Message from the Chair

Steven M. Mayer  
Mayer & Glassman Law Corp.  
Los Angeles, CA

I am delighted to report that the Young Lawyer Forum’s Sixth Annual Young Lawyer Institute was a huge success. I extend a huge “thank you” to the hardworking YLF executive committee, Section leadership and staff, for their many hours spent planning another first class event.

This year's Institute was held on April 16th in beautiful Vancouver, Canada, during the Business Law Section’s stand-a-lone annual meeting. Nearly 100 lawyers and law students from around the world participated. In addition to the Institute, hundreds more Young Lawyers attended the conference and participated in other Section activities throughout the weekend. The Institute featured an activity-filled day of timely and important "nuts and bolts" programming on such topics as Contract Drafting and the Deal; The Future of Consumer Lending — Back to Basics; Understanding LLC Operating Agreements: How the Deal Affects Drafting; What to Expect When Your Deal Goes Bad; Career Management for Young Lawyers in a Troubled Economy; Everything You’ve Always Wanted to Know About Cross-Border Insolvency; and The Legal Side of the World of Sports and Entertainment - Vancouver 2010.

Those attending also participated in a networking lunch, a welcome reception, a leadership opportunity meeting, and elegant waterfront dinner. A special thanks to the Section and Section sponsors for donating great door prizes at our Friday night mixer (cle filled iPods, hotel gift certificates, and Section publications)!

I also want to recognize the work of our Pro Bono/Public Service Subcommittee for their efforts and good work in the Section's book drive for the children served by Vancouver's Union Gospel Mission.

Do not feel left out if you were not there. Big projects are in the works, new subcommittees are being formed, and plans are well underway for our next meeting this August in Chicago and the Seventh Annual Institute next spring in Denver, Colorado.

The Year In Review

As I complete my term as Chair, I am proud to report that we successfully accomplished our goals set last year in New York for the 2008-2009 bar year: (i) we explored new ways to provide membership value to young lawyers unable to attend Section meetings; (ii) we restructured several subcommittees and are reactivating others to meet the needs and requests of our members world-wide; (iii) we continued to promote diversity in our membership and throughout our leadership structure; (iv) we continued to offer programming relevant to the interests and requests of our members; and (v) we continued the YLF mission of providing a soft landing for younger and newer lawyers in the Section's committees and assisting them in finding a home in active Section work.

I am pleased to announce that Sherwin Simmons will be installed as the next YLF Chair this Summer during the ABA's Annual Meeting. Sherwin is a past Section Fellow with a long history of YLF involvement. Sherwin is
more than a founding member and leader of the YLF, a regular speaker at the Institute, and player of an integral role in welcoming and assimilating young lawyers into the Section's substantive committees. Sherwin exemplifies the spirit of the YLF and the limitless involvement opportunities available to all our members.

During my three years as Chair, I have grown professionally, made new friends from around the world, and shared many interesting experiences. This would not have been possible without the service, dedication, and hard work of a large group of amazing people, including the entire YLF executive committee, my Section mentor, and of course, the Section staff, for whose guidance, support, and encouragement I am very much appreciative.

I look forward to my new role as co-Chair of the Section's Advisors Committee and to seeing you at future conferences. I encourage you to contact Sherwin or me, or any of the subcommittee chairs, with any questions, comments, suggestions, or if you want to become more actively involved in the YLF or the Section generally.

The YLF remains committed to serving as a center of gravity for business lawyers under the age of 40 or in practice for less than 10 years. The YLF will continue to provide its members with numerous opportunities for education, training, public service, networking, socializing, and leadership and business development.

The YLF offers plenty of ways to become involved even for those who cannot attend Section meetings. Many of the YLF Subcommittees were formed with the focus on providing value to young lawyers regardless of whether they attend Section meetings. This focus remains paramount in the YLF's activities as we continue working to provide important and valuable resources to young lawyers everywhere.

*Make friends, generate business, network with lawyers from around the world, join a committee and learn something new. Your firm might even sponsor you. We look forward to hearing from you.*

–Steven Mayer

**Message from the Incoming Chair**

*Sherwin P. Simmons, II*
*Carlton Fields*
*Tampa, FL*

At the ABA Annual Meeting in Chicago this year, the Chair position of the Young Lawyer Forum will be relinquished by Steven Mayer. I wanted to take the opportunity to thank Steven for his contributions and leadership over the past three years as Chairman of the Young Lawyer Forum.

Steven became a Co-Chairman of Young Lawyer Forum during the 2006 Annual Meeting in Hawaii. At that time, the Committee had just been around for a few years and was definitely in the infancy stage. Steven was supposed to be the younger Co-Chairman with a senior Co-Chairman handling the heavy lifting. Shortly into Steven's tenure as a Co-Chairman the other Co-Chairman had to resign due to time constraints and as a result, Steven was thrust into the sole leadership position. Steven immediately jumped into the position to learn every aspect of what needed to be done and formed a new direction for the Young Lawyer Forum. Steven helped the Institute for a New Business Lawyer grow into the success that it is today and has established a
foundation for the Institute to continue moving in a positive direction. He helped strengthen the bonds with the Section of Business Law leadership in order to ensure that the Young Lawyer Forum would continue to grow in respectability and size.

Steven always made it his goal to help every young lawyer that sought advice or help, get actively involved into an additional Section of Business Law committee. Steven felt that his primary job was complete if someone came to the committee, worked for a little bit and then was placed in another committee to thrive. With this concept, Steven has helped form and establish the major responsibility of the leadership of the Young Lawyer Forum.

We are a much stronger and a better committee due to Steven Mayer's leadership and contribution. We wish our friend and colleague much success in his new role as a Co-Chairman of the Section's Advisors Committee but hope he will continue to be actively involved with our committee now and as he continues to elevate through the leadership ranks of the Section of Business Law. I am relieved to know that Steven has promised to help me during this transition and will always be around to bounce ideas off of. I will strive with all my efforts to carry the torch that Steven has so greatly held for the last three years. Thank you Steven.

Young Lawyer Forum Leadership Opportunities

With the change of Chairman, there is also an opportunity for a change in the leadership of the Young Lawyer Forum as a whole. To that end, I am pleased to announce that Stephanie Cohen of Reed Smith, LLP and Mac Richard McCoy of Carlton Fields, P.A. have both agreed to serve as Vice-Chairs. There are a number of subcommittees which comprise the Young Lawyer Forum, most of these subcommittees are made up of a chairperson and a vice-chairperson. Some of these positions are currently filled, but those chairpersons may be moving to another position; thus, if you have an interest in any of these positions, whether as a chairperson or vice-chairperson, please let us know. We plan on filing these positions in September after the Annual Meeting; therefore, feel free to grab Stephanie, Mac or me in Chicago to discuss your interest. We are also changing our tenure for each chairperson or vice-chairperson of the subcommittees to two years. Below is a list of all the subcommittees and a brief description.

Following is a list of subcommittees:

**Diversity**
- Liaison to the Section of Business Law Diversity Committee, help ensure the Young Lawyer Forum continues to meet the criteria and guidelines of the Section's diversity initiatives and effort.

**International Young Lawyers**
- Liaison for all Section of Business Law young lawyers who practice outside the United States. Coordinate with those young lawyers; help facilitate a platform for the discussion of the unique nature of their involvement.

**Membership**
- Continue to promote the Young Lawyer Forum and involve other young lawyers into the committee.

**Newsletter**
- Responsible for publication of the various Young Lawyer Forum newsletters throughout the year.

**Pro-Bono/Public Service**
Coordinates all aspects of the Committee's sponsorship of and involvement in the various pro bono and public service activities of the Section. Also works to identify opportunities for Committee members to organize and/or participate in pro bono legal work within their home communities and to network with other Section members sharing their commitment to providing pro bono legal services to indigent persons, legal aid organizations, and nonprofit organizations.

Programming/Institute for the New Business Lawyer
- Provides the direction and decision making with respect to the institute for New Business Lawyer on an annual basis. Also chooses the programming throughout the year for the various slots designated to the committee.

Social
- Organize the annual committee dinner and hospitality suites. Coordinate social activities during the course of the spring meeting and annual meeting. Attempt to make everyone happy!

Small Firm
- Provide a platform where young lawyers can gather and discuss the specialized nature of their practice. Also organizes a program for the Institute for New Business Lawyer.

Technology
- Deals directly with the Committee's website to ensure it is updated, information is posted and the website is organized in an efficient manner. Also integrates new technology into the Committee and coordinate with the Section's technology committee.

Business Fellows/Ambassadors
- This individual needs to be a current Section of Business Law Fellow or Ambassador and will coordinate between the two committees as the committees are essentially intertwined with respect to their desires and goals.

Speaker Bank
- Maintain a list of young lawyers who wish to participate in other committees' presentations and panels. Act as a resource for other committees who are seeking to obtain a young lawyer to speak on their panel.

Please feel free to email me at ssimmons@carltonfields.com or call me at (813) 229-4307 to discuss your involvement in the subcommittees or if you have an idea for an additional subcommittee. Additionally, please feel free to contact Stephanie Cohen at SDCohen@reedsmith.com or Mac McCoy at mmccoy@carltonfields.com. Thank you and I look forward to seeing everyone in Chicago!

"Be more concerned with your character than your reputation, because your character is what you really are, while your reputation is merely what others think you are." ~ John Wooden ~

Featured Articles

Justice Systems in Canada and the United States
Selina Koonar, B.A., J.D., L.L.M. Candidate, Richmond, British Columbia
Judicial independence as a prerequisite to justice is evident in both the Canadian and American legal systems. Both Canada and the United States stem from the common law system. However, its justice systems are very distinct. The Canadian judicial system is a unified system where all courts are part of the same system and the Supreme Court of Canada has the final authority throughout Canada. Conversely, the US has two parallel and sovereign judicial systems where the federal justice system applies federal law and the state systems are sovereign over the interpretation of state law.

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Changing Landscape: Introduction to the Third Amendment to the Chinese Patent Law

China's patent law is rapidly evolving to keep pace with its constantly expanding economy. On December 27, 2008, the Standing Committee of the Eleventh National People's Congress approved the Third Amendment of the Chinese Patent Law. The Third Amendment will go into full effect on October 1, 2009. These changes will have profound effect on global industries and innovative Chinese companies that expect to obtain and enforce patents in China. To help foreign businesses and practitioners stay on top of the new laws, major changes are outlined as follows.

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S-Corp LLCs - Planning Opportunity or Solution in Search of a Problem?
Thomas E. Rutledge, Stoll Keenon Ogden PLLC, Louisville, Kentucky and Sherwin P. Simmons, Il, Carlton Fields, P.A., Tampa, Florida

At the recently completed Young Lawyer Institute in Vancouver we were among the presenters at the program Understanding LLC Operating Agreements How the Deal Affects Drafting. In the course of the program we were asked, inter alia, why would anyone have an LLC make an S-election? Frankly, we were not able to provide much in the way of a complete and balanced answer as, well, there seems to us to be very little to recommend that format. We hope that the following thoughts are a rather more complete answer to the question presented.

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Nuts & Bolts of Conducting Cross Border Negotiations
Sajal Singh, Partner, J. Sagar Associates, Bangalore, India

Introduction

Face-to-face negotiations are crucial aspects of inter-organizational relationships like joint ventures, mergers and acquisitions, licensing and distribution agreements, and sales of products and services. As the proportion of foreign to domestic trade increases, so does the frequency of business negotiations between people from different countries and cultures. To successfully manage these negotiations, businesspeople need to know how to influence and communicate with members of cultures other than their own.

More...

2009 ABA Annual Meeting Program Announcement

Don't miss the opportunity to attend, "Women in the Law: Past, Present and Future", an interactive and highly candid CLE program Co-Sponsored by YLF. Being held on Saturday, August 1 at 8:00 a.m. in the Sheraton Hotel and Towers Ballroom I, Level Four, this program will explore 60 years of history ♦ from the bench, government, academia, business and private practice ♦ in a conversation among an amazing group of women. Representing each decade from 1950 to 2000, the panel will discuss their professional lives and the accomplishments, changes and challenges experienced by women lawyers, as well as those confronting the profession today.

Click here for more information.

Navigating the ABA Business Law Section Spring Meeting:
Lessons from Vancouver

Daria Boxer, United States Bankruptcy Court, Los Angeles, CA

Vibrant, dynamic, intense, the ABA Business Law Section Spring Meeting is now behind. As a first timer, one is likely to be overwhelmed by the abundance of events and activities the meeting has to offer: an array of cutting-edge CLE programs, subsection meetings, networking events, and, of course, the gorgeous city of Vancouver. Unfortunately, 24 hours in a day is the limit. How to spend this time most efficiently? As the Annual ABA Meeting in Chicago is approaching, here are some tips on how to get the "biggest bang" for each hour of your visit:

- Take one step at a time. From the outset, admit you cannot clone yourself. As tempting as the idea of attending
two programs at a time may sound, pick one program and give it your undivided attention. By dashing from one program to another, you will likely find yourself sitting between two chairs. Attending one program at a time ensures the most meaningful experience and facilitates program retention.

- **Kill two birds with one stone.** While you cannot be at two places simultaneously, there are plenty of opportunities in the art of multitasking. For instance, if you are a runner, join a local attendee for a morning run. In that way, not only will you stay energized for the rest of the day, but you can also explore the city and learn about the local practice of law from your Canadian colleague. Also, if time does not permit for a one-on-one chat with your colleagues, consider attending a program presented by them. In that way, you can catch up on what they have been working on and ask questions during the Q&A period.

- **Keep an open mind.** Although plotting and planning your schedule in advance may be advantageous, do not hesitate to deviate from it. More interesting opportunities may arise as you meet new people and learn new things throughout the meeting. Have a schedule, but consider it tentative. Be flexible and open to new experiences.

- **Take notes.** Although all CLE materials will be generally available after the meeting, they cannot substitute your own notes. Jot down points that are new and important to YOU. Upon return to your office desk with piled-up work, you are much more likely to review a few pages of notes rather than thousands of pages of CLE materials. Additionally, particular points you have found important may not even be included in the materials. So, arm yourself with a pen and a pad before attending a program.

- **Pace yourself.** An ABA meeting is an exciting marathon of CLE programs, meetings, receptions, lunches, dinners, and other social events. Take, for example, Thursday, April 16th: a long day of CLE programs and meetings was followed by the First Timer's Reception at 5 pm, the Welcome Reception at 6 pm, a subsection cocktail reception and dinner at 7:30 pm, polished at the WBLN Sweet Endings Dessert Reception at 10 pm and finished with the Young Lawyer's Hospitality night out. Just like in a marathon, you have to pace yourself to the finish line to obtain the most satisfying results. Distributing your energy evenly throughout the day and keeping in mind that the first reception is not the last will enable you to absorb the most knowledge, meet the most people and, above all, have the most fun!
local outreach organization providing an array of services to homeless families. The project was listed as a highlight in the Section's "Top 10 Things to Know for the Spring Meeting." With on-the-ground coordination by the Vancouver office of Farris, Vaughan, Wills & Murphy LLP, and with support from the Vancouver law firm members of the Host Circle, the Section was able to donate nearly twenty boxes of books and toys for children of various ages. This meaningful donation will help support UGM's childhood literacy and education programs in two separate facilities for an entire year. The Bring-a-Book Project was co-sponsored by the Pro Bono and Public Service Subcommittee of the Business and Corporate Litigation Committee, the Section's Committee on Pro Bono, and the Pro Bono Services Subcommittee of the Business Bankruptcy Committee.

Based on the tremendous success of the Bring-a-Book Project in Vancouver, the YLF Pro Bono Subcommittee will co-sponsor another book drive during the ABA Annual Meeting in Chicago. The Chicago book drive will benefit Book Worm Angels, a local organization working to promote children's literacy in underperforming schools. For more information or to volunteer for the book drive, please email Mac R. McCoy, YLF Pro Bono Subcommittee Chair, at mmccoy@carltonfields.com.

Get Published Now! Articles Needed!

Over 12,000 Young Business Lawyers Want to Hear From You!

There are over 400,000 ABA members of which more than 57,000 are Business Law Section members, in addition to the general public, that will have access to your article through high ranking search engine results. Your article will also be memorialized on the ABA website. The Young Lawyer Forum is collecting articles for future newsletters which are circulated to our members worldwide. Please send your submissions to Tracy A. Cinocca at TracyCinocca@aim.com.

Articles should be 1500 words or less, and on any topic of interest to young lawyers. From short scholarly articles, to practice tips, reviews/summaries of a Section program, life in the trenches, interesting pro bono projects, humorous looks at life and the law, or even how you balance work and personal life. We appreciate your help in making this newsletter a success.
Chair: **Steven Mayer**

Vice-chairs: **Aaron Lovaas**

**Sherwin Simmons**

**Subcommittees:**

**International Lawyers:** **Sajai Singh**

**Membership:** **David Kinman**

**Adam Segal**

**Newsletter:** **Tracy A Cinocca**

**Pro Bono/Public Service:** **Mac McCoy**

**Programming:** **Sherwin Simmons**

**Social:** **Stephanie Cohen**

**Richik Sarkar**

**Solo/Small Firm:** **Aaron Lovaas**
JUSTICE SYSTEMS IN CANADA AND THE UNITED STATES

Judicial independence as a prerequisite to justice is evident in both the Canadian and American legal systems. Both Canada and the United States stem from the common law system. However, its justice systems are very distinct. The Canadian judicial system is a unified system where all courts are part of the same system and the Supreme Court of Canada has the final authority throughout Canada. Conversely, the US has two parallel and sovereign judicial systems where the federal justice system applies federal law and the state systems are sovereign over the interpretation of state law.

The “supreme law” in both Canada and the U.S. is its’ Constitutions. Canada’s Constitution is a combination of both codified and uncodified acts, conventional practices, and traditions. The Constitution Act 1867, originally the British North America Act, provides the core of the Canadian Constitution. It describes the structure and workings of government at the federal and provincial levels, among other things. The Constitution Act 1982 includes the Charter of Rights and Freedoms which functions as an entrenched bill of rights, is also an integral part of Canada’s Constitution. Because it has a long and storied history as a member of the Commonwealth, Canada’s legal system is solidly embedded in the British common law tradition. However, Quebec has its own separate history as a French colony which makes it a special case in many aspects of law, and to this day it retains a unique civil system for handling issues of private law. Both Canadian legal systems are subject to, and protected by, the Constitution of Canada.

The law of the U.S. was also originally largely derived from the common law system of English law, which was in force at the time of the Revolutionary War. However, the supreme law of the land is the United States Constitution and, under the Constitution's Supremacy Clause, laws enacted by Congress and treaties to which the U.S. is a party. These form the basis for federal laws under the federal constitution in the United States, circumscribing the boundaries of the jurisdiction of federal law and the laws in the fifty U.S. states and in the territories.

While Canada and the U.S. both stem from the English common law system, its’ justice systems are very distinct. The Canadian court system is made up of many courts differing in levels of legal superiority and separated by jurisdiction. Some of the courts are federal in nature while others are provincial or territorial. This intricate interweaving of Canada’s federal and provincial powers is typical of the Canadian constitution. Generally speaking, Canada’s court system is a four-level hierarchy. Each court is bound by the rulings of the courts above them; however, they are generally not bound by their own past rulings or the rulings of other courts at the same level in the hierarchy. The Canadian constitution gives the federal government the exclusive right to legislate criminal law while the provinces have exclusive control over civil law. The provinces have jurisdiction over the administration of justice in their territory. Almost all cases, whether criminal or civil, start in provincial courts and may be eventually appealed to higher level courts. The quite small system of federal courts only hear cases concerned with matters which are under exclusive federal control, such as immigration.

The U.S. court system is quite complicated. While the U.S. Constitution states that federal law overrides state laws where there is a conflict between federal and state law, state courts are not subordinate to federal courts. Rather they are two parallel sets of courts with different, and often overlapping, jurisdictions. State courts systems always contain some courts of general jurisdiction. All disputes which are capable of being brought in courts, arising under state or federal law maybe brought in one of the state courts, except in a few narrow cases where the federal law specifically limits jurisdiction exclusively to the federal courts. Unlike state courts, federal courts are courts of limited jurisdiction, which can only hear the types of cases specified in the Constitution and federal statutes (mainly federal crimes, cases arising under federal law and cases involving a diversity of citizenship between the parties). Furthermore,
federal courts must defer to state courts in their interpretation of state laws. The U.S. Supreme Court may review the final decision of state courts, after a party exhausts all remedies up to a request for relief from the state’s highest appellate court, if the justice believes that the case involves a question of constitutional or federal law, or a criminal case is the federal wit of habeas corpus.

Another main difference between the Canada and U.S. justice systems are the selection of judges. In Canada, judges are appointed by the government, not elected. Judges of the Supreme Court of Canada, the federal courts, the appellate courts and the superior-level courts are appointed by the federal government. The federal government appoints and pays for both the judges of the federal courts and the judges of the superior-level court of each province. The provincial governments are responsible for appointing judges of the lower provincial courts.

In many American jurisdictions, judges are elected. In some cases, the elections are partisan, where the nominee is affiliated and supported by a political party. Others are not. Each state court system has different rules for the purpose of electing judges as well. In California, for instance, any qualified lawyer can run for judicial office at election time. The process is non-partisan. If a vacancy arises between elections, the governor appoints the judge. While the election of judges keeps the administration of justice consistent with prevailing social ideal, this system comes with many problems, particularly if the elected judge makes decisions “for the vote.”

There are Canadians who would like to see their judges be elected as is the case for some American judges; however, there is no indication that the longstanding British tradition of appointing judges will be altered in Canada anytime soon. It is doubtful if an elected judiciary would be consistent with the Canadian constitution. Those who favor the appointment method point out that the election approach could possibly threaten the judiciary’s ability to be independent in its decision-making. Though political patronage has certainly been a factor in the appointment of some judges, judges appointed to the Supreme Court of Canada have been remarkably non-partisan and well respected by Canadians of all political stripes.

Finally, it should be noted that Canada’s legal system is quite open to using case precedents from both England and the United States when there are insufficient ones in the realm of Canadian law. For the most part, Canadian jurists will refer to American cases dealing with privacy rights, as the U.S. has many precedents in that area. However, they often consider decisions by both the English Court of Appeal and the House of Lords when judging a wide range of matters. Once a Canadian court has established a non-Canadian court or magistrate as being a persuasive authority, it can use their decisions as foundations for its own. In this way, Canada’s legal system truly incorporates a living body of laws.
Changing Landscape: Introduction to the Third Amendment to the Chinese Patent Law

China’s patent law is rapidly evolving to keep pace with its constantly expanding economy. On December 27, 2008, the Standing Committee of the Eleventh National People’s Congress – China’s top legislature – approved the Third Amendment of the Chinese Patent Law. The Third Amendment will go into full effect on October 1, 2009. These changes will have profound effect on global industries and innovative Chinese companies that expect to obtain and enforce patents in China. To help foreign businesses and practitioners stay on top of the new laws, major changes are outlined as follows:

Absolute Novelty Requirement

Currently, Article 22 of the Patent Law makes use of a two-pronged approach to novelty. That is, while an absolute novelty standard is applied to publications, a relative novelty standard is applied to prior public use or public knowledge. As such, a publication anywhere in the world concerning a relevant invention is deemed as prior art, but prior public use such as sales, offers for sale, and manufacturing outside China is not prior art and does not destroy novelty. The current law, therefore, creates an often exploited loophole by Chinese companies to usurp patent protection in China for another’s invention. Such a situation may occur when a product is disclosed to the public at a foreign trade show, but without any publications, and a third party races to the State Intellectual Property Office (SIPO) and files a Chinese patent application on
the product. With the patent on the product, the third party can extort money from the innovator company or prevent the import of its products.

The Third Amendment eliminates this loophole by introducing an absolute novelty requirement. Under the amended Article 22, the territorial restriction on prior public use and knowledge has been removed, and an invention loses its novelty in China from any prior public disclosure in the world. The inclusion of an absolute novelty requirement will force patent practitioners to adjust their patent application strategies. For jurisdictions which enjoy a grace period, such as in the U.S. (one year to file after disclosure (offer for sale, use, publication, etc)), utilization of that period before filing a Chinese patent application will destroy the novelty of the invention. Therefore, it is advisable to file a Chinese patent application before there is any disclosure of the invention. Because the Third Amendment lacks transitional provisions, whether or not the new law will affect existing applications and patents remains unclear.

**Foreign Filing License**

Under Article 20 of the current law, an invention made in China by Chinese individuals or entities must first be filed in China before patent applications may be filed elsewhere. To circumvent this filing requirement, a common practice is to assign ownership of the invention to a related foreign entity that is not subject to the requirement to file in China before filing anywhere else.

To combat the above, under the amended Article 20, the Patent Law will no longer require inventions “made in China” to be first filed in China. However, similar to
the U.S. foreign filing license requirement, the application must first be submitted to
SIPO for a “confidentiality examination” prior to filing abroad. This new national security
review is intended to prevent security leaks through the aforementioned circumvention
techniques. The time to complete the review is uncertain, but it is expected to be
provided in the implementing regulations. To reinforce the governmental control on
foreign filing of patent for invention “made in China,” a penalty provision has been
added for non-compliance with the confidentiality examination procedure – the refusal to
grant a patent right in China.

Compulsory Licensing

Under Articles 48-55 of the current Patent Law, there is already broad discretion
in granting a requesting party a compulsory license on a Chinese patent when the party
otherwise was unable to obtain a license on reasonable terms within a reasonable
amount of time. To date no compulsory license has been granted.

Specifically, the Third Amendment provides better guidance and additional
grounds for the grant of a compulsory license. Under amended article 48, SIPO may
grant compulsory license to a requesting party upon request if: (1) the patentee, without
satisfactory reason, does not exploit or sufficiently exploit the patent after the expiration
of three years from the grant of the patent right and four years from the date of filing,
and (2) the patentee exploitation of the patent has been determined through a legal
process as having negative monopolistic effects on competition.
Under amended Article 50, for the purpose of public health, SIPO may grant a compulsory license for manufacturing and exportation to approved countries, belonging to treaties in which China participates, of Chinese medicinal patents.

**Genetic Resources Disclosures**

With an eye towards protecting and preventing the misappropriation of China’s genetic resources, the amended Article 26 added provisions that require the applicant to disclose the direct source and original source of the genetic resources relied upon in the completion of an invention. If the original source can’t be disclosed, the applicant must state the reason.

Further, amended Article 5 added provision stipulating that any patent application for any invention based on genetic resources, the acquisition or exploitation of which violates relevant laws and administrative regulations, will be rejected.

In contrast, the U.S. does not require the disclosure of the source of genetic resources. This disparity between Chinese and foreign laws in relation to genetic resources should make foreign scientists conducting research related to genetic resources in China, and practitioners aiding in patent procurement, wary of this unique disclosure requirement.

**Prior Art Defense**

Under the current law, patent infringement cases are heard in the People’s Courts while in parallel the invalidation proceedings are administered in the Patent Reexamination Board (Board). As such delays often occur in the patent infringement
cases and thus increase the costs to the Patentee. Article 62 allows for a prior art defense if the accused infringer has evidence to prove that his technology belongs in the prior art. This defense is similar to the U.S. such as when the accused infringer technology has been practiced before the Patentee invented his invention.

**Double Patenting**

The Third Amendment also codifies the current SIPO practice in which both an invention patent and a utility model may be filed on an invention for an article, but that only one can ultimately obtained. Since a utility model application is not substantially examined, it is often granted within one year of the filing date, while an invention patent takes about three years. Thus, the current practice is to abandon the utility model patent once the invention patent is granted.

Amended Article 9 now provides that where the same applicant applied for the both invention patent and utility model on the same day and the previously granted utility model has not expired, the applicant must abandon the utility model patent then the invention patent can be granted.

It is good practice to file both an invention patent and a utility model in China so that the utility model patent that can be asserted should there be infringement. However, utility model patents are not substantially examined and are thus, subject to being held invalid by the Board.

**Statutory Damages Award**
Currently, damages in a patent infringement case are determined based on actual losses or lost profits. However, if actual losses or loss profits can't be accurately calculated, the Court can award damages based on a multiple of a reasonable royalty rate.

The amended Article 65 provides maximum statutory damages of RMB 1,000,000, upward from the RM 500,000 as set in 2001 and provides for payment of reasonable expenses incurred in stopping the infringement.

**Bolar Exemption**

A clinical trial exemption, or Bolar exemption, is introduced under the Third Amendment. Under new Article 69(5), a party can manufacture, import, or use a patented drug or patented apparatus for medical use in order to obtain regulatory approval prior the expiry of the patent. This exemption is similar to the Safe Harbor Provision under the Hatch-Waxman Act in the U.S. which allows the use of a patented invention solely for uses reasonable related to the development and submission of information to the FDA.

**Co-Ownership**

The current Patent Law does not address how a co-owner can individually exploit a co-owned patent. Under the new Article 15, a co-owner can individually grant a non-exclusive license to a third party, but must share the royalties with the other co-owners. In all other circumstances, consent by all co-owners is required. Thus, it is
recommended that joint ownership be avoided to the extent possible or that an agreement to assign any patent rights in a joint venture to your client.

This is in contrast to U.S. laws in which a co-owner can grant a license without any accounting to the other co-owners.

**Changes to Design Patents**

Amended Article 23 attaches the absolute novelty standard to design patents. It also appears that design patents should be non-obvious over the prior design. Other changes in the Third Amendment include not allowing trademarks and labels to be registered as a design patent, allowing more than one embodiment may be made in one application and

**Conclusion**

The Third Amendment will change the way foreign companies obtain patent protection and conduct business in China. With the new absolute novelty standard, it is advisable to file a patent application before any disclosure. It is also advisable to submit the application to a confidential examination by the SIPO before it is filed anywhere in the world particularly if there is at least one Chinese inventor. Inventions involving genetic materials require a disclosure of its source which a practitioner should consider before filing the application. Foreign companies should consider filing both an invention patent and the utility model on the same day in order to maximize patent protection for their products. When a foreign company is developing a product with a Chinese company, the foreign company should have an agreement in place to have any
intellectual property developed by the Chinese company assigned to the foreign company.
S-CORP LLCs - PLANNING OPPORTUNITY OR SOLUTION IN SEARCH OF A PROBLEM?

By: Thomas E. Rutledge¹ & Sherwin P. Simmons, II²

At the recently completed Young Lawyer Institute in Vancouver we were among the presenters at the program Understanding LLC Operating Agreements – How the Deal Affects Drafting.³ In the course of the program we were asked, inter alia, why would anyone have an LLC make an S-election? Frankly, we were not able to provide much in the way of a complete and balanced answer as, well, there seems to us to be very little to recommend that format. We hope that the following thoughts are a rather more complete answer to the question presented.⁴

The S-Corp LLC - Mixing State and Tax Law

Let’s be sure we are clear as to what it is we are discussing. An LLC is an unincorporated business organization having at least one owner called a “member.” The agreement that governs the operation of the LLC is the “operating agreement.”

Under the so-called “check-the-box” classification regulations adopted as of January 1, 1997, unincorporated business organizations are “eligible entities” that may elect how they would like to be “classified” for Federal tax purposes. Classification is the mechanism by which a particular form of organization will be taxed is determined, typically under Subchapter C (the default treatment of “corporations”), Subchapter K (classification as a partnership) or Subchapter S (small business corporation or “S-Corp”). While a corporation is automatically subject to Subchapter C, and if eligible to do so may elect to be an S-corporation, an unincorporated entity has a default classification as a partnership subject to Subchapter K so long as it has at least two owners or as a “disregarded entity” if it has only a single member.⁵

An LLC that has either one or multiple members may elect to be classified as a corporation, and from there (assuming such is permissible) make an election to be classified as an S-Corp. The initial election for an LLC to be classified as a corporation for tax purposes is

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⁴ Another review of these issues appears that Robert R. Keatinge, LLCs and Limited Partnerships as S-Corporations, presented at LIMITED LIABILITY ENTITIES: NEW DEVELOPMENTS IN LIMITED LIABILITY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS (March 17, 2005).

⁵ The Check-the Box regulations appear at Treas. Reg. § 301.7701 et seq.
done on Form 8832, Entity Classification Election.\textsuperscript{6} If S-Corp. status is as well desired, that election is made on Form 2553, Election by a Small Business Corporation.\textsuperscript{7}

It is important to understand that one does not organize an S-Corp. Rather, the status as an S-Corp. is elected by a business organization that is otherwise taxed as a corporation. Not only may a traditional state law corporation elect S-Corp. status, but that same election may be made by an LLC, irrespective of whether it is a single or a multiple member LLC, a limited partnership or any other form of business organization that, in a particular instance, satisfies the requirements for S-Corp. status that are set forth in the Internal Revenue Code at § 1361(b). As such, when the provisions of the Internal Revenue Code and its regulations discuss an “S-Corp.”, they are referring to a business organization that is taxed as a corporation and which has made an election under Internal Revenue Code § 1362 to be an S-Corp.; there is no requirement that the organization in question had been organized as a corporation for state law purposes.

**But Why?**

It is possible for an LLC to be taxed as an S-Corp. But just because it can be done does not mean that it should be done. Rather, this structure should be utilized only if it responds to a need, only if it resolves a particular set of problems. If it does not, it is an answer in search of a problem.

The questions presented are at least two: (a) what are the advantages of state law organization as an LLC rather than as a corporation; and (b) what are the benefits of S-Corp. taxation over Subchapter K that warrant the election?

One aspect of the LLC that is not available in the corporation is the “charging order,” the provision of LLC law that provides that a judgment creditor of a member may in effect garnish the distributions made by the LLC to the member, but may not otherwise insert themselves into the operation of the LLC.\textsuperscript{8} The availability of the charging order is often trumpeted by those involved in “asset protection” who posit that the charging order makes it less likely that a judgment creditor will be able to collect and for that reason they are more likely to either abandon the claim or settle at a reduced rate. Whether such an asset protection objective should be a significant issue in the choice of entity calculus is certainly open to question.\textsuperscript{9} Furthermore,

\textsuperscript{6} No Form 8832 is necessary if the unincorporated entity desires its default classification; it is not necessary to affirmatively elect into that default classification.

\textsuperscript{7} Treas. Reg. § 301.7701-3(c)(1)(v)(C) provides, that an eligible entity desiring S-Corp. status may file Form 2553 which will be deemed to constitute as well an election of corporate classification as would otherwise be made on Form 8832.

\textsuperscript{8} For a general review of the charging order, see Thomas E. Rutledge, *Charging Orders: Some of What You Ought to Know (Part I)*, 9 J. PASSTHROUGH ENTITIES 15 (Mar./Apr. 2006); (Part II), 9 J. PASSTHROUGH ENTITIES 9 (Jul./Aug. 2006); see also Thomas E. Rutledge, Carter G. Bishop and Thomas Earl Geu, *Foreclosure and Dissolution Rights of a Member’s Creditors: No Cause for Alarm*, 21 PROPERTY & PROBATE 35 (May/June, 2007).

\textsuperscript{9} With one exception, the charging order is uniquely a component of unincorporated business law and is absent from business corporation law. That one exception is Nevada, which has a charging order provision for certain corporations in its business corporation act. One of us has argued, however, that this provision is
as an asset protection vehicle, the charging order will likely not be effective in a single member LLC.  

A perhaps more valid basis for choosing, within the context of an anticipated S-Corp. classification election, to be organized as an LLC is the greater flexibility with respect to organizational structure. As a general rule, the corporate structure rules are mandated by the statute and are not modifiable by private ordering, rules which include the requirement that there be a board of directors, that the board of directors designate at least one officer, namely the secretary, that there be a minimum of two days notice of any meeting of the board of directors, that there be an annual meeting of the shareholders, that there be provided a minimum of ten days notice for any meetings of the shareholders, and that significant organic transactions such as a merger proceed only with the approval of the board of directors.  

While these rules are subject to a limited degree of modification in those few states that have adopted the Close Corporation Supplement to the Model Business Corporation Act, that degree of flexibility is still significantly less than that permitted under the equivalent LLC Act.

Another basis for choosing the LLC over a corporation may involve questions of professional regulation. Many professions may be practiced in the corporate form if and only if the corporation is as well subject to the professional corporation supplement as affect in the various states, which statutes have the effect of mandating certain requirements with respect to the directors and officers of the corporation, permissible shareholders and certain mandatory redemptions. In many of these states, while there is a professional service corporation supplement in place, similar limitations do not apply to LLCs that are organized to render professional services.

In addition to choosing the LLC format over the corporate format, there is the question of why to choose taxation under Subchapter S over taxation under Subchapter K. Determining whether, at least on a pro-forma basis, Subchapter S or Subchapter K is preferable is a rather involved process, especially in the context of a professional practice or other business in which capital is not a material income producing item. Conversely, in businesses in which capital is a material income producing item, such as real estate development, often the advantages of ineffectiveness. See Thomas E. Rutledge, Nevada’s Corporate Charging Order: Less there than Meets the Eye, 11 J. PASSTHROUGH ENTITIES 21 (Mar./Apr. 2008).


Model Business Corporation Act §§ 8.01, 8.40(c), 8.22(b), 7.01(a), 7.05(a) and 11.04(a).


We here assume that the entity in question has at least two (2) members; a single member organization may not elect to be taxed under Subchapter K. Note, however, that a single owner organization that is otherwise eligible may elect to be taxed as an S-Corp.

Subchapter K will significantly trump those of Subchapter S and Subchapter C both as to the treatment of current distributions and as well the tax treatment upon liquidation.

There is often cited the distinction between Subchapter S and Subchapter K with respect to distributions. In an S-Corp., a certain amount of the distributions that would be made may be characterized as “salary” which is subject to Social Security (“SECA”) and Medicare taxes and the balance of the funds available being treated as a distribution that is not subject to those levies. Conversely, in many situations (definitive guidance from the IRS has not yet been handed down) all of the amounts distributed to a member may be subject to Social Security and Medicare taxes, and there is not the ability to subdivide those amounts between “salary” and “distributions.”

At the same time, it needs to be recognized that S-Corp. classification imposes significant limitations that do not apply under Subchapter K. For example, many start-up ventures incur losses that are supported by debt financing. In the context of an S-Corp., failing to properly structure that debt as a personal obligation of the shareholder(s) rather than initially an obligation of the business organization that is in turn guaranteed by the shareholder limits the deductibility of losses as the latter format does not create at-risk basis. Conversely, in an LLC subject to Subchapter K, the guarantee of the debt undertaken by the business organization is sufficient to create at-risk basis against which losses may be taken. Additionally, the context of an organization taxed under Subchapter K, Code § 754 provides planning opportunities with respect to basis step-ups on transfers of ownership interests, a planning opportunity that does not exist with respect to an S-Corp.

**What Could Go Wrong?**

Simply because something can be done does not mean it should be done, especially when the degree of complexity, and consequent risk of failure, are high. While such caveats are typically applied in the context of mountain climbing and base jumping, they can apply as well in the choice of entity calculus. Classification of a business organization as an S-Corp. is dependent upon satisfaction of a number of conditions, some procedural such as the timely filing of Form 2553, and others more substantive, such as the limitations on permissible shareholders set forth at Code § 1361. There is especially troubling the requirement that an S-Corp. be limited to a “single class of stock.” A requirement that is particularly troubling in light of the usual statutory directive as to how assets will, upon liquidation of an LLC, be distributed. For example, the Revised Uniform Limited Liability Company Act (“RULLCA”), at Section 708(b), directs that after the satisfaction of creditor claims, the assets of an LLC will be distributed first amongst the holders of the economic rights therein as a return of capital contributed and that the balance of the assets will then be distributed pro-rata amongst the members, dissociated members

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17 Code § 1362(b)(1). An election may be made at any time during the preceding taxable year, or on or before the 15th day of the third month of the current taxable year.
18 Code § 1361(b)(1)(D). Within the “single class” of stock there may be voting and non-voting shares that, but for that distinction as to participation of management, are otherwise economically identical.
and certain transferees. This formula for the distribution of assets upon liquidation, as applied, would violate the single class of stock rule. While this provision may be modified in the operating agreement,¹⁹ it is open to debate whether and how often S-Corp. LLC operating agreements have effectively overridden these and similar provisions of state law. The writing of an effective operating agreement for an LLC that is to elect to be an S-Corp. entails an understanding of the various requirements and limitations imposed upon S-Corps. and a willingness to review them against the entirety of the controlling LLC Act to determine where the LLC Act provides a default rule that would or could violate the requirements of S-Corp. status and, once those areas of conflict have been identified, the effective drafting within the operating agreement of an override provision. The transactional costs imposed in this effort are obvious.

Our respective practices involve significant work in choice of entity and preparation of organizational documents. While we certainly can not represent that there is no situation in which the S-Corp. LLC will not be the best option, neither of us has yet encountered that situation. As such, while the S-Corp. LLC may be conceptually possible, we continue to view it as being a solution in search of a problem.

¹⁹ RULLCA § 110.
Nuts & Bolts of Conducting Cross Border Negotiations

Background paper for presentation at the ABA – Section of Business Law, Young Lawyer Forum
By Sajai Singh, Partner, J. Sagar Associates, Bangalore, India
in Vancouver, BC, April 18, 2009

Introduction

Face-to-face negotiations are crucial aspects of inter-organizational relationships like joint ventures, mergers and acquisitions, licensing and distribution agreements, and sales of products and services. As the proportion of foreign to domestic trade increases, so does the frequency of business negotiations between people from different countries and cultures. To successfully manage these negotiations, businesspeople need to know how to influence and communicate with members of cultures other than their own.¹

Differences in cross-cultural values and behaviour lead to additional conflicts in negotiations beyond the obvious substantive conflicts. During the negotiations, prospective business partners may exhibit behaviour that may be strange, and at other times be insulting and offending. While it is tempting and easy to interpret such behaviour within the prism of our own culture, doing so can create a high degree of friction and frustration thereby jeopardizing business deals.

Culturally, the world may be divided into a large number of groups, with each group having its own traditions, experiences, traits and values. While people often speak in generalities, referring to groups as Asians, Latinos or Western, having a broad perspective about such groups will work to the detriment of the negotiation as a Japanese negotiator may hold different values than an Indian or Chinese.² Similarly, culture and nationality are not always the same. For example, in India, South Indians represent a different culture and hold values that are different from North Indians. Indian Muslims are a different cultural group from Hindus. Thus, a country may have several distinct cultural groups.

Negotiators need to acquire cultural knowledge on the following:

1. Traditions, etiquette and behaviour of the group (which can be further split into protocol and deportment and deeper cultural characteristics); and

2. Players and the process

This paper begins with a discussion of Edward T. Hall’s theory of high-context and low-context communication and its relevance to intercultural communications before progressing to a discussion of the four dimensions of culture as postulated by Geert Hofstede. Subsequently, the paper attempts to analyze both the influence that cultural differences have on negotiations and the importance of ascertaining and identifying the players in negotiation and the processes they employ. Finally, the paper examines the ‘getting to yes’ approach to negotiation before discarding it in favour of a more culturally responsive negotiation strategy.

Communication

Cultural knowledge must be used with caution. Forming stereotypical notions about a group and considering them as a universal truth is a sure shot way of ruining the negotiating process. On acquiring cultural knowledge, the negotiator must use this in the pursuit of effective cross-cultural communication.

Communicating across cultures is even more demanding than working at effectively communicating within a single culture, because there is hardly any common ground in the participants’ references, experiences or filters. The negotiating parties, however, must first recognize the additional challenges that cross-cultural disputes bring.

Cultures can be predominantly verbal or non-verbal. Cultures that use verbal communications transmit information though a code that makes meanings both explicit and specific. In nonverbal communications, the nonverbal aspects become the major channel for transmitting meaning. This ability is termed as ‘context.’ Context includes both the vocal and non-vocal aspects of communication that surround a word or passage and clarify its meaning – the situational and cultural factors affecting communications. High-context or low-context refers to the amount of information given in communication. These aspects include factors like the rate at which one talks, the pitch or tone of the voice, the fluency, expressional patterns, or nuances of delivery. Nonverbal aspects include eye contact, pupil contraction and dilation, facial expression, odour, colour, hand gestures, body movement, proximity, and the use of space.

The greater the contextual portion of communication in any given culture the more difficult it is for one to convey or receive a message. Conversely, it is easier to communicate with a person from a culture in

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4 *Id.*
which context contributes relatively little to a message. In high-context cultures, information about an individual (and consequently about individual and group behaviour in that culture) is provided through mostly non-verbal means. Information flows freely within the culture although outsiders who are not members of the culture may have difficulty reading the information.\(^5\)

Information transmitted through an explicit code in a low-context communication compensates for a lack of shared meaning or specifically, words. In such cultures, the environment, situation, and non-verbal behaviour are less important and negotiators must provide information that is more explicit. A direct style of communications is valued. Relationships between individuals are relatively shorter in duration and personal involvement tends to be valued less. Low-context countries tend to be more heterogeneous and prone to greater social and job mobility. Agreements tend to be in writing rather than verbal and are final and legally binding. The difference between high-context and low-context communication, pioneered by Edward T. Hall, is probably the most important cultural difference in many cross-cultural negotiations.\(^6\)

(Please see Table 1 in the Annexure for a better understanding of the difference between high-context and low-context communication.)

**Dimensions of Culture**

Dutch cultural anthropologist Geert Hofstede’s remarkable empirical study of cross-cultural differences must occupy the heart of any work on cross-cultural negotiation. Hofstede based his work on over 116,000 questionnaires from IBM employees in 53 countries. According to him, the way people in different countries perceive and interpret their world varies along four dimensions:

1. Power Distance,
2. Individualism versus collectivism,
3. Masculinity, and
4. Uncertainty Avoidance.\(^7\)

**The Power Distance or the Distribution of Power**

Power distance refers to the degree of inequality among people the population of a country considers acceptable (i.e., from relatively unequal to extremely unequal). In some societies, power is concentrated

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\(^6\) Anthropologist Edward T. Hall is considered the founder of the cross-cultural communication field. He called this field “intercultural communication.” His worked focused on differences between Japan and the United States.

among a few people at the top who make all the decisions. People at the other end simply carry out these decisions. Such societies are associated with high power distance levels. In other societies, power is widely dispersed and relations among people are more egalitarian. These are low power distance cultures. The lower the power distance, the more individuals expect to participate in the organizational decision-making process.

The United States of America (USA) records a middle-level rating on power distance, but Sweden much lower ratings. In these countries, leaders are more likely to give subordinates the initiative to participate. (Power distance scores for a sampling of countries appear in Table 2 in the Annexure.)

With reference to negotiations, the relevant questions the negotiator needs to ask himself/herself (as far as this dimension is concerned) are these:

1. Are significant power disparities accepted?
2. Are organizations run mostly from the top down, or is power more widely and more horizontally distributed?

**Individualism versus Collectivism**

Individualism denotes the degree to which people in a country learn to act as individuals rather than as members of cohesive groups (i.e., from collectivist to individualist). In individualistic societies, people are self-centred and feel little need for dependence on others. They seek the fulfilment of their own goals over the group’s goal. Managers belonging to such societies are competitive by nature and show little loyalty to the organizations for which they work.

In collectivistic societies, members have a group mentality. Their individual goals are subordinate to the group goals. Collectivistic managers have high loyalty to their organizations and subscribe to joint decision making. The higher a country’s index of individualism, the more its managerial concepts of leadership are bound up with individuals seeking to act in their ultimate self-interest. USA, Australia and the United Kingdom show high ratings on individualism while India, Japan and Brazil exhibit low ratings.

A negotiator should determine whether the culture of the other party emphasizes the individual or the group.

Individualism scores for a sampling of countries appear in Table 3 in the Annexure.

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9 *Supra* note 8, at 31.
10 *Supra* note 8, at 31.
Masculinity or Harmony versus Assertiveness

Masculinity relates to the degree to which “masculine” values such as assertiveness, performance, success, and competition prevail over “feminine” values such as quality of life, maintenance of warm personal relationships, service, care for the weak, and solidarity.11 Masculine cultures exhibit different roles for men and women.

A relatively high masculinity index for the United States and Japan is prevalent in approaches to performance appraisal and reward systems. In low-masculinity societies such as Denmark and Sweden, qualitative goals set as a means to job enrichment are motivating factors.

For cross-cultural negotiations, a negotiator should know if the culture emphasizes interpersonal harmony or assertiveness.

Masculinity scores for a sampling of countries appear in Table 4.

Uncertainty Avoidance Index

Uncertainty avoidance concerns the degree to which people in a country prefer structured over unstructured situations. At the organizational level, factors such as rituals, rules orientation and employment stability are indicative of uncertainty avoidance. Consequently, personnel in less structured societies face the future as it takes shape without experiencing undue stress. The uncertainty associated with upcoming events does not result in risk avoidance behaviour.12

To the contrary, managers in low uncertainty avoidance cultures abstain from creating bureaucratic structures that make it difficult to respond to unfolding events. But in cultures where people experience stress in dealing with future events, various steps are taken to cope with the impact of uncertainty. Such societies are high uncertainty avoidance cultures, whose managers engage in activities such as long-range planning to establish protective barriers to minimize the anxiety associated with future events. With regard to uncertainty avoidance, the USA and India score low indicating an ability to be more responsive coping with future changes. But Greece, Portugal and Japan score high indicating their desire to meet the future in a more structured and planned fashion.

The pertinent question for cross-cultural negotiations is this: How comfortable are people with uncertainty or unstructured situations, processes or agreements?

Uncertainty Avoidance scores for a sampling of countries appear in Table 5.

11 Supra note 8, at 38.
12 Supra note 8, at 49.
How do Cultural Differences Influence Negotiations?

Given that cultural differences exist, can be measured, and operate on different levels, the question that then needs answering is, how they influence negotiations. Culture influences negotiations across borders in at least eight different ways.\(^\text{13}\)

### Definition of Negotiation

Concepts of negotiation, like the definition of negotiation, negotiable topics, and procedure can differ greatly across cultures. For instance, Americans tend to view negotiation as a competitive process of offers and counteroffers, while the Japanese consider it a means to share information.\(^\text{14}\)

### Selection of Negotiators

The criteria used to select negotiators vary across cultures. These criteria can include knowledge of the subject matter up for negotiation, seniority, family connections, gender, age, experience and status. Different cultures weigh these criteria differently, leading to varying expectations about what is appropriate in different types of negotiations.\(^\text{15}\)

### Protocol

The degree to which protocol, or the formality of relations between the two negotiating parties, is different in different cultures. American culture is among the least formal cultures in the world. A generally familiar communication style is quite common and negotiators prefer to use first names, while generally ignoring titles. On the other hand, most European countries are very formal, and not using the proper title when addressing someone is considered insulting.\(^\text{16}\)

### Communication

Cultures influence verbal and nonverbal communication. There are also differences in body language across cultures; a behaviour that may be highly insulting in one culture may be completely innocuous in another. To avoid offending the other party in negotiations across borders, the international negotiator needs to observe cultural rules of communication carefully.\(^\text{17}\)

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\(^{14}\) *Id.*

\(^{15}\) *Ibid.*, at 216.

\(^{16}\) *Supra* note 14, at 216.

\(^{17}\) *Id.*
Time

Cultures largely determine what time means and how it affects negotiations. In most Western cultures, people tend to respect time by appearing for meetings at an appointed hour, being sensitive to not wasting the time of the other people, and generally holding that “faster” is better than “slower” because it symbolizes high productivity. In traditional societies, the pace is slower. This tends to reduce the focus on time as these cultures prefer to focus on the task, regardless of the amount of time that it takes. The opportunity for misunderstandings because of different perceptions of time is great during cross-cultural negotiations.\(^\text{18}\)

Risk Propensity

Cultures vary in the extent to which they are willing to take risks. Some cultures tend to produce bureaucratic, conservative decision makers who want a great deal of information before making decisions. Other cultures produce negotiators who are more entrepreneurial and who are willing to act and take risks when they have incomplete information. The orientation of a culture toward risk affects negotiations substantially in that the content of the negotiated outcome may vary. Those in risk-avoiding cultures are more likely to seek further information and take a wait-and-see stance.\(^\text{19}\)

Groups versus Individuals

Cultures differ according to whether they emphasize the individual or the group. Individual-oriented cultures value and praise independence and assertion. Group-oriented cultures, in contrast, favour the superiority of the group and see individual needs as second to the group’s needs. This cultural difference can have a variety of effects on negotiation. Decision-making in group-oriented cultures involves consensus and may take considerably more time than in individual-oriented cultures. In addition, because so many people can be involved in the negotiations in group-oriented cultures, and because their participation may be sequential rather than simultaneous, negotiators must be prepared to face a series of discussions over the same issues and materials with many different people.\(^\text{20}\)

Nature of Agreements

Culture also has an important effect both on concluding agreements and on what form the negotiated agreement takes. In advanced legal systems, agreements are formal, and enforced through the legal system if the standards mentioned in the agreement are not honoured. In other cultures, however, who you are or whom you know forms the basis for obtaining a deal (e.g. family, political connections) rather than on

\(^{18}\) Id.  
\(^{19}\) Supra note 14, at 217.  
\(^{20}\) Id.
what you can do. In addition, agreements do not mean the same thing as they do in all cultures. The Chinese frequently use memorandums of agreement to formalize a relationship and to signal the start of negotiations whereas Americans interpret the same memorandum of agreement as the completion of the negotiations that is enforceable in a court of law. Again, cultural differences in how to close an agreement and what exactly that agreement means can lead to confusion and misunderstandings when negotiating across borders.21

The visible manifestations of protocol and deportment and the deeper cultural characteristics that influence how people interact form integral parts of cross-cultural negotiating etiquette. Lapses in etiquette can derail negotiations. The list enumerating various cultural quirks goes on and on and can certainly help the negotiator to avoid mistakes. However, the complexity and detail of these rules makes it difficult to memorize, and the likelihood of regional variation further complicates matters.22

Nonetheless, negotiators would do well to consider a range of questions about these mannerisms when preparing for international negotiations, either by consulting the literature or by engaging in conversations with people who have experienced the culture at hand.23 Table 6 outlines the categories of surface behaviours most likely to affect the tenor of negotiations. While the list is not exhaustive, seeking answers to those questions will at least provide a degree of familiarity with the basic do’s and don’ts in any given culture.

Players and Process

While it is important for a negotiator to learn about culture and negotiating style, it may be more crucial to know about the organization that the negotiators belong to and the process they must follow in seeking final approval of the agreement. A meaningful business agreement goes through a hierarchy of individuals in an organization before it is finalized. Therefore, it is useful to find out who the individuals are that might influence the negotiation outcome, what role each individual plays and what the informal networking relationships are between the individuals that might affect the negotiation.24

Key Individuals

Key individuals are those people both inside and outside the company whose approval must be sought before a negotiated deal is finalized. For example, in the United States of America, any large deal must be

21 Id.
23 Id.
24 Ibid., at 77.
approved by the company’s top officers and the Board of Directors, as well as the Securities and Exchange Commission, the Federal Trade Commission and others.\(^{25}\)

It is essential that the attitude of key individuals toward particular types of agreements be thoroughly examined before beginning to negotiate. To avoid any unpleasant surprises, a negotiator must compile a list of all individuals who have a say in an agreement.

**Decision Process**

Equally important is the need to understand the role each individual is likely to play in the approval process. The questions that the negotiator should get answered are:

- What are the particular aspects of the deal an individual concerned with?
- Who has the authority to override the concerns a person might raise?
- What kind of information can be used to generate a favourable response from different individuals?\(^{26}\)

**Informal Influences**

Many countries have webs of influence that are more powerful than the formal managerial executives. These influences may not have formal standing, but they can make or break negotiations. A negotiator should determine the role of such influences and factor them into his or her negotiation approach.\(^{27}\)

However, simply knowing the individuals who are involved in the process is not enough. When negotiating with people, a negotiator is typically seeking to influence the outcome of an organizational process that takes different shapes in different cultures. Since different processes call for different negotiating strategies, a negotiation approach should be carefully crafted depending on the individuals involved and the process they follow.

**Abandoning ‘Getting To Yes’**

The ‘Getting to Yes’ approach to cooperative, problem-solving conflict resolution is characterized by its four core principles:

1. Separating the people from the problem;

2. Focusing on interests and not on positions;

\(^{25}\) *Supra* note 22, at 77.

\(^{26}\) *Supra* note 22, at 78.

\(^{27}\) *Id.*

sajai@jsalaw.com 											Page # 9 									Nuts & Bolts of Conducting Cross Border Negotiations
3. Inventing options for mutual gain; and

4. Using objective criteria.

This approach is so representative of American values that it is useless in a cross-cultural conflict. It reflects high individualism, medium power distance index, and low uncertainty avoidance.

The first principle of ‘separating the people from the problem’ reflects an individualistic perspective which clashes with collectivist cultures where there is more of a focus on building and maintaining relationships than on the tasks at hand or the issues being negotiated. In such countries, it may be impossible and unwise to ‘separate the people from the problem’ as the people are intertwined with the problem and in some cases, might even be the problem. This fact needs to be addressed and negotiation strategies chosen accordingly.28

In high power distance cultures, having and maintaining power is a critical interest and negotiators adopt positions that relate to hierarchy and power interests. Negotiators may be less concerned with apparent substantive interests than appearing powerful. Negotiators not only want to be powerful, they also must look powerful to maintain their status and hierarchy. In this sense, a negotiated solution must not only be good, it must also look good.

The idea of ‘inventing options’ suggests a willingness to try novel, and not-yet-proposed solutions, or at least solutions that were not proposed initially by one of the parties to the negotiation. Inventing options is the norm in uncertainty avoidance cultures, such as the U.S. However, for someone from a high uncertainty avoidance culture, what is different is dangerous. They have an interest in avoiding uncertain situations and nurturing the status quo.

Striving for ‘mutual gain,’ or win-win goals, or anyone else’s goals, might seem quite naive or feminine for someone from a culture high in masculinity. In such a culture, aggression, competition, and dominance are prime cultural beliefs and any approach that deviates from this is weak. Negotiators from such cultures are more likely to use a competitive negotiation style and seek win-lose solutions. Thus, to negotiators from a masculine culture, the ‘Getting to Yes’ approach to negotiation might sound like an approach for the weak. More importantly, establishing objective criteria may be exceptionally difficult for negotiators from different cultures who hold different values. What is fair to one side, may not seem completely unfair to the other.

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The ‘Getting to Yes’ approach to negotiation is perhaps, the most culturally insensitive negotiation strategy. Thus, it is pertinent to discuss culturally sensitive negotiation strategies.

**Culturally Responsive Negotiation Strategies**

While there has been considerable scholarship on international and cross-cultural negotiation, scant attention has been devoted to giving prescriptive advice to those facing the challenge of international negotiation. Two contributions stand out as universally practical and particularly effective.

Initially, many negotiation scholars advised the practitioners to follow the approach attributed to Saint Augustine: “When in Rome, do as the Romans do.”  

Currently, there is a widespread consensus that this advice is oversimplified and therefore rather impractical.  

Ideally, international and cross-cultural negotiators should:

1. **Anticipate differences in strategy and tactics that may cause misunderstandings.** It has been established that a negotiator’s culture affects his/her negotiating behaviour and style. Anticipating these differences is a source of advantage in international negotiations. Awareness of cultural differences reduces the negative attributions about the negotiation partner and helps view the difference as an inherent part of international negotiation process.

2. **Analyze cultural differences to identify differences in priorities that create value.** Differences add value to negotiation rather than similarities. A high level of cultural differences in international negotiations implies greater potential for integrative agreements.

3. **Recognize that the other party may not share your view of what constitutes power.** Power or the ability to influence other people’s decisions, is highly subjective and therefore context dependent. International negotiators should be aware that the other party’s estimate of power is based on completely different factors that may even seem unimportant. Engaging in a power contest may reduce the probability of an integrative agreement.

4. **Avoid attribution errors.** Attribution error occurs when people assume that a person’s behaviour is influenced more by what “kind” of person he is, rather than on the social and environmental forces that influence that person. Culturally sensitive negotiators should view their partners’ behaviour within the prism of cultural and situational norms and not attribute it to their underlying personality.

5. **Find out how to show respect in the other culture.** It is very important to show respect for the other party before starting negotiation. However, it is wrong to assume that display of respect is the same way in each country.

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30 Id.
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### TABLE 1

**Difference between Low-Context Culture and High-Context Culture**

<table>
<thead>
<tr>
<th>LOW-CONTEXT CULTURE</th>
<th>HIGH-CONTEXT CULTURE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overtly display meanings through direct</td>
<td>Implicitly embeds meanings at different</td>
</tr>
<tr>
<td>communication forms.</td>
<td>levels of the sociological context.</td>
</tr>
<tr>
<td>Values individualism.</td>
<td>Values group sense.</td>
</tr>
<tr>
<td>Tends to develop transitory personal</td>
<td>Tends to take time to cultivate and establish</td>
</tr>
<tr>
<td>relationships.</td>
<td>permanent person relationships.</td>
</tr>
<tr>
<td>Emphasizes linear logic.</td>
<td>Emphasizes spiral logic.</td>
</tr>
<tr>
<td>Values direct verbal interaction is less able to</td>
<td>Values indirect verbal interaction and is more</td>
</tr>
<tr>
<td>read non-verbal expressions.</td>
<td>able to read non-verbal expressions.</td>
</tr>
<tr>
<td>Tends to use “logic” to present ides.</td>
<td>Tends to use more “feeling” in expression.</td>
</tr>
<tr>
<td>Tends to emphasize highly structured messages, give</td>
<td>Tends to give simple, ambiguous, non-contextual messages.</td>
</tr>
<tr>
<td>details, and place great stress on words and technical</td>
<td></td>
</tr>
<tr>
<td>signs</td>
<td></td>
</tr>
<tr>
<td>Perceive highly verbal persons favourably.</td>
<td>Perceive highly verbal persons favourably.</td>
</tr>
</tbody>
</table>
TABLE 2

Power distance scores for a sampling of countries

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>POWER DISTANCE INDEX</th>
<th>COUNTRY</th>
<th>POWER DISTANCE INDEX</th>
</tr>
</thead>
<tbody>
<tr>
<td>Malaysia</td>
<td>104</td>
<td>South Korea</td>
<td>60</td>
</tr>
<tr>
<td>Philippines</td>
<td>94</td>
<td>Taiwan</td>
<td>58</td>
</tr>
<tr>
<td>Russia</td>
<td>93</td>
<td>Spain</td>
<td>57</td>
</tr>
<tr>
<td>Mexico</td>
<td>81</td>
<td>Japan</td>
<td>54</td>
</tr>
<tr>
<td>China</td>
<td>80</td>
<td>Italy</td>
<td>50</td>
</tr>
<tr>
<td>Indonesia</td>
<td>78</td>
<td>Australia</td>
<td>36</td>
</tr>
<tr>
<td>India</td>
<td>77</td>
<td>United Kingdom</td>
<td>35</td>
</tr>
<tr>
<td>USA</td>
<td>40</td>
<td>Germany</td>
<td>35</td>
</tr>
<tr>
<td>France</td>
<td>69</td>
<td>Sweden</td>
<td>31</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>68</td>
<td>Norway</td>
<td>31</td>
</tr>
</tbody>
</table>

**TABLE 3**  
Individualism scores for a sampling of countries

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>INDIVIDUALISM SCORE</th>
<th>COUNTRY</th>
<th>INDIVIDUALISM SCORE</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States of America</td>
<td>91</td>
<td>India</td>
<td>48</td>
</tr>
<tr>
<td>Australia</td>
<td>90</td>
<td>Japan</td>
<td>46</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>89</td>
<td>Russia</td>
<td>39</td>
</tr>
<tr>
<td>Canada</td>
<td>80</td>
<td>Brazil</td>
<td>38</td>
</tr>
<tr>
<td>Netherlands</td>
<td>80</td>
<td>Germany</td>
<td>35</td>
</tr>
<tr>
<td>New Zealand</td>
<td>79</td>
<td>China</td>
<td>20</td>
</tr>
<tr>
<td>Spain</td>
<td>51</td>
<td>Singapore</td>
<td>20</td>
</tr>
<tr>
<td>Thailand</td>
<td>20</td>
<td>Taiwan</td>
<td>17</td>
</tr>
<tr>
<td>South Korea</td>
<td>18</td>
<td>Indonesia</td>
<td>14</td>
</tr>
</tbody>
</table>

TABLE 4
Masculinity scores for a sampling of countries

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>MASCULINITY SCORE</th>
<th>COUNTRY</th>
<th>MASCULINITY SCORE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Slovakia</td>
<td>110</td>
<td>United Kingdom</td>
<td>66</td>
</tr>
<tr>
<td>Japan</td>
<td>95</td>
<td>Germany</td>
<td>66</td>
</tr>
<tr>
<td>Hungary</td>
<td>88</td>
<td>United States of America</td>
<td>62</td>
</tr>
<tr>
<td>Austria</td>
<td>79</td>
<td>Australia</td>
<td>61</td>
</tr>
<tr>
<td>Italy</td>
<td>70</td>
<td>South Korea</td>
<td>30</td>
</tr>
<tr>
<td>Mexico</td>
<td>69</td>
<td>Thailand</td>
<td>34</td>
</tr>
<tr>
<td>China</td>
<td>66</td>
<td>Finland</td>
<td>26</td>
</tr>
<tr>
<td>India</td>
<td>56</td>
<td>Norway</td>
<td>8</td>
</tr>
<tr>
<td>Denmark</td>
<td>16</td>
<td>Sweden</td>
<td>5</td>
</tr>
</tbody>
</table>

TABLE 5
Uncertainty Avoidance scores for a sampling of countries

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>UNCERTAINTY AVOIDANCE INDEX</th>
<th>COUNTRY</th>
<th>UNCERTAINTY AVOIDANCE INDEX</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>112</td>
<td>Indonesia</td>
<td>48</td>
</tr>
<tr>
<td>Portugal</td>
<td>104</td>
<td>United States of America</td>
<td>46</td>
</tr>
<tr>
<td>Japan</td>
<td>92</td>
<td>Philippines</td>
<td>44</td>
</tr>
<tr>
<td>Spain</td>
<td>86</td>
<td>India</td>
<td>40</td>
</tr>
<tr>
<td>South Korea</td>
<td>85</td>
<td>United Kingdom</td>
<td>35</td>
</tr>
<tr>
<td>Mexico</td>
<td>82</td>
<td>China</td>
<td>30</td>
</tr>
<tr>
<td>Germany</td>
<td>65</td>
<td>Hong Kong</td>
<td>29</td>
</tr>
<tr>
<td>Sweden</td>
<td>29</td>
<td>Singapore</td>
<td>8</td>
</tr>
</tbody>
</table>

Table 6
Do’s and Don’ts in Protocol and Deportment

<table>
<thead>
<tr>
<th>Greetings</th>
<th>How do people greet and address one another? What role do business cards play?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Degree of Formality</td>
<td>Will my counterparts expect me to dress and interact formally or informally?</td>
</tr>
<tr>
<td>Gift Giving</td>
<td>Do businesspeople exchange gifts? What gifts are appropriate? Are there taboos associated with gift giving?</td>
</tr>
<tr>
<td>Touching</td>
<td>What are the attitudes toward body contact?</td>
</tr>
<tr>
<td>Eye Contact</td>
<td>Is direct eye contact polite? Is it expected?</td>
</tr>
<tr>
<td>Deportment</td>
<td>How should I carry myself? Formally? Casually?</td>
</tr>
<tr>
<td>Emotions</td>
<td>Is it rude, embarrassing, or usual to display emotions?</td>
</tr>
<tr>
<td>Eating</td>
<td>What are the proper manners for dining? Are certain foods taboo?</td>
</tr>
<tr>
<td>Body Language</td>
<td>Are certain gestures or forms of body language rude?</td>
</tr>
<tr>
<td>Punctuality</td>
<td>Should I be punctual and expect my counterparts to be as well? Or are schedules and agendas fluid?</td>
</tr>
</tbody>
</table>

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Saturday August 1, 2009
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Armed Services Board of Contract Appeals

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Professor Roberta Karmel
Professor, Brooklyn Law School
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Loretta Collins Argrett
First African-American Assistant Attorney General, Tax Division, Justice Department

1980’s
Susan Levy
Managing Partner
Jenner & Block, LLP

1990’s
Deneen Stewart
General Counsel
ING Direct

2000’s
Daria Boxer
Law Clerk, Judge Samuel L. Bufford

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Professor Corinne Cooper
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