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LEGAL MALPRACTICE IN INTERNATIONAL BUSINESS TRANSACTIONS

*Vincent R. Johnson**

I. REPRESENTING CLIENTS IN A WORLD OF GLOBAL TRANSACTIONS

Lawyers are at an increased risk of committing legal malpractice when they begin representing clients in areas of the law unfamiliar to them.¹ This is particularly true if the relevant legal principles are complex.² Consequently, lawyers who normally specialize in domestic law (for example, the common law of contracts and the *Uniform Commercial Code* (“UCC”))³ have a heightened exposure to malpractice liability when they start to represent clients in international business transactions (“IBTs”). Those transactions may be governed by foreign law or international agreements, such as English law⁴ or the United Nations Convention on Contracts for the International Sale of Goods (“CISG”).⁵

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1. See Paige A. Thomas, Comment, *Online Legal Advice: Ethics in the Digital Age*, 4 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 440, 445 (2014) (noting that lawyers are exposed to claims for negligence when they “offer advice in an area of law in which they are unfamiliar or give advice on a complex issue without the adequate experience and research to fully appreciate the complexities”).

2. See MICHAEL PAUL THOMAS ET AL., CALIFORNIA CIVIL PRACTICE-TORTS § 33:17 (Nov. 2015 ed.) (“An attorney may be sued for malpractice for venturing into an unfamiliar area without the assistance of a specialist.”).

3. Vincent R. Johnson, *Regional Sales Law in a World of Global Transactions*, 1 CHINESE J. COMP. L. 426, 427 (2013) (book review) (“In the mid-twentieth century, [UCC] Article 2 was adopted in 49 of the 50 American states, plus the District of Columbia.”).

4. See Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT’L L. & BUS. 455, 472 (2014) (“[F]or international contracts involving international parties, English and Swiss laws are on average three times more attractive than U.S. State laws and French law, and almost five times more attractive than German law.”).

5. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: DRAFT CONVENTION ON THE

Of course, even knowledgeable and experienced IBT lawyers are at risk of being sued for legal malpractice. IBTs often raise a multitude of legal issues and require reference to numerous sources of law. Many of those sources are highly specialized, like the Carriage of Goods by Sea Act (“COGSA”)⁶ and the Federal Bill of Lading Act.⁷ In such a challenging practice environment, errors can be made.

Indeed, even if an IBT lawyer has not erred, a malpractice claim may be filed, as supported by the fact that “disputes arising from private [IBTs] have . . . increased significantly in the last twenty years.”⁸ Presumably, that trend, in itself, demonstrates an increased risk that legal malpractice actions will be threatened or asserted against IBT lawyers. The losing parties to international business disputes—like the losers to domestic disputes⁹—may seek to reallocate their losses to the lawyers who represented them in the underlying transactions.¹⁰ In the American legal profession, the risk of being sued for legal malpractice is substantial because the “number of claims continues to increase at a rate greater than the increase in the lawyer population.”¹¹

LAW APPLICABLE TO CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Oct. 30, 1985, 24 I.L.M. 1575; see FRANCO FERRARI, CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATIONS OF THE 1980 UNITED NATIONS SALES CONVENTION 277 (2012) (“It is worth pointing out . . . how important foreign case law and scholarly writing are to reach the CISG’s ultimate goal . . . [namely] the creation of a uniform law for the international sale of goods.”); Vincent R. Johnson, *The CISG After a Generation*, 2 CHINESE J. COMP. L. 181, 183 (2014) (book review) (“The widely adopted CISG is a key source of the legal principles that shape business-to-business transactions around the globe.”).

6. Carriage of Goods by Sea Act, 46 U.S.C. § 30701 (2012); see also O. Shane Balloun, *The Derailment of a Transport Statute: How Regal-Beloit Shipwrecked the Carmack Amendment on the Shoals of COGSA*, 37 TUL. MAR. L.J. 379, 380 (2013) (“In 2010, the United States Supreme Court decided that only the Carriage of Goods by Sea Act (“COGSA”), and not the Carmack Amendment, governs the domestic legs of international intermodal shipments coming into the United States by sea.”).

7. Federal Bill of Lading Act, 49 U.S.C. §§ 80101–80116 (2012). See generally Conte C. Cicala, *A Punic Web: Statutes and Contracts Affecting the Container Trade*, 25 U.S.F. MAR. L.J. 153 (2013) (discussing legal instruments relevant to the resolution of disputes of shippers and ocean common carriers).

8. Alexander Kamel, Note, *Cooperative Federalism: A Viable Option for Implementing the Hague Convention on Choice of Court Agreements*, 102 GEO. L.J. 1821, 1822 (2014).

9. See SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION 4 (2d ed. 2015) (discussing claims related to the 2007–2008 financial crisis).

10. See *id.* at 3 (“Clients disgruntled with the outcome of transactions or litigation may look for lawyers’ fingerprints in an effort to blame someone for the negative results.”).

11. *Id.* at 14 (citing RONALD E. MALLIN ET AL., LEGAL MALPRACTICE § 1:6 (2014)).

A. Reported Cases

There are numerous reported cases involving legal malpractice claims arising from international aspects of American law practice.¹² A number of cases have involved patent law. American law firms have been sued for failing to timely file an application for foreign patent protection of an invention;¹³ negligently terminating such services;¹⁴ failing to attach a translation to a U.S. Patent and Trademark Office filing for a Japanese client;¹⁵ making “misrepresentations about the availability of foreign patents;”¹⁶ and, failing to timely file an Asian patent for a pharmaceutical product.¹⁷

Other legal malpractice cases related to international law or international lawyering have involved allegedly defective legal advice. For example, lawyers have been sued for issuing an opinion letter assuring an Egyptian bank, which did business in New York, that a mortgage and promissory note were enforceable,¹⁸ and for failing to advise a Dutch company that involvement by its officers in arranging a subsidiary’s payment of a bribe in Panama could result in criminal liability for the company.¹⁹ In one case, a malpractice claim arose from

12. See Vincent R. Johnson & Stephen C. Loomis, *Malpractice Liability Related to Foreign Outsourcing of Legal Services*, 2 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 262, 270 (2012) (“It took longer than one might have predicted, but legal malpractice claims related to international aspects of American law practice have begun to result in reported decisions.”).

13. See *Vaxiion Therapeutics, Inc. v. Foley & Lardner LLP*, 593 F. Supp. 2d 1153, 1167, 1175 (S.D. Cal. 2008) (finding that there were disputed questions of fact related to the alleged untimely filing of a Patent Cooperation Treaty patent application); *Kairos Sci. Inc. v. Fish & Richardson P.C.*, Nos. A107085, A107486, 2006 WL 171921, at *1, *17 (Cal. Ct. App. Jan. 24, 2006) (awarding damages).

14. See *Harness, Dickey & Pierce, P.L.C. v. Andrews*, Civil Action No. 03-40334, 2006 WL 2671039, at *13 (E.D. Mich. Sept. 18, 2006) (rejecting the claim because “Andrews could have had no reasonable expectation that Harness Dickey would continue to represent him without payment, or . . . subsidize his foreign patent portfolio by continuing to absorb the fees and costs generated by its foreign associates”).

15. See *Seed Co. v. Westerman*, 62 F. Supp. 3d 56, 59, 67 (D.D.C. 2014) (finding no breach of the duty of care).

16. See *Waterloov Gutter Prot. Sys. Co. v. Absolute Gutter Prot., L.L.C.*, 64 F. Supp. 2d 398, 418, 428 (D.N.J. 1999) (rejecting a legal malpractice claim, but allowing a common law fraud claim to go forward).

17. See *InKine Pharm. Co. v. Coleman*, 759 N.Y.S.2d 62, 63 (App. Div. 2003) (stating that a cause of action was adequately alleged for legal malpractice causing a “substantial diminution of the value of [the plaintiff’s] worldwide license to manufacture, sell and sublicense the product”).

18. See *Arab African Int’l Bank v. Epstein*, 10 F.3d 168, 170 (3d Cir. 1993).

19. See *Stichting Ter Behartiging v. Schreiber*, 327 F.3d 173, 176-78 (2d Cir. 2003). Legal malpractice claims related to illegal conduct by a client are normally barred by the unlawful conduct defense. See Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 46 (2008) (“Rulings deny relief from errant attorneys under the rubric of *in pari delicto*, unclean hands, and even proximate causation.”); see also John G. Browning & Lindsey Rames, *Proof of Exoneration in Legal Malpractice Cases: The Peeler Doctrine and Its Limits in Texas and*

an American law firm's structuring of a Russian natural gas investment for Austrian clients.²⁰ The claim (which was ultimately rejected) was that the defendant-firm had negligently failed to warn the plaintiffs of the possible criminal consequences of their use of a simple partnership structure to invest in the Russian natural gas company, Gazprom.

Other suits have involved a wide variety of deficiencies related to international aspects of law practice. Lawyers have been sued for inadequately representing a foreign client in arbitration proceedings;²¹ improperly structuring a stock purchase agreement and otherwise failing to properly address "the enforceability of the pledge agreement used to secure . . . Bahamian collateral;"²² negligently handling a transaction creating a supplier/distributor relationship with a Taiwanese company;²³ failing to satisfactorily resolve the issue created when a bank refused to accept checks from the Israeli partner to a money-services business relationship;²⁴ and, assisting an allegedly fraudulent scheme to sell Ecuadoran water that purportedly offered medicinal benefits.²⁵ One legal malpractice claim grew out of a dispute over the reasonableness of fees charged in a representation that involved fighting more than 1700 subpoenas. The underlying matter involved the alleged theft of an international law firm's clients in Kazakhstan by lawyers who left the firm.²⁶

B. "Mission Creep" from Domestic to Foreign

International "mission creep" is common for American business lawyers. Clients that once had legal needs exclusively related to domestic law often begin to seek greater profits by looking past national

Beyond, 5 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 50, 55 (2014) ("[A convicted] malpractice plaintiff—who may have never actually committed a crime—will not be able to recover unless the plaintiff can prove that the conviction was overturned and that it was the lawyer's negligence that proximately caused the conviction in the first place.").

20. GUS Consulting GMBH v. Chadbourne & Parke LLP, 905 N.Y.S.2d 158, 159 (App. Div. 2010).

21. See *Doucakis v. Speiser, Krause, Madole, P.C.*, No. 08-00-00296-CV, 2002 WL 1397155, at *1-2 (Tex. App. June 27, 2002).

22. *Hart v. Carro, Spanbock, Kaster & Cuiffo*, 620 N.Y.S.2d 847, 848-49 (App. Div. 1995); see also *Hart v. Carro, Spanbock, Kaster & Cuiffo*, 620 N.Y.S.2d 850, 850 (App. Div. 1995) (related case).

23. See *Joseph DelGreco & Co., v. DLA Piper L.L.P.*, 899 F. Supp. 2d 268, 271 (S.D.N.Y. 2012), *aff'd*, No. 12-4524-bk, 2010 WL 5340403 (2d Cir. Sept. 25, 2013).

24. See *K.R. Exch. Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 891-92, 894-95 (Fla. Dist. Ct. App. 2010) (finding that the complaint failed to state a cause of action).

25. See *Ohman v. Kahn*, 685 F. Supp. 1302, 1304-05, 1311 (S.D.N.Y. 1988).

26. See *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP, C.A. No. 09C-08-239JAP*, 2010 Del. Super. LEXIS 52, at *1-3, *6-7 (Del. Super. Ct. Feb. 19, 2010) (denying a motion to amend the complaint in order to assert a legal malpractice claim).

borders. Those profits might be derived from import/export transactions,²⁷ outsourcing of services to providers in lower-cost countries,²⁸ foreign franchising of the client's business model,²⁹ or the establishment of a foreign business presence (whether by engaging foreign agents or distributors to promote or sell the company's products, entering into joint ventures with foreign entities,³⁰ or even creating or acquiring³¹ wholly foreign-owned subsidiaries to do business abroad on a continuing basis).³²

As clients expand internationally, they may expect their current lawyers to handle at least some of their non-domestic legal needs. Such expectations might be well-founded if the client's law firm touts itself as having global reach³³ or international connections.³⁴ However, similar expectations may also arise in less imposing circumstances. A small Texas law firm that represents a business client in transactions involving counterparties throughout the United States may be asked by the client to handle similar transactions with a counterparty in Monterrey, Mexico, not far away. Rather than advise its current client to take its international legal needs elsewhere, and risk losing some or all of the client's

27. See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS* 49 (3d ed. 2015) (discussing international sales of goods).

28. See Vincent R. Johnson & Stephen C. Loomis, *United States*, in 33a *COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS*, "OUTSOURCING LEGAL SERVICES: IMPACT ON NATIONAL LAW PRACTICES" 283, 284 (2012) ("For American businesses, foreign outsourcing began during the 1970s and 1980s . . . [and] was limited to blue-collar work, . . . [but] the creation and growth of the Internet, and the consequent ease of international communication, has played an important role in facilitating the outsourcing of certain professional tasks.").

29. See CHOW & SCHOENBAUM, *supra* note 27, at 334-47 (discussing business format franchising).

30. Rona R. Mears, *Joint Ventures in Mexico: A Current Perspective*, 23 *ST. MARY'S L.J.* 611, 614-24 (1992) (offering both a current and historical analysis).

31. See CHOW & SCHOENBAUM, *supra* note 27, at 17 ("The two main categories of FDI [foreign direct investment] are mergers and acquisitions (M&A) of existing businesses and greenfield investments.").

32. See *id.* at 464-65 (discussing joint ventures and wholly foreign-owned enterprises in China).

33. See Johnson & Loomis, *supra* note 12, at 303 ("Firms often use expansive language in their public relations, for example, touting themselves as being 'global' law firms or as offering clients the resources of an international 'team' of professionals.").

34. See *Harness, Dickey & Pierce, P.L.C. v. Andrews*, Civil Action No. 03-40334, 2006 WL 2671039, at *2 (E.D. Mich. Sept. 18, 2006) (indicating, in a case involving a legal malpractice claim arising from patent-related work, that "the international work was handled through [the law firm's] foreign 'associates' or 'affiliates' (patent attorneys or agents in other countries with whom Harness Dickey contracted to secure such services)"); see also 1 RONALD E. MALLIN & ALLISON MARTIN RHODES, *LEGAL MALPRACTICE* § 2:122 (2015 ed.) ("One of the first well-known law firm affiliates was designed to consult in the areas of international trade and real estate . . ."); *id.* at § 2:65 (noting the "continued growth of law firms with . . . international offices").

business, the small firm may decide to do what it takes to handle the client's cross-border legal needs. However, once a business transaction crosses an international border, everything becomes more complex and increasingly fraught with risks of legal malpractice.

C. *International Business Transactions' Legal Complexity*

IBT law is a body of legal principles that sometimes approaches Byzantine complexity.³⁵ The relevant legal provisions include a broad mix of rules drawn from American common law, state and federal statutes, international conventions, customary business practices,³⁶ and foreign legal systems.³⁷ In addition, IBT issues are often unavoidably linked to specialized areas of the law with which many lawyers are unfamiliar. These include import/export regulations,³⁸ copyright,³⁹ trademark,⁴⁰ and patent law,⁴¹ franchising⁴² and competition

35. See Gil Lan, *Foreign Direct Investment in the United States and Canada: Fractured Neoliberalism and the Regulatory Imperative*, 47 VAND. J. TRANSNAT'L L. 1261, 1297-98 (2014) ("Recently, it has become more apparent that the complex sets of relationships among various actors involved in the globalized provision of goods and services has given rise to spheres of commercial influence that go far beyond equity investments.").

36. See Richard F. Dole, Jr., *The Effect of UCP 600 upon U.C.C. Article 5 with Respect to Negotiation Credits and the Immunity of Negotiating Banks from Letter-of-Credit Fraud*, 54 WAYNE L. REV. 735, 737 (2008) (describing UCP 600 as the "most important" legal regime applicable to American letters of credit); Kyle Winnick, Note, *International Commercial Arbitration, Anticipatory Repudiation, and the Lex Mercatoria*, 15 CARDOZO J. CONFLICT RESOL. 847 (2014) ("The *lex mercatoria* is a supranational legal system consisting of international commercial usages and of principles and rules common to most nations." (citation omitted)). See generally INT'L CHAMBER OF COMMERCE, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (2007).

37. See Cuniberti, *supra* note 4, at 466 ("[P]arties often prefer to submit their contract to their law However, it is not always possible to satisfy parties from different jurisdictions Rather, the parties must settle on one of two solutions. The first is to choose the law of one party In the alternative, the second solution is to choose a third-state law.").

38. See Jo Anne Hagen, *An Overview of U.S. Import/Export Regulations—Part II, Imports*, COLO. LAW., Aug. 2003, at 47 (discussing U.S. import history, regulations, and paired concepts).

39. Amy Rosen, *China vs. United States: A Cosmopolitan Copyright Comparison*, 15 PITT. J. TECH. L. & POL'Y 1, 19 (2014) (noting "complex copyright issues").

40. See CHOW & SCHOENBAUM, *supra* note 27, at 309-10 (discussing trademarks); see also Daniel C.K. Chow, *Trademark Squatting and the Limits of the Famous Marks Doctrine in China*, 47 GEO. WASH. INT'L L. REV. 57, 97 (2015) ("Once a trademark squatter or opportunist has obtained a registration for the trademark in China, cancelling the trademark requires a complex and time-consuming process fraught with uncertainty.").

41. One particular risk of entering a foreign market is the risk of being sued by a "non-performing entity" for infringement of patent rights. See Vincent R. Johnson, *Minimizing the Costs of Patent Trolling*, 14 UCLA J.L. & TECH. 1, 4-6 (2014) (discussing the costs that patent trolling imposes on producers of products).

42. See CHOW & SCHOENBAUM, *supra* note 27, at 335-36 ("In the United States, both federal and state laws govern the franchise relationship. . . . On an international level, some nations do not have specific laws governing franchise agreements but apply general principles of contract law.

law;⁴³ the laws governing foreign agents and distributors;⁴⁴ foreign investment law;⁴⁵ corporate and securities law;⁴⁶ consumer protection regulations;⁴⁷ transportation law;⁴⁸ insurance law;⁴⁹ immigration law;⁵⁰ international commercial arbitration;⁵¹ and criminal prohibitions against corrupt practices.⁵²

Others, such as Canada, have laws governing issues such as misrepresentation in the franchise prospectus. . . . Other laws, such as EU competition laws, may also apply.”).

43. See, e.g., Daniel C.K. Chow, *A Comparison of EU and China Competition Laws That Apply to Technology Transfer Agreements*, 9 *US: J.L. & POL’Y FOR INFO. SOC’Y* 497, 498 (2014) (“Technology transfer has become an essential component in most sophisticated international business transactions According to many experts, EU competition law is the most complex and sophisticated in the world.”).

44. See CHOW & SCHOENBAUM, *supra* note 27, at 285 (discussing independent foreign agents and distributors).

45. See Ajay Sharma, *A Comparative Analysis of the Chinese and Indian FDI Regimes*, 15 *CHI.-KENT J. INT’L & COMP. L.* 35, 42 (2015) (“[T]he Chinese FDI Regime is pretty complex, [and] one of its distinguishing features . . . is the creation and legal recognition of separate standardized business vehicles specifically for FDI. The basic feature of all FDI in China . . . is that mandatory approval is required from the specified authorities.”); Leon E. Trakman, *China and Foreign Direct Investment: Does Distance Lend Enchantment to the View?*, 2 *CHINESE J. COMP. L.* 1, 2 (2014) (“[FDI is] guided by a sophisticated international investment treaty program.”).

46. See Roman A. Tomasic, *Corporate Governance in Chinese-Listed Companies Going Global*, 2 *CHINESE J. COMP. L.* 155, 174 (2014) (“Understanding how [Chinese] companies will behave when operating abroad will be greatly assisted by a better understanding of patterns of corporate governance that have developed in these companies in China.”); Wen-yeu Wang & Jhe-yu Su, *The Best of Both Worlds? On Taiwan’s Quasi-Public Enforcer of Corporate and Securities Law*, 3 *CHINESE J. COMP. L.* 1, 27 (2015) (“Taiwan’s model creates a quasi-public representative plaintiff to enforce securities and corporate law and does not rely on private economic incentives, as in the US entrepreneurial litigation scheme.”).

47. See, e.g., Martin Doris, *Digital Content Contracts, the Right of Withdrawal, and the Drafting of a Hong Kong Consumer Rights Ordinance*, 3 *CHINESE J. COMP. L.* 47, 48 (2015) (“[T]his is a sub-field of consumer law that has received much less attention among stakeholders in Hong Kong than in the USA or the United Kingdom (UK), and particularly in Brussels.”).

48. See CHOW & SCHOENBAUM, *supra* note 27, at 89-121 (discussing contracts of affreightment and related liability).

49. See *id.* at 121-28 (discussing insurance).

50. See *id.* at 426 (asking, “[w]hat immigration permits and visas are necessary to allow personnel from the investor’s country to live and work in the host country?”).

51. See John P. Bowman, *Advocacy in International Commercial Arbitration*, 65 *ADVOCATE (Texas)* 39, 39 (2013) (“Effective advocacy in international commercial arbitration requires, to start, acquiring a comprehensive knowledge of the five building blocks of international arbitration: the arbitration agreement, arbitration rules, international conventions concerning the enforcement of arbitration agreements and awards, national arbitration laws, and pertinent decisions and procedures of relevant national courts.”); Larry A. DiMatteo, *Soft Law and the Principle of Fair and Equitable Decision Making in International Contract Arbitration*, 1 *CHINESE J. COMP. L.* 221, 230, 255 (2013) (“[F]air and equitable decision making . . . [is] the unifying principle that binds international commercial arbitration and soft law.”); Ewan McKendrick & Iain Maxwell, *Specific Performance in International Arbitration*, 1 *CHINESE J. COMP. L.* 195, 209-10, 220 (2013) (“[T]here are practical reasons that may militate against seeking a specific performance order before an arbitral tribunal and . . . these factors should be taken into account before any arbitration is commenced . . .”).

52. See Kathleen M. Hamann, *The Globalization of Anticorruption Enforcement: It is Not Just the Foreign Corrupt Practices Act Anymore*, in *INTERNATIONAL WHITE COLLAR*

A lawyer who represents clients in IBTs should keep legal malpractice premiums well-paid. In addition, the lawyer should inform the insurance carrier of the nature of the representation to ensure that coverage applies to transactions extending beyond national borders⁵³ and to aspects of the lawyer's work that might be characterized as "doing business," rather than "practicing law."⁵⁴

A lawyer's job in IBT representation normally involves multiple tasks. Those duties may include not only drafting or reviewing international business contracts and related documents, but also anticipating legal issues and risks and counseling the client on how best to address those concerns. Malpractice liability may arise not merely from substantive errors, such as composing a document with incorrect or inconsistent provisions, but even from failure to obtain informed client consent to a particular course of conduct.

ENFORCEMENT 77, 77-78 (2015 ed. 2015) ("Governments around the world are stepping up investigations and actions against companies as part of a global anticorruption campaign. . . . [T]he United Kingdom, Canada, Germany, and Switzerland, but also now joined by Brazil and others [. . .] have adopted new legislation and stepped up enforcement."); Bryane Michael, *Can the Hong Kong ICAC Help Reduce Corruption on the Mainland?*, 2 CHINESE J. COMP. L. 78, 118 (2014) ("Cross-border work on fighting corruption has taken off in recent years."); Melvin L. Otey, *Why RICO's Extraterritorial Reach Is Properly Coextensive with the Reach of Its Predicates*, 14 J. INT'L BUS. & L. 33, 35 (2015) ("RICO's breadth . . . potentially permits prosecutors and plaintiffs to include persons filling distinct roles in various components of a complex transnational enterprise in one case."); Michael B. Runnels & Adam M. Burton, *The Foreign Corrupt Practices Act and New Governance: Incentivizing Ethical Foreign Direct Investment in China and Other Emerging Economies*, 34 CARDOZO L. REV. 295, 296 (2012) ("The Foreign Corrupt Practices Act (FCPA) is a U.S. statute that prohibits U.S. citizens, companies, and their employees from giving 'anything of value' to foreign government officials in order to secure business advantages."); David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 477 (2009) (noting that the FCPA "first criminalizes bribery of foreign officials and, second, establishes accounting and record-keeping requirements").

53. See MALLEN & RHODES, *supra* note 34, at § 38:18 ("The most common provision is for the policy to apply to the United States, its territories and possessions, and Canada. Attorneys engaged in international law and those likely to be sued in a country not included or expressly excluded from the policy form should seek broader geographical coverage.").

54. Susan Saab Fortney, *Legal Malpractice Insurance: Surviving the Perfect Storm*, 28 J. LEGAL PROF. 41, 50 (2004) ("In order to clarify that the legal malpractice policy will not insure lawyers' entrepreneurial ventures, malpractice insurance policies contain some form of business pursuits exclusion."); *id.* at 46 ("[Insuring agreements] may also clarify that the policy is intended to cover only the insured acting in the capacity of a lawyer engaged in the legal profession.").

In *Smith v. Ohio Bar Liability Insurance Co.*, a lawyer (Smith) operated as a lawyer and was also the owner of an insurance agency. No. 24424, 2009 WL 4829998, at *1 (Ohio Ct. App. Dec. 16, 2009). After a couple (the Ottos) contacted the insurance agency, the agency issued several annuity policies. *Id.* Smith also drafted wills and trusts for the couple. *Id.* After the Ottos became dissatisfied with the wills and trusts because of the nature of the annuities, they sued for malpractice. *Id.* The court found that the Smith's malpractice insurer did not have to defend the claim because the business enterprise exclusion in the policy applied to the facts of the case. *Id.* at 4.

II. INTERNATIONAL BUSINESS TRANSACTIONS MALPRACTICE BASED ON NEGLIGENCE

Virtually anything that a lawyer does on behalf of a client can be done negligently. Thus, neither in the IBT field, nor in any other practice area, is it possible to specify all of the ways in which a lawyer may be negligent. Nevertheless, it is useful to differentiate some basic types of IBT negligence, such as a lawyer's failure to know the law, failure to chart a prudent course, and failure to obtain informed consent. As the following discussion shows, while these varieties of negligence can be distinguished from one another, and sometimes occur in isolation, they are often interrelated. A lawyer who negligently fails to know the relevant law will often also negligently fail to chart a prudent course and negligently fail to disclose material risks to the client.

While negligence is the most commonly asserted theory of lawyer liability, it is not the only theory under which a lawyer may be held liable. Deficient lawyer conduct that involves disloyalty (such as representation of clients with conflicting interests or the lawyer's receipt of an excessive equity interest in a business venture as compensation for legal services) will often⁵⁵ support a cause of action for damages caused by breach of fiduciary duty⁵⁶ or fee forfeiture.⁵⁷ Less frequently, lawyers are sued by their clients for intentionally tortious conduct, such as fraud,⁵⁸ or for breach of contract.⁵⁹ Indeed, a lawyer may be sued for fraud even by a non-client.⁶⁰ For example, a federal court in New Jersey

55. See Vincent R. Johnson, "Absolute and Perfect Candor" to Clients, 34 ST. MARY'S L.J. 737, 752 (2003) (noting that "malpractice claims based on breach of fiduciary duty are increasingly common").

56. See, e.g., Chrissy L. Schwensen, Case Note, *Arbitration Clauses in Fee Retainer Agreements*, 3 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 330, 334 (2013) ("[R]etainer agreements between attorneys and their clients are traditionally interpreted with strict scrutiny to correspond with the attorney's fiduciary duties.").

57. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (AM. LAW INST. 2000) ("A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter."); VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 137 (2011) ("Fee forfeiture . . . is essentially a request for a refund, or for forgiveness of nonpayment, because the client did not get what was bargained for The difference between damages and forfeiture is the difference between loss and gain. Damages are measured by what the plaintiff lost; forfeiture, as a form of restitution, is measured by what the defendant improperly gained.").

58. Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 536-61 (2004) (discussing liability for fraud).

59. See Vincent R. Johnson, *Legal Malpractice in a Changing Profession: The Role of Contract Principles*, 61 CLEV. ST. L. REV. 489, 526 (2013) ("Contract law offers no great repository of client protection principles, but rather an array of rules which do as much to limit obligations by lawyers to clients as to create them.").

60. A lawyer may be liable to a non-client under many theories. See FORTNEY & JOHNSON,

allowed a claim by a competitor of a lawyer's client to go forward against the lawyer, based on alleged misrepresentations of the foreign patentability of a product.⁶¹ However, except as otherwise noted below, breach of fiduciary duty, fraud, and breach of contract are theories of liability beyond the scope of this Article.

In a malpractice case based on negligence, a plaintiff must prove that the defendant's conduct fell short of what the standard of care required. On this point, the introduction of expert testimony is ordinarily essential.⁶² In addition, a malpractice plaintiff seeking damages ordinarily must prove that the lawyer's conduct caused harm. The difficulty of establishing this causal link—typically pursuant to a “but for” test applied via a “trial-within-a-trial” procedure—often saves lawyers who committed malpractice from liability.⁶³ The “but for” rule may prove to be particularly important in IBT legal malpractice litigation.⁶⁴ As transactions and actors span the globe, it is harder to connect the dots and prove with reasonable certainty that, but for the lawyer's malpractice, the client would not have suffered damages. This

supra note 9, at 182-84 (identifying sixteen categories of potential lawyer liability to non-clients).

61. See *Waterloov Gutter Prot. Sys. Co. v. Absolute Gutter Prot., L.L.C.*, 64 F. Supp. 2d 398, 400-01, 420-21 (D.N.J. 1999) (denying the defendant lawyer's motion for summary judgment, the court noted that “[d]espite indications that [the opposing party] was represented by counsel and that he independently investigated the soundness of investing in WIC, it is not entirely clear that [the opposing party] was in a position to ascertain that public use of Waterloov gutters as early as 1990 would stymie efforts to obtain foreign patents”).

62. See *In re Joseph DelGreco & Co. v. DLA Piper L.L.P.*, No. 12-4524-bk, 2013 WL 5340403, at **1 (2d Cir. Sept. 25, 2013) (noting that courts generally require the plaintiff to proffer expert opinion on the duty of care); Jeffrey I.H. Soffer, *A Professional (Lack of) Courtesy: The Emergence of Expert Testimony in Legal and Medical Malpractice Cases*, 5 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 346, 353-59 (2015) (discussing the need for expert testimony). *But cf.* David S. Caudill, *Controversial Defenses to Legal Malpractice Claims: Are Attorney-Experts Being Asked to Be Advocates?*, 5 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 312, 345 (2015) (“Some instances of legal malpractice, nevertheless, are so easy to identify that expert testimony is not even required—clearly defrauding a client, ignoring a client's requests, and failing to do minimal discovery . . .”); David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions*, 2 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 136, 139 (2012) (discussing cases prohibiting expert testimony).

63. See Jeffrie D. Boysen, *Shifting the Burden of Proof on Causation in Legal Malpractice Actions*, 1 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 308, 316-20 (2011) (discussing the problems and difficulties associated with the “trial-within-a-trial” method of proving factual causation); F. Parks Brown, Case Note, *Evidentiary Standards in the Legal Malpractice Trial-Within-A-Trial*, 3 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 320, 323-27 (2013) (“The trial-within-a-trial method is often criticized for the burden it places upon the plaintiff, who must acquire sufficient evidence, prove the meritorious nature of her case, and procure relevant expert testimony (if admissible, required, or both).”).

64. See, e.g., *In re DelGreco & Co.*, 2013 WL 5340403, at **2 (dismissing an allegation that a law firm's failure to advise a client to pay an interest fee as required by contract resulted in a negative outcome in arbitration for the client, the court noted more momentous breaches by the client that would interrupt the causal “but for” connection).

was the problem in a New York case in which the court rejected a legal malpractice claim. As the court explained:

[The plaintiff]’s claim that, had [the defendant] properly advised it of potential criminal exposure, it would have changed or ceased its use of the SP Structure and then would have been able to maintain its presence in Russia and grow its business there over the next six years, while the Russian economy rebounded, is too speculative⁶⁵

However, everything depends on the particular facts. If a lawyer drafts an invalid IBT agreement or fails to timely file a foreign patent application, it may be clear that, but for the lawyer’s negligence, the client would not have suffered financial harm.

A. *Failure to Know the Law*

Failure to know the law is no excuse, particularly for a lawyer. In handling IBTs, lawyers must be reasonably knowledgeable about both the substantive law and possible dispute resolution mechanisms related to the matters they have undertaken. As ethics rules make clear,⁶⁶ a lawyer does not need to be an expert or even have had prior experience before accepting representation.⁶⁷ However, a lawyer who is not reasonably competent must achieve competence—through self-study or consented association with a more experienced lawyer—without undue delay or expense to the client.⁶⁸

Commentators argue that a lawyer who lacks relevant experience or training must, at least under some circumstances, disclose that deficiency to the client in a timely fashion so that the client can make an

65. See *GUS Consulting GMBH v. Chadbourne & Parke LLP*, 905 N.Y.S.2d 158, 160 (App. Div. 2010) (citation omitted).

66. Of course, with respect to international lawyering, it is important to determine which rules of ethics apply. A leading treatise explains that, “[w]hen dealing with . . . international transactions, determining the applicable ethics rules can invoke the jurisdiction’s choice-of-law rules.” MALLEN & RHODES, *supra* note 34, at § 15:12; see also *CenTra, Inc. v. Estrin*, 639 F. Supp. 2d 790, 793, 806-08 (E.D. Mich. 2009) (holding that, in an action against a Canadian law firm seeking a preliminary injunction, the Law Society of Upper Canada’s Rules of Professional Conduct, rather than the Michigan Rules of Professional Conduct, applied).

67. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS’N 2013) (stating that a lawyer “need not necessarily have special training or prior experience”).

68. Ethics rules dealing with competence normally expressly recognize that a lawyer can achieve competence “through necessary study” or “through the association of a lawyer of established competence in the field in question.” *Id.* A comment under Rule 1.1 of the *Model Rules of Professional Conduct* states: “Before a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client” *Id.* r. 1.1 cmt. 6. Actions that cause undue expense or delay to the client would likely run afoul of the ethics rules requiring diligence and reasonable fees. *Id.* r. 1.3 (covering diligence); *id.* r. 1.5 (covering fees).

informed decision about whether to allow the lawyer to provide representation.⁶⁹ Moreover, a positive misrepresentation of the lawyer's experience in handling business matters—as opposed to a mere failure to disclose lack of experience—may support an action for fraud. A New York court found that a client had raised a triable issue of fact as to whether a defendant lawyer had committed constructive fraud by misrepresenting that he had experience in handling commercial partnership cases.⁷⁰

1. Blindly Opting Out of the CISG

When the United States became a signatory to the CISG, that international convention became, in the words of the U.S. Constitution, part of the “supreme Law of the Land.”⁷¹ As a result, the CISG preempts⁷² state versions of the *UCC* in any case where both parties to an international contract for the sale of goods have their places of business in signatory states⁷³ and have not opted out of the CISG.⁷⁴ For the first ten years, American lawyers were widely ignorant of this fact and, because of that ignorance, were at risk of liability for malpractice if such ignorance caused clients harm.⁷⁵

69. Johnson & Lovorn, *supra* note 58, at 576 (“Attorneys *must* disclose facts that are basic to the transaction, not reasonably discoverable, or directly relevant to the representation [as well as] information that is necessary to prevent partial statements from being misleading . . .”). *But see* Moye White LLP v. Beren, 320 P.3d 373, 378 (Colo. App. 2013) (finding that information was not material and did not need to be disclosed “because the evidence presented at trial demonstrated that Attorney A’s medical and arrest history did not adversely affect the quality of . . . [the] representation”).

70. See *Nason v. Fisher*, 828 N.Y.S.2d 51, 52 (App. Div. 2007).

71. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”).

72. See *Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd.*, No. 4:09CV00318 SWW, 2009 WL 5181854, at *5 (E.D. Ark. Dec. 23, 2009) (“Despite differing viewpoints concerning the preemptive effect of the CISG on tort remedies, there is agreement that concurring state contractual claims are preempted by the CISG.”); *Asante Techs. Inc. v. PMC—Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001) (“[T]he expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action.”).

73. See Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, COLO. LAW., Feb. 2003, at 11, 12 (“The United States and several other countries made a reservation stating that they will not be bound by a technical CISG provision that makes the Convention applicable under a choice-of-law analysis, even if one or both parties to the contract do not have a place of business in a Contracting State.”).

74. *Cf.* William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFF. L. REV. 213, 290 (2011) (noting that intent to exclude the CISG can be “demonstrated in numerous ways”).

75. *Cf.* Larry A. DiMatteo, *The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC*, in CISG VS. REGIONAL SALES LAW UNIFICATION: WITH A

Once American lawyers recognized that the CISG was applicable to a wide range of international business contracts, they began to draft contracts containing language that routinely opted out of the CISG,⁷⁶ even though the lawyers were often unaware of the substantive provisions of the CISG or how those provisions would affect the interests of their clients. The CISG differs from the *UCC* in numerous respects.⁷⁷ An American client will not always be best served by the *UCC*. For example, an oral contract may be enforceable under the CISG,⁷⁸ but barred by the *UCC*'s statute of frauds.⁷⁹ The duty of reasonable care imposed by the law of negligence requires lawyers to think about these matters, or at least to disclose to their business clients that they decline to do so. Whether such a disclosure would be sufficient would likely depend on the clarity of the communication and the sophistication of the client. In some cases, even a disclosed refusal to consider issues related to the CISG might be regarded as an unreasonable limitation on the scope of representation.⁸⁰

FOCUS ON THE NEW COMMON EUROPEAN SALES LAW 25, 27-28 (Ulrich Magnus ed., 2012) (“American exporters and importers, and their attorneys, were ignorant of the CISG’s existence for an unreasonable amount of time after its adoption. Therefore, for at least the first decade of its existence, American businesses were subject to unintended legal liability.”).

76. See Johnson, *supra* note 3, at 428 (“[L]awyers unfamiliar with the detailed CISG provisions routinely excluded their application to cross-border transactions . . . because the CISG was not wholly congruent with the legal provisions extant in any part of the globe. Rather, the CISG was an amalgamation of rules that attempted to bridge the divergent laws that operate in common law and civil law countries.”).

77. See Christopher C. Kokoruda, *The UN Convention on Contracts for the International Sale of Goods—It’s Not Your Father’s Uniform Commercial Code*, FLA. B.J., June 2011, at 103, 103-04 (“[T]here are many striking substantive legal differences between art. 2 of the UCC (as well as the common law) and the CISG.”); DiMatteo, *supra* note 75, at 31 (identifying six important differences: “statute of frauds (UCC) versus no writing requirement (CISG); common law parol evidence rule versus all forms of evidence including witness testimony allowed; perfect tender versus fundamental breach rule; strict enforcement of timely delivery versus nachfrist notice (time extensions); generalized notice of non-conformity is sufficient versus requirement of particularized notice; additional terms almost never materially change an offer versus most terms are considered to materially alter the offer”).

78. U.N. Convention on Contracts for the Int’l Sale of Goods, art. 11, Apr. 11, 1980 (“A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”).

79. U.C.C. § 2-201 (AM. LAW INST. & UNIF. LAW COMM’N 1977) (“Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.”).

80. See MODEL RULES OF PROF’L CONDUCT r. 1.2(c) (AM. BAR ASS’N 2013) (covering the scope of representation); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19(1)(a)–(b) (AM. LAW INST. 2000) (“[A] client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances.”); see also JOHNSON, *supra* note 57, at 46

When lawyers, without disclosure to their clients, blindly opt out of the CISG because they are unfamiliar with its terms, it might fairly be argued they are breaching their duties of competence,⁸¹ diligence,⁸² and client communication,⁸³ and that their performance is impaired by a conflict of interests⁸⁴ based on their own lack of familiarity with a legal instrument that has been in force for nearly thirty years.⁸⁵

During the past three decades, thousands of American law students have taken courses on the law governing international sales, whether at their home campuses across the United States or at scores of foreign sites where American law schools operate study abroad programs.⁸⁶ In such courses, great attention is typically devoted to the CISG.⁸⁷ In addition, each year an expanding number of law review articles, court decisions, and arbitral awards refer to the CISG.⁸⁸ Thus, the landscape of IBT law has changed, and it is increasingly implausible that a lawyer who blindly opts out of the CISG can persuasively argue that doing so is consistent with the duty of reasonable care imposed by the law of negligence. Although precise figures are elusive, anecdotal evidence suggests that opting out of the CISG is less common today than it was earlier.⁸⁹

(“Consider . . . the case of a lawyer advising a client on a contract for the sale of goods to a foreign buyer. If the lawyer-client contract provides that the lawyer is not obliged to consider issues arising under international law, such as the Convention on the International Sale of Goods, that limitation may be so unreasonable that it may not limit the lawyer’s liability for failing to address such issues.”).

81. MODEL RULES OF PROF’L CONDUCT r.1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

82. *Id.* r. 1.3 (“A lawyer shall act with reasonable diligence and promptness . . .”).

83. *Id.* r. 1.4 (mandating lawyers to “promptly inform” and “reasonably consult” with clients).

84. *Id.* r. 1.7(a)(2) (dealing with representation “materially limited by . . . a personal interest of the lawyer”).

85. See CHOW & SCHOENBAUM, *supra* note 27, at 170 (“[T]he CISG came into effect in 1988.”).

86. See John A. Barrett, Jr., *International Legal Education in U.S. Law Schools, Plenty of Offerings, But Too Few Students*, 31 INT’L LAW. 845, 852-53 (1997); Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309, 309 n.1 (2006) (indicating that American law schools offer nearly 200 study abroad programs).

87. Ulrich Magnus, *Introduction*, in CISG VS. REGIONAL SALES LAW UNIFICATION: WITH A FOCUS ON THE COMMON EUROPEAN SALES LAW, *supra* note 75, at 1, 3 (noting that courses “prominently mention the CISG”).

88. Pace Law School and the Institute of International Commercial Law maintain an extensive website collecting CISG cases and commentaries. *Albert H. Kritzer CISG Database*, PACE L. SCH. & INST. INT’L COM. L., <http://www.cisg.law.pace.edu> (last visited Feb. 15, 2016).

89. See Magnus, *supra* note 87, at 2 (“In Germany the CISG is often applied and much less excluded than in its early years.”). *But see* Harry M. Flechtner, *The U.S. Experience with the UCC and the CISG: Some Insights for the Proposed CESL?*, in CISG VS. REGIONAL SALES LAW UNIFICATION: WITH A FOCUS ON THE COMMON EUROPEAN SALES LAW *supra* note 75, at 5, 18

2. Required Knowledge

A lawyer's ignorance of the relevant law is one path that may lead to IBT malpractice liability. Thus, it becomes important to ask what an IBT lawyer must know. This is a difficult question because, as suggested earlier, IBTs are governed by a very complex array of domestic, foreign, and international laws, as well as by commonly-used commercial terms⁹⁰ and customary business practices.⁹¹ Surely, it cannot be said that every lawyer who ventures anywhere into the broad territory of IBT law must be reasonably informed about every legal source.

Thus far, the principles of American law governing legal malpractice liability have tended to favor a unified standard of care.⁹² Thus, the question of whether the duty of care was breached is normally framed in terms of whether the defendant acted as a reasonably prudent lawyer would have acted under similar circumstances. Different standards of care are not applied to large firm lawyers, small firm lawyers, and solo practitioners.⁹³ However, it is often useful to focus on the field or sub-field of law at issue. An international lawyer specializing in patents must understand the relevant domestic and international instruments of patent law and, perhaps, even closely-related areas such as the law of business associations. However, for purposes of fulfilling obligations to a patent law client, a lawyer ordinarily does not have to be knowledgeable about "close-out netting," a practice which plays an important role in many international financial transactions.⁹⁴

In thinking about IBT malpractice—and the question of what an IBT lawyer must know—it is useful to remember that the IBT field is

(suggesting that the "vast majority of lawyers and their clients" in the United States have been opting out of the CISG); *id.* at 23 ("[Flechtner's] confident guess is that U.S. lawyers advising clients on international sales . . . still generally counsel opting out of the CISG if possible.").

90. See Juana Coetzee, *The Interplay Between Incoterms® and the CISG*, 32 J.L. & COM. 1, 2-3 (2013) ("Scholars are of the view that the majority of international sales contracts are concluded on the basis of a trade term. Trade terms (also known as delivery or price terms) are three letter abbreviations which reflect mercantile custom regarding the parties' respective obligations in connection with the delivery of goods, the passing of risk and other incidental matters.").

91. *Id.* at 2 ("[T]rade usage not only functions as an interpretation tool to fill gaps, . . . it can also supplement the provisions of the CISG . . .").

92. See FORTNEY & JOHNSON, *supra* note 9, at 65 ("[W]hile there are occasional cases holding specialists to a higher standard of care and novices (if they disclose their inexperience) to a lower standard of care, most legal malpractice cases are governed by the same standard of care.").

93. See Johnson, *supra* note 59, at 516 ("In most circumstances, there is no reliable way of establishing what a reasonably prudent large-firm lawyer would do that can be confidently distinguished from what a reasonably prudent solo practitioner would do, or what a reasonably prudent lawyer with twenty years of experience would do differently than a reasonably prudent lawyer with less experience.").

94. Cf. Vincent R. Johnson, *International Financial Law: The Case Against Close-Out Netting*, 33 B.U. INT'L L.J. 395, 403-06 (2015) (describing close-out netting, and its role in IBTs, as an alternative to bankruptcy).

often subdivided, both by textbook authors and by professors teaching IBT courses.⁹⁵ Among the major divisions are those which differentiate (1) international sales of goods; (2) international franchising; and (3) foreign direct investment (“FDI”). Of course, other lines may be drawn.

It would be reasonable to argue that a lawyer representing clients in import/export transactions must be knowledgeable of the key legal provisions and source of law relevant to the international sale of goods, such as, among other things: the CISG and *UCC*; transportation liability regimes (including COGSA); bills of lading; letters of credit; the International Chamber of Commerce (“ICC”) *Incoterms*; and the *Uniform Customs and Practice for Documentary Credits*. These sources are part of the well-established canon of legal provisions that are commonly taught in IBT courses and covered in IBT texts.

In contrast, a lawyer representing a client in international franchising would need to know different things. Those legal provisions would normally include competition law and trade secret law—subjects that are usually not directly related to import/export transaction. Similarly, competent representation of a client engaging in FDI may require knowledge of joint venture law, investment law, foreign employment law, and administrative regulations of the host country.

Of course, there will be aspects of legal knowledge that may be needed regardless of what subcategory of IBT is at issue. It is important for lawyers representing a wide range of IBT clients to know and understand the principles governing conflicts of law, international commercial arbitration, forum non conveniens,⁹⁶ enforcement of judgments,⁹⁷ and criminal liability for corrupt practices.⁹⁸

95. It might be possible to think about what an IBT lawyer must know not in terms of the subcategories of IBT, but in terms of geography. Consider the following:

[S]uppose that a partner in a large American law firm lives and works in one of the firm’s foreign offices while representing American clients on matters generally controlled by the law of the foreign country. By reference to what group of lawyers should the lawyer’s actions be judged? American lawyers generally? Lawyers practicing in the U.S. state where the lawyer is licensed? American lawyers practicing in this particular foreign location? Lawyers licensed in the foreign country? American lawyers specializing in the relevant field of international law? Moreover, who would be permitted to testify as an expert about the standard of care?

FORTNEY & JOHNSON, *supra* note 9, at 83.

96. See Chenglin Liu, *Escaping Liability Via Forum Non Conveniens: ConocoPhillips’s Oil Spill in China*, 17 U. PA. J.L. & SOC. CHANGE 137, 141 (2014) (“Forum non conveniens is a common law doctrine that allows a court to dismiss a case if an alternative forum is substantially more convenient or appropriate.”).

97. See James P. George, *Enforcing Judgments Across State and National Boundaries: Inbound Foreign Judgments and Outbound Texas Judgments*, 50 S. TEX. L. REV. 399, 424 (2009) (“First, there is no international law mandate although there are several treaties. Second, although the United States is not a signatory to any judgment enforcement treaties for general civil

B. Failure to Chart a Prudent Course of Action

IBT lawyers have a duty to exercise reasonable care to chart a prudent course on behalf of their clients. Just what this entails depends on the scope of the representation.⁹⁹ If the lawyer has been asked to provide a broad range of assistance, the lawyer typically will be obliged to identify risks and alternatives, counsel the client about options, and implement the client's decision. Thus, the lawyer may have to consider how a transaction can be structured so that the client is assured of payment;¹⁰⁰ whether hard currency can be taken out of a country;¹⁰¹ how to minimize the risk that FDI assets will be expropriated by the government;¹⁰² or, whether a party hired for a construction project should be required to post a performance bond.¹⁰³

Similarly, it may be necessary for the lawyer to anticipate issues of criminal liability that may arise under the laws of any jurisdiction connected to the transaction. So, too, in representation that involves international mergers and acquisitions, it may be appropriate for the lawyer to consult guidelines that have been proposed for the exercise of due diligence.¹⁰⁴

1. Contract Drafting

IBT lawyers are frequently involved in contract negotiation and drafting. It is therefore important to consider the wide array of issues

judgments, it has signed treaties covering arbitration and family matters, as well as a treaty governing the authentication of foreign judgments. Third, in the absence of international rules, the law of the country where enforcement is sought . . . controls and those laws vary widely.”).

98. See *supra* note 52.

99. See MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2013).

100. See CHOW & SCHOENBAUM, *supra* note 27, at 52 (discussing how the standard documentary transaction minimizes risks and uncertainties by using “at least three contracts: (1) the sales contract between the seller and buyer for the goods, (2) the letter of credit between the buyer's bank and the seller for payment, and (3) the bill of lading between the seller and the carrier, which serves as a contract for the transportation of the goods”).

101. See *id.* at 492-93 (discussing Argentina, Brazil, China, and developing countries).

102. See *id.* at 358 (“[O]ne of the most important concerns of the foreign investor is that the host country might unexpectedly seize or expropriate the foreign investor's business assets in the country of investment.”).

103. Cf. *Chinese Hit Polish Road Block*, PROJECT FIN. INT'L, June 3, 2011, 2011 WLNR 28650352 (discussing a failed construction project in Poland).

104. See generally A.B.A., INTERNATIONAL MERGERS AND ACQUISITIONS DUE DILIGENCE (2007); see also MALLIN & RHODES, *supra* note 34, § 14:36 (“Despite the recognized need for careful investigation in a securities practice, there are currently no due diligence guidelines or checklists approved by the SEC or the National Association of Securities Dealers (“NASD”). Nonetheless, prior efforts to propose such guidelines have gained recognition and should be considered by counsel.”).

that may arise and call for the exercise of care in defining the terms of the agreement.

If English law applies, it may be important to add language to a contract excluding or limiting the rights of third parties. This is true because under English legislation, “the right of enforceability by a third party must be ‘subject to and in accordance with any other relevant terms of the contract,’” and, thus, it is “possible to attach conditions to the exercise of the right,” and thereby limit or “exclude some forms of liability.”¹⁰⁵

In many countries, contracts are rarely subject to renegotiation even if, as events develop, performance would impose a financial or other hardship on the obligor.¹⁰⁶ However, depending on the facts, the duty of reasonable care may oblige a lawyer to incorporate into an international contract a provision allowing for renegotiation of the terms of the agreement in certain cases.¹⁰⁷ According to contracts scholar Joseph M. Perillo, “[s]ophisticated international trade agreements of long duration typically contain a renegotiation or other adaptation clause that provides flexibility to the relationship—so typical as to perhaps rise to the strength of a usage.”¹⁰⁸

In some cases, a debtor has “a considerable interest in dealing exclusively with his original creditor.”¹⁰⁹ In such a case, attentive drafting can protect the debtor “against any change of creditor by

105. See Catharine MacMillan, *A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999*, 63 MOD. L. REV. 721, 725-26 (2000).

106. See Kapwadi F. Lukanda, *Renegotiating Investment Contracts: The Case of Mining Contracts in Democratic Republic of the Congo*, 5 GEO. MASON J. INT’L COM. L. 301, 310-12 (2014) (“[T]he tendency among American Courts is that without a renegotiation or adjustment clause provided for in the contract, parties cannot expect to obtain relief from their obligations because the unforeseen difficulty is believed to have been accepted implicitly. This situation prompted professor [Peter J.] Mazzacano’s comment that US courts tend to follow the traditional approach of the *pacta sunt servanda* despite the enactment of the UCC and Restatement (second).”); Joseph M. Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts*, 5 TUL. J. INT’L & COMP. L. 5, 8-26 (1997) (noting that the “Convention on the International Sale of Goods . . . is silent on the question of hardship” and that “[c]ompelled renegotiation and judicial reformation of the bargain are not in the mainstream of the Common Law”). See generally PETER MAZZACANO, EXEMPTIONS FOR THE NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS IN CISG ARTICLE 79: THE QUEST FOR UNIFORMITY IN INTERNATIONAL SALES LAW (2014).

107. See Lukanda, *supra* note 106, at 310-21 (discussing renegotiation of a contract under various legal regimes); Perillo, *supra* note 106, at 9 (indicating that reference can be made to the UNIDROIT Principles of International Commercial Contracts).

108. Perillo, *supra* note 106, at 11.

109. HEIN KOTZ, EUROPEAN CONTRACT LAW BY HEIN KOTZ AND AXEL FLESSNER: FORMATION, VALIDITY, AND CONTENT OF CONTRACTS; CONTRACT AND THIRD PARTIES 269 (Tony Weir trans., 1997).

stipulating that the claim be non-transferrable.”¹¹⁰ Similarly, in some jurisdictions, language can be inserted into a contract to minimize the burdens that arise from partial assignments of the right to receive money. Thus, “[t]he risk of conflicting judgments can be avoided by allowing the debtor to insist that all the assignees join in a suit against him.”¹¹¹

It may also be prudent for a lawyer drafting a contract to include a provision whereby a debtor agrees not to raise certain defenses, such as that “the debt never arose, that it has lapsed, that a period of grace was allowed, that it is now time-barred or that for some other reason it is not actionable.”¹¹² In certain countries, “[s]uch waivers are commonly accepted as valid between tradesmen.”¹¹³

2. The Scope of Representation

If the scope of the legal representation is narrow, the lawyer’s duty to chart a prudent course is limited. In some cases, the lawyer may be asked to do little more than draft a contract that accurately reflects the agreement of the parties. In such cases, the lawyer will be obliged to exercise reasonable care to ensure that the agreement is clear and enforceable. Failure to do so may give rise to a claim. For example, if a contract of sale uses ICC *Incoterms* that are inconsistent with the terms of the intended transportation contract, and the inconsistencies result in increased expenses or other losses to the client, the lawyer will be subject to an action for negligence.

In many instances, the scope of legal representation turns upon what the law firm promised to the client. In one New York case, the plaintiffs, a U.S. holding company and its foreign parents, alleged that an American law firm, which had set up a transaction to allow them to take advantage of then-existing tax laws, also promised that it would inform them “if any significant amendments to the United States tax laws were enacted.”¹¹⁴ In refusing to dismiss a subsequent legal malpractice claim, the court noted that “[i]f in fact such a specific commitment was made which was later handled in a negligent manner, liability may arise on that basis.”¹¹⁵ The plaintiffs “claimed that they could have avoided \$33,000,000 in tax liability, if they had known of the tax law change.”¹¹⁶

110. *Id.*

111. *Id.* at 270-71.

112. *Id.* at 282.

113. *Id.* at 283.

114. *Lama Holding Co. v. Shearman & Sterling*, 758 F. Supp. 159, 160-61 (S.D.N.Y. 1991).

115. *Id.* at 161, 164.

116. *MALLEN & RHODES*, *supra* note 34, § 35:8.

3. Exercise of Judgment

In general, the broader the scope of the representation, the greater the opportunities for a lawyer to commit malpractice.¹¹⁷ However, in charting a prudent course of action, lawyers are protected by what is sometimes called the “exercise of judgment” rule.¹¹⁸ So long as the lawyer chooses or recommends a course of action that is somewhere within the broad bounds of reasonableness, the lawyer will not be liable for malpractice merely because some other lawyer would have followed a different course.¹¹⁹ To prevail in an action for negligence, the plaintiff must prove the defendant-lawyer acted in a manner in which no reasonably prudent lawyer would have acted under the circumstances.¹²⁰ The exercise of judgment rule provides lawyers with room to exercise discretion.¹²¹ This is important because the relevant facts and laws may be so numerous, complex, or uncertain that there may be more than one course of action that is reasonable under the circumstances.

The exercise of judgment rule only protects lawyers who exercise judgment and, in doing so, act reasonably.¹²² The rule does not protect from liability a lawyer who fails to identify legal issues or willfully ignores such matters. Consequently, a lawyer must be attentive to danger signals that may arise in IBTs and take appropriate action in light of those risks. Thus, it has been argued that the client’s obligations under the Foreign Corrupt Practices Act “should be carefully reviewed [by the lawyer] if any questionable circumstances arise in dealings” with a foreign party.¹²³ Ignoring signals of material danger is not an option.

The standard documentary transaction that is customarily used in international sales of goods is often structured in a way that allows the

117. See Ethan S. Burger, *International Legal Malpractice: Not Only Will the Dog Eventually Bark, It Will Also Bite*, 38 ST. MARY’S L.J. 1025, 1039 (2007) (“Because common law lawyers can exercise greater discretion in structuring deals, they also have greater opportunities for mistakes that could amount to malpractice.”).

118. See FORTNEY & JOHNSON, *supra* note 9, at 71 (discussing errors of judgment).

119. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. b (AM. LAW INST. 2000) (“[The duty of competence] does not require a lawyer, in a situation involving the exercise of professional judgment, to employ the same means or select the same options as would other competent lawyers in the many situations in which competent lawyers reasonably exercise professional judgment in different ways.”).

120. *Cosgrove v. Grimes*, 774 S.W.2d 662, 664-65 (Tex. 1989) (“If an attorney makes a decision which a reasonably prudent attorney could make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable.”).

121. See *Seed Co. v. Westerman*, 62 F. Supp. 3d 56, 65-67 (D.D.C. 2014) (“[L]awyers must exercise reasonable care, but [are not required] to foretell the future.”).

122. *Id.*

123. See Rona R. Mears, *Ethics and Due Diligence: A Lawyer’s Perspective on Doing Business with Mexico*, 22 ST. MARY’S L.J. 605, 649-50 (1991).

goods to be sold while they are in transit.¹²⁴ To accomplish this goal, there must be a negotiable bill of lading.¹²⁵ A lawyer who advises the client to save money on carriage of the goods by obtaining a *non-negotiable* bill of lading is likely to be subject to malpractice liability if the choice results in damages. Although the lawyer exercised judgment, the choice was unreasonable because it undermined the objectives of the transaction.

As discussed earlier, an American lawyer representing a client in the international sale of goods has a duty to consider how opting out of the CISG would affect the client (or at least disclose to the client that no such evaluation will be made). However, if the lawyer has considered the advantages and disadvantages of opting out, and based on a reasonably careful assessment of the options, recommends opting out (or not opting out), the lawyer will likely be protected by the exercise of judgment rule from malpractice liability, even if that course of action ultimately proves to have been unwise and the client suffers damage.

C. *Failure to Disclose Material Risks*

Lawyers must disclose to their clients the material risks and alternatives to a proposed or chosen course of action. In general, this obligation is backed by the law of negligence. In making disclosures, a lawyer must act reasonably, taking into account the magnitude of the risks, the feasibility of the alternatives, and the sophistication of the client.¹²⁶ However, where the interests of the lawyer are adverse to the client—such as where the lawyer has something to gain or something to hide—the standard is much more demanding and approaches “absolute and perfect candor.”¹²⁷

The law requires disclosure of risks and alternatives so that a client can make informed decisions relating to the representation. If the matters in question are significant, the lawyer must obtain informed consent from the client. This means that the lawyer must provide adequate

124. See INDIRA CARR, *INTERNATIONAL TRADE LAW* 84 (3d ed. 2005).

125. See CHOW & SCHOENBAUM, *supra* note 27, at 60 (“A negotiable bill of lading . . . represents title to and control of the goods themselves because whoever has possession of a properly endorsed bill has a legal right to obtain possession of the goods.”).

126. See Johnson, *supra* note 55, at 747 (“By embracing a rule of reasonableness, negligence principles recognize that the complexities and uncertainties of law practice mandate existence of a scope of action within which, free from the risk of legal liability, attorneys must be able to exercise judgment as to how to conduct representation.”).

127. *Id.* at 771 (stating that “the duty of ‘absolute and perfect candor’ applies most forcefully in instances where the interests of the attorney and client are adverse, as in the case of a business transaction between them” (citations omitted)).

information to enable the client to make a sound decision, and the client must in fact give informed consent.¹²⁸

In some areas of legal representation, legal complexities coupled with the client's lack of sophistication may make it impossible for a lawyer to obtain informed consent.¹²⁹ However, this will rarely be the case in IBT representation, since the parties to international transactions are often well-versed in the issues and risks related to their lines of business. Sophistication on the part of the client makes it easier to conclude that dangers and alternatives were adequately disclosed and understood.¹³⁰ Indeed, there is no duty to disclose risks or options that a client clearly understands.¹³¹

Legal malpractice actions predicated on lack of informed consent are common,¹³² and they are a potent type of claim. Juries can easily appreciate the gist of a malpractice action when the client says, "if my lawyer had told me X, I would never have gone forward with the deal." In such cases, the key legal questions are likely to be whether X was a fact which, under the circumstances, had to be disclosed, and whether the nondisclosure caused damages.

128. See MODEL RULES OF PROF'L CONDUCT r. 1.0(e) (AM. BAR ASS'N 2013) ("Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.").

129. See Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 166, 235 (2012) ("Based on the ethical requirements associated with limited representation, it is not surprising that informed consent in some complex legal matters is presumed impossible to obtain.").

130. See Johnson & Loomis, *supra* note 12, at 284 ("The need for client protection is often reduced in cases involving the representation of sophisticated clients and entities. This is why client sophistication is such an important factor in determining whether a lawyer's disclosure obligations to the client have been met.").

131. See Johnson, *supra* note 55, at 785-87 ("[T]here is no duty to disclose information that is already known. [This] rule, rooted in common sense and efficiency, is applied throughout the law. . . . [T]here will be cases where there are questions as to what the client 'knows,' and there will be instances where it is fair to conclude that what the client 'knows' the client fails to appreciate adequately. . . . But within a certain range of cases it is possible to conclude that the facts in question are both known and appreciated . . .").

132. See, e.g., *Sierra Fria Corp. v. Evans*, 127 F.3d 175, 179-80 (1st Cir. 1997) ("[W]hen a client seeks advice from an attorney, the attorney owes the client 'a duty of full and fair disclosure of facts material to the client's interests.' This means that the attorney must advise the client of any significant legal risks involved in a contemplated transaction, and must do so in terms sufficiently plain to permit the client to assess both the risks and their potential impact on his situation."); *Bowman v. Gruel Mills Nims & Pylman, LLP*, No. 5:06-CV-87, 2007 WL 1203580, at *5-6 (W.D. Mich. Apr. 24, 2007) (holding, in a malpractice action, that an ERISA lawyer's decision not to press certain ERISA claims was a key strategic decision that was not entitled to attorney judgment protection); see also FORTNEY & JOHNSON, *supra* note 9, at 96-97 (discussing informed consent claims in legal malpractice); Johnson & Lovorn, *supra* note 58, at 568-76 (discussing actions based on lack of informed consent).

In actions predicated on lack of informed consent, the standard for proving causation is normally an objective one.¹³³ The question is not what the particular client would have done if the matter had been disclosed, but whether a reasonable person, aware of the undisclosed information, would have chosen a different course and, therefore, not have suffered damages.

Two examples related to informed consent may be useful. The first relates to choice of law, and the second to choice of dispute resolution mechanism.¹³⁴

1. Choice of Law

The rights and liabilities of parties to international contracts normally depend upon which nation's law or international convention governs the agreement. Normally, the parties to a contract have great freedom to define in their contract which law applies.¹³⁵ When such a choice is made, it greatly reduces legal uncertainties and the costs related thereto.

However, in some instances, the parties to an international contract cannot agree about which law will apply. In that case, they may include in their contract a provision vaguely stating that the agreement "shall be governed by the 'general principles of law,' by the 'usages and customs of international trade,' [or] by the *lex mercatoria*, etc."¹³⁶ In other cases, choice of law is an issue simply unaddressed by the contract. In such situations, the rules of law that govern the contract will ultimately be determined in accordance with what is sometimes¹³⁷ known as "private international law."¹³⁸ The principles of private international law differ

133. See VINCENT R. JOHNSON, *STUDIES IN AMERICAN TORT LAW* 291 (5th ed. 2013) ("Most cases reject a subjective test for causation in informed consent cases.").

134. See *infra* Part II.C.1-2.

135. See Cuniberti, *supra* note 4, at 457, 465-66 ("Particularly in the context of international commercial arbitration, parties' freedom of choice is not limited by a requirement that the chosen law be connected to the transaction or, for that matter, to the parties themselves.").

136. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS pmbl. cmt. 4(b) (INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2010).

137. "Private international law" is called "conflict of laws" in the United States. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 cmt. c (AM. LAW INST. 1987).

138. See CHOW & SCHOENBAUM, *supra* note 27, at 23 ("[P]rivate international law . . . refers to the use of domestic choice of law rules by domestic courts to resolve issues of conflicts of law and the recognition and enforcement of judgments in the international context."); Alex Mills, *The Identities of Private International Law: Lessons from the U.S. and EU Revolutions*, 23 DUKE J. COMP. & INT'L L. 445, 472 (2013) ("[T]here is a considerable range of different ideas of what private international law 'is' in the sense of how we should understand its purpose and function."); John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561, 561-62 (1952) (noting that "private international law" means "the body of norms applied in international cases to determine . . . the particular system or systems of law to be

from one country to the next. Nations disagree about which factors are most relevant to the choice of law and how those factors should be weighed. Consequently, the result of the private international law process for determining the law applicable to the contract is often unpredictable.

In thinking about legal malpractice issues related to choice of law and, in particular, the rules related to informed consent, it is useful to differentiate four cases. The first is where the contract chooses the law of the client's jurisdiction. The second is where the contract chooses the law of some country other than the client's jurisdiction. The third is where the contract fails to make a choice of law. And the fourth is where the parties agree for the contract to be governed by the *UNIDROIT Principles of International Commercial Contracts* ("*UNIDROIT Principles*").

First, if the contract chooses as the applicable law the contract law of the client's own jurisdiction, presumably there is no need to obtain informed consent from the client. There are no special risks, since the client is normally subject to that body of law and, indeed, presumed to know the law. The only reason it might be appropriate to disclose alternatives is if some other body of law that might feasibly be chosen by the parties would confer distinct advantages on the client that are not available under the law of the client's jurisdiction.

Second, and in contrast, if the contract selects the law of a place other than the client's jurisdiction, informed consent may need to be obtained. The issue will turn on the degree to which the chosen law differs from the law of the client's jurisdiction. In the field of contracts, civil law principles differ from common law principles in many respects. If the differences between the chosen law and the law of the client's jurisdiction are likely to be important to the performance and enforcement of the contract, disclosures need to be made and informed consent must be obtained. However, such disclosure and consent might not be necessary if the client is already familiar with the chosen contract law because it regularly does business in that jurisdiction or has offices in that location.¹³⁹

applied in reaching a judicial decision").

139. An analogy can be drawn to the seller's obligation to deliver conforming goods under the CISG. Generally, a seller has no duty to supply goods complying with the law in the buyer's jurisdiction. However, an exception imposes a duty "if due to 'special circumstances,' such as the existence of a seller's branch office in the buyer's state, the seller knew or should have known about the regulations at issue." *Med. Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L.*, No. CIV. A. 99-0380, 1999 WL 311945, at *2 (E.D. La. May 17, 1999).

Third, if the contract makes no choice of law, the client usually faces great uncertainties about what law will govern the contract (assuming that the CISG is inapplicable or that the issues in question fall outside the narrow scope of the CISG). In addition, the uncertainties about the applicable law may raise a threat that the client will later become involved in a costly and time-consuming dispute with the contract counterparty over which law applies. In view of these risks and the threat that they pose to the efficacy of the underlying business transaction, it will be necessary for the lawyer to obtain informed consent. The absence of a choice of law provision in an international commercial contract is a danger signal that a lawyer cannot ignore.

Fourth, parties sometimes elect to have their contract governed by the *UNIDROIT Principles*.¹⁴⁰ The *UNIDROIT Principles* were first promulgated in 1994 by the International Institute for the Unification of Private Law (Institut International Pour l'Unification du Droit Privé, "UNIDROIT"), seeking "to provide a uniform framework for international commercial contracts."¹⁴¹ They have been described as "the most successful attempt, so far, to codify transnational rules on the law of international commercial contracts."¹⁴² A growing body of scholarship assists businesses and their lawyers in understanding the advantages of incorporating the *UNIDROIT Principles* into their agreements.¹⁴³

The *UNIDROIT Principles* address "virtually all issues which are traditionally ascribed to the general part of the law of contracts and obligations."¹⁴⁴ They cover contract formation and interpretation; the authority of agents; validity (including grounds for avoidance and illegality); the rights of parties and third parties; conditions, performance, nonperformance, and termination; damages and set-off; the transfer of rights and obligations; limitations periods; and issues that arise when there are a plurality of obligors and obligees. The

140. See UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 2010); Vincent R. Johnson, *Incorporating UNIDROIT Principles into International Commercial Contracts*, in 37 THE COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS 149 (Dennis Campbell ed., 2015).

141. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS at art. 1.6 cmt. 3; *id.* at xvi.

142. Jan Kleinheisterkamp, *UNIDROIT Principles of International Commercial Contracts (PICC)*, in II THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 1727, 1727 (Jurgen Basedow et al. eds., 2012).

143. See, e.g., COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009).

144. Anna Veneziano, *The Soft Law Approach to Unification of International Commercial Contract Law: Future Perspectives in Light of UNIDROIT's Experience*, 58 VILL. L. REV. 521, 524 (2013).

UNIDROIT Principles are applicable to all types of international contracts, at least if coupled with the provision calling for international commercial arbitration.

However, like the rules in the American Restatements of the Law, the *UNIDROIT Principles* are not the law anywhere until they have been adopted. Instead, the *UNIDROIT Principles* seek to thread a middle course between common law and civil law rules by endorsing positions capable of finding acceptance by parties to international agreements. Many provisions in the *UNIDROIT Principles* are not expressions of established law, but proposals for “what should be considered the best solutions for specific problems.”¹⁴⁵

Consequently, the *UNIDROIT Principles* will inevitably diverge in some respects from the law of the client’s jurisdiction. A lawyer who seeks to bring an important measure of certainty to an international contract by incorporating¹⁴⁶ the *UNIDROIT Principles* as applicable rules of law will, therefore, need to obtain informed consent from the client. This is true, at least if the client is not familiar with the *UNIDROIT Principles* and has not previously agreed to similar contract provisions.

2. Choice of Dispute Resolution

Arbitration is a process with deep roots in American law.¹⁴⁷ Notwithstanding that fact, American courts have made clear that, in many instances, lawyers must disclose to clients the risks and alternatives to arbitration. This is particularly true if the arbitration relates to disputes between the lawyer and client.¹⁴⁸

145. Kleinheisterkamp, *supra* note 142, at 1728.

146. Model clauses are available to guide lawyers drafting contracts. See *Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts*, INT’L INST. FOR UNIFICATION PRIV. L., <http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses> (last visited Feb. 15, 2016).

147. See BERNARD S. MEYER ET AL., *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1932-2003*, 493 (2006) (“New York has sanctioned arbitration as an effective alternative method of settling disputes since at least 1829.”).

148. According to the Supreme Court of Louisiana:

Attorneys, by virtue of their legal education and training, have an advantage over clients, who may not understand the arbitration process and the full effects of an arbitration clause. At a minimum, the attorney must disclose the following legal effects of binding arbitration, assuming they are applicable:

- Waiver of the right to a jury trial;
- Waiver of the right to an appeal;
- Waiver of the right to broad discovery under the Louisiana Code of Civil Procedure and/or Federal Rules of Civil Procedure;
- Arbitration may involve substantial upfront costs compared to litigation;
- Explicit disclosure of the nature of claims covered by the arbitration clause,

International commercial arbitration is now the widely-preferred mechanism for resolving international business disputes.¹⁴⁹ Thus, the question arises as to what must be disclosed to the client when an agreement, drafted or reviewed by the lawyer, elects international commercial arbitration as the agreed method for resolving disputes.

If the client is a sophisticated business entity and has previously agreed to other arbitration provisions, perhaps nothing needs to be disclosed. Under those circumstances, it may be reasonable to assume that the client understands the implications of electing international commercial arbitration. Moreover, the choice of that dispute resolution method is, from the perspective of international business, quite routine.

However, if there is something unusual about the chosen arbitration process, such as the place of the arbitration, the method for selecting arbitrators, or the governing rules, disclosures may be required. In such a case, it may be necessary to call the special facts to the attention of the client, explain the risks and alternatives, and obtain informed consent.

What if the international contract does not contain an arbitration process? Presumably, that omission creates great uncertainties and risks related to the client's ability to enforce the terms of the agreement. Depending on the facts, the threats to the client's interests may be so great as to require the lawyer to obtain informed consent. In a bankruptcy case out of Texas, an expert from Scotland opined that it would be "legal malpractice to recommend investment in Russia without the availability of international arbitration as a remedy" because anything else "would subject an investor to the vagaries of politically-dominated opponents."¹⁵⁰

III. CONCLUSION

In thinking about the risks of IBT malpractice liability, it is useful to remember that IBT disputes often involve vast amounts of money. In

such as fee disputes or malpractice claims;

- The arbitration clause does not impinge upon the client's right to make a disciplinary complaint to the appropriate authorities;
- The client has the opportunity to speak with independent counsel before signing the contract.

Hodges v. Reasonover, 103 So. 3d 1069, 1077 (La. 2012).

149. See S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J.L. & POL'Y 11, 27 (2014) ("International commercial arbitration has long been the preferred means of resolving complex business disputes in the cross-border context.")

150. See *In re Yukos Oil Co.*, 321 B.R. 396, 405 (S.D. Tex. 2005) (quoting Thomas Wälde, professor at the University of Dundee, Scotland, who was tendered as an expert on international arbitration of investment disputes).

one recent case arising from a disagreement between oil companies over whether they had agreed to become partners in a liquefied natural gas joint venture, the plaintiff sought “punitive damages on top of its \$1.37 billion claim.”¹⁵¹ If a lawyer handling that type of matter commits malpractice, the potential damages may be staggering. Clearly, IBT lawyers need to devote as much attention to adopting prudent professional practices and mitigating malpractice risks as to otherwise advancing the business interests of their clients.

151. David Bario, *Baker Botts Derail \$1.37B Gazprom Case in Trial Stunner*, AM. L. LITIG. DAILY, Feb. 2, 2015.