litigation in another (non-US) jurisdiction? The conservative US view is to ask whether the foreign action threatens US policy and what is the effect on comity. The more liberal US view is to avoid duplicative or vexatious litigation. US courts will grant injunctive relief – applying only to the US court. Consider two situations: 1) the parties have agreed to a particular court but one party files in its home jurisdiction; and 2) a party files suit despite an agreement to arbitrate. Federal courts *do* support arbitration. In a case brought also in Mexico, the US court noted that the Mexican proceeding dealt with Mexican issues and therefore allowed both cases to proceed. Both cases proceeded. US courts do not have the power to

stop a foreign arbitration. In another case, the parent of a party to an arbitration was brought into the proceeding despite not having agreed to the arbitration.

Under the Hague Convention on Choice of Courts, the parties may agree on a court and the excluded court will not accept the case. Note that the chosen court may refuse jurisdiction or may not have subject matter jurisdiction. For example, lawyers like the Delaware Chancery Court, but it will not hear cases on conventional breach of contract claims. Often the parties' agreement does not cover such a refusal.

Note that the court may have venue rules. If the court agreed upon does have venue rules, it may apply them to transfer the case to another court. The Convention permits such a transfer. If the court selected by the parties has no connection to the parties, the winner may face problems when it goes to enforce the decision in the loser's home court. There are subject matter exceptions such as for antitrust and intellectual property rights. If a court transfers the case over a party's objection, then the judgment might not be enforced.

INSOLVENCY

In the US auto industry, regardless of the value of saving Chrysler or GM, 90% of their parts came from the same suppliers. So if GM were allowed to go bankrupt, the other US car companies would also be directly affected because their suppliers might not survive. Chrysler needed (and got) small car technology, from Fiat. GM faced its legacy costs. Both had overly large dealer networks. Car companies cannot survive without offering owner warranties, so the governments offered them, too.

The GM and Chrysler restructurings were under Section 363 of the Bankruptcy Act – a sale of assets. Chrysler sold to a Fiat entity. GM did not have a 3rd party buyer, but sold to a newly formed entity. The labor union work rules and salary structures changed. Using a different method might have given some creditors more money, but the process would have taken longer and been more expensive.

The unique aspects of these transactions were the role of the US and Canadian governments. The North American supply chain was in danger. This chain is very closely integrated. The loss of jobs due to the shutdown of GM could have been many times more than just the GM jobs. Whole communities in Canada would have been badly hit. Half of Canada's budget deficit for 2009 resulted from its support for GM.

Government ownership of such enterprises shifts the agenda. US company management is charged with producing a profit for the company's shareholders. Government has different stakeholders and standards. Government has to "do the right thing." Also government usually moves at a different speed than private enterprise. Coordination among various government agencies is also difficult. In these cases, the government brought in private specialists. The government *did* think of the taxpayer as owner and creditor.

In the Lehman bankruptcy, their US attorneys had several hours' warning, not weeks' or even days'. Lehman's counterparties lost confidence in Lehman and demanded more collateral. The system had no slack in it and seized. Lehman was active in 40 countries and had 900 related entities. At the final board meeting, the Chairman of the SEC, Christopher Cox, actually attended. Cox told the board that bankruptcy was the only answer. He was asked whether he was telling Lehman to go into bankruptcy. After off line discussions with his staff, finally he said no, but the message was clear. Lehman filed at 1:45 am Monday morning. Actually the first entity to file was in the UK – Lehman International Inc. - due to stricter European laws which make management personally liable. PriceWaterhouse Coopers had determined the need to file. This was the largest Chapter 11 ever. The Federal Reserve was told about the "vast entanglement" of Lehman and claimed it understood the extent, but it did not.

As a direct result of the filing, the computer connection of the various Lehman entities to each other was immediately lost. So the people managing the various entities were "flying blind." The problems of coordinating the various entities, many of which are under different bankruptcy regimes, were extremely difficult to accomplish, especially since the different regimes had different attitudes about personal liability.

Ironically, Lehman lobbied for and obtained "safe harbor" protection for forward-looking statements made in the sale of securities. Securities Exchange Act Section 21E. This provision will likely stand in the way of Lehman's making claims regarding the sales of its assets.

ECONOMICS UNDER THE OBAMA ADMINISTRATION

FINANCIAL REGULATION - Financial regulation cannot change behavior radically but it can move the system towards taking fewer risks. The lack of consistency in policy created difficulties, for example the different treatment of Bear Stearns and Lehman. The Bear Stearns experience created expectations. There was no planning on either the government or private level. Shortly before the bankruptcy, Lehman had turned down a major infusion of Korean capital. The US Treasury asked for flexibility in the summer of 2008. But flexibility means a lack of predictability and so it may have unintended consequences. We have had politicians picking winners and losers on an ad hoc basis, which creates problems.

The point is not to prevent the next crisis but to lower the probability and prepare for it better.

There is a tension between crisis management and avoiding the crisis. In 2008, the policy makers decided to deal with the immediate problems and worry about the policy later. The next crisis growing appears to be sovereign debt. Funds set up to protect those at risk encourage them to take even bigger risks. And the funds set aside are likely to be used up. The system of protections favors big firms over smaller ones [said the speaker].

ANTITRUST - Antitrust concerns have taken a back seat during the crisis. The purpose of antitrust policy is to protect consumers, but it is only one tool. The Obama administration does seem to be concerned that firms are too big to fail. But does the Federal Trade Commission have the authority to implement this policy?

Note that in the US antitrust is not dealt with by regulators but by the enforcement of laws before courts. US authorities do not have the same powers as Europeans. In this regard, US courts are more important in this area. Section 2 of the Sherman Act (monopolization) and 7 of the Clayton Act (mergers which may lessen competition) are the main antitrust tools. The government does not want to punish success, even if it results in great size. The Bush Administration stated an antitrust policy near the end of his 2nd term and it was quickly reversed by President Obama. The US Supreme Court seems hostile to expanding Section 2.

The "news" is in Section 5 of the Federal Trade Commission Act (unfairness and deception). Section 5 is the wildcard. In the 1980's there were many cases under this Section, but they were defeated. We can also expect a Section 2 case. Merger Guidelines will also be revised. The 1968 Guidelines have been revised several times. The Herfindahl-Hirschman Index (HHI) Thresholds will be liberalized.

The current policy has been to either permit the merger or not. But we may begin to see more "behavioral modification" decisions, i.e. more actions, but not absolute prohibitions. Merger law in the US is consensus driven and changes are possible only at the edges. The "Chicago School" of antitrust analysis is under scrutiny.

Obama has been President for over a year, but has not made his mark in this area. [Possibly the economic crisis and health care reform are the reasons.]

TRADE – Although free trade is a noble goal, not every trade agreement is a good one. We need to be sure our trade partners play fair. But the US needs to stay active in this area. The US focuses more now on enforcement of existing agreements, especially at the WTO.

China has imposed export restraints on raw materials. This has the effect of driving up US prices and driving down the prices of Chinese competitive products.

The banana and beef disputes took years to resolve, but we finally have more access to the EU markets. Enforcement is not just a matter of litigation. In the case of the H1-N1 flu, import restrictions were put on pork in the name of health but without any scientific basis. 30 countries put on restrictions and cost us $900 million in sales.

In the Doha Round, the US position is moving from generalities to more sector-specific provisions. The US is also trying to reduce red-tape imposed by other countries, to encourage mid-sized US companies to export. Only 1% of small and mid-sized companies in the US export.

Chinese currency manipulation plays an important role in trade. It is 25-40% undervalued and functions as an export subsidy. Only exported goods enjoy this benefit. Countervailing duties could be imposed.

No one has a reliable idea of what the value is of many assets. In the case of pension funds, retirees are getting benefits today at rates (based on values) which may not be justified, leaving later recipients to bear the loss. Pensions generally are vastly underfunded. Their valuations are subject to manipulation. The value is dramatically affected by the interest rate applied.

As to antitrust and size, the "failing company" doctrine, which permits a company which is otherwise likely to fail to merge with another, could have the effect of producing companies which are "too big to fail." But the US administration does not like to use the term "failing" in connection with financial institutions, where trust and reliance are essential. The "too big to fail" situation is a discriminatory state subsidy.

ETHICS

Some ethical standards have been developed in the G8, with the thought they could be expanded to the G20. But of course the additional 12 countries do not want to be handed a position to simply accept. The 12 want to put their own stamp on the standards. These standards start as "soft law" but then may develop into "hard law." Judges and arbitrators may refer to non-binding standards. "Soft law" also has a greater impact on countries without a legal system based on precedents.

International standards of behavior may be directed at states or individuals. State sovereign funds may adopt standards for investment, such as Norway's decision not to invest in Wal-Mart due to Wal-Mart's position on health care for its employees. These standards reflect views on ethics and justice. The views start out unified across countries, but quickly get complex and diverge. They apply to relations within a firm, such as shareholders, managers, employees and products, but also outside a firm, such as suppliers and neighbors. There are different processes whereby these standards gain legitimacy.

For example, the "Sullivan Principles" which applied to investment in South Africa pre-1994 were the "big bang" event. Government sanctions were ineffective, but private business ones were not. Some sustainability campaigns make more sense for certain producers. Coke is dependent on supplies of clean water and IKEA is dependent of the availability of inexpensive wood.

BUBBLES

In the recent overexpansion of markets, the SEC and other securities regulators did not use their powers. The public has thought that too much regulation hurt the country, when in fact it worked out to be the opposite. Many risks now are not based on industrial production but on bets on the market itself. Many technical terms currently used are not generally understood. How do regulators and the public understand the idea of "systemic risk"? 28 significant countries do not even have definitions in this area. One area where the SEC acts in this area is the approval of shareholder governance initiatives. How you understand "systemic risk" affects how you regulate it. The functioning of markets is more important than any one institution. During the current crisis, primary regulators (like the SEC) were told not to press their regulations due to the "too big to fail" concern. Reform will not work if companies go on as before, just subject to closer regulation. Regulators had discretion in the name of flexibility, but the country needs standards even when administrators don't use them.

AIG was a $1 trillion company active in 130 countries. The effect of AIG's following Lehman's path to bankruptcy would have been catastrophic. The US lent it up to $85 billion. Essentially no financial institutions saw the extent of the financial crisis coming. The SEC needs more reliable funding for its operations, not the cyclical funding it has suffered under. Any regulator who can "write a check" has more authority than one who cannot. So Treasury has more influence than the SEC. The regulators in the EU don't have this kind of check-writing authority.

The recent crash was closely tied to mortgage underwriting, which is not the province of the SEC. The Treasury had authority over mortgage underwriting. The mortgage brokers engaged in outright fraud, soft and hard. The method of funding of rating agencies created an incentive to find product and rate it highly. The Office of Thrift Supervision is known to be the weakest of the related regulators. The system of regulation in the US is a hodge-podge created over the last 100 years. It is an incoherent, uncoordinated system. The US government failed by its passivity and its view that the markets regulate themselves. Derivatives are not regulated by anyone. The SEC needs to be rehabilitated. It has not been strong until recently. Hedge funds and private equity need to be regulated, as do CDO's (collateralized debt obligations) and derivatives.

As to check writing ability, when the big institutions began to fail, they all went to the Fed, not to the SEC. The Fed is the lender of last resort. The split between the SEC and the Fed is not helpful. The failure to cooperate and share information results in inefficiency and increased risk. The government gave the SEC powers but no funds.

The next crisis may be the pension systems. Oregon's public pensions are 12 % in subprime investments. Morgan Stanley's real estate holdings have lost 2/3rds of their value. But pension fund assets have not been revalued since the crisis began. A shortfall is likely to be made up by the taxpayer. This problem will only get worse.

The Glass Steagall Act (1932) (splitting banks and brokerage firms and passed as a result of the Great Depression) was dismantled piece by over years. The Gramm-Leach-Bliley Act (1999) was only the last piece in this process. It exempted credit default swaps from regulation. There are many shadow entities which exist only to dress up company balance sheets.

Some standards are imposed by contracts between companies, such as purchasers' contracts with suppliers. A non-compliance supplier is punished financially and directly. This becomes a sort of privatized governance.

Non-compliance with OECD guidelines results mainly in harm to a company's reputation. Lawyers import terms of art from other areas, such as "due diligence" to this area, but without any clear meaning. Wal-Mart's policies on sustainability (such as standards for packaging) have had more effect than NGO's.

Corporations (at least in the US) have different agendas and stakeholders than NGO's, governments and possibly foreign businesses. Milton Friedman (possibly Alfred Sloan) said, "The business of business is business." Maryland's business corporation law now permits formation of "Benefit Corporations" – which permit consideration of non-business factors.

GENERAL INTERNATIONAL LAW PRESENTATIONS – Brief Summary

An indemnitor wants controls on the extent of a cure carried out with its money by the indemnitee.

Anti-dumping concepts were developed in the US but have been adopted by countries around the world and are used aggressively against US goods. For example, Mexico has tough anti-dumping laws. US security concerns affect our trade. A valve may be deemed to be "dual use" (and its export restricted) if it is Teflon coated. Transfer pricing decisions also have effects on the amount of customs duties imposed.

In dispute resolution, if all the disputes and parties are not in the same court, a party which has to make a payment may not have access to its indemnitor. Consider having the other parties to a contract appoint an agent for service of process and submission to one court's jurisdiction. In foreign jurisdictions, can the currency in which an award is made be converted and taken out of the country? If the amount claimed was a loan, can other entities come in ahead of the lender's position? What is the effect of expropriation on the lender's claims? If the transaction involves a loan, the government of the lender's jurisdiction may pass legislation intended to change the due date of repayment. Consider having the lender appoint an agent for purposes of selling US collateral. When in doubt, have the borrower disclaim sovereign immunity. Signature formalities vary from country to country.

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, commonly called the Hague Service Convention, applies to civil and commercial disputes, not to criminal matters, divorce, etc. (There are many different Hague Conventions.) The cost of translations plays a significant role. There are companies which provide Hague service. Some 1st world countries are not signatories to the treaty, such as Austria. A plaintiff must follow a more complex procedure there. If the Hague Convention procedures have not been followed, the defendant can attack service. Once service has been made, there are other procedural formalities a US party will want, but needs to request specially, and may not get. For example, a US party may want the presence of a stenographer and the right to be present at pre-trial proceedings. The local judge runs the proceeding and will resist US practices. A civil law courtroom is quite different from a common law court. For example, the civil law judge will summarize the testimony. The Hague Convention does not foresee any pretrial discovery. The US is the only country in the world which permits discovery. If testimony is taken in a foreign jurisdiction, it may be conducted by the judge following questions presented by a party's attorney in writing prior to the proceeding. This requires the initiating attorney to anticipate the witness's possible answers, to permit meaningful follow up – very difficult.

One advantage of arbitration is its confidentiality. However confidentiality should not be taken for granted. If important, the parties and arbitrators should be specifically bound to arbitration. Even so, details of the proceedings may emerge. Testimony in arbitration is not necessarily under oath. Compliance with terms of the arbitration may be dependent on the panel.

Very few countries impose income tax the way the US does. South Korea is one of the 3-5 countries which tax similarly. Presence in the US under 120 days in a year should provide protection from being taxed as being present here. The day-counting rules are very complex, including such as for the first and last year when the person begins and ends his/her visits to the US.

In 2008 procedures were adopted for giving up a green card. Assets are treated as having been sold and they are taxed, subject to a $600,000 exemption. Actual payment may be deferred. Banks are subject to a 30% withholding. A particular danger is being a foreigner owning stock in US companies. A simple solution is to own the stock through a foreign corporation.

When moving an employee between jurisdictions, agreeing to the law of one jurisdiction may give the employee a choice of laws – the one selected and either the one where he is normally resident and the one where he happens to be working. The better course may be to leave the choice of law open. Some US laws apply to US employees working for US companies outside the US. For example, an American working for a US company abroad is still protected by US age protection legislation. US citizens traveling abroad are still covered by US laws if injured, although if they are working long term in a foreign country for a US based employer they may not enjoy those protections. The US is famous for permitting employment at will, i.e. the employee can be terminated at any time without cause. Indeed, it is the only country which does not provide worker protection. Data protection laws may prohibit the sharing of an employee's work-related information across borders even between affiliated companies. US laws generally enforce non-compete agreements, but foreign laws may not.

If a foreigner intends to move to the US, he/she should do pre-immigration tax planning.

Certain US visa categories which normally run out did not do so last year. Foreign lawyers used to do short term training in the US on B-1 visas, but now J visas are the correct ones to get. When coming through passport control in the New York area, JFK is a better choice than Newark.

There is a Hague Convention on divorce and child custody. Japan is not a signatory, nor is China or any Islamic country other than Turkey.

Other jurisdictions do not give attorney-client privilege as much protection as NY and US generally. If concerned, pay attention to the jurisdiction where the matter is likely to arise. In the UK, there is no privilege with respect to in-house attorneys. In the US, there may be a privilege assuming the house advisor is indeed a lawyer. The independence of the advice is part of the analysis. The war on drugs and money laundering concerns may restrict privilege in the US. Also tax evasion and terrorism tend to reduce the extent of privilege. The right of privilege does not have a US constitutional basis. Duties to report a crime, including a financial crime, may apply to lawyers. A lawyer asked to draw up papers to permit a wife to buy a house with money her husband has obtained illegally may put the lawyer at risk. Some legislation in this area is very broadly drafted, so it applies to relatively normal transactions.

The Foreign Corrupt Practices Act (FCPA) applies to agents of governments and state-owned enterprises. An exception applies to "grease" payments necessary to speed up treatment of routine transactions. Ignorance or lack of control over the ultimate use of funds is not a defense. Due diligence and investigation of agents may be required. Any payments in cash are suspect.

MISCELLANEOUS

Understanding a presentation by a non-English native speakers is almost impossible unless the group is very small, the speaker system is very good or the speaker is exceptional. Even some native English speakers (Indians for instance) cannot be understood. Germans are a rare exception, because the cadence of English and German is similar and German words have distinct parts, a characteristic which helps when speaking English.

Presenters should go over key points at least twice. Special terms and names of cases, treaties, etc. should be shown visually. Otherwise the whole presentation is wasted.

When I complain to Germans that I cannot understand a native English speaker, they often say, “Oh good. I thought my English was just too bad.”

Possibly the most important parts of a conference are being sure presenters speak clearly and that the speaker system is 1st rate.

Compiled
Rudolph (Rob) Houck
Eaton & Van Winkle LLP
New York, New York
May 5, 2010