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A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars

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Laurel S. Terry

Abstract

This Article will focus on the agreement (“Agreement”) between the American Bar Association (“ABA”) and the French and Dutch Orders of the Brussels Bar (“Brussels Bars”). Section I of this Article provides an overview of the different models used, or approaches to, cross-border practice and places the Agreement in context. Section II chronicles the legislative history of the Agreement, noting the process by which it was developed. Section III contains the analysis of the Agreement, comparing it to other cross-border practice regulation. Section IV addresses the implementation of the Agreement. Finally, Section V offers a summary of the strengths and weaknesses of the Agreement and the process by which it was reached.

A CASE STUDY OF THE HYBRID MODEL FOR FACILITATING CROSS-BORDER LEGAL PRACTICE: THE AGREEMENT BETWEEN THE AMERICAN BAR ASSOCIATION AND THE BRUSSELS BARS

*Laurel S. Terry**

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INTRODUCTION

This Article is based on the following premises:

1) there *has* been a “globalization of the legal profession,” which is demonstrated by the fact that cross-border legal practice is both increasing, and increasingly important, throughout the world;¹

2) important as it is, the cross-border legal practice that currently exists barely scratches the surface of that which is to come;

3) despite the increase in scholarly writing on this topic, the *development* of cross-border practice throughout the world has vastly outpaced the *theory* of whether and how such practice should be regulated;²

1. See Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, 947 (1995). For example, exports of U.S. legal services worldwide rose from a total of US\$97 million in 1986 to US\$1.453 trillion in 1993. *Id.* Likewise, U.S. imports of foreign legal services rose from a total of US\$40 million in 1986 to US\$326 million in 1993. *Id.* at 948. See also SYDNEY M. CONE, III, INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND FIRMS IN GLOBAL PRACTICE 1:19 (1996) (explaining basis for these figures); see 1 MARTINDALE-HUBBELL INT'L LAW DIRECTORY LA1B-LA43B (1996) (listing law firms involved in international affiliations or cooperative arrangements).

2. There are many books addressing cross-border legal practice. See RICHARD L. ABEL & PHILIP S.C. LEWIS, *LAWYERS IN SOCIETY* 1-3 (1988); *TRANSNATIONAL LEGAL PRACTICE* 1-2 (Prof. Dennis Campbell ed., 1982); see CONE, *supra* note 1. See also RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE (Mary C. Daly & Roger J. Goebel eds., 1995); *CROSS BORDER PRACTICE COMPENDIUM* (D.M. Donald-Little ed., 1991) [hereinafter *COMPENDIUM*]; *LAW WITHOUT FRONTIERS* (Edwin Godfrey ed., 1995); *LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK* (Alan N. Katz ed., 1986); LINDA S. SPEDDING, *TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES* (1987).

There are also several articles discussing cross-border legal practice. See Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994) [hereinafter *Transnational Law Practice*]; Julie Barker, *The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal Service*, 19 HOUS. J. INT'L L. 95 (1996); Chapman & Tauber, *supra* note 1; Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159 (1996); Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556 (1991-92); Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443 (1989) [hereinafter *Bridging the Gap*]; Kenneth S. Kilimnik, *Lawyers Abroad: New Rules for Practice in a Global Economy*, 12 DICK. J. INT'L L. 269 (1994); Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53 (1992-1993); Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal System: The Side Effects of the Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401 (1995).

4) many of the same issues seem to surface whenever cross-border legal practice is contemplated and thus it is worthwhile to compare the different approaches to these common issues; and

5) because the development of the regulation of cross-border practice used different models, it is a worthwhile exercise to examine not only the *substance* but also the *procedures* used to develop these regulations in order to better evaluate the possibility of future competing procedures.

It is against this background that this Article is written. This Article will focus on the agreement ("Agreement") between the American Bar Association ("ABA") and the French and Dutch Orders of the Brussels Bar ("Brussels Bars").³ In order to better understand and develop future cross-border practice, this Article will discuss both the substance of the Agreement and the procedures used to develop it, putting both in context.

Section I of this Article provides an overview of the different models used, or approaches to, cross-border practice and places the Agreement in context. Section II chronicles the legislative history of the Agreement, noting the process by which it was developed. Section III contains the analysis of the Agreement, comparing it to other cross-border practice regulation. Section IV addresses the implementation of the Agreement. Finally, Section V offers a summary of the strengths and weaknesses of the Agreement and the process by which it was reached.

I. AN OVERVIEW OF MODELS THAT HAVE BEEN USED TO RESPOND TO CROSS-BORDER LEGAL PRACTICE

Several different types of regulations have been used to facilitate or respond to the situation of lawyers engaged in cross-border legal practice.⁴ For purposes of analysis, these types, or

Interestingly, an unusually large amount of the available literature is by practitioners rather than academics. Moreover, with the exception of Richard Abel, most of this scholarship does not attempt to develop a unified approach or theory to cross-border practice.

3. Agreement, Aug. 6, 1994, American Bar Ass'n-French Language Order of the Brussels Bar-Dutch Language Order of the Brussels Bar, *reprinted in* Appendix A [hereinafter Agreement].

4. In this Article, the term "cross-border legal practice" is used rather loosely to refer to the general situation in which a lawyer originally licensed in one jurisdiction, the Home State, provides legal services in another jurisdiction, the Host State. This can occur when the lawyer physically travels to the Host State, or when the lawyer provides

models, of regulation can be organized into two major categories.⁵ First, there are the models used where there is no single entity with the authority to set the conditions under which lawyers from one state may provide legal services in another state. Second, there are the models used in those situations in which there is a single body that has, or purports to have, the authority to regulate the ability of lawyers from one jurisdiction to practice in a second jurisdiction.

A. Models Used Where There Is No Single Regulating Authority

Although there are some situations in which there may be a single entity with the power to set the conditions of cross-border practice, regulation by a single entity is far from the norm. In those situations in which there is no single entity, four models have been used to facilitate, or regulate, the provision of cross-border legal services. These models include a non-negotiation model, in which individual states simply establish their own requirements; government to government negotiations; private sector to private sector negotiations; and a hybrid model, involving negotiations between private sector representatives and regulatory body representatives.

1. The Non-negotiation Approach: Individual State Regulation

One approach, used when there is no single regulatory entity, occurs when one state or country, acting alone, sets forth the conditions under which lawyers from another state or country can qualify as lawyers or provide legal services in that State or country. For example, this is what New York did when it adopted a rule regulating foreign legal consultants ("FLC").⁶ It may be misleading to call this a model. At some level, every country does this when it determines what, if any, requirements

services through other means. *See, e.g.*, Kilimnik, *supra* note 2, at 273-75 (discussing methods by which cross-border legal practice may be performed). Obviously, jurisdictions that want to regulate this type of cross-border practice must try to define precisely that which they seek to regulate. As used in this Article, however, the term is not intended to refer particularly to any of these definitions. *Cf.* North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993) (using term cross-border legal practice narrowly and precisely) [hereinafter NAFTA].

5. These "models" represent my own articulation of how cross-border practice has been regulated. In setting forth these "models," I have drawn upon the work of many people, including those cited earlier. *See supra*, note 2.

6. *See* New York Rules of Court, Rules of the Court of Appeals, Pt. 521.

it will impose on the practice of law; whether and how lawyers from other countries can satisfy these requirements; and whether it recognizes a different type of professional license for foreign lawyers, often called an FLC license. Several books and articles now exist documenting various countries' handling of these issues.⁷

2. Government to Government Negotiations

A second model that occurs when there is no single regulatory body involves government to government negotiations about the conditions that will apply in each country to regulate the practice of law. This is a model that the United States has used with Japan. The U.S. trade representative treated Japan's limitations on U.S. and other foreign lawyers as trade issues and negotiated these limitations with the Japanese Government in the context of broad ongoing trade talks.⁸

3. Private Sector to Private Sector Negotiations

A third model often used occurs where private sector representatives, acting alone or under the umbrella of some voluntary association, negotiate or attempt to negotiate standards for facilitating cross-border legal practice, which they in turn hope will be adopted by the appropriate regulatory bodies. The ongoing efforts of the International Bar Association ("IBA") to develop guidelines for regulating Foreign Legal Consultants is an example of such an effort.⁹ The ABA Model Rule for the Licensing of

7. See COMPENDIUM, *supra* note 2; LAW WITHOUT FRONTIERS, *supra* note 2. One of the biggest variations in this approach is whether the regulation depends on reciprocity. Some Host States condition the admission of a foreign lawyer on the foreign lawyer's Home State similarly permitting Host State lawyers to practice in the foreign lawyer's Home State. See CONE, *supra* note 1, at 2:28-31 (discussing reciprocity requirements in light of the General Agreement on Trade and Services ("GATS")).

8. See United States International Trade Commission, USITC Publication 2594 (SV-3) 51 (Feb. 1993), available in 1993 ITC LEXIS 126, at 23. See generally CONE, *supra* note 1, at 1:14-15, 2:8-12 (describing general circumstances in which government to government negotiations are likely to occur and specifically Japanese-U.S. negotiations).

9. The General Professional Program Committee of the International Bar Association has been involved in a multi-year effort to develop model standards concerning Foreign Legal Consultants. The International Bar Association ("IBA") committee originally drafted guidelines that contained very specific provisions. See PROPOSED GUIDELINES FOR FOREIGN LEGAL CONSULTANTS (Apr. 5, 1996) [hereinafter IBA'S REJECTED FLC GUIDELINES] (on file with the *Fordham International Law Journal*). There were numerous objections, however, to the IBA'S REJECTED FLC GUIDELINES. See Telephone Interview

Legal Consultants is another example of this approach.¹⁰ A third example is the CCBE Code of Conduct ("CCBE"), which the Council of the Bars and Law Societies of the European Community adopted. Unlike the IBA and ABA efforts, however, the CCBE ultimately proved successful in its efforts to have the various regulatory bodies adopt its guidelines.¹¹

4. The Hybrid: Private Sector to Regulatory Body Negotiation

The fourth model is something of a hybrid. In this fourth model, the facilitation and regulation of cross-border practice occurs between private sector representatives and a regulatory body. The Agreement is an example of this fourth model. It is an agreement between the ABA, which has no power other than precatory power, and the two Brussels bar associations, which have no right to insist upon registration of foreign lawyers who will not appear in court, although they do have the power to set

with Bernard L. Greer, Jr., Principal Drafter of the IBA's REJECTED FLC GUIDELINES (Mar. 19, 1997). Consequently, the drafting committee abandoned the detailed "Guidelines" approach and instead drafted a much shorter STATEMENT OF GENERAL PRINCIPLES FOR THE ESTABLISHMENT AND REGULATION OF FOREIGN LAWYERS [hereinafter IBA PROPOSED GENERAL PRINCIPLES] (on file with the *Fordham International Law Journal*). As explained by Ben Greer, one reason for the change in approach was that in "at the last two Council meetings it was clear that a number of bars simply will not support the limited licensing approach taken in the previous drafts of the Guidelines." Accordingly, the IBA PROPOSED GENERAL PRINCIPLES "identify common regulatory principles which should apply to all regimes and then . . . outline alternative approaches to the regulation of foreign lawyers." One approach requires full integration into the Host State legal profession and the other permits a limited license to practice law. See Letter from Bernard L. Greer, Jr., Principal Drafter of IBA PROPOSED GENERAL PRINCIPLES, to author (Feb. 27, 1998) [hereinafter Greer Feb. 27, 1998 Letter]. The IBA PROPOSED GENERAL PRINCIPLES will be submitted to the IBA Council for approval in June 1998, at a meeting in Vienna.

For a critical analysis of the rules facing foreign legal consultants, see Sydney M. Cone, III, *FLC's Face Licensing Hurdles in Host Countries*, NAT'L L.J., Oct. 7, 1996, at C2.

10. See American Bar Association Section of International Law and Practice Report to the House of Delegates, *Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207 (1994) [hereinafter *ABA Model FLC Rule*].

11. For a discussion of the applicability of the CCBE Code of Conduct in the European Union, see Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 11-15 (1993) [hereinafter *CCBE Code, Part I*]; see also Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 345 (1993) (discussing jurisdictional provisions in CCBE Code and some implementation issues) [hereinafter *CCBE Code, Part II*].

The IBA has had even less success than the ABA because it has been unable to have its Guidelines adopted. See *supra* note 9.

the conditions of such registration. Unlike the private sector to private sector model, an agreement resulting from this model effects the nature of the cross-border regulation because the regulatory body has the power to set and change the conditions under which foreign lawyers are licensed.

B. *Models Used Where There Is a Single Regulating Authority*

As noted above, one of the ways in which cross-border practice regulation may occur is through government to government negotiation. Such negotiations may be bilateral or multilateral. In certain circumstances, these governmental entities may agree to create a new entity that is responsible for regulating the cross-border practice of lawyers from those countries. In other words, through bilateral or multilateral negotiation, governments may give, or purport to give, authority to a single entity that has the power to regulate lawyers from one state and set the conditions under which lawyers from that state may practice in another state.¹² At least two different approaches to this "single entity" approach have been used. I describe these as the "legislative model" and the "legislative delegation" model.

1. The Legislative Model

The approach used in the European Union ("EU") to regulate intra-EU cross-border legal practice can be described as an example of the legislative model. It is beyond the scope of this Article to thoroughly discuss the EU's regulation of lawyers. A brief overview is helpful, however, in order to understand the various ways in which cross-border practice have been regulated and to place the Agreement in context.

The relevant treaties of the EU transferred to the EU governing bodies the authority to adopt certain legislation with which the fifteen countries who are Member States of the EU

12. It is not always clear that governments that sign multilateral agreements have the authority to transfer the power to regulate lawyers to a new entity. In the United States, for example, some commentators questioned whether the federal government has the authority to adopt GATS and displace state regulation of lawyers. Compare Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223 (1995) with BRUCE ACKERMAN & DAVID GOLOVE, *IS NAFTA CONSTITUTIONAL?* (1995). See Kilimnik, *supra* note 2, at 291 n.113 (discussing NAFTA's constitutionality).

must comply.¹³ These treaties also establish the procedures by which such laws must be adopted.¹⁴ Two EU courts ensure that these laws are followed by the EU Member States.¹⁵

The EU governing bodies responded to the issue of cross-border practice by issuing various laws, called directives. For twenty years, the EU followed a directive¹⁶ that regulated lawyers who *temporarily* engage in cross-border legal practice in a "Host State."¹⁷ Since 1989, the "Diploma Directive" governed the situation of lawyers from one EU Member State who want to become *permanently* established in another EU Member State. This "Diploma Directive" was not directed specifically to lawyers, however, but was a "global directive" designed to respond to the difficulties and delays that the EU encountered when trying to develop legislation for many different fields and professions.¹⁸ Finally, in December 1997, after a decade of effort, the EU adopted a directive that specifically addresses lawyers who want to provide legal services on a *permanent* basis in another EU country ("EU Establishment Directive").¹⁹ In short, the EU has

13. See generally GEORGE A. BERMAN ET AL., EUROPEAN COMMUNITY LAW 74-78 (1993) [hereinafter EUROPEAN COMMUNITY LAW]; *The European Union-EU*, EUR. WORLD Y.B. 143-69 (1996).

14. See EUROPEAN COMMUNITY LAW, *supra* note 13, at 79-90.

15. See *id.* at 69-79; see also *Single Market: Infringement Procedures Launched against Slackers*, EUR. REP., Dec. 24, 1996 available in LEXIS, Intlaw Library, Eurnews File (reporting on five cases to be brought by EU Commission against Member States for failing to transpose EU directives); *European Countries Face Heavy Fines for Defying EU Law*, AGENCE FRANCE - PRESSE, Jan. 8, 1997 available in LEXIS, Intlaw Library, Eurnews File (noting new system of multi-million dollar fines for Member States that fail to comply with European Court of Justice's rulings).

16. Council Directive No. 77/249, O.J. L 78/17 (1977) (facilitating effective exercise by lawyers of freedom to provide services) [hereinafter Lawyers' Services Directive].

17. Host State and Home State are terms frequently used when discussing cross-border practice. The CCBE Code of Conduct, for example, defines the Home Member State as "the Member State of the Bar or Law Society to which the lawyer belongs." See CCBE CODE OF CONDUCT Rule 1.6 (1988), cited in *CCBE Code, Part I, supra* note 11, at 66. The CCBE Code of Conduct defines the "Host Member State" as "any other Member State where the lawyer carries on cross-border activities." *Id.*

18. Council Directive No. 89/48, O.J. L 19/16 (1989) [hereinafter Diploma Directive].

19. See Council Directive No. 98/5, O.J. L 77/36 (1998) [hereinafter EU Establishment Directive].

The directive's path to adoption has not been easy. The Commission first presented a proposed directive on establishment of lawyers in 1994. See Commission Proposal for a European Parliament and Council Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, O.J. C 128/6 (1995) (permitting established lawyers to

promulgated legislation that will govern the cross-border legal

practice under their Home State title for maximum of five years). On July 5, 1995, the Economic and Social Committee issued an opinion criticizing portions of the proposed directive. See Opinion of the Economic and Social Committee on the proposal for a European Parliament and Council Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, O.J. C 256/14 (1995). On November 17, 1995, the CCBE issued an opinion on the proposed directive criticizing much of the Commission's original directive. See Explanatory Memorandum to the Proposed Directive, COM (96) 446 Final (citing CCBE report); CONE, *supra* note 1, at 8:21-25 (describing report). The European Parliament referred the directive to its Committee on Legal Affairs and Citizens Rights, which issued the Report on the proposal for a European Parliament and Council Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. See PE Doc. A4-0146/96 of Apr. 30, 1996, cited in O.J. C 198/93 (1996); CONE, *supra* note 1, at 8:22-25 (describing report). The first reading of the proposal in the European Parliament took place on June 6, 1996, and on June 19, 1996, the proposal was approved by a vote of 449 to 23, subject to numerous amendments. See Proposal for a European Parliament and Council Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification obtained COM(94) 0572-C4-0125/95 -94/0299(COD), O.J. C 198/85, at 85, 92-93 (1996); CONE, *supra* note 1, at app. IIIA:1. After receiving Parliament's amendments, the Commission issued an amended proposed directive that adopted some, but not all, of the European Parliament's amendments. See Amended Proposal for a European Parliament and Council Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, O.J. C 355/19 (1996). The Council adopted this proposal on July 24, 1997. See Common Position (EC) NO. 35/97, adopted by the Council on July 24, 1997 with a view to adopting Directive 97/. . . /EC of the European Parliament and of the Council of . . . to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, O.J. C 297/6 (1997). Parliament's Committee on Legal Affairs and Citizens Rights recommended no further amendments to the Common Position which the Council adopted July 24, 1997. See *European Parliament Passes Lawyers Directive in Second Reading*, EUR. REP. 2271 (Nov. 26, 1997) available in LEXIS, Intlaw Library, Eurnews File. The Parliament adopted the Directive on November 19, 1997. *Id.* When the Council approved the Directive on December 15, 1997, it became official EU law. See EU Establishment Directive, *supra*.

The Commission's work in preparing an establishment directive was built on the earlier work of the CCBE. See generally CONE, *supra* note 1, at 8:12-26; *Proceedings of the Third Joint Conference of the American Society of International Law and the Nederlandse Vereniging voor Internationaal Recht* 429-430 (T.M.C. Asser Institute The Hague, 1995) (Remarks of John Toulmin, C.M.G., Q.C.) (summarizing relationship of CCBE Draft Directive and Commission Draft Directive) [hereinafter Hague Proceedings]; *Miracle of Barcelona Reconfirmed in Lisbon: New Draft Directive on Rights of Establishment for Lawyers*, 18 LAW. IN EUR. 10, 12-13 (1992) (presenting draft establishment directive approved by CCBE); *Establishment Directive: Where to Now?*, Draft Establishment Directive, 9 LAW. IN EUR. 6, 8-11 (1991) (containing CCBE "Experts" Draft Establishment Directive, which was never approved by full CCBE); Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country*, 63 TUL. L. REV. 443 (1989) (providing history of CCBE's efforts to develop draft establishment directive prior to "experts" draft).

practice of lawyers in the EU. Hence the name “the legislative model.”

2. The Legislative Delegation Model

A second approach which involves a single entity with regulatory authority over cross-border practice can be described as a legislative delegation approach. Under this model, the entity’s legislation establishes some general standards that govern the requirements of cross-border legal practice. The legislation, however, contemplates that another group, sometimes called a working party, will develop the details that should apply to the regulation of cross-border legal practice.²⁰ Alternatively, this working party may not have ultimate authority, but may instead be asked to give a report or recommendations to the main legislative body. The main legislative body retains the power to act, or not act, on that report.

Something close to this second model is used in the General Agreement on Trade in Services²¹ (“GATS”) and the North American Free Trade Agreement (“NAFTA”).²² Although it is beyond the scope of this Article to discuss in detail the regulation of lawyers under GATS and NAFTA, a very brief overview of GATS and NAFTA is helpful in order to understand the various ways countries regulate cross-border legal practice, in order to place the Agreement in context.

20. The line between the legislative model and the legislative-delegation model is not necessarily a bright line. For example, I described the European Union as an example of the legislative model. The EU Commission, however, initially did not draft an establishment directive because it hoped that the CCBE would come up with a draft directive that was acceptable to all its members. *See* Hague Proceedings, *supra* note 19, at 429-430 (Remarks of John Toulmin, C.M.G., Q.C.). As set forth above, the CCBE ultimately agreed upon a draft, following which the Commission issued its proposed directive. *See supra*, note 19. This initial Commission proposal, which differed in significant respects from the CCBE draft directive, ultimately was modified to more closely track the CCBE draft. *See generally supra* note 19. Thus, to some extent, one arguably could characterize the EU Establishment Directive for lawyers as the result of a legislative delegation process. Despite the similarities, I have separated the models because the EU Commission clearly had the power to develop its own legislation. In contrast, the NAFTA and GATS enabling documents themselves create the delegation process.

21. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations: General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 (1994) [hereinafter GATS].

22. NAFTA, *supra* note 4; *see also* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (implementing NAFTA into U.S. law).

a. GATS

GATS is a multilateral trade agreement, which is annexed to the agreement establishing the World Trade Organization ("WTO").²³ GATS was part of the Uruguay Round trade negotiations. These negotiations were substantially completed by December 15, 1993. On April 15, 1994, in Marrakech, Morocco, the participants agreed to the text of the Final Act embodying the results of the negotiations.²⁴ Over 120 countries, including the United States, became Member States of the WTO and thus, contracting parties to these multilateral trade agreements.²⁵

To determine the effect of GATS on cross-border legal services, one must examine three different aspects of GATS.²⁶ First, one must consider the basic GATS agreement, which consists of twenty-nine articles and nine annexes, one of which is important to legal services.²⁷ Second, there are the "Schedules of Specific Commitments" submitted by individual countries ("Schedule").²⁸ Third, there are "Exemption Lists" from the most favored nation provision that could be submitted by individual countries for specific services upon the signatory's entry into GATS ("MFN Exemption List").²⁹

The basic framework of the GATS final Agreement, despite

23. The Uruguay Round of GATT negotiations produced a group of multilateral trade agreements. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, December 15, 1993, 33 I.L.M. 9 (1994) [hereinafter Uruguay Round]. This group includes, but is not limited to, an Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter WTO]; General Agreement on Tariffs and Trade 1994, Dec. 15, 1993, 33 I.L.M. 28 (1994) [hereinafter GATT 1994]; Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994) [hereinafter TRIPS]; and GATS, *supra* note 21, with which this Article is concerned. *Id.*

24. See generally CONE, *supra* note 1, at 2:14.

25. *Id.* at 2:15 (identifying 124 countries that have become or are expected to become members of WTO, including United States). See also WTO, *About the WTO* (visited Apr. 11, 1998) <<http://www.wto.org/wto/about/organs6.htm>> (identifying 132 members of WTO as of October 22, 1997) (also on file with the *Fordham International Law Journal*). The U.S. Congress enacted legislation to implement the WTO and annexed agreements, such as GATS, but did not ratify them as a treaty. See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); see generally Tribe, *supra* note 12 (discussing importance of approval of WTO and annexed agreements pursuant to Constitutional requirements for treaties).

26. See CONE, *supra* note 1, at 2:15 (utilizing these three aspects to analyze GATS).

27. *Id.*

28. *Id.*

29. *Id.*

the long-standing objections of some countries and the last minute maneuvering of the United States, includes legal services.³⁰ However, the inclusion of “legal services” in GATS does not mean that a country’s existing regulation of cross-border legal services automatically must comply with all twenty-nine articles in GATS. Rather, whether a WTO Member must comply with *all* GATS provisions depends on whether, and how, legal services are listed in its Schedule and its Most Favored Nation (“MFN”) Exemption List.

A WTO Member is only required to comply with GATS’ “national treatment” and “market access” requirements if it included legal services in its Schedule.³¹ Although most countries included legal services in their Schedules, they generally added a *caveat* exempting their existing regulations.³² Thus, the current effect of GATS is not so much a liberalization of trade in legal services, but a standstill, in which most countries have agreed not to pass any measure more restrictive than their existing provisions.

One of the most significant aspects of GATS is the MFN pro-

30. Although the United States initially sought inclusion of legal services in GATS and preferred a special annex addressing legal services, the annex approach was rejected and, by the conclusion of the GATS negotiations, many U.S. lawyers were unhappy that legal services had been included. See Karen Dillon, *Unfair Trade?*, AM. LAW., Apr. 1994, at 54-57 (reporting that ABA representatives urged U.S. Government negotiators to withdraw concessions on legal services because of dissatisfaction with Japanese concessions). U.S. concessions on legal services remained in GATS, however, as part of a package deal in which Japan traded concessions unrelated to legal services. *Id.* See CONE, *supra* note 1, at 1:19-20, 2:2-13 (providing detailed description of evolution of legal services in GATS, including last minute developments regarding legal services); Flores, *supra* note 2, at 178 nn.146, 164-166 (noting that France initially objected to inclusion of legal services in GATS and summarizing position of United States).

31. GATS, *supra* note 21, at part III, arts. XVI and XVII, 33 I.L.M. at 60. The national treatment provision essentially prohibits discrimination against foreign providers of services. The market access provision identifies six types of quantitative or qualitative limits on market access, that are prohibited unless they are listed on a country’s schedule of commitments.

32. See CONE, *supra* note 1, at 2:20-24 (listing in tables I-IV GATS members that submitted schedules of specific commitments for legal services, GATS members that submitted MFN exemption lists for legal services, GATS members that submitted neither lists nor schedules for legal services, and non-members of GATS.) Table I identifies approximately 70 countries, counting each member of the EU, that submitted schedules for legal services. Table I also summarizes the nature of the standstill and agreed liberalization. *Id.* at 2:20-22. See also *WTO - World Trade Organization* (Apr. 9, 1998) <<http://www.tradecompass.com/library/wto/schedulesandexemptions>> (also on file with the *Fordham International Law Journal*).

vision.³³ However, a WTO Member State is *not* subject to this MFN provision if that WTO Member State placed legal services on its MFN exemption list.³⁴ Only twelve Member States, out of more than 120, placed legal services on their MFN Exemption Lists.³⁵ Thus, most signatory countries will be subject to an MFN requirement with respect to legal services.

Because GATS itself covers legal services, WTO Members must comply with certain provisions with respect to legal services, regardless of a country's action with respect to its Schedule or its MFN Exemption List. These provisions include a "transparency" provision that requires any regulation to be published or publicly available and a requirement that domestic regulations of general application be administered in a reasonable, objective, and impartial manner.³⁶

The basic framework of GATS also requires all signatory countries to inform the WTO bodies concerning their measures for the authorization, licensing, or certification of service providers.³⁷ It further encourages a Member State to recognize the education and experience obtained, requirements met, or licenses granted in another country on a unilateral or multilateral basis.³⁸ This "recognition" provision further provides that "[i]n appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions."³⁹

In order to fulfill these provisions, a Working Party on Pro-

33. GATS, *supra* note 21, art. II, 33 I.L.M. at 49.

34. *Id.*

35. See CONE, *supra* note 1, at 2:22; see also Chapman & Tauber, *supra* note 1, at 146 (identifying four countries that placed legal services on MFN exemption list). Thus, these 12 countries need not comply with the MFN provision even with respect to any future bilateral or multilateral agreement they might negotiate. The first Annex to GATS, however, provides that the Council for Trade in Services will review all MFN exemptions granted for more than five years and provides for termination of MFN exemptions. GATS, *supra* note 21, at Annex on Article II Exemptions, 33 I.L.M. at 67; see CONE, *supra* note 1, at 2:18.

36. See GATS, *supra* note 21, arts. III, VI, 33 I.L.M. at 49-50.

37. *Id.* art. VII, para. 4, 33 I.L.M. at 54.

38. *Id.* at para. 1, 33 I.L.M. at 54.

39. *Id.* at paras. 1, 5, 33 I.L.M. at 54.

fessional Services ("Working Party") was created.⁴⁰ This Working Party has the obligation to examine and report, with recommendations, on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade.⁴¹ In 1994, the Working Party determined that the accountancy sector should be considered first; its report is now complete.⁴² Legal services are to be considered second, probably beginning in 1998.⁴³

In sum, GATS itself did not establish a system for cross-border legal practice. GATS did establish a structure, including a Working Party, that may serve as a basis for further development of cross-border legal practice standards.⁴⁴ Thus, GATS can be

40. See *Decision on Professional Services*, 33 I.L.M. 1259 (1994).

41. *Id.*

42. *Id.* "As a matter of priority, the Working Party shall make recommendations for the elaboration of multilateral disciplines in the accountancy sector, so as to give operational effect to specific commitments." See also Flores, *supra* note 2, at 191-192 n.229. See *WTO Adopts Guidelines for Recognition of Qualifications in the Accountancy Sector* (visited Apr. 22, 1998) <<http://www.wto.org/wto/press/press73.htm>> (reporting May 29, 1997 adoption of guidelines for accountancy sector) (also on file with the *Fordham International Law Journal*). Steve Nelson reports that although the GATS Working Party has not addressed lawyers, members of that working party are aware of the issues related to legal services because they follow the work done by the Organization for Economic Cooperation and Development ("OECD"), which sponsored several conferences related to restrictions in services, including legal services, resulting in the papers cited in Flores, *supra* note 2, at nn.37, 146, 151. Telephone Interview with Steven Nelson, Agreement Negotiator and Chair, NAFTA Trilateral Lawyers Working Group ("TWLG") (Mar. 10, 1997) [hereinafter Nelson Mar. 10, 1997 Interview].

43. See Ward Bower, *Multidisciplinary Practices - The Future*, in *GLOBAL LAW IN PRACTICE* 155, 162 (J. Ross Harper ed., 1997). "An October 1996 WTO briefing of [International Bar Association] leaders, in Geneva, indicates that the legal profession will be next, 'in a few years' (1998 or after)."

44. Commentators disagree as to whether liberalization is more or less likely as a result of GATS. One commentator predicted that,

[a] GATS jurisprudence will likely develop in this area [of recognition of professional qualifications] because the GATS encourages the creation of multilateral standards, criteria, and procedures. A country can challenge recognition requirements on the grounds that they are not based on competence and ability to supply the service; are more burdensome than necessary to ensure the quality of the service; or are themselves a restriction, through the procedures imposed, on the supply of the service.

See Kilimnik, *supra* note 2, at 280 n.34, 315 n.285.

Other commentators, however, predicted that GATS will slow the speed at which agreements are reached. Among other reasons, in the absence of the ability to impose a reciprocity agreement, countries may be concerned about the free rider problem and

viewed as an example of a legislative delegation model.

b. NAFTA

NAFTA is another example of the legislative delegation model. NAFTA, like GATS, is a multilateral trade agreement. Signatory countries currently include Canada, Mexico, and the United States.⁴⁵ Unlike GATS, NAFTA does not employ a "positive list" or Schedule that requires the signatory parties to affirmatively indicate the goods and services to be covered by certain agreements. Instead, NAFTA uses its "scope and coverage" provisions in each chapter to specify the goods and services covered by NAFTA. Chapters eleven and twelve of NAFTA cover legal services.⁴⁶ Unless an existing law is specifically exempted or reserved, the signatory countries have agreed to a number of provisions that affect legal services, including a "most-favored nation" requirement, a "national treatment" requirement, a "most-favored treatment" requirement, and a requirement that individual licensing decisions be based upon "objective and transparent criteria, such as competence, and that they not be unnecessarily burdensome or purely protectionist in nature . . ."⁴⁷ With respect to legal services, these provisions are less significant than they sound because the parties filed many reservations related to legal services.⁴⁸ Both Mexico and the United States, for exam-

be less inclined to negotiate any further liberalization of its own rules. See Flores, *supra* note 2, at 180. "Thus, removing the reciprocity requirement may have eliminated an important incentive for liberalization." Chapman & Tauber, *supra* note 1, at 968-71. Chapman and Tauber propose a possible annex for GATS on legal services. *Id.* at 976-79. There seems little likelihood, however, that such an annex will be approved. The EU and Japan previously rejected a U.S. proposal for an annex of the GATS on legal services by foreign legal consultants. See Kilimnik, *supra* note 2, at 280 n.34.

45. See NAFTA, *supra* note 4, 32 I.L.M. at 605.

46. NAFTA, *supra* note 4, at Chap. 11, art. 1101, § 1, 32 I.L.M. at 639, and Chap. 12, art. 1201, §§ 1, 2, 32 I.L.M. at 639; see Vanessa P. Sciarra, NAFTA and the Transnational Practice of Legal Services 2 (Jan. 1996) (on file with the *Fordham International Law Journal*); see also CONE, *supra* note 1, at 6:3-5 (discussing history of legal services' inclusion in NAFTA).

47. NAFTA, *supra* note 4, art. 1103, 32 I.L.M. at 639, art. 1203, 32 I.L.M. at 649 (explaining most-favored nation treatment); art. 1102, 32 I.L.M. at 639, art. 1202, 32 I.L.M. at 649 (discussing national treatment); art. 1104, 32 I.L.M. at 639, art. 1204, 32 I.L.M. at 649 (detailing most favored treatment, called "standard of treatment"); and art. 1210, 32 I.L.M. 650 (licensing and certification); see Sciarra, *supra* note 46, at 2-3.

48. NAFTA contains two types of reservations with respect to legal services:

Annex I contains reservations taken by a NAFTA government for existing measures which do not conform to a Chapter 11 or 12 obligation. Once listed as a reserved measure in Annex I, the measure can remain in existence indefi-

ple, reserved the right to regulate each other's foreign legal consultants in a more restrictive manner in the future.⁴⁹

One of the most important provisions in NAFTA related to legal services is Annex 1210.5 to Chapter Twelve. Section A of Annex 1210.5 applies to "Professional Services" whereas Section B applies to "Foreign Legal Consultants."⁵⁰ Section B was added to the Annex due to the importance the negotiators attached to the issue of legal services and in recognition of the fact that the treatment of FLCs was not uniform among the three countries and was subject to significant reservations. The goal is to ensure that FLCs can effectively practice the law of their home country in the host country.⁵¹

Both sections of Annex 1210.5 require the signatory countries to encourage the relevant professional bodies to collaborate in order to develop recommendations for the NAFTA Free Trade Commission regarding standards and criteria for licensing.⁵² A working party called the Trilateral Lawyers Working Group has been established. This working party consists of both

nitely. However it cannot be made more restrictive at any future time

Reservations were taken in [Annex II] for sectoral areas in which a NAFTA government wanted freedom to make or adopt more restrictive measures than would be allowed under the relevant obligations of Chapters 11 and 12.

Sciarra, *supra* note 46, at 5. Sciarra characterized the reservations taken as "very defensive." The annexes list existing laws regulating lawyers as a reservation, meaning they were exempted from the NAFTA requirements. *See, e.g.*, NAFTA, *supra* note 4, Annex I - Mexico I-M-45, 32 I.L.M. at 718, Annex I - United States I-U-9, 32 I.L.M. at 742. Moreover, both Mexico and the United States reserved the right to regulate each other's foreign legal consultants in a more restrictive manner. *Id.* at Annex II - Mexico II-M-10, 32 I.L.M. at 752, Annex II - United States II-U-7, 32 I.L.M. at 755. The "commitments to liberalize quantitative restrictions, licensing requirements, performance requirements or other non-discriminatory measures" which were to be set forth in Annex VI amounted to little more than a listing of current measures. *Id.* at Annex VI - Canada VI-C-1, 32 I.L.M. at 766, Annex VI - Mexico VI-M-2, 32 I.L.M. at 166, Annex VI - United States VI-U-2, 32 I.L.M. at 767.

49. *See supra* note 48.

50. NAFTA, *supra* note 4, Annex 1210.5, 32 I.L.M. at 651.

51. Sciarra, *supra* note 46, at 3.

52. NAFTA, *supra* note 4, Annex 1210.5, 'A, para. 2, 32 I.L.M. 652, Annex 1210.5, 'B, paras. 2-3, 32 I.L.M. at 652.

Annex 1210.5 recognizes that the legal profession may be self-regulating and that the appropriate relevant body charged with addressing the issue of licensure and, therefore, of mutual recognition, may not be a governmental entity, but may be a professional association or board. The NAFTA negotiators intended to allow these groups to meet on a trilateral basis, develop proposals for mutual recognition and/or temporary licensure, and submit these proposals to the NAFTA governments, meeting as NAFTA's governing body, the NAFTA Commission. Sciarra, *supra* note 46, at 3.

private sector and state regulatory representatives.⁵³ NAFTA provides that once the proposals are reviewed by the Commission for consistency, the signatory governments will use their best efforts to get the proposals adopted by the relevant regulatory boards.⁵⁴ Thus, notwithstanding the many reservations in NAFTA for legal services, it establishes a framework for evaluating and possibly changing the cross-border regulation in the signatory countries. Indeed, the evidence so far shows NAFTA's impact and may lead to some changes in some signatory countries' laws regulating cross-border legal practice. The Trilateral Lawyers Working Group has developed, but not yet officially recommended, a NAFTA Model Rule Respecting Foreign Legal Consultants ("NAFTA Model Rule").⁵⁵ Thus NAFTA, like GATS,

53. One of the representatives includes Steve Nelson, a partner in the Minneapolis firm of Dorsey & Whitney. See Nelson Mar. 10, 1997 Interview, *supra* note 42. Mr. Nelson indicates that U.S. Government representatives attended these sessions as observers, but took the position that the bars should work out the details of any agreement. The TLWG determined that it would first address the topic of foreign legal consultants. The TLWG initially thought it reached an agreement on a NAFTA Model Rule Respecting Foreign Legal Consultants, but is withholding its recommendation.

As an aside, when asked, Steve Nelson indicated that he had not thought in terms of whether the TLWG was formed pursuant to Section B of Annex 1210.5, or pursuant to Sections A and B. He indicated, however, that if and when the Working Party agreed on the foreign legal consultant issues, they likely would turn to broader issues of harmonization and recognition and thus might act pursuant to Section A, as well as Section B. *Id.*

54. NAFTA, *supra* note 4, at Annex 1210.5, section B, para. 5, 32 I.L.M. at 652.

55. The TLWG, formed pursuant to NAFTA, initially thought it reached agreement on a NAFTA Model Rule Respecting Foreign Legal Consultants, which it could jointly recommend to submit to the NAFTA Free Trade Commission. See Joint Recommendations of the Relevant Canadian, Mexican and American Professional Bodies under Annex 1210.B, Section B of the North American Free Trade Agreement and Schedule 1, Model Rule Respecting Foreign Legal Consultants (May 16, 1996), *reprinted in* CONE, *supra* note 1, at App. IID:1-16 [hereinafter NAFTA Model Rule]; Susan Hansen, *Viva La Protectionism*, AM. LAW., June 1996, at 19 (reporting on status of NAFTA's TWLG, noting tentative agreements).

Steve Nelson, chair of the NAFTA TLWG, notes that Hansen's report of an agreement on the NAFTA Model Rule was premature. Although the TLWG tentatively reached an agreement on a Model Rule Respecting Foreign Legal Consultants, as reported by Hansen, the group has not submitted this NAFTA Model Rule to the NAFTA Free Trade Commission or the NAFTA governments as a joint recommendation. Based upon comments received after circulating the proposed Model Rule, the TLWG decided to delay recommendation of the Model Rule pending a determination of the position of the Mexican Government. Some commentators suggested that the Mexican Government's position was not as restrictive as the position of the Mexican National Bar Association representatives on the TLWG. The Canadian and U.S. representatives did not want to issue a set of recommendations more restrictive than necessary and thus delayed approval pending determination of the Mexican Government's position. See

might be described as a legislative delegation model. Although NAFTA theoretically creates a single entity with authority to regulate the provision of legal services, in reality that regulation, if any, will be developed by the working party to which it is delegated.

As this very abbreviated discussion demonstrates, efforts have been and currently are being made on many fronts to facilitate or regulate the provision of cross-border legal services. The ABA/Brussels Agreement must be understood in this larger context as the product of one of several different types of efforts or models that can be undertaken. Its hybrid approach, between private sector representatives and a regulatory body, represents one method by which liberalization of trade in legal services may be accomplished. By focusing on both the *procedure* by which the Agreement came about, its legislative history, and its *substance*, my hope is that this analysis will prove useful as the private sector and the public sector, lawyers and non-lawyers, contemplate the desirability, proper regulation, and methods of facilitating, further cross-border trade in legal services.

II. *EXPLORING THE PROCEDURE USED UNDER A HYBRID MODEL: THE AGREEMENT BETWEEN THE ABA AND THE BRUSSELS BARS*

On August 6, 1994, representatives of the ABA, the French Language Order of the Brussels Bar, and the Dutch Language Order of the Brussels Bar signed an historic agreement. This Agreement set forth the conditions under which U.S. lawyers could practice law in Brussels, Belgium. In order to understand the Agreement, however, it is helpful to know some background information.

Nelson Mar. 10, 1997 Interview, *supra* note 42; Telephone Interview with Steven Nelson, Chair, NAFTA Trilateral Lawyers' Working Group (Mar. 18, 1998) [hereinafter Nelson Mar. 18, 1998 Telephone Interview]; *see also* CONE, *supra* note 1, at 6:10-19 (summarizing TLWG discussions under NAFTA and proposed NAFTA Model Rule Respecting Foreign Legal Consultants which is awaiting recommendation); Robert Budden, *Mexican Lawyers Not Ready to Rock the Boat*, 12 INT'L FIN. L. REV. 21 (1993) (providing brief overview of U.S. law firms in Mexico and Mexican reaction to upcoming NAFTA agreements).

Any joint recommendation reached by the TLWG would have to be adopted in the individual states with regulatory powers over lawyers. Nevertheless, if this professional group reaches agreement on key issues, it seems fair to conclude that this may lead to some changes. *But see* CONE, *supra* note 1, at 6:19.

A. *Background Information about the Legal Situation in Brussels*

The first important fact to understand is that an individual in Brussels need not be licensed as a "lawyer" in order to provide legal advice. To state it differently, in Belgium, lawyers do not have a monopoly on providing legal advice. Anyone is free to offer his or her services in providing legal advice.⁵⁶ This lack of restriction on offering legal advice stands in contrast to the approach used in the United States, where the individual states that regulate lawyers generally prohibit non-lawyers from practicing law.⁵⁷ While the definition of "practicing law" varies from U.S. state to U.S. state, these definitions are generally interpreted to include the provision of advice regarding the legal rights or obligations of others.⁵⁸ Thus, unlike the situation that occurs in the United States and many countries, foreign lawyers in Brussels, including U.S. lawyers, may hang up their shingle and offer legal advice, provided it does not violate the conditions of their work permit.

A second important concept to understand before examining the Agreement is the fact that in Belgium, the licensing of lawyers is performed on a regional basis, rather than a national basis.⁵⁹ There are twenty-nine bar associations in Belgium. In addition to the Bar of the Court of Cassation, which is the Con-

56. See CCBE, CROSS-BORDER PRACTICE COMPENDIUM 8-Belgium (D.M. Donald-Little ed. 1996); Louis-Henri Verbeke, *Brussels: What's the Crack Jacques?*, 13 LAW. IN EUR. 13, 15 (1992) (noting that legal professions of *avocats* and *notaries* have monopoly only on representing clients before courts and delivery of certain deeds, including conveyances and incorporations).

This sentence is not intended to disparage the regulation used in Brussels or to suggest that the United States' regulation of the giving of legal advice is necessarily more protective of the public or clients. Rather, this language was used in order to emphasize to U.S. lawyers how very different the U.S. and Brussels systems are because many U.S. lawyers may be unaware of the different approaches to regulation that are utilized throughout the world.

57. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 21:8001 (1998).

58. *Id.*

59. It is somewhat misleading to speak of the licensing of "lawyers" because Belgium, like other European countries, does not have a unified legal profession. In contrast to the situation in the United States, Belgium has no single title of lawyer that encompasses all licensed professionals. Rather, there are a series of different kinds of licenses for different kinds of legal work. In Belgium, what we would call lawyers include the *Avocat*, *Avocat a' la Cour de Cassation*, Notary, *Juriste d'entreprise*, *Stagiaire*, and *Hissiers*. See COMPENDIUM, *supra* note 2, at 8-12 Belgium. The profession that comes closest to what we in the United States would call lawyer is the *avocat*, who practices in all areas of legal work and has, with few exceptions, the exclusive right to plead in court. *Id.*

stitutional Court, there is one bar for each of twenty-six districts, and two bar associations for Brussels.⁶⁰ Brussels has both a French Language Order and a Dutch Language Order.⁶¹ Thus, in order to be an *avocat* (French) or *advocaat* (Dutch)⁶² one must register with the appropriate bar association of the judicial district in which that person's office is located and must comply with the requirements of that bar association.⁶³ In addition to these regional bar associations, there is a national bar association which has responsibility for "maintaining and defending the interests of the profession as a whole."⁶⁴

A third important fact about Brussels is that it is considered to be a critical market by many non-Belgian lawyers. Brussels is the site of many important EU law making institutions.⁶⁵ Thus, many non-Belgian lawyers, including U.S. lawyers, consider it important to have a presence in Brussels in order to advise their clients about EU laws that might affect them.⁶⁶ Indeed, the number of U.S. lawyers in Brussels increased dramatically as 1992 and European Integration approached.⁶⁷

60. *Id.* at 14-Belgium.

61. *Id.* It is a matter of choice for *avocats* as to whether they join the French Bar or the Dutch Bar. *Id.* The functions of the two are similar. *Id.*

The split of the Brussels Bar into separate Dutch and French Orders occurred in 1984. See *Transnational Law Practice*, *supra* note 2, at 798. As of 1992, the Brussels Bars had approximately 3400 members, of which 2250 belonged to the French Language Order and 1150 belonged to the Dutch Language Order. See *Position Paper on Establishment and Practice by non-EEC lawyers — Members of a Bar or Law Society in the Country of Origin or in a Third Country — Possible Cooperation with Members of the Brussels Bar*, presentation at the ABA Annual Meeting, San Francisco, Cal., Aug. 8, 1992 (on file with the *Fordham International Law Journal*) [hereinafter *Brussels' Bars Position Paper*]. One commentator characterized the Flemish Bar of Brussels as younger, more international, and more structured, than the French Bar of Brussels. See Verbeke, *supra* note 56, at 14.

62. CROSS-BORDER PRACTICE COMPENDIUM, *supra* note 2, at 8-Belgium.

63. *Id.*

64. *Id.* at 15-18. One commentator noted that the National Bar Council is playing a greater, and usually welcomed, role in determining policy issues, which are then adopted by the local bars. He noted as an example that the National Bar Council has been at the forefront of efforts to legitimize cooperation between the two independent legal professions of *avocat* and civil law notary. See Verbeke, *supra* note 56, at 14.

65. See 1 THE EUROPA WORLD YEAR BOOK 150-52 (1996) (explaining roles of European Commission and European Council and their location in Brussels); (Mar. 10, 1998) <<http://Europa.eu.int/index-en.htm>> (referencing home pages of EU institutions) (also on file with the *Fordham International Law Journal*).

66. See, e.g., *Transnational Law Practice*, *supra* note 2, at 797-801, 832-33 (summarizing foreign firms' presence in Belgium); *Bridging the Gap*, *supra* note 2, at 476; CONE, *supra* note 1, at 10:2.

67. According to Professor Goebel, the 1988 Martindale-Hubbell Directory listed

Fourth, in order to understand the Agreement, one must be familiar with certain terminology. Brussels lawyers who register with the French or Dutch bar associations are called *tableau* lawyers. Before one can become a *tableau* lawyer, one must serve an apprenticeship, or *stage*, during which period one is referred to as a *stagiair*.⁶⁸ The list on which *tableau* lawyers and *stagiaires* are recorded is colloquially referred to as the "A List." As noted above, these A List lawyers are also referred to as *avocats* or *advocaten*. In addition to the A List, since 1984, the Brussels Bar has maintained a "B List," on which foreign lawyers could register if they satisfied certain conditions. Because there is no monopoly on giving legal advice, however, historically, many foreign lawyers chose not to register on the B List.⁶⁹ The final term which one should know is *jurist*. A *jurist* is a Belgian who graduated from a Belgian law school but chose not to serve a *stage* or register on any bar list.⁷⁰

There are two final background facts that are important and intertwined. First, the Brussels Bars' ethics rules historically either prevented or severely restricted licensed Belgian *tableau* lawyers, or *stagiaires*, from joining foreign firms as either partners or employees. Secondly, some foreign firms responded to these ethics rules by hiring Belgian law school graduates or ju-

eight U.S. law firms, either independent or branch offices, a half dozen English solicitor or barrister firms, five Dutch law firms, and several other firms from France, Germany, Italy, Spain, and Sweden. *Bridging the Gap*, *supra* note 2, at 477.

In contrast to these figures, by 1991 there were more than 200 non-Belgian firms. Additionally, the number of U.S. firms increased from seven firms before 1987 to over 30 firms in 1991. See *Transnational Law Practice*, *supra* note 2, at 801 (noting that there were 350 foreign lawyers in 250 firms and 3100 Belgian lawyers at end of 1991); Steven Greenhouse, *Aggressiveness of U.S. Lawyers Offends Members of Old World Bar*, CHI. DAILY L. BULL., May 14, 1991, at 3 (noting that more than 20 large U.S. firms opened offices in last two years, seeking to cash in on expected avalanche of rule-making that will inevitably accompany EC's plans to form barrier-free market in 1992). See also Joel Havemann, *U.S. Law Firms Chasing New Clients in Brussels; They Hope to Cash in on the European Community's Quiet Revolution in the Way Businesses on the Continent Do Business*, L.A. TIMES, Dec. 4, 1990, at H4 (noting presence of more than 25 U.S. law firms in Brussels in response to EC); Verbeke, *supra* note 56, at 14 (noting present wave's impressiveness in terms of numbers of foreign firms, and that Belgian lawyers were better equipped to meet challenge from outside than they were in previous invasions). See generally CONE, *supra* note 1, at 10:18 (discussing influx of foreign firms in expectation of barrier free market in 1992).

68. See COMPENDIUM, *supra* note 2, at 9, 13-Belgium; Agreement, *supra* note 3, at first "Whereas" clause.

69. See Agreement, *supra* note 3, at sixth "Whereas" clause.

70. *Id.* at thirteenth "Whereas" clause.

rists who did not register with the Brussels Bars and thus were not *avocats* or *advocaten*.⁷¹ Over the years, the Brussels Bars expressed concern that some of the "best and brightest" Belgian legal minds chose not to become Belgian lawyers, but instead worked for foreign firms, sometimes at triple the salary they would have earned as a Belgian lawyer.⁷²

B. *A Summary of the Brussels Bars' Dealings with Foreign Lawyers up until the Agreement*

The Brussels Bars' dealings with foreign lawyers has ranged from hostility to acceptance. The mid to late 1960s and early to mid 1970s were periods in which Brussels lawyers worried about competition from foreign lawyers and there was much hostility towards foreign lawyers.⁷³ Under pressure from the bars, the Belgian Government began to issue work permits, or professional cards, that contained numerous restrictions on foreign lawyers.⁷⁴ For example, many of these professional cards pro-

71. See Hague Proceedings, *supra* note 19; Patrick Stewart, *Partners in Belgium*, NAT'L L. J., Apr. 11, 1994, at A4 (noting that Brussels rules unintentionally encouraged best graduates to join international firms without registering locally); *U.S. Lawyers to Register with Brussels Bar*, INT'L LAW., Apr. 1994, at 2 (noting that high quality local lawyers joined international firms without registering as *avocats*) [hereinafter *U.S. Lawyers*]. This became a concern for the bar and a major incentive to resolve the issue.

In this context, the term "foreign firms" refers to firms having "foreign", or non-Brussels-qualified, lawyers because the Brussels Bars' ethics rules prohibited membership with foreign lawyers who were not qualified as Brussels lawyers.

72. See Greenhouse, *supra* note 67 (noting that "high-paying American firms, for example, are bidding up salaries for young Belgian law school graduates, in some cases tripling their pay."). Also, "Belgian firms often complain about the starting salaries American firms pay to 25-year-old-lawyers — often \$65,000 or more, at least twice what many Belgian firms pay." Havemann, *supra* note 67 (quoting Carl Bevernage, president of Brussels' Dutch Language Bar, as noting that U.S. firms pay double local going rate for starting attorneys); see also *U.S. Lawyers*, *supra* note 71 (noting that Agreement should help ease tension in Brussels, where local bar tried unsuccessfully to bring foreign law firms under its wing).

73. See CONE, *supra* note 1, at 10:4-8; *Bridging the Gap*, *supra* note 2, at 476-77; Interview with Walter Oberreit, Agreement Negotiator, in Brussels, Belgium (July 4, 1995) [hereinafter Oberreit July 4, 1995 Interview].

74. See CONE, *supra* note 1, at 10:2-6; *Bridging the Gap*, *supra* note 2, at 476. See also TRANSNATIONAL LEGAL PRACTICE, *supra* note 2, at 57-58 (describing policies and restrictions implemented in 1972). These restrictions were possible because, although U.S. and other foreign lawyers did not need to be licensed as Brussels lawyers in order to provide legal advice, they did need a professional card issued by the immigration authorities in order to reside and practice in Brussels. CONE, *supra* note 1, at 10:3. These professional cards, however, were only required of foreign lawyers who were partners. Associates only needed work permits. See SPEDDING, *supra* note 2, at 225.

vided that foreign lawyers could not cooperate with Belgian lawyers, could not have Belgian lawyers as partners or employees, and could not advise on Belgian law.⁷⁵ Indeed, the restrictions on these cards were so severe that the U.S. embassy became concerned about the issue and a series of diplomatic negotiations ensued.⁷⁶

After this period of hostility, the late 1970s and early 1980s ushered in a period of relatively peaceful coexistence.⁷⁷ The bar leadership in Brussels realized that foreign lawyers were there to stay. As a result, there seemed to be less pressure with respect to the work permit issue.⁷⁸ In 1984, the Brussels Bars created a special status, called the B List, for foreign lawyers who were not *avocats*. Among other provisions, the new B List contained "scope of practice" provisions which permitted B List lawyers, including U.S. lawyers, to practice European Community law. The B List rules also relaxed the rules prohibiting registered Belgian lawyers from associating with foreign lawyers, although there still were many restrictions which limited the usefulness of the "B

75. See CONE, *supra* note 1, at 10:3-6 (describing "The Professional-Card Wars"); SPEDDING, *supra* note 2, at 225 (describing system for issuing professional cards, and importance of Brussels to foreign lawyers); Verbeke, *supra* note 56, at 15 (noting that most permits were issued with proviso that permit holder will not practice Belgian law and, in many cases, will not hire Belgian lawyers).

One of the leading foreign lawyers in Brussels concluded that this policy was a big mistake on the part of the Belgians. He believes that if Belgian lawyers worked as partners with foreigners, there would have been six to eight big international firms in Brussels with dominant Belgian lawyers. See Oberreit July 4, 1995 Interview, *supra* note 73.

76. See CONE, *supra* note 1, at 10:7-11; *Brussels Bars' Position Paper*, *supra* note 61. The *Brussels Bars' Position Paper* explains that "these cards or permits have been issued with the express proviso that the applicant may not practice Belgian law, nor hire or employ Belgian lawyers. The latter condition has not been enforced for many years." *Bridging the Gap*, *supra* note 2, at 476 n.85. (noting that "Bertouille & Konyk, *Belgium*, in TRANSNATIONAL LEGAL PRACTICE . . . discuss policies of the Ministry of Middle Classes and the Brussels Bar as of 1972 that do not reflect the current policies of the Ministry and may no longer represent the views of the Brussels Bar.")

77. Oberreit July 4, 1995 Interview, *supra* note 73.

78. *Id.*; see also CONE, *supra* note 1, at 10:12. In the 1970s and 1980s, the Brussels Bar,

began to question its policy of discouraging its members from associating with these firms . . . and began to cast around for an appropriate way to encourage cooperation between EU and Belgian lawyers in Brussels, and, not so incidentally, to bring the EU lawyers within the ambit of the Brussels bar.

Id.

Additionally, the Brussels Bars noticed the lack of enforcement of card restrictions and the fact that the card quotas were not reached.

List.”⁷⁹ Within five years of the creation of the B List, a number of American, English, Dutch, German, and Japanese lawyers were employed by, or had become partners of, Belgian *avocat* firms.⁸⁰ In 1991, the Brussels Bars further relaxed their ethics rules when they permitted Belgian lawyers acting as partners at the law firm of Cleary, Gottlieb, Hamilton & Steen, Brussels (“Cleary Gottlieb”) to become *tableau* lawyers, provided several conditions were satisfied.⁸¹

The Brussels Bars recognized that when the 1992 European Integration occurred, they would have to consider more fully the role of the many European Community lawyers, especially English, French, and Dutch lawyers, who practiced in Brussels. The Brussels Bars were particularly concerned about unregulated foreign lawyers.⁸² Their concerns included risk of confusion on the part of clients, as well as concerns that the foreign lawyers were unfairly advantaged because they were not bound by, and were not necessarily complying with, restrictive Brussels ethics rules on advertising, for example.⁸³ At approximately the same time,

79. The new rules authorized Brussels *avocats* to form associations in Brussels with members of non-Belgian Bars who registered with the Brussels Bar. The new rules also treated members of non-Belgian Bars as associates, or if the foreign lawyers registered with the Brussels Bar for at least three years, as partners. The U.S. lawyers taking advantage of these new rules were subject to the rules of the Brussels Bar and its disciplinary procedures. SPEDDING, *supra* note 2, at 225-26; *see also Transnational Law Practice, supra* note 2, at 797 (noting both 1984 relaxation and corollary informal quota of 25 work permits per year for non-EC lawyers); Verbeke, *supra* note 56, at 15 (summarizing 1984 regulations); CONE, *supra* note 1, at 10:13-15 (describing in detail history of regulations and scope of practice provision).

80. *Bridging the Gap, supra* note 2, at 478.

81. *See* Verbeke, *supra* note 56, at 15 (explaining reasons why Brussels Bar recently admitted Belgian lawyers working for Cleary, Gottlieb, Hamilton & Steen, Brussels (“Cleary Gottlieb”) to full membership); CONE, *supra* note 1, at 10:15-16, 39-40.

82. *See* Carl Bevernage, President of the Dutch Order of the Brussels Bar, Brussels: The Meeting of National and Transnational Practices and the Nature of Community Practice, The Regulatory Framework, speech at Lawyers in Europe Third Annual Practice Conference (Nov. 20, 1992) (on file with the *Fordham International Law Journal*).

83. *See Brussels Bars' Position Paper, supra* note 61 (noting that there were approximately 350 foreign lawyers in Brussels, 120 of whom registered on B List and expressed an interest in working together to achieve greater registration); *see also* Greenhouse, *supra* note 67 (reporting complaints by Belgian lawyers that some U.S. lawyers acted unprofessionally when they placed advertisements to announce their arrival in Brussels); Havemann, *supra* note 67 (quoting an unnamed source as saying “Many [Brussels] lawyers feel that they are being invaded by foreigners who are playing by different rules.”). This story noted that the Brussels Bar sharply limits advertising. Local law firms cannot even widely distribute informational brochures about themselves. It also prohibits lawyers from lobbying, yet lobbying is precisely why many U.S. law firms came

the French Order of the Brussels Bar adopted a policy statement that recites that a "policy of *open welcome* . . . is the one and only policy worthy for the Bar of the main capital of EEC institutions, a few months before the single market comes into effect."⁸⁴ Thus, in 1992, the Brussels Bars approached several different bar associations, including the ABA, in the hopes of negotiating agreements requiring foreign lawyers to register with one of the Brussels Bars and binding them to the Brussels Bars' ethics rules.⁸⁵ The Bars' negotiations with the ABA lasted two years. At the same time that the Brussels Bars negotiated with the ABA, they also negotiated with the English and the Paris Bars, among others.⁸⁶ It is against this backdrop that the Agreement must be

to Brussels. Sheila Kaplan, *Backlash in Brussels*, LEGAL TIMES, Dec. 3, 1990, at 1, 20. Verbeke, *supra* note 56, at 15-16 (noting existence of unsatisfactory marketing situation because everyone except notaries, *avocats*, and foreign lawyers admitted on B list are permitted to advertise or otherwise directly market their services). Thus, there are no restrictions on unregistered foreign law firms and auditing firms. In explaining the special 1991 exemption for Belgian lawyers who were Cleary Gottlieb partners, the author pointed out "[t]he firm's reputation as the one U.S. firm which had always sought to comply with the Brussels ethical code," but noted Brussels lawyers' concern about whether this treatment would be extended to other firms "some of which show a fairly reckless disregard of local norms."

84. STATEMENT OF PRINCIPLES ISSUED UNANIMOUSLY ON MAY 5, 1992 BY THE FRENCH LANGUAGE ORDER OF THE BRUSSELS BAR FOR THE 'ESTABLISHMENT OF FOREIGN LAWYERS IN BRUSSELS' (on file with the *Fordham International Law Journal*); see CONE, *supra* note 1, at 10:19.

85. See generally *Brussels Bars' Position Paper*, *supra* note 61 (noting that Brussels Bars also approached Law Society of England and Wales in order to reach agreement on conditions under which foreign lawyers could practice in Brussels); Carl Bevernage, *Interview: On the Legal Scene in Belgium*, 12 LAW. IN EUR. 18, 19 (1992) (noting desire for registration of all foreign lawyers and referring to ongoing discussions with Law Society of England and Wales and ABA). The Brussels Bars also realized that they needed to address the issue of the differential treatment of lawyers at Cleary Gottlieb. *Id.*; see CONE, *supra* note 1, at 10:21 (explaining that some of Brussels Bars' officers and recently arrived U.S. lawyers believed ABA might be "a promising interlocutor that might help find a consensual escape from the dead end of regulatory inadequacy").

86. See *English and Belgians Agree on a Deal*, INT'L LAW., May 1994, at 4; *U.S. Lawyers*, *supra* note 71 (noting that Brussels Bars also engaged in parallel talks with Law Society of England and Wales); *Update, Solicitors Report on Progress with Paris and Brussels Bars*, 27 LAW. IN EUR. 8 (1993); John de Forte, *Brussels: Defending the Local Market*, 23 LAW. IN EUR. 23 (1993) (noting agreement between Brussels and Paris Bars); *Update, Paris-Brussels Agreement on Access*, 23 LAW. IN EUR. 11 (1993) (providing further details of Paris-Brussels agreement); CONE, *supra* note 1, at 10:17-18, 29-34 (summarizing agreements entered into by Brussels Bars with Bars of Strasbourg, Lille, Paris, England, Geneva, Montreal, Italy, and Netherlands); *Nederlandse Orde van Advocaten, Guidelines and Information Concerning the Registration of Foreign Lawyers in Belgium and With the Brussels Bar* (May 22, 1996) (containing full text in original languages of Brussels Dutch Bar's 1977, 1988 and December 23, 1992 agreements with Paris Bar Council;

understood.

C. *The Legislative History of the Agreement*

The Agreement is the product of approximately two years of negotiations. The parties consisted of representatives from the Brussels Bars and the ABA. Approximately six U.S. lawyers and six representatives of the Brussels Bars participated in the negotiations.⁸⁷

1. The Genesis of the Agreement

The genesis of the Agreement was a letter sent to the ABA President by the President of the Dutch Order of the Brussels Bar, Carl Bevernage, in July of 1992. Mr. Bevernage indicated that he and a colleague from the French Order of the Brussels Bar would be at the August 1992 ABA Annual Meeting in San Francisco.⁸⁸ He reported that “[o]ur respective Bar Councils have asked us to seize upon this occasion to discuss with the relevant committee or section of the ABA the practice rules for American lawyers and law firms in Brussels.”⁸⁹ The President of the ABA responded to this letter by asking these Brussels lawyers to brief the ABA’s Special Advisory Committee on International

September 18, 1993 agreement with Geneva Bar Council; May 26, 1994 agreement with St. Petersburg Bar; June 13, 1994 agreement with [Italian] National Bar Council; July 7, 1994 agreement with Law Society of England and Wales; March 22, 1995 agreement with Dutch Bar Council (Netherlands); and June 15, 1995 agreement with Bologna Bar Council) (on file with the *Fordham International Law Journal*).

87. In contrast with talks between the ABA and CCBE, for example, none of these negotiation sessions included official government representatives. See, e.g., Agreed Minutes of Meeting Between Representative of The American Bar Association (ABA) and The Council of Bars and Law Societies of the European Community (CCBE), New York City, Oct. 12, 1991 (on file with the *Fordham International Law Journal*) [hereinafter Oct. CCBE Minutes]. The minutes reflect the attendance of U.S. State Department representatives and EC Commission representatives.

88. See Letter from Carl Bevernage, President of the Dutch Order of the Brussels Bar, to Talbot D’Alemberte, ABA President (July 9, 1992) (on file with the *Fordham International Law Journal*).

89. *Id.* This letter explained the reason for the request as follows:

Now that the practice by and with foreign lawyers has been reshaped in France and more particularly in Paris as well as in London, it has become urgent to revisit unresolved issues of the same nature in Brussels. We therefore welcome the opportunity to prepare the way in San Francisco for meaningful discussions between the Brussels Bar and the ABA at an appropriate level.

Id. This July 1992 letter to the ABA followed a March 1992 letter the Brussels Bar sent to the English Law Society with a similar request to negotiate. See *English and Belgians Agree on Deal*, INT’L LAW., May 1994, at 4.

Activities and to meet with the ABA Section of International Law and Practice's Transnational Legal Practice Committee.⁹⁰ The Brussels representatives accepted the invitation of the ABA President and met with these groups.

2. The ABA Negotiators

Following the presentation by the Brussels representatives at the ABA Annual meeting⁹¹ and upon the recommendation of the Special Advisory Committee, the ABA President asked Steve C. Nelson and Joseph P. Griffin to pursue discussions with the Brussels Bars along the lines indicated.⁹² Mr. Nelson and Mr. Griffin were past chairs of the ABA's International Law Section, were chair and vice-chair, respectively, of the Transnational Legal Practice Committee, and both had spent several years practicing in Brussels.⁹³ They immediately enlisted the assistance of Walter Oberreit, who had practiced in Brussels for over twenty-five years.⁹⁴ The three then began to seek other lawyers to add to the ABA negotiating team. Their goals were to provide

90. See Letter from Talbot D'Alemberte, ABA President, to Carl Bevernage, President of the Dutch Order of the Brussels Bar, (July 16, 1992) (on file with the *Fordham International Law Journal*).

91. At the ABA Annual Meeting in San Francisco, the representatives of the Brussels Bars presented a "Position Paper." See *Brussels Bars' Position Paper*, *supra* note 61. A "Statement of Principles Issued Unanimously on May 5, 1992 by the French Language Order of the Brussels Bar for the 'Establishment of Foreign Lawyers in Brussels'" preceded this position paper. In their September 4, 1992 response to the Position Paper, the ABA negotiators indicated that they also received a copy of this "Statement of Principles." See Letter from Steven C. Nelson & Joseph P. Griffin, Chair and Vice Chair respectively, ABA Committee on Transnational Legal Practice, to Mr. Carl Bevernage and Mr. Edouard Jakhian, Presidents of the Dutch and French Orders of the Brussels Bars, respectively, 2 (Sept. 4, 1992) (on file with the *Fordham International Law Journal*) [hereinafter Sept. 4, 1992 Nelson/Griffin Letter].

92. See Memorandum Regarding the Proposed Protocol with the Brussels Bar Councils from James H. Carter, Chair of the ABA Section of International Law and Practice, to the Board of Governors, 4 (Mar. 24, 1994) (on file with the *Fordham International Law Journal*) [hereinafter Mar. 24, 1994 Carter Memorandum]; Nelson Mar. 10, 1997 Telephone Interview, *supra* note 42. See also Minutes of the Meeting of the Special Advisory Committee on International Activities, San Francisco, Cal., Aug. 9, 1992 (on file with the *Fordham International Law Journal*) (noting that Steve Nelson briefed entire group on recent developments in Brussels and "agreed to prepare comments on the Brussels Bar's [sic] proposal by the end of August.").

93. *Id.*; see also Sept. 4, 1992 Nelson/Griffin Letter, *supra* note 91; Letter from Joseph P. Griffin to Laurel S. Terry (June 27, 1997) (on file with the *Fordham International Law Journal*) [hereinafter Griffin June 27, 1997 Letter].

94. Telephone Interview with Joseph Griffin, Agreement Negotiator (Feb. 14, 1997) [hereinafter Griffin Feb. 14, 1997 Telephone Interview].

balance as to geography, firm size, and type of practice. They believed that such balance was important to their goal of obtaining approval of a final agreement from the ABA hierarchy.⁹⁵

Six U.S. lawyers, all private practitioners, ultimately joined the ABA negotiating team. This negotiating team was very stable. No additional personnel were added over the course of the two-year negotiation, no one left the team, and all remained very involved.⁹⁶ These six representatives included Joseph P. Griffin,⁹⁷ John H. Harwood II,⁹⁸ Steven C. Nelson,⁹⁹ Walter W. Oberreit,¹⁰⁰ Paul D. Sher,¹⁰¹ and Thomas C. Vinje.¹⁰² Attorneys Nelson and Griffin were designated as co-chairs of the ABA negotiating team.¹⁰³ Of these six, all except Steve Nelson and Joe Griffin were based in Brussels at the time of the negotiations.

The Belgians usually had the same number of people at a negotiating session as did the ABA, although the composition of the Belgian group changed as the bar officials changed.¹⁰⁴ Carl

95. *Id.*

96. Interview with Joseph Griffin, Agreement Negotiator, in Washington, D.C. (Feb. 18, 1997) [hereinafter Griffin Feb. 18, 1997 Interview].

97. Mr. Griffin was Co-Chairman of the ABA/CCBE Joint Working Group and Vice-Chairman of the ABA Section of International Law and Practice's Committee on Transnational Legal Practice. He also was a partner resident in the Washington, D.C. office of Morgan, Lewis & Bockius LLP. *Id.* Mr. Griffin described himself as the "bad cop" to Steve Nelson's "good cop" in the "good cop/bad cop" negotiations that sometimes occurred. *Id.* He indicated that after awhile, these roles were so obvious that it was humorous, and that the Belgian negotiators sometimes assumed similar roles. *Id.*

98. Mr. Harwood was with the Brussels office of Wilmer, Cutler & Pickering. *Id.*

99. Mr. Nelson was a past-chair of the ABA's Section on International Law and Practice. He was also chair of that section's Committee on Transnational Legal Practice. He is a partner resident in the Minneapolis office of Dorsey & Whitney.

100. Mr. Oberreit was a partner with Cleary Gottlieb, and a resident of Brussels. Mr. Griffin described Mr. Oberreit to me as "the dean of foreign lawyers in Brussels." *Id.* At the time of the negotiations, Mr. Oberreit had practiced law in Brussels for over 25 years and was well-regarded by the Belgians. *Id.* See also Verbeke, *supra* note 56, at 15-16. In explaining the special 1991 exemption for Belgian lawyers who were Cleary Gottlieb partners, the author noted "[t]he firm's reputation as the one U.S. firm which had always sought to comply with the Brussels ethical code."

101. Mr. Sher was a member of Paul D. Sher & Associates, and a resident of Brussels. Mr. Sher's firm was a relatively small firm, providing balance to the representatives from large law firms. See Griffin Feb. 18, 1997 Interview, *supra* note 96.

102. Mr. Vinje was with Morrison & Foerster LLP, and a resident of Brussels. In addition to providing representation of a West Coast firm, Mr. Vinje was a partner of Robert D. Raven, a former ABA President. He thus had access to information which would help the group shepherd any final agreement through the ABA hierarchy. *Id.*

103. *Id.*

104. *Id.*

Bevernage, who was President of the Dutch Bar Council at the time the negotiations began, took the dominant role in the negotiations for the Belgians.¹⁰⁵ According to Joe Griffin, the negotiators for the Brussels Bars, like the ABA negotiators, were private practitioners.¹⁰⁶

3. The History of the Negotiations

The first ABA response to the Brussels Bars was a five page letter sent by Mr. Nelson and Mr. Griffin approximately one month after the August 1992 ABA Annual Meeting in San Francisco.¹⁰⁷ By the time negotiations concluded, the parties had met over fifteen times¹⁰⁸ and exchanged over thirty drafts.¹⁰⁹

105. *Id.*

106. Griffin Feb. 18, 1997 Interview, *supra* note 96. Several of the negotiators occupied leadership positions within the Brussels Bars. According to Joe Griffin, although these positions required significant time commitments, as does the presidency of the ABA, these lawyers came from private practice and intended to return to private practice. *Id.*

107. *See* Sept. 4, 1992 Nelson/Griffin Letter, *supra* note 91. The five page single spaced letter expressed interest in cooperating and then set forth the criteria by which they believed one must judge the legitimacy, in an open global economy, of any condition of, or restriction upon, the right of any lawyer who is duly qualified as a member of a recognized legal profession to practice outside the jurisdiction in which he is so qualified. This portion of the letter stated:

In our view, any such condition or restriction must be objectively justified as a means of achieving either or both of the purposes of (i) protecting the public, as consumers of legal services, against the risks of relying upon legal advice rendered by those who are not competent to render such advice and (ii) preserving the integrity of, and public respect for, the legal profession as a whole. We do not regard as a legitimate purpose of professional regulation the limitation of economic competition among lawyers, as we do not believe lawyers can properly claim exemption from the rules of competition that apply to persons providing other services, provided of course that such competition is not carried out in a manner which tends to interfere with the achievement of either of the two legitimate purposes referred to above. We have taken this position with regulatory authorities of various jurisdictions in the United States who have been or are now considering the adoption of legal consultant rules, and we intend to continue to work toward a global system based upon these principles.

Id. The letter continued by stating: "We believe the restrictions and conditions you propose to implement can be fairly said to be objectively justified for the achievement of the two purposes it recognized, subject to [five points.]" The letter sought "your thoughts and clarifications on the various questions we have raised" at the upcoming meeting on September 14, 1992. *Id.*

108. The meetings between the negotiating parties included the following: Aug. 8, 1992 (San Francisco); Sept. 14-15, 1992 (Brussels); Oct. 29, 1992 (Brussels); Jan. 18, 1993 (Brussels); May 7, 1993 (Brussels); May 13, 1993 (Brussels); May 27, 1993 (Brussels); June 23, 1993 (Brussels); Aug. 8, 1993 (New York City); Aug. 9, 1993 (New York

Until the very end of the negotiations when numerous letters and corrections were exchanged, progress occurred primarily as a result of face-to-face meetings.¹¹⁰ These meetings were held on an *ad hoc* basis, when the two U.S. based participants were in Brussels.¹¹¹ These meetings, which generally happened every one to two months, took place in a conference room at the *Pa-*

City); Sept. 16, 1993 (Brussels); Oct. 18, 1993 (Brussels); Oct. 21, 1993 (Brussels); May 6, 1994 (Brussels); May 17, 1994 (Brussels); Aug. 6, 1994 (New Orleans).

The parties did not necessarily realize at the outset that their negotiations would take so long. In February 1993, for example, Carl Bevernage stated that he hoped to have a signed agreement by the time of the ABA Annual Meeting in August 1993. *See Update*, 19 *LAW IN EUR.* 7 (Feb. 1993). That date came and went, however, without a final agreement. Indeed, there is a handwritten comment on a February 1, 1994 cover memo from Steve Nelson noting that the English "solicitors expect to reach agreement with our Belgian colleagues this week. *I remember thinking that once.*" *See Cover Memo* from Steven Nelson, ABA Negotiator, to ABA Negotiating Team (Oberreit, Harwood, Griffin, Sher, Vinje) (Feb. 1, 1994).

109. The written exchanges between the parties can be sorted into four different groups. The first items exchanged were the *Brussels Bars' Position Paper*, *supra* note 61, and the Sept. 4, 1992 Nelson/Griffin Letter, *supra* note 91 (responding to Position Paper).

The second set of exchanges were drafts of the Agreement, then called a Protocol. These drafts included the following, identified by the date of the draft and party circulating the draft: Jan. 14, 1993 (Brussels); Mar. 2, 1993 (ABA); Apr. 30, 1993 (Brussels); May 14, 1993 (ABA); May 19, 1993 (ABA); May 25, 1993 (ABA; Article 8 and Annex only); June 17, 1993 (Brussels); Aug. 3, 1993 (Brussels); and Aug. 5, 1993 (ABA).

In August 1993, at the ABA Annual Meeting in New York, the parties decided to develop a consensus on general principles, to be called "Heads of Agreement," rather than negotiate specific agreement language. The exchanges that occurred during this third stage of negotiation included the following, identified by the date of the letter and party circulating the draft or comment: Sept. 13, 1993 (Brussels; Bevernage draft and Sloomans draft of art. 9 on ethics); Sept. 14-15, 1993 (ABA); Sept. 16, 1993 (Brussels); Sept. 18, 1993 (ABA); Sept. 21, 1993 (Brussels); Oct. 13, 1993 (ABA); Oct. 18, 1993 (Brussels); Oct. 19, 1993 (Brussels); Oct. 20, 1993 (ABA); Oct. 21, 1993 (Brussels); Oct. 22, 1993 (Brussels); Nov. 16, 1993 (Brussels); Dec. 15, 1993 (ABA); Dec. 31, 1993 (Brussels); Jan. 13, 1994 (ABA); Jan. 27, 1994 (Brussels; para. 12); Feb. 2, 1994 (Brussels); Feb. 11, 1994 (ABA); Mar. 2, 1994 (Brussels; noting that French and Dutch Orders had approved Heads of Agreement on Feb. 21 and 22, 1994).

The fourth set of documents were exchanged after agreement on the Heads of Agreement; the documents concerned the specific language of the Agreement. Included in these exchanges were the following, identified by date of the letter and party circulating the draft or comment: May 6, 1994 (ABA); May 11, 1994 (ABA); May 18, 1994 (Brussels; partial changes); June 6, 1994 (ABA). In addition to the above, there was a series of correspondence that were more in the nature of "technical corrections." These include letters on June 24, 1994 (Brussels, noting approval of the June 6, 1994 agreement by the two Brussels orders); June 27, 1994 (ABA); June 30, 1994 (Brussels); June 30, 1994 (ABA); July 1, 1994 (Brussels; noting they reached Agreement).

110. Griffin Feb. 14, 1997 Telephone Interview, *supra* note 94.

111. *Id.*

lais de Justice, where the Brussels Bars had their offices.¹¹² The parties conducted the negotiations in English.¹¹³ Unlike negotiation sessions between the ABA and the CCBE, these did not include any U.S. or European Government representatives.¹¹⁴

The negotiations were very informal.¹¹⁵ No minutes were kept of the negotiating sessions.¹¹⁶ Although the participants kept their own files,¹¹⁷ no particular effort was made to keep an official file of all the paperwork generated in connection with the negotiations.¹¹⁸ There rarely were agendas for the meeting. When there were, they were often delivered the morning of the meeting.¹¹⁹ Because the ABA negotiators did not have any sort of model as to how they should be proceeding, they basically were “making it up” as they went along.¹²⁰ Thus, in the early meetings, both sides were trying to develop a list of issues that needed to be covered in any agreement and to learn more about the other side’s concerns.

Following a negotiating session, the ABA representatives would assign someone to document the progress made during the discussion and someone to prepare a response, if one was required.¹²¹ That response might appear shortly thereafter or months later.¹²² The ABA representatives generally circulated draft responses to each other, and sometimes to the greater U.S.

112. Griffin Feb. 18, 1997 Interview, *supra* note 96.

113. *Id.*

114. See Oct. CCBE Minutes, *supra* note 87 (showing representatives of U.S. State Department and EC Commission attending this meeting).

115. Griffin Feb. 18, 1997 Interview, *supra* note 96.

116. *Id.* This practice stands in contrast to the practice of the ABA/CCBE Working Group. This group, which included many of the same people as the ABA/Brussels Bar negotiations, Steve Nelson, Joe Griffin, Carl Bevernage, issued “Agreed Minutes” on several occasions. See Oct. CCBE Minutes, *supra* note 87.

117. Joe Griffin was kind enough to share his file concerning the Agreement with this author [hereafter cited as ABA/Brussels file] (on file with the *Fordham International Law Journal*). Where I am citing a specific document, I have given the date, author and recipient of the document. For the sake of brevity, however, when summarizing numerous documents or the negotiations, I used a “*see generally* ABA/Brussels file” cite. Copies of this file and these documents are available from the author. I also used the “*see generally*” cite on a few occasions where I am citing a document merely as an example of a reaction and where I thought it appropriate to omit the name of the particular lawyer in order to protect the lawyer’s privacy.

118. Griffin Feb. 14, 1997 Telephone Interview, *supra* note 94.

119. Griffin Feb. 18, 1997 Interview, *supra* note 96.

120. *Id.*

121. *Id.*

122. *Id.*

legal community in Brussels, before sending any response to the Brussels representatives.¹²³

Between September 1992 and June 1993, the negotiators met approximately eight times and exchanged seven different drafts of the Agreement, then called a Protocol.¹²⁴ In June 1993, the parties seemed relatively close to an agreement.¹²⁵ There was a hiatus, however, until the August 1993 ABA Annual Meeting in New York City. At that time the Brussels negotiators presented their own completely new document entitled "Heads of Agreement."¹²⁶ This document, containing the principles to be embodied in the proposed agreement rather than the actual agreement, was a distillation of the most important points in the May 1993 drafts of the Protocol.¹²⁷ As reported to the ABA Board of Governors, the Brussels Bars intended to present the document to their memberships in order to obtain authority to proceed with the actual drafting and signature of the final text. "This procedure was designed to get the Bar Councils around internal difficulties that had apparently arisen when they attempted to present the more detailed document to their full membership."¹²⁸

The ABA negotiators agreed to use this Heads of Agreement approach proposed by the Brussels Bars.¹²⁹ It required over fifteen exchanges and several meetings before the parties could agree on the Heads of Agreement.¹³⁰ The parties finally reached an agreement in principle on January 28, 1993. On February 21 and 22, 1994, the two Brussels Bars approved the agreement headings, subject to ABA approval.¹³¹ The ABA Board of Governors approved these Heads of Agreement during

123. See generally ABA/Brussels file, *supra* note 117.

124. See *supra* note 109.

125. See Mar. 24, 1994 Carter Memorandum, *supra* note 92, at 2.

126. *Id.*

127. *Id.*; see also Memorandum on Proposed Protocol with the Brussels Bar Councils from Virginia M. Russell, Director, Presidential Administration and International Liaison, to Operations Committee, ABA Board of Governors (Mar. 31, 1994) (on file with the *Fordham International Law Journal*).

128. See Mar. 24, 1994 Carter Memorandum, *supra* note 92, at 2.

129. See *id.*

130. See *supra* note 109.

131. See Letter from Erik Carre and Pierre Legros, Presidents of the Dutch and French Orders of the Brussels Bars, respectively, to Steven Nelson and Joseph Griffin, ABA Negotiators, (Mar. 2, 1994) (on file with the *Fordham International Law Journal*).

its April 15-16, 1994 meeting.¹³²

Meanwhile, as soon as the Heads of Agreement had been finalized, the parties began negotiating the specific language of an agreement. This stage of the negotiations proceeded quite quickly compared to the earlier negotiations. Whereas it took approximately six months to agree on the Heads of Agreement, it took less than three months for the parties to agree on the specific language of the final Agreement.¹³³ These negotiations concerning the specific language of the final Agreement were handled primarily by an exchange of correspondence between Steve Nelson and Carl Bevernage.¹³⁴ Finally, on July 1, 1994, almost two years after his initial letter, Carl Bevernage sent a letter to Steve Nelson announcing that they had an agreement.¹³⁵ During the August 1994 ABA Annual Meeting in New Orleans,

132. See Minutes of the Meeting of the American Bar Association Board of Governors 1996 [sic], Washington, D.C., April 15-16, 1994 (on file with the *Fordham International Law Journal*). These minutes state:

UPON MOTION DULY MADE, SECONDED AND CARRIED:

The Board of Governors approved the request of the Section of International Law and Practice to conclude a Protocol with the Brussels Bar Councils with the understanding that the text of the final draft of the Protocol will be submitted to the Board for final approval at the June or August 1994 meeting, and further, that (1) the text of the final draft will incorporate the substance of footnote 1 on page 3 of the request concerning the term "mandatory," and (2) that clarification will be provided with respect to the extent of the Association's commitment as it relates to "undertake to use its best efforts" to encourage adoption of the ABA Model Rule on the Licensing of Legal Consultants.

Id. at 2. This motion was made at the recommendation of the Operations Committee of the ABA Board of Governors. *Id.* The Special Advisory Committee on International Activities had submitted to the Operations Committee a two page memorandum, dated March 31, 1994, introducing the three attached items: 1) a March 24, 1994 Memorandum from James H. Carter, Chair of the Section of International Law and Practice to the ABA Board of Governors regarding the Proposed Protocol with the Brussels Bar Councils; 2) the Heads of Agreement document; and 3) the May 19, 1993 draft of the "Protocol."

133. See *supra* note 109.

134. See generally ABA/Brussels file, *supra* note 117.

135. Letter from Carl Bevernage, President of the Dutch Language Order of the Brussels Bar, to Steven C. Nelson, ABA Negotiator (June 27, 1994) (on file with the *Fordham International Law Journal*). This letter also discussed the logistics of preparing the French Language and Dutch Language versions of the Agreement, each of which would be considered equally authentic. *Id.* The file reveals only one translation issue which arose during this period; a minor question arose as to title in English which would best correspond to the titles given in French and Dutch for the committee that ultimately became the "Joint Supervisory Committee." Other possibilities were the Joint Implementation Committee and the Joint Oversight Committee. *Id.*

the Agreement was presented to the entire Board of Governors of the ABA and approved.¹³⁶ On Saturday, August 6, 1994, the Agreement was signed by R. William Ide III, President of the ABA, Pierre Legros, *Bâtonnier* of the French Language Order of the Brussels Bar, and Erik Carre, *Stafhouder* of the Dutch Language Order of the Brussels Bar.¹³⁷

4. Consultations with the U.S. Legal Community in Brussels

The final Agreement did not come as a surprise to the U.S. legal community in Brussels because the community had been regularly consulted during the negotiation process. When the

136. See Minutes, American Bar Association Board of Governors 1996 [sic], New Orleans, La., Aug. 4-5, 1994. These minutes state, "UPON MOTION DULY MADE, SECONDED AND CARRIED; The Board approved the Agreement with the Brussels Bar Councils proposed by the Section of International Law and Practice as contained in Exhibit 3.8 of the August 3-5, 1994, agenda books." *Id.*

These minutes explain the history of the Agreement between the April, 1994 preliminary approval and August, 1994 final approval by the ABA Board of Governors:

At its June meeting, the Board deferred consideration of a request from the Section of International Law and Practice for an Agreement with the Brussels Bar Councils. The Agreement superseded a draft Protocol proposed by the Section at the April meeting. The Board deferred action on the Agreement and directed the Section to prepare a black-lined copy, noting changes from the Agreement, for consideration by the Executive Committee. In reviewing the black-lined copy, the Executive Committee noted that the Agreement included substantial changes that had not been considered by the Board previously, and referred the matter to the full Board. The Operations Committee advised that it had received a full report from Governor Shestack, Board liaison to the Section, on the changes contained in proposed Agreement. The Committee recommended that the Agreement be approved as presented.

See Minutes, American Bar Association Board of Governors 1994, New Orleans, La., Aug. 4-5, 1994. In addition to the above items, the Minutes from the June 2-3, 1994 meeting note that the conditions imposed by the Board at the April Meeting had been satisfied. See Minutes of American Bar Association Board of Governors 1994, Chicago, Ill., June 2-3, 1994 (on file with the *Fordham International Law Journal*).

137. Agreement, *supra* note 3, at 10. Present at the signing of the French, Dutch and English versions of the Agreement were: R. William Ide III, President of the ABA; Pierre Legros, *Bâtonnier* of the French Language Order of the Brussels Bar; Erik Carre, *Stafhouder* of the Dutch Language Order of The Brussels Bar; ABA negotiators Steven C. Nelson and Joseph Griffin; Brussels negotiators Carl Bevernage and Michel Van Doosselaere; Virginia Russell, ABA Director, Presidential Administration and International Liaison; and Gayle Ide. See Letter from R. William Ide, III, ABA President, to Pierre Legros, *Bâtonnier* of the French Language Order of the Brussels Bar, Erik Carre, *Stafhouder* of the Dutch Language Order of the Brussels Bar, Steven C. Nelson and Joseph Griffin, ABA negotiators, and Carl Bevernage and Michel Van Doosselaere, Brussels negotiators (Sept. 26, 1994) (enclosing copy of photograph taken at signing) (on file with the *Fordham International Law Journal*); Telephone Interview with Virginia Russell, ABA Director, Presidential Administration and International Liaison (Mar. 10, 1997).

ABA negotiators first appeared in Brussels, the reaction of some of the U.S. lawyers based in Brussels was to ask the negotiators "who are you and who appointed you God?"¹³⁸ Many U.S. lawyers in Brussels initially resisted the idea of an agreement because they believed the status quo was fine and that an agreement was risky.¹³⁹ The negotiators responded by telling these lawyers about the Brussels Bars' threat to have their Government enforce stricter standards against U.S. lawyers.¹⁴⁰ ABA negotiators believed, and most U.S. lawyers in Brussels were convinced, that it was necessary for U.S. lawyers to reach an agreement with the Brussels Bars because there was a real risk that U.S. lawyers would not be permitted to continue practicing as they had been.¹⁴¹

The U.S. legal community in Brussels remained apprised of the status of the negotiations through periodic meetings held shortly before or after the negotiating sessions.¹⁴² In addition, the ABA negotiating team circulated many of the Agreement drafts to the U.S. legal community in Brussels, seeking input.¹⁴³ The ABA team incorporated many of the comments and suggestions received into their drafts and negotiating posture.¹⁴⁴

138. Griffin Feb. 18, 1997 Interview, *supra* note 96. With respect to the issue of who should be doing the negotiating and the authority of the negotiating team, Joe Griffin advises that he responded to these questions by asking if anyone wanted to take over instead, to which he got no answer. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. The first briefing of U.S. firms occurred on September 17, 1992, at the offices of Cleary Gottlieb in Brussels with representatives from approximately 30 U.S. law firms in attendance. See, e.g., Memorandum from Walter Oberreit, ABA Negotiator, to U.S. Law Firms in Brussels (Sept. 22, 1992) (on file with the *Fordham International Law Journal*); Memorandum from Walter Oberreit, ABA Negotiator, to U.S. Law Firms in Brussels (Oct. 23, 1992) (reminding 34 U.S. law firms of informational meeting on October 28, 1992 with Steve Nelson and Joe Griffin, and asking them for any additions to list of U.S. firms in Brussels; see also Updated List Showing 35 U.S. Firms (on file with the *Fordham International Law Journal*); see CONE, *supra* note 1, at 10:21 (noting initial meeting with 35 U.S. law firms). Additional meetings with U.S. firms occurred on Oct. 13, 1992, Oct. 28, 1992, Jan. 15, 1993, Mar. 2, 1993, June 3, 1993, Feb. 1, 1994, and May 5, 1994. See generally ABA/Brussels file, *supra* note 117.

In addition to speaking with U.S. lawyers, the ABA negotiators occasionally communicated with the English representatives, who simultaneously negotiated with the Brussels Bar representatives. The two bars were not negotiating in tandem, however, because the starting premises were quite different and thus the issues were quite different. See Griffin Feb. 18, 1997 Interview, *supra* note 96.

143. See generally ABA/Brussels file, *supra* note 117.

144. *Id.*

Among other things, the ABA sought specific details of the Belgian lawyers working in U.S. firms in order to better negotiate the transition provisions which would attempt to grandfather in or ease the restrictions on U.S. firms' current arrangements.¹⁴⁵

The March 1994 report to the ABA Board of Governors summarized the reactions of U.S. lawyers in Brussels to the negotiations.¹⁴⁶ While the report's title *Absence of Known Opposition* may not be completely accurate, the content accurately reflects the reaction of U.S. lawyers in Brussels to the final Agreement and earlier drafts. Although most U.S. lawyers in Brussels supported the Agreement, there was some opposition. For example, following the August 3, 1994 meeting at which the parties circulated the final Agreement, the ABA negotiators received a letter from a U.S. lawyer documenting his previously expressed concerns about the procedure leading to the Agreement and its substance. With respect to procedure, the lawyer complained that the negotiations excluded the Belgian *jurists* most affected by the Agreement. With respect to substance, this lawyer complained about the transition provisions, which required very senior Belgian *jurists* working in U.S. firms to complete a *stage* or apprenticeship before the mandatory registration as a *tableau* lawyer.¹⁴⁷

5. The Major Concerns

The ABA negotiators clearly benefited from the input of the

145. *Id.*

146. See Mar. 24, 1994 Carter Memorandum, *supra* note 92, at 5 (describing U.S. lawyers' sentiments towards action). The Carter Memorandum states:

Absence of Known Opposition

Our negotiating team has consulted continuously with the American lawyers and law firms practicing in Brussels. They have met with representatives of all of the firms, as a group, on at least six occasions and have encouraged them to make their concerns known. While there are concerns about the specific situation in which some of the firms will find themselves, particularly insofar as the transition rules for Belgian jurists are concerned, it appears to be recognized by all concerned that the situation in Brussels will change regardless of what the ABA or anyone else does and that the American legal profession will be better served if the ABA attempts to shape that change than if it is simply permitted to happen. There is no other bar organization that is perceived to be in a position of authority to represent American interests in this area.

Id.

147. See generally ABA/Brussels file, *supra* note 117.

larger U.S. legal community in Brussels.¹⁴⁸ Through these discussions, and the discussions among the ABA negotiating team itself, some key positions quickly emerged. Some of the most important and difficult issues from the perspective of U.S. lawyers in Brussels included the desire that they not be placed at a disadvantage in comparison with other law firms in Brussels; maintaining continuity of their firms, some of which had very senior Belgian lawyers not registered with the Belgian Bars; and maintaining their current practices with respect to advice on EU law.¹⁴⁹ In contrast, the Belgian concerns included an interest in having the Belgian *jurists*, who were working for foreign firms, become licensed *tableau* lawyers; the desire that all foreign lawyers in Brussels register with the Bars and be subject to their ethics rules; and an interest in protecting Belgian clients and lawyers. The latter two concerns formed the basis for numerous specific proposals, many of which became the subject of lengthy negotiations.¹⁵⁰

In addition to these key points, many of the negotiators had particular issues they considered important. Joe Griffin was particularly concerned about the European Court of Justice's *AM&S* decision,¹⁵¹ which refused to recognize the attorney-client privilege in a situation involving a non-EU attorney. Mr. Griffin lobbied successfully to include language that provides that the Brussels Bars will protect and defend U.S. lawyers' professional privileges, including the attorney-client and attorney-attorney privileges.¹⁵² Other negotiators, both ABA and Belgian,

148. See *supra* notes 144-45 and accompanying text.

149. See generally ABA/Brussels file, *supra* note 117.

150. See *supra* note 82-83 and accompanying text (regarding these concerns). Some of the Belgian proposals include limitations on U.S. lawyers' ability to advise on Belgian law; waiting requirements before U.S. lawyers could form partnerships, or cooperations, with *tableau* lawyers or *stagiaires*; requirements regarding the training period of *stagiaires*; requirements regarding firm names and stationery; mandatory registration; and submission of firm partnership agreements to the bar, among other issues. See also CONE, *supra* note 1, at 10:22 (identifying three principal points of difference between ABA and Brussels negotiators, all of which involved application of specific Brussels ethics rules to U.S. lawyers).

151. *AM&S Europe Ltd. v. Commission*, Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264; see also CONE, *supra* note 1, at 8:28 (evaluating impact of this case, which he believes turned out to be "a tempest in a teapot").

152. Agreement, *supra* note 3, art. 6, para. 3. Joe Griffin explains that *AM&S* was of particular concern to him because it was decided while he was practicing law in England. He also helped lead the ABA's fight challenging the *AM&S* decision. This resulted in the ABA House of Delegates' adoption of the Section of International Law

presented points that they wanted included in the Agreement. Thus, part of the negotiation process became an effort to include these points, address the underlying concerns, or otherwise ensure that each negotiator would be willing to support the Agreement.¹⁵³ This “horsetrading” effort ultimately proved successful as demonstrated by the signed Agreement. Hence, as of September 1, 1994, the effective date of the Agreement, U.S. lawyers in Brussels theoretically received new rights and responsibilities with respect to their provision of legal services in Brussels.¹⁵⁴ The nature of these new rights is set forth below.

III. *EXPLORING THE SUBSTANCE DEVELOPED UNDER A HYBRID MODEL: THE AGREEMENT BETWEEN THE ABA AND THE BRUSSELS BARS*

There are several important aspects to the Agreement that should be discussed in order to fully understand its impact. Who the Agreement applies to and the binding force of the Agreement are two important subjects. Additionally, it is necessary to examine the particular treatment of various issues, including scope of practice, forms of association, and ethics and discipline.

A. *An Overview of the Agreement*

The Agreement is ten pages long.¹⁵⁵ It consists of fourteen “whereas” clauses, which state the background, premises, and justifications for the Agreement. These provisions are followed

and Practice’s January 18, 1983 Report and Recommendation regarding *AM&S*. See Griffin June 27, 1997 Letter, *supra* note 93.

153. Griffin Feb. 18, 1997 Interview, *supra* note 96. When I first studied the Agreement, it seemed to be mutually advantageous to both parties. Indeed, I wondered how useful a model the Agreement would be for it might be unusual to get a situation in which both sides perceive a cross-border practice agreement to be mutually advantageous. Thus, I was surprised to hear from Joe Griffin that when the negotiations first began, it was not at all clear to him that an agreement would be possible or that they were in a “win-win” situation. *Id.*

154. Meanwhile, the Brussels Bars also reached agreements with the Law Society of England and Wales and the Paris Bar. See, e.g., *Update: Paris-Brussels Agreement on Access*, 23 *LAW IN EUR.* 11 (1993); *Business and the Law: English and Brussels Lawyers Reach Agreement*, *FIN. TIMES*, July 12, 1994, at 16 (stating that agreement with Law Society of England and Wales and French and Dutch-language Brussels Bars becomes effective September 15, 1994).

155. Agreement, *supra* note 3, art. 14, para. 3. The final version of the Agreement was prepared in English, Dutch, and French. The Agreement provides that each version is equally authentic. *Id.*

by fourteen articles.¹⁵⁶

The key to understanding the Agreement is to realize that it created, for the first time, a mandatory registration requirement for all U.S. lawyers practicing in Brussels.¹⁵⁷ The Agreement made mandatory registration more palatable to U.S. lawyers by creating a new third list, called the "Joint List", to supplement the A List and the B List. A U.S. lawyer's rights and responsibilities differ depending on whether the lawyer chooses to register

156. The titles of these fourteen articles are: Article 1: Registration; Article 2: Co-operations; Article 3: Partnerships; Article 4: Practice; Article 5: Stationery and Firm Name; Article 6: Conduct and Privileges; Article 7: Discipline; Article 8: Administration; Article 9: Registration Fees; Article 10: Non-Discrimination; Article 11: Implementation; Article 12: Transitional Provisions; Article 13: Reciprocity; Article 14: Final Provisions. See generally Agreement, *supra* note 3.

157. The Brussels Bars' position paper indicated that one of their major goals included mandatory registration of all U.S. lawyers in Brussels. See *Brussels Bars' Position Paper*, *supra* note 61. The ABA negotiators opposed this requirement for over one year. Their initial response asserted their understanding that any agreement would not apply to U.S. lawyers who "do not choose to engage in either vertical or horizontal integration, who would continue to be entitled to carry on a full international practice, including advice on the law of the European Economic Community, provided that they do not advise on matters of Belgian national law." See Sept. 4, 1992 Nelson/Griffin Letter, *supra* note 91. The January 14, 1993, Brussels draft required registration on the B List of all U.S. lawyers who wished to formally cooperate or form a partnership with members of the Brussels Bars; it also required registration, presumably on another list, of "all holders of a professional card." See *supra* note 109. The ABA's next draft, however, used the language "should" rather than "shall" with respect to registration on the Joint List. This standoff lasted until the August 6, 1993, ABA draft which provided that Joint List registration would be mandatory "unless the U.S. Lawyer has been seconded for a limited period of time, not exceeding three years, to the Brussels office of the law firm of origin in the United States." *Id.* In the September 18, 1993 ABA draft the ABA dropped this requirement and agreed to mandatory registration on one of the two lists. *Id.*

In contrast to the Agreement which requires all U.S. lawyers in Brussels to register, the agreement between the Brussels Bars and the English Law Society apparently only requires solicitor firms with Belgian lawyers to register. See Memorandum of Understanding Between the French and Dutch Language Orders of the Brussels Bar and The Law Society of England and Wales, pt. I(A)(2), reprinted in *Nederlandse Orde van Advocaten, Guidelines and Information Concerning the Registration of Foreign Lawyers in Belgium and With the Brussels Bar* (May 22, 1996) (on file with the *Fordham International Law Journal*). "Other English solicitors who establish in Brussels may be registered on one of the Bar's Lists of Foreign Lawyers. The Law Society, while having no statutory power to impose any obligations on English solicitors in this respect, commends the provisions of this Memorandum to English solicitors established in Brussels . . ."; *U.S. Lawyers*, *supra* note 71; *Business and the Law: English and Brussels lawyers reach agreement*, *FIN. TIMES*, July 12, 1994, at 16. "English solicitors will be able to practice under their established firm names in Brussels from September 15 without registering on one of the Brussels Bars' lists of foreign lawyers." *CONE*, *supra* note 1, at 10:29 (summarizing agreement).

on the B List maintained by each of the two Brussels Bars, referred to in the Agreement as the "Foreign Lawyer List," or the newly created Joint List, which is jointly maintained by the two Brussels Bars.¹⁵⁸ Moreover, unlike some other cross-border arrangements, mandatory registration did not require the U.S. lawyer to take an examination or satisfy additional requirements, such as length of practice requirements.¹⁵⁹

This three category registration system used in the Agreement differs somewhat from the Foreign Legal Consultant ("FLC") concept found in proposals from the NAFTA Working Party, the IBA, and the ABA.¹⁶⁰ The FLC approach contem-

158. The Agreement refers to what had been the B List as the "Foreign Lawyer List." The latter term is a new term, selected because the parties did not like the term B List. Despite the change in terminology in the Agreement, however, the list is still referred to colloquially as the B List. Nelson Mar. 10, 1997, Telephone Interview, *supra* note 42. I also have used the term B List in this article to refer to what is described in the Agreement as the Foreign Lawyer List.

159. Compare New York Rules of Court, Rules of the Court of Appeals, pt. 251 (requiring practice for five of past seven years) with Diploma Directive, *supra* note 18, O.J. L 19/16 (1989) (permitting one EU Member State to select either waiting period or aptitude test before permitting establishment of professionals from another EU Member State).

160. As its name suggests, the IBA's REJECTED FLC GUIDELINES use the term "Foreign Legal Consultant" and envision a two-tier system. See *supra* note 9. Although the IBA's prior Draft Guidelines did not include the word "foreign," it did contemplate a two-tier system, rather than the three-tier system adopted in Brussels. *Id.* at D(1). The limited licensing approach in the IBA PROPOSED GENERAL PRINCIPLES also appears to contemplate two tiers. See IBA PROPOSED GENERAL PRINCIPLES, *supra* note 9.

Although the ABA's MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS does not use the term "Foreign Legal Consultant," it also employs a two-tier concept, rather than the three-tier concept adopted in the Agreement. See *ABA Model FLC Rule*, *supra* note 10.

The EU Establishment Directive is another example of a two-tier approach that does not employ the term "Foreign Legal Consultant." See *supra* note 19. The directive permits the migrant lawyer to practice either under the lawyer's Home State's title or to integrate into the Host State's profession and use the Host State's title for lawyer. In other words, like the FLC statutes, the directive contemplates only two tiers of lawyers; unlike many FLC provisions, however the two types of lawyers have substantially similar rights and responsibilities. Compare EU Establishment Directive, art. 4 (practicing under Home State's professional title); art. 10 (allowing integration as lawyer of home Member State). See *supra* note 19. In contrast to the EU Establishment Directive, the EU's Diploma Directive arguably only provides for a one-tier approach in which a professional from one EU country can become integrated into, and recognized by, the profession of another EU country. See *supra* note 18.

NAFTA uses the term "Foreign Legal Consultant." See NAFTA, *supra* note 4, at Annex 1210.5, Section B - Foreign Legal Consultants, 32 I.L.M. at 652. One commentator observed that although NAFTA does not define the term "Foreign Legal Consultant,"

plates only two categories of lawyers: 1) the fully integrated lawyer, who is equivalent to the Home State's own lawyers; and 2) the FLC, who generally has lesser rights and obligations than the fully integrated lawyer. The Agreement differs from these other regulatory systems because it provides two different categories of FLCs, each with different levels of rights and responsibilities. The Agreement does not go as far as the recent EU Establishment Directive, which treats an EU lawyer practicing under home title substantially similar to the Host jurisdiction's own lawyers, and permits full integration into the Host State legal profession provided certain minimal conditions are met.¹⁶¹ Although the Agreement created three categories of lawyers in contrast to the traditional FLC approach, it should be noted that the Agreement created strong incentives for U.S. lawyers to register on the B List since the B List provides significant benefits over the Joint List on the key issues of scope of practice, ethics and discipline, and forms of associations.

B. *To Whom Does The Agreement Apply?*

The Agreement is structured so that Article One requires "Established U.S. Lawyers" to register with one of the Brussels Bars.¹⁶² The Agreement's only definition of "Established U.S. Lawyer" is found in the preliminary section in which the term is

the meaning of the term can be construed from paragraph 1 of Section B to mean nationals of a NAFTA country who are authorized to practice or advise on the law of their home country (or a third country) under the licensing authority of that jurisdiction and now seek to provide their legal expertise to consumers in another NAFTA country.

See Sciarra, *supra* note 46, at 4 n.5.

For a discussion of the evolution of the three-list approach used in the Agreement, see *supra* note 157.

161. One of the topics of vigorous debate with respect to the EU Establishment Directive was whether there should even be two categories of lawyers, at least on a permanent basis. France, for example, thought that an EU lawyer providing legal services in another EU country should only be allowed a limited period of time in which to practice law in the Host State under the Home State title. France believed that after the limited period of time, the migrant lawyer must either return to his or her Home State or become fully integrated in the Host State's legal profession by complying with its normal licensing requirements. Other countries, such as Britain, believed that an EU Lawyer providing legal services in another EU country should be able to practice indefinitely using the lawyer's Home State title. This debate was limited to EU lawyers practicing in another EU country. There is no EU requirement with respect to non-EU lawyers who want to provide legal services in an EU country. See *supra* note 19; CONE, *supra* note 1, at 8:14-25.

162. "A U.S. Lawyer who becomes an Established U.S. Lawyer shall, within six

first used. This section states: "WHEREAS certain members of bars of the United States who are not Tableau Lawyers or Stagiair(e)s (hereinafter "U.S. Lawyers") are resident or regularly present in Brussels and maintain respective establishments in Brussels from which they provide legal services (hereinafter "Established U.S. Lawyers")."¹⁶³ Although the parties negotiated over the terminology to be used to describe those required to register, they made no effort to define the term "regularly present."¹⁶⁴ One of the chief ABA negotiators indicated to the rest

months thereafter, register with one of the Orders in accordance with this Article." Agreement, *supra* note 3, art. 1, para. 1.

163. *Id.* at fourth "Whereas" clause.

164. It was not until late in the negotiations that the parties had occasion to develop the definition of persons to whom the Agreement would apply. Whereas the May 6, 1994 ABA draft, *supra* note 109, required registration of those "resident and established," the May 11, 1993, ABA draft required registration only of those resident in Brussels. *Id.* When the Brussels representatives apparently proposed replacing the term "resident" with "established," Steve Nelson responded,

[f]irst, as I indicated in our conversation, the proposed replacement of the term "resident" with "established" . . . would have produced a number of unintended consequences that neither of us would have been happy with. I understand that this change is more than simply a drafting issue, in that you want to bring within the ambit of the mandatory registration requirements U.S. Lawyers who are not technically "resident" in Brussels but who may carry on a regular practice from an office there and are in that sense "established." I don't believe we have any difficulty with that concept, but the change destroys a very fine distinction between those U.S. Lawyers who are actually practicing in Brussels and those who are "established" only in the sense that their firms have offices there. This is a distinction that has considerable importance in terms of the operative provisions of the Agreement.

What we have done, accordingly, is to define a new term — "Established U.S. Lawyer" — which incorporates the notion you want to include but is distinct from the more general term "U.S. Lawyer," which is no longer limited to those that are "established" in Brussels. This definitional change requires some corresponding changes at various points in the draft, but I think you will find the original intent is preserved. Along the same lines, and to make the text more readily understandable, we have also replaced the term "U.S. Law Firm" with the term "established U.S. Law Firms" to make it clear that we are speaking of firms that have offices in Brussels.

June 6, 1994 ABA draft, *supra* note 109. The Brussels representatives accepted the concept and objected only to the fact that "[t]he use of the plural 'maintain establishments' could be construed as a possibility for a U.S. lawyer or law firm to have more than one office in Brussels." June 24, 1994 Brussels draft, *supra* note 109. *See also* June 27, 1994 ABA draft, *supra* note 109 (suggesting insertion of word "respective" before "establishments" to eliminate multiplicity of offices concern); June 30, 1994 Brussels draft, *supra* note 109 (accepting ABA's June 27th change). This legislative history thus supports the conclusion that the Agreement applies both to U.S. lawyers resident in Brussels and those who travel there regularly.

Unlike the issue of the residence of U.S. lawyers to whom the agreement would

of the ABA negotiating team that he was comfortable with the term “established” because it “is so well defined in international practice, including FCN/FEN treaties, as well as EC/EU law itself, as not to be subject to argument”¹⁶⁵ This confidence may or may not turn out to be well-placed.¹⁶⁶ It is clear from the legislative history, however, as well as the “whereas” clause, that the parties contemplated the Agreement’s application to U.S. lawyers residing in Brussels and U.S. lawyers residing outside Brussels who travel to Brussels regularly, if they maintain an office in Brussels.¹⁶⁷

apply, the parties were able to resolve very early in the negotiations the type of U.S. lawyer to whom the Agreement would apply. The January 14, 1993 Brussels draft had required registration on the B List of all U.S. lawyers who wished to formally cooperate or form a partnership with members of the Brussels Bars; it also required registration, presumably on another list, of all “holders of a professional card.” See *supra* note 109. The ABA negotiators advised the Brussels Bars at their January 18, 1993 meeting that they wanted the provisions of the Agreement to include U.S. lawyers with work permits, generally, law firm associates, as well as those with professional cards, generally law firm partners. See Memorandum from Steven Nelson, Agreement Negotiator, to American Law Firms in Brussels (Jan. 18, 1994) located in ABA/Brussels file, *supra* note 117. This was accepted in the March 2, 1993 Brussels draft. See *supra* note 109.

165. See Memorandum from Steven Nelson, Agreement Negotiator, to ABA Negotiating Team (May 9, 1994). FCN refers to Friendship, Commerce and Navigation treaties; FEN, which refers to Friendship, Establishment and Navigation treaties, are similar but include investment. Nelson Mar. 10, 1997 Telephone Interview, *supra* note 42.

166. The distinction between “established lawyers” and those merely providing occasional services is beyond the scope of this Article. As an aside, however, it is not completely obvious to me that the term “established” is so well defined as to be beyond dispute. One of the leading commentators in this area remarked,

Commentators also tend to assume that the [Lawyers Services] Directive only enables the visiting lawyer to provide ‘occasional’ services, with the implication that a certain degree of frequency or regularity would take the services outside its scope. This is an area of some doubt on which there is a lack of authority. An attempt by one Member State (Spain) in its transposing legislation to impose an arbitrary limit of five times a year on the frequency with which services could be provided under the Directive met with objections from the EC Commission and was withdrawn.

HAMISH ADAMSON, *FREE MOVEMENT OF LAWYERS* 34 (1992). See also *CCBE Code, Part II*, *supra* note 11, at nn.42-43 and accompanying text.

On the other hand, given that there will be line-drawing problems, it is not clear that a definition would have added much. Moreover, this issue has not presented any problems to date. Thus, it may have been a good decision to ignore this issue, and to avoid disagreement over the definition of this term.

167. See *supra* note 164. Joe Griffin reports that he is a good example of someone covered by this “regularly present” language; his firm has an office in Brussels and he visits there frequently, *i.e.* once every month or six weeks, which is not an uncommon pattern. He also reports that some U.S. law firms had no U.S. partner resident in Brussels but did have U.S. visitors to their Brussels office. The ABA negotiators were concerned from personal experience that people in these positions be covered by the

Determining who is an "Established U.S. Lawyer" in Brussels does not completely answer the question of "to whom does the Agreement apply?" The Agreement specifies that it applies only to U.S. established lawyers registered on either the B List or the Joint List.¹⁶⁸ U.S. lawyers registered on the A List are specifically excluded from the definition and excluded from coverage. They have, by definition, already agreed to be bound by the all of regular rules of the Brussels Bars with which they registered.¹⁶⁹ Thus, when one reads the Agreement, it purports to apply to non-A List U.S. lawyers established in Brussels and it purports to make registration mandatory. However, this impression is misleading.

C. *What is the Binding Force of the Agreement?*

After determining to whom an agreement applies, a likely second question is to ask how an agreement will be enforced and, as a corollary, what are the consequences of its violation. These two questions are among the most interesting questions with respect to the Agreement. The simple answer is that in many respects, the Agreement has no binding force whatsoever.¹⁷⁰ The Agreement can be analogized to the CCBE Code of Conduct, which was not independently binding, but became so because of the ways in which the parties treated it.¹⁷¹

The parties to this Agreement are the ABA and the two

Agreement. He believed the Belgians were happy to include that group of non-residents because it expanded their jurisdiction. See Letter from Joseph P. Griffin to Laurel S. Terry (June 26, 1997) (on file with the *Fordham International Law Journal*).

168. See generally Agreement, *supra* note 3.

169. The definitions were carefully crafted so that the Agreement does not apply to U.S. lawyers who have qualified as *Tableau* lawyers. *Id.* at art. 1, para. 2. There is no need for U.S. lawyers who have qualified as *tableau* lawyers to be covered by the Agreement because, by definition, they have agreed to become "normal" Brussels lawyers and abide by the regular rules that apply to Brussels *tableau* lawyers.

170. Although the Agreement speaks in terms of the obligations of an "Established U.S. Lawyer," the Agreement does not, in fact, bind these individuals. Thus, it cannot be enforced and discipline cannot be imposed.

The Agreement does, however, impose two obligations on the ABA. First, "the ABA undertakes strongly to urge U.S. Lawyers to comply with the terms hereof [the Agreement.]" Agreement, *supra* note 3, art. 11, para. 2. Second, the ABA undertakes to use its best efforts to ensure the U.S. states adopt the ABA's model foreign legal consultant rule. *Id.* at art. 13, para. 1.

171. See generally CCBE Code, Part I, *supra* note 11, at 11-15 (describing how CCBE Code of Conduct is not binding unless adopted by participating countries, and noting its adoption success).

Brussels Bars. The Brussels Bars are the regulatory bodies that set the rules of professional conduct, discipline, and otherwise regulate the professional lives of Brussels *avocats* and *advocaaten*.¹⁷² The Brussels Bars are able to fulfill their part of the Agreement because they can regulate the conditions to which their own registered lawyers are subject. The ABA, however, has no authority to enforce the Agreement language that U.S. lawyers "shall" register with the Brussels Bars. As the Agreement itself notes, the ABA has no authority to proscribe the conduct of U.S. lawyers who are regulated on a state wide basis. Despite this lack of authority, and in contrast to the Brussels Bars' agreement with the Law Society of England, the Agreement is couched as a mandatory registration requirement.¹⁷³

If the Agreement is an illusory contract, why were the Brussels Bars interested in it? One answer to this question is provided in the introductory provisions which note that many U.S. lawyers are members of the ABA and abide by the rules and recommendations of the ABA.¹⁷⁴ Another explanation may be the lack of anyone else with whom to negotiate. Moreover, while the ABA may not have actual authority, it may have a certain amount of moral authority in this context because it may be able to convince U.S. lawyers that it will reflect poorly on the U.S. legal community if that community repudiates an agreement negotiated by the ABA. The ABA may also be able to convince U.S. lawyers in Brussels that failure to comply with the Agreement could re-

172. The Brussels Bars, however, are not the Belgian Government and do not control immigration or the conditions placed on work permits. Thus, so long as Belgium permits non-lawyers to offer legal advice, then the Brussels Bars do not have authority to exclude or regulate foreign lawyers who offer legal advice in Brussels. The most they can do is regulate the conditions to which their own registered lawyers are subject.

173. Agreement, *supra* note 3, at twelfth "Whereas" clause. According to Joe Griffin, one key point of the early discussions was educating the Brussels representatives about the fact that the ABA is a voluntary bar association and lacks any regulatory authority over U.S. lawyers. See Griffin Feb. 18, 1997 Interview, *supra* note 96. The Brussels Bars apparently realized this by January 1993 because their first actual draft contained a "whereas" clause which was similar to that found in the final agreement, and which noted the ABA's lack of regulatory authority over U.S. lawyers. See January 14, 1993 Brussels Draft, *supra* note 109.

Despite this acknowledgment in the preamble, the Agreement is strikingly different from that between the Brussels Bars and the Law Society of England and Wales. The Law Society/Brussels agreement itself acknowledges the Law Society's lack of authority. It does not even purport to require its members to register. Instead, it "commends" them to do so. See *supra* note 157.

174. Agreement, *supra* note 3, at twelfth "Whereas" clause.

sult in having even more stringent conditions imposed by the Belgian authorities. The bottom line, however, is that the Agreement only has whatever force the individuals concerned choose to give it by registering with the Brussels Bars.

D. *The Substance of the Agreement*

The issues that drove the desire for the Agreement and that were the subject of much negotiation, are the same issues that seem to recur in most, if not all, cross-border practice situations. These key issues are the permissible scope of the migrant lawyer's legal practice; the acceptable forms of association between and among migrant lawyers and others; and issues involving the legal ethics obligations and the Host State's right to discipline the migrant lawyer.¹⁷⁵ Most of the provisions in the Agreement address one of these three topics. In addition to addressing these key topics, the Agreement contains several miscellaneous provisions. For each topic the Agreement distinguishes between the treatment afforded U.S. lawyers registered on the B List and those registered on the Joint List.

1. The "Scope of Practice" Provisions

One of the most important issues to a lawyer engaged in cross-border legal practice is the scope or extent of legal practice in which the lawyer may engage. The regulatory body in the Host State decides whether the visiting lawyer may advise only on his or her Home State law,¹⁷⁶ on international law,¹⁷⁷ on the

175. See Kilimnik, *supra* note 2, at 277-79. In addition to scope of practice, ethics and discipline, and forms of association issues, other issues that often arise in cross-border practice provisions include the relationship of the foreign lawyers to the local bar association, requirements concerning experience and other qualifications, residency requirements, local office requirements, and reciprocity requirements.

These last items are not discussed separately in this Article, but are interwoven into the discussion. With respect to the first item above, U.S. lawyers who register with the Brussels Bars are treated as full members of the Bar with corresponding rights and obligations, except as specifically provided elsewhere in the Agreement. As explained *supra* note 173, the registration requirement is simply that and contains no examination or qualification requirement. Finally, the only residency and local office requirements are those contained within the definition of "Established U.S. lawyer" to whom the Agreement applies. See *supra* note 164. Reciprocity is addressed *infra* notes 294-97 and accompanying text.

176. This is the approach taken in Florida, for example. See Rules of the Florida Supreme Court Relating to Admission to the Bar, Ch. 16, R. 16-1.3(a)(2)(F), *cited in* American Bar Association Section of International Law and Practice, *Report to the House*

Host State's law,¹⁷⁸ or some combination thereof. In addition, the regulatory body decides whether the visiting lawyer may work alone or whether he or she is required to work in conjunction with a lawyer from that Host State.¹⁷⁹

The Agreement provides different answers to this scope of practice question depending on whether the U.S. lawyer registers on the B List or the Joint List. Although the Agreement begins by granting the same scope of practice authority to both B List and Joint List lawyers, the exceptions differ, resulting in different permissible practices for B List and Joint List lawyers.

After much negotiation, the parties agreed that the scope of practice for U.S. lawyers registered on the B List only excluded advice on matters governed predominantly by Belgian law.¹⁸⁰

of Delegates, 28 INT'L LAW. 207, 227 n.57 (1994). A legal consultant is required to utilize a written retainer agreement specifying in bold type that the legal consultant is not admitted to practice in the state of Florida or licensed to advise on the laws of the United States or any political subdivision and is limited to the laws of the foreign country where the legal consultant is licensed to practice. *Id.*

177. *Id.* at 213-15. This is the approach taken in the New York Foreign Legal Consultant rule. See New York Rules of Court, Rules of the Court of Appeals, pt. 521, *cited in* American Bar Association Section of International Law and Practice, *Report to the House of Delegates*, 28 INT'L LAW. 207, 226-28 (1994).

178. This is the approach used in the EU Establishment Directive. See EU Establishment Directive, *supra* note 19, art. 5, para. 1 (stating that "a lawyer may . . . give advice on the law of his home Member State, on Community law, on international law and on the law of the host Member State.").

179. *Id.* at art. 5, para. 3; see *Commission v. French Republic*, Case C-294/89, [1991] E.C.R. I-3591, [1993] 3 C.M.L.R. 569. A Member State may not require a foreign lawyer (1) to act in conjunction with a local lawyer where a lawyer's service is not mandatory or before non judicial authorities or (2) to retain a local lawyer in order to conduct proceedings in civil cases where lawyer services are compulsory. *Commission v. Germany*, Case 427/85, [1988] E.C.R. 1123, [1989] 2 C.M.L.R. 677. A Member State may require a foreign lawyer to act in conjunction with a local lawyer where a lawyer's service is mandatory, provided obligations are restricted to enable a foreign lawyer to comply with applicable procedural and ethical rules. Provisions requiring constant presence of a local lawyer during oral proceedings, with a local lawyer assuming role as an authorized representative, are disproportional and therefore incompatible with the Treaty.

180. The Agreement states that B List lawyers,

shall be free to render legal services in Brussels and to provide advice and representation regarding all matters as to which they are consulted, provided that they shall be prohibited from rendering advice and representation as to matters governed predominantly by the national laws of Belgium, except as is provided [elsewhere].

Agreement, *supra* note 3, art. 4, para. 1.

The substance of the first Brussels draft agreement did not differ substantially from the substance of the final Agreement. The details of the language, however, required much negotiation. Issues included "distinctions between casual advice and formal ad-

The exception applicable to B List lawyers permits them to advise on Belgian law provided two conditions are satisfied. First, the U.S. lawyer's advice must be based on the advice of, and rendered in consultation with, a Belgian *tableau* lawyer, or *stagiair* with one year's experience.¹⁸¹ The second condition is that a Belgian lawyer must be identified as the source of the advice through inclusion of the Belgian lawyer's name on the stationery, through signature, or otherwise.¹⁸² Provided these conditions are satisfied, the B List lawyers may advise on Belgian law, even if the matter is governed entirely or in material part by Belgian law.¹⁸³

The authority given to a Joint List lawyer is much narrower. First, a Joint List lawyer may advise only on "matters involving ancillary issues of Belgian law."¹⁸⁴ When the Joint List lawyer does so, the advice must be based on the advice of, and rendered in consultation with, a Belgian *tableau* lawyer or a *stagiair* with one year's experience. There is no requirement, however, that this Belgian lawyer be identified.¹⁸⁵ This provision was also the subject of much negotiation.¹⁸⁶

vice; between written and unwritten advice; between requiring that the local lawyer countersign the U.S. lawyer's advice or opinion and simply requiring the U.S. lawyer to identify the local lawyer in a suitable way, as against no such requirement at all. . . ." See Memorandum from Sydney Cone, III, Attendee at August 8-9, 1993 Meetings, to ABA Negotiators (Aug. 23, 1993). The requirement that the advice be based on a *stagiaire* with one year's experience was proposed in the October 19, 1993 Brussels draft, *supra* note 109. The parties did not resolve these issues until November, 1993. See November 16, 1993 Brussels draft, *supra* note 109. Moreover, in the actual drafting stages, numerous corrections were made in these provisions. See, e.g., May 6, 1994 ABA draft, May 11, 1993 ABA draft, May 18, 1994 Brussels draft, June 6, 1994 ABA draft, June 30, 1994 ABA draft, *supra* note 109.

181. Agreement, *supra* note 3, art. 4, para. 2.

182. *Id.*

183. *Id.*

184. *Id.* at art. 4, para. 3.

185. *Id.*

186. Agreement, *supra* note 3, art. 4, para. 3. For B List lawyers, the parties agreed on the basic scope of practice provisions; their disagreement was more a matter of detail and defining the boundaries. See *supra* note 180. In contrast, with respect to Joint List lawyers, the parties had a fundamental disagreement as to whether Joint List lawyers ever could be said to advise on Belgian law. The Belgians did not want Joint List lawyers to have any such authority. Movement on this issue ultimately came when Brussels representatives wrote,

we cannot admit that American lawyers on the Joint List would indirectly advise[sic] on matters of Belgian law, except in a most ancillary way, as suggested in article 10bis. If they wish to advise indirectly on matters of Belgian law, they

The Agreement contains an additional limitation, which is similar for both B List and Joint List lawyers. The Agreement ratifies limitations on a U.S. lawyer's ability to appear in a Belgian court.¹⁸⁷

While negotiating the Agreement, the parties reached an impasse on how to interpret these scope of practice concepts. In particular, the parties could not agree on how to view the practice of European Union law. The Belgians considered EU law to be part of "Belgian law," somewhat analogous to U.S. federal law, and, thus, covered by the "scope of practice provisions" that required U.S. lawyers to work in consultation with Belgian lawyers.¹⁸⁸ The U.S. lawyers, in contrast, considered EU law to be international law, not governed by the "Belgian Law" scope of practice provisions.¹⁸⁹

Neither side wanted to yield on this issue. Both sides considered it a deal breaker.¹⁹⁰ The parties ultimately resolved this issue relatively late in the negotiations when they finally "agreed

are free to register on the B-list and to adhere to the terms and conditions thereof.

See October 18, 1993 Brussels draft, *supra* note 109. This became the basis for agreement. For B List lawyers, the scope of practice provision was the subject of much discussion during the drafting stage, even after agreement had been reached in the Heads of Agreement. See *supra* note 180.

187. The Agreement notes that a U.S. lawyer, shall not have the right to appear as a lawyer before any Belgian judicial or administrative tribunal except if and to the extent permitted by the rules of such tribunal and then only in a manner consistent with the limitations and conditions applicable to such U.S. Lawyer in relation to advice on matters of Belgian law.

Agreement, *supra* note 3, art. 4, para. 4.

188. Griffin Feb. 18, 1997 Interview, *supra* note 96; see generally ABA/Brussels file, *supra* note 117; see also CONE, *supra* note 1, at 10:24 (describing Belgian position).

189. Griffin Feb. 18, 1997 Interview *supra* note 96; see also Hague Proceedings, *supra* note 19 at 426-7 (Remarks of Joseph Griffin, Esq.).

Although international law was not in dispute in this Agreement, some authorities have noted that it is unclear whether the right to practice one's Home State law includes the right to practice international law. See Kilimnik, *supra* note 2, at 277 n.12. "The restriction to home country law is ambiguous as far as international law is concerned. International law is regarded as part of the domestic law of many jurisdictions. [cite omitted] Domestic law also includes conflict of law rules, which sometimes lead to the application of foreign law." *Id.*

190. Griffin Feb. 18, 1997 Interview, *supra* note 96. For additional information on the debate between U.S. and EU lawyers about the characterization of EU law, see CONE, *supra* note 1, at 2:6 (concluding that U.S. position "was not sustainable, however, because EU law frequently takes the effect as the domestic law of the several EU member states.").

to disagree” on this point. Accordingly, much effort was spent negotiating the precise language of the paragraph which sets forth this “agreement to disagree” found in the scope of practice provisions.¹⁹¹ It should be noted that the ABA negotiators were told that the CCBE, which considers itself the European Community’s bar association, was unhappy with the Brussels Bars for this concession. The CCBE believed that reasonable minds could not differ on this point and that the Brussels Bars should not have conceded.¹⁹²

The approach used in the Agreement to these scope of practice issues shares similarities with, but is also distinguishable from, other cross-border practice regulation. The Agreement’s courtroom limitation is similar to other regulatory schemes.

191. Agreement, *supra* note 3, art. 4, para. 5. Because the Agreement was being negotiated while the GATS negotiations were ongoing, one of the concerns was that the language be precise enough so that the Agreement could operate as a “standstill” provision under GATS. See October 19, 1993 Brussels draft, *supra* note 109 (indicating that “standstill formula on the practice of EC Law by American lawyers is consistent with CCBE/ABA tentative understanding reached in Geneva in view of the GATT negotiations on i.a. services.”).

Thus, much attention was paid on the part of the ABA negotiators to the language proposed for this provision. See Nov. 16, 1993 Brussels draft, *supra* note 109; Dec. 15, 1993 ABA draft, *supra* note 109 (objecting to the Brussels language); Dec. 31, 1993 Brussels draft, *supra* note 109; Jan. 13, 1994 ABA draft, *supra* note 109; Jan. 27, 1994 Brussels draft, *supra* note 109; Feb. 2, 1994 Brussels draft, *supra* note 109. Indeed, one of the ABA negotiators noted that “[f]or the first time in the history of this exercise we seem to be having trouble agreeing on language.” See Fax Cover Sheet from Steven Nelson, Agreement Negotiator, to ABA Negotiating Team (Harwood, Griffin, Oberreit, Sher, Vinje) (Jan. 10, 1994).

According to one commentator, the Agreement leaves the subject to the B List rules themselves, which permit the practice of EU law and, because there are no “C List” rules, the matter is left to the professional cards, which are likely to be silent, and thus by negative implication confirmed by experience, to permit the practice of EU law. CONE, *supra* note 1, at 10:26. The file, however, reveals significant concern on the part of the ABA negotiators concerning this issue. Language that would have expressly confirmed that the issue is left to the B List which permits the practice of EU law was considered by the ABA negotiators but never adopted. See Memorandum from Walter Oberreit, Agreement Negotiator, to Steven Nelson, Agreement Negotiator (Jan. 7, 1994), in ABA/Brussels file, *supra* note 117.

192. Griffin Feb. 18, 1997 Interview, *supra* note 96; see also CONE, *supra* note 1, at 10:24.

Representatives of the Brussels bar said that this text was designed to avoid problems with other EU member states. Did this mean that France had asked Belgium to curtail the B-List right to practice under home-country title. . . . ? That Germany did not want a foreign lawyer’s scope of practice to be broader under the Brussels B List than under its own. . . . ?

Id.

What is somewhat notable about this version is that the ultimate limitation derives from the courts or administrative tribunals themselves, rather than from the Host State's regulatory body or the cross-border practice regulatory scheme. In other words, if the Belgian courts or administrative tribunals begin allowing U.S. lawyers to appear, then U.S. lawyers could do so without violating this Agreement. In this respect, the Agreement is more liberal than many of its counterparts. The EU Establishment Directive, the ABA Model FLC Rule, the IBA's Rejected FLC Guidelines, the IBA's Proposed General Principles, and the pending NAFTA Model Rule, all permit Host State limitations on the ability of the migratory lawyer to practice before the courts of the Host Jurisdiction.¹⁹³ GATS and NAFTA do not contain this level of detail.¹⁹⁴

193. See *ABA Model FLC Rule*, *supra* note 10, para. 4(a). An FLC shall not "appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission pro hoc vice pursuant to [citation of applicable rule])." EU Establishment Directive, *supra* note 19, art. 5, para. 3 (explaining that "[the Host State] may require lawyers practising under their home-country professional title to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority . . ."); IBA'S REJECTED FLC GUIDELINES, *supra* note 9, art. G(1) (stating that "unless specifically authorized by the Host Authority or the law of the Host Jurisdiction to do so, he/she may not appear as an attorney or plead in any court or other judicial tribunal in the Host Jurisdiction."); Pending NAFTA Model Rule, *supra* note 55, Rule 7 (prohibiting representation of a client "in a court, in an administrative court, before a magistrate, before any other judicial officer or in a procedure before a public administrative body, except as may be permitted under the laws of the host Party.").

The Agreement differs from some other cross-border schemes in that it does not explicitly refer to, or permit representation of, clients in dispute settlement proceedings such as international or domestic arbitrations. Compare Agreement, *supra* note 3, with Pending Nafta Model Rule, *supra* note 55, rule 8(a) (noting that "[a] foreign legal consultant in the host Party is not precluded from . . . acting as an arbitrator or as counsel in an arbitration") and with IBA'S REJECTED FLC GUIDELINES, *supra* note 9, art. G, comment (explaining that "[t]his limitation is not intended to, and should not, prohibit a Foreign Legal Consultant from acting as an arbitrator or appearing as counsel in an arbitration") and with IBA PROPOSED GENERAL PRINCIPLES, *supra* note 9, at IV(B)(1) (setting forth principle that "[t]he Host Authority may impose the following conditions and limitations on the scope of the practice of law by Foreign Lawyers to the extent necessary. . . . Foreign lawyers may be prohibited from appearing or pleading in courts or other judicial tribunals in the Host Jurisdiction . . .") and with *ABA Model FLC Rule*, *supra* note 10, at §4 (including no reference to arbitration) and with EU Establishment Directive, *supra* note 19, art. 5, para. 3 (lacking any reference to arbitration). See generally CONE, *supra* note 1, at 1:12 (summarizing varying approaches to the issue of whether foreign lawyers may represent clients in dispute settlement proceedings, including arbitration).

194. See *supra* note 55 and accompanying text (explaining that NAFTA and GATS

With certain inherently local transactions, the Agreement appears broader than either the ABA Model FLC Rule or the EU's current legislation. Unlike the ABA and EU provisions, the Agreement has no exclusion for drafting documents to administer estates or transferring interests in land.¹⁹⁵ The Brussels negotiators never sought such exceptions, possibly because they believed it unlikely that these would be large practice areas for U.S. lawyers.¹⁹⁶

The Agreement's treatment of a lawyer's ordinary transactional work also differs from these other regulatory schemes. In some respects, the Agreement is narrower than these other schemes, and in some respects it is broader. The Agreement's scope of practice provisions are narrower than those in the EU Establishment Directive. Whereas the EU Establishment Directive permits the established lawyer to advise on the Host State's own law, the Agreement permits such action only if done in consultation with a clearly designated Brussels-registered lawyer.¹⁹⁷

have set framework for future agreement and limitation on adoption of more restrictive practices in future, but neither purports to reach immediate agreement on details of this sort). See *supra* note 193 (discussing pending NAFTA Model Rule's provisions).

195. Compare with Lawyers' Services Directive, *supra* note 16, art. 1, para. 1 (stating that, "Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estate of deceased person, and the drafting of formal documents creating or transferring interests in land.") and with EU Establishment Directive, *supra* note 19, art. 5, para. 2.

Member States which authorize in their territory a prescribed category of lawyers to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land which, in other Member States, are reserved for professions other than that of lawyer may exclude from such activities lawyers practising under a home-country professional title conferred in one of the latter Member States.

The ABA Model FLC Rule similarly excludes from the FLC's scope of practice both real property transfers and trusts and estate work, as well as domestic relations and custody work. See ABA Model FLC Rule, *supra* note 10, at para. 4(b-d).

196. Nelson Mar. 10, 1997 Interview, *supra* note 42. Mr. Nelson suggested that the failure to request such an exclusion might also stem from the different perspective from which civilian lawyers, as compared with common law lawyers, approached these issues. *Id.* The civilian lawyers tend to think first of court appearances and the giving of opinion letters, rather than drafting documents when they consider what lawyers do. *Id.* Mr. Nelson also thought it possible that these activities were reserved to Belgian notaries, such that no provisions were necessary. *Id.* If, however, there were a liberalization or merger of the notarial and *avocat* professions, U.S. lawyers presumably would not be banned from these activities. *Id.* Given the liability exposure, however, it is highly unlikely U.S. lawyers would want to engage in such activities. *Id.*

197. Compare Agreement, *supra* note 3, art. 4, para. 5 with EU Establishment Directive, *supra* note 19, art. 5, para. 1 (stating that "[Host Lawyer] may, *inter alia*, give advice

The scope of practice provisions in the Agreement related to the giving of advice, however, are broader than those found in the NAFTA Model Rule and the IBA's Rejected FLC Guidelines or the IBA Proposed General Principles. The proposed NAFTA Model Rule permitted U.S. law firms to open offices in Mexico, but prohibited lawyers there from advising clients on Mexican law.¹⁹⁸ The IBA's Rejected FLC Guidelines similarly would have permitted the Host State lawyers to forbid lawyers from advising about Host State law; the IBA Proposed General Principles take a similar approach.¹⁹⁹

Future parties negotiating the conditions of cross-border legal services may find it worthwhile to consider both the substance and the procedure of the Agreement. In its substance, the Agreement demonstrates a middle of the road approach. The scope of practice provisions are neither as broad nor as narrow as they might be. The Agreement's procedural aspects demonstrate an approach that might prove useful when negotiating parties reach an impasse. The most significant aspect of the Agreement may be the "agreement to disagree" on the scope of practice issues related to EU law. Future negotiators may, for the sake of reaching an agreement, want to consider "agreeing to disagree" on certain scope of practice issues. This is especially

on the law of his home Member State, on Community law, on international law and on the law of the host Member State."). Perhaps not surprisingly, the Agreement is very similar to the ABA Model FLC rule on this point. The ABA negotiating team described the scope of practice provisions in the Agreement as nearly identical to those found in the ABA's Model Rule for the Licensing of Legal Consultants. See Mar. 24, 1994 Carter Memorandum, *supra* note 92, at 4. While there certainly are differences between the two, these differences are relatively insignificant with respect to transactional work and the giving of legal advice. Compare Agreement, *supra* note 3 with ABA Model FLC Rule, *supra* note 10, para. 4(e). The ABA rule, for example, similarly permits the FLC to advise on U.S. law "on the basis of advice from a person duly qualified and entitled." Unlike the Brussels rule, however, there is no specific requirement to identify the lawyer relied upon for local law.

198. See NAFTA Model Rule, *supra* note 55, at Rule 9 (explaining that "[a] foreign legal consultant may only practice or advise on the host Party law in the host Party, when and to the extent that he or she is permitted to do so by the host Party."); Hansen, *supra* note 55, at 19 (noting limitations on practice of Mexican law).

199. See IBA'S REJECTED FLC GUIDELINES, *supra* note 9, art. G, para. 2; IBA PROPOSED GENERAL PRINCIPLES, *supra* note 9, at IV(B)(2). The Agreement's scope of practice provisions regarding transactional work are substantially similar to those found in the ABA Model FLC Rule. The Agreement cannot be compared to GATS because GATS itself does not address specific issues such as the scope of practice and because the Working Party has not yet begun to address the topic of legal services.

true if they may be resolved at some point by external parties.²⁰⁰

2. Ethics and Disciplinary Issues

A second major issue addressed in the Agreement is the topic of ethics and discipline. One of the motivating factors for the Brussels Bars was the desire to regulate foreign lawyers practicing in Brussels and subject them to the Brussels ethics rules.²⁰¹ The ABA negotiators understood how important this issue was to the Belgians and wanted to comply. However, the ABA negotiators were also sensitive to the concerns that some U.S. lawyers might have with respect to this issue, especially those who had not previously registered with a Brussels bar and who had no Belgian lawyers or *jurists* in their offices.²⁰² Accordingly, the Agreement treats B List and Joint List lawyers differently. Just as the B List lawyers receive more scope of practice rights than the Joint List lawyers, B List lawyers also face more responsibilities in the form of ethics rules to which they are bound and the discipline to which they are subject.

With one exception, B List lawyers are bound by *all* of the Brussels Bars' rules of ethics, provided that they are applied in accordance with the principles set forth in the CCBE Code of Conduct.²⁰³ The exception is that unlike *tableau* lawyers and

200. The debate about whether EU law constitutes the "local law" of its Member States should not be a unique issue. For example, in the NAFTA context, a comparable issue might be whether a European lawyer who desires to practice in the United States is entitled to advise on NAFTA law. Although comparable debates theoretically are available, however, to date there appears not to have been any comparable disputes concerning NAFTA or whether the law of an economic integration unit is "local law." Nelson Mar. 10, 1997 Interview, *supra* note 42.

201. See *supra* notes 83-85 and accompanying text.

202. Griffin Feb. 18, 1997 Interview, *supra* note 96. See generally ABA/Brussels file, *supra* note 117.

203. Agreement, *supra* note 3, art. 5, para. 1. This provision evolved over the course of the negotiations. The Brussels representatives initially proposed that U.S. lawyers be subject to the Brussels ethics rules. See Aug. 3, 1993 Brussels draft, *supra* note 109. The ABA representatives responded by noting that a provision would have to be made for situations in which there was a conflict between the U.S. and Brussels rules. See Sept. 4, 1992 Nelson/Griffin Letter, *supra* note 91. The Jan. 14, 1993 Brussels draft, *supra* note 109, provided that U.S. lawyers on the B List were subject to the stricter of the Brussels rules or the CCBE Code of Conduct; Joint List lawyers were subject to the CCBE Code of Conduct. The Mar. 2, 1993 ABA draft, *supra* note 109, proposed that both B List and Joint List lawyers be subject to the CCBE Code of Conduct, except as modified in accordance with Annex A (which had not been drafted). The Apr. 30, 1993 Brussels draft, *supra* note 109, contained the same provision that had been in its Jan. 14, 1993 draft. The ABA May 14 and May 19, 1993 drafts, *supra* note 109, which

stagiaires, B List lawyers are permitted to have the status of employees in a law firm or partnership.²⁰⁴ This "employee" excep-

were circulated following the May 13, 1993 meeting, indicate that at the May 13th meeting, the Brussels representatives tentatively had agreed to the ABA approach. The ABA May 25, 1993 draft, *supra* note 109, contains a revised provision which specifies that U.S. B List and Joint List lawyers were subject to the CCBE Code of Conduct, subject to the modification and understandings set forth in the Appendix and without prejudice to the continued application of U.S. rules of professional conduct. It further provided that the rules of the Brussels Bars applied to U.S. lawyers to the extent they were embodied in the CCBE Code, as so modified and understood in the Annex, or as expressly referred to in the Appendix. The June 17, 1993 Brussels draft, *supra* note 109, accepted the "Annex approach" for Joint List lawyers, but proposed that B List lawyers "shall comply with the rules of the competent BRUSSELS BAR COUNCIL without prejudice for the U.S. Lawyer to abide by those United States rules of Professional conduct and responsibilities in as far as such rules concern cross-border activities and are not contrary to the CCBE Common Code of Conduct." The Aug. 3, 1993 Brussels draft, *supra* note 109, contained the same language, except added a caveat that the requirements for B List lawyers were "subject, however, to the understandings set forth in the Appendix." The Aug. 6, 1993 ABA draft, *supra* note 109, required U.S. Joint List lawyers to comply with the CCBE Code, subject to the reservations and understandings set forth in the appendix, and required B List lawyers to comply with the rules of the relevant Brussels Bar Council to the extent that such rules are consistent with the CCBE Code, as modified by the reservations and understandings set forth in the Appendix and without prejudice to the obligations of the U.S. lawyers to abide by the U.S. rules.

At the August 8 and 9, 1993 meetings in New York, during which the ABA and Brussels representatives agreed to negotiate Heads of Agreement rather than specific agreement language, the representatives also agreed the "Appendix" approach "might prove difficult to interpret and apply." See Memorandum of New York Meetings August 8-9, 1993 Between Representatives of the ABA and the Brussels Bar Councils ("BBC") from Sydney M. Cone, III, to ABA Agreement Negotiators (Oberreit, Nelson, Griffin, Pickering, Harwood) (Aug. 23, 1993) at 5. Accordingly, the Sept. 13, 1993 Brussels draft by J. Sloomans, *supra* note 109, which was the first date on which the Heads of Agreement approach was used, adopted the basic approach which was embodied in the final agreement. Although Sloomans' draft did not provide that the Joint List lawyers need not comply with the CCBE Code when inconsistent with the U.S. rules, the ABA's clarification of this point was accepted without objection. There continued to be numerous exchanges, however, as to the exact language to be used in this provision. See generally *supra* note 109.

204. Agreement, *supra* note 3, art. 6, para. 5. See Letter from Walter Oberreit, ABA Negotiator, to Steven Nelson, ABA Negotiator (Mar. 2, 1994) (on file with the *Fordham International Law Journal*). Mr. Oberreit reported as follows concerning a meeting of the B List Committee [representatives of foreign attorneys in Brussels]:

[T]he *Counsel de l'Ordre* had reexamined the question of whether an *avocat* can be an employee and had reaffirmed its view that employee status is incompatible with being a "*member du tableau*" or a *stagiaire*. However, the Counsel decided that employee status is not incompatible with being a "*member associe' du barreau de Bruxelles*" (i.e. a B List member) provided

- (i) the home bar permits employee status, and
- (ii) such status does not affect the "independence" of the foreign lawyer.

Id. See generally *CCBE Code, Part I, supra* note 11, at nn.88-90, nn.240-41, and accompanying text (discussing prohibitions on employment found in some European countries

tion is justified on the grounds that the independence of U.S. lawyers is guaranteed by the rules of professional conduct of their U.S. bar.²⁰⁵ However, one might wonder whether this differential treatment of U.S. and Belgian lawyers will create pressure to change the Brussels ethics rules because Brussels lawyers are also subject to rules regarding independence. If Belgian lawyers see B List lawyers who are employees of law firms, and if the Belgian lawyers believe that the independence of these lawyers is not comprised by their employment status, that might lead the Belgian lawyers to question the premises of their local bar rules and to press for change. This is especially true if Belgian law firms or lawyers believe that the ban on employment status puts them at a competitive disadvantage.

Under the terms of the Agreement, B List lawyers are subject to discipline by the Brussels Bars if they violate any of the applicable Brussels Bars' ethics rules.²⁰⁶ Although the Agreement subjects B List lawyers to the Brussels Bars' discipline systems, the Agreement also provides a dispute resolution mechanism.²⁰⁷ The Agreement establishes a committee, called the Joint Supervisory Committee, which consists of representatives of the ABA and the two Brussels bar associations. The Agreement specifies that at the request of either the ABA or the Brussels Bars, any disciplinary dispute involving lawyers covered by the Agreement be submitted to, and if possible, resolved by the Joint Supervisory Committee.²⁰⁸

In addition to the Joint Supervisory Committee, the Agreement contains a second requirement that acts as a safety valve before one of the Brussels Bars imposes discipline. The Agree-

and the differing conceptions of independence and conflicts of interest which this reflects).

205. *Id.* This issue was important to U.S. lawyers, because they obtained favorable tax treatment by virtue of being an employee. See Letter from Richard Temko, Brussels lawyer, to Steven Nelson, ABA Negotiator (Feb. 11, 1994) (on file with the *Fordham International Law Journal*).

206. Agreement, *supra* note 3, art. 7, para. 1.

207. The idea of having this kind of committee stems from the exchanges between the parties. See *Brussels Bars' Position Paper*, *supra* note 61. This concept was endorsed in the Mar. 2, 1993 ABA draft, *supra* note 109, which was the first draft agreement the ABA sent to the Brussels Bars. See also *supra* note 203 (describing the legislative history of ethics rules).

208. *Id.* at art. 7, para. 3. This provision actually covers more than discipline of U.S. lawyers on the B List or Joint List. It also covers discipline of lawyers who are "participating in relationships referred to in [this Agreement]." *Id.*

ment states that if it is determined that a U.S. lawyer breached a Brussels Bar rule, which irreconcilably conflicts with a U.S. ethics rule to which the lawyer is subject, the Brussels Bar "shall invite and consider" the views of the ABA or relevant State Bar before imposing sanctions. The Brussels Bars nonetheless retains the absolute right to discipline B List lawyers who violate their rules.²⁰⁹ Although the Agreement does not specify who makes the determination of the existence of an "irreconcilable conflict," the Joint Supervisory Committee, together with the lawyer in question, presumably would play a role in defining this situation.

In contrast to B List lawyers, Joint List lawyers are bound by the rules found in the CCBE Code of Conduct except in situations where they conflict with the U.S. ethics rules to which the U.S. lawyer is bound.²¹⁰ Moreover, Joint List lawyers are not subject to discipline by the Brussels Bars for violation of these ethics rules. The only sanctions available are "suspension or deregistration" from the Joint List and referral of the issue to the Joint List lawyer's Home State discipline authorities.²¹¹ Once again, however, the Agreement permits either the ABA or the Brussels Bars to invoke the Joint Supervisory Committee to resolve the problem.²¹²

This rather flexible "dispute resolution" approach, which is used for both B List and Joint List lawyers, is quite different from the approach initially contemplated. Initially, the ABA negotiators envisioned an appendix to the Agreement identifying the CCBE or Brussels ethics provisions with which a U.S. lawyer need not comply.²¹³ The ABA negotiators sought outside assistance on this point from various academics, including Professors Roger Goebel and Mary Daly of Fordham University School of Law, and this author. After receiving input about possible conflicts among the CCBE Code of Conduct, the ABA Model Rules

209. *See id.* at art. 5, paras. 1, 3.

210. *Id.* at art. 6, para. 2. *See also supra* note 203 (providing legislative history of this provision).

211. Agreement, *supra* note 3, art. 7, para. 2. This point was not addressed until late in the negotiations. In the May 18, 1994 Brussels draft, *supra* note 109, Carl Bevernage writes "we hope that our text of Article 7.2 will give the USA lawyers the reassurance they seek that they can be 'tried' in the USA under U.S. Bar rules, without depriving the local Orders of the possibility to protect local interests."

212. *Id.* at art. 7, para. 3.

213. *See supra* note 203.

of Professional Conduct, and other U.S. state ethics rules, the ABA negotiators developed such an appendix.²¹⁴ They continued to use this “appendix” approach to the issue of conflicts through several drafts.²¹⁵ The ABA and Brussels negotiators ultimately decided that the flexibility of the Joint Supervisory Committee’s dispute resolution approach was more desirable than the rigidity of the appendix approach.²¹⁶ Although Joe Griffin reported that the ABA team found it amusing to imagine various scenarios that would give rise to “irreconcilable conflicts”, they thought it likely that the first irreconcilable conflict to arise would be one they had not contemplated.²¹⁷ Moreover, by the time they abandoned the appendix approach, the ABA negotiators had built up enough trust in their Brussels counterparts as a result of their year of negotiations, so that the flexible Commit-

214. This author, for example, sent Steve Nelson seventeen pages of materials related to this issue on May 23, 1993 and a three-page follow-up letter on May 24, 1993 (on file with the *Fordham International Law Journal*). Among other things, these materials (as supplemented) identified: 1) provisions which may conflict with a U.S. lawyer’s duty under the relevant U.S. regulations; 2) provisions that a U.S. lawyer would want to construe in a certain manner so that they do not conflict with the relevant U.S. provisions; and 3) provisions with which a U.S. lawyer could comply, but which the U.S. lawyers might want to limit to the lawyers based in Brussels as these provisions are stricter than the relevant U.S. provisions. For a discussion of the differences between the CCBE Code of Conduct and the ABA Model Rules, see generally *CCBE Code, Part I*, *supra* note 11, at 17-45.

The ABA negotiators first circulated a draft of the “Annex” to the Brussels Bar representatives on May 27, 1993. This Annex stated that “[f]or purposes of the application of the provisions of the Common Code to U.S. Lawyers under and in accordance with the [Agreement], the provisions of the Common Code shall be deemed modified as provided in Part I hereof and interpreted in accordance with the understandings set forth in Part II hereof.” May 27, 1993 ABA Draft, *supra* note 109, at A-1. The Annex listed the following as CCBE Rules to which “modifications” were required: CCBE Rules 1.4 (Field of Application *Ratione Personae*); 1.5 (Field of Application *Ratione Materiae*); 2.3.2 (Confidentiality); 5.9.1 - 5.9.3 (Disputes Among Lawyers).

The Annex identified the following CCBE Rules as provisions subject to “understandings” as to their scope: CCBE Rules 2.5.1 (Incompatible Occupations); 3.2.1 and 3.2.2 (Conflict of Interest); 3.2.3 (Conflict of Interest - New Client); 3.2.4 (Conflict of Interest - Attribution); 3.3.1 - 3.3.3 (*Pactum de Quota Litis* [Contingency Fees]); 3.8.1 and 3.8.7.1 (Clients’ Funds); 5.3.1 and 5.3.2 (Correspondence Between Lawyers); 5.6.1 (Change of Lawyer).

As set forth *supra* note 203, the “Annex” approach lasted until August 1993, at which time the negotiators agreed to abandon the “Annex” approach in favor of the more flexible approach now found in the Agreement.

215. See *supra* note 203.

216. Griffin Feb. 18, 1997 Interview, *supra* note 96.

217. *Id.*

tee approach seemed desirable.²¹⁸ Thus, the final Agreement makes the Joint Supervisory Committee available both for B List lawyer disputes and Joint List lawyer disputes.

In addition to the general provisions on conduct and discipline, two more specific provisions are found in these sections. First, the Agreement obligates the Brussels Bars to protect and defend the professional privileges of U.S. lawyers in the same manner as they defend the professional privileges of their own members.²¹⁹ The ABA negotiator Joe Griffin requested the insertion of this provision. His request was in response to the European Court of Justice's *AM&S* case, which opined that the attorney-client privilege was not available in EU institutions with respect to communications between non-EU lawyers and their clients.²²⁰ This section requires the Brussels Bars' support of U.S. lawyers' efforts to have the EU institutions recognize this privilege for U.S. lawyers.

The second additional provision found in the "conduct" and "discipline" sections is a non-discrimination provision.²²¹ This provision represents the evolution of the negotiations. In early drafts of the Agreement, U.S. lawyers were subject to different bar rules than other foreign lawyers on the B List. The Brussels Bars, for example, wanted U.S. lawyers to wait three years before forming a partnership with a *tableau* lawyer, even though other B List lawyers were not subject to this rule.²²² This provi-

218. *Id.*

219. Agreement, *supra* note 3, art. 6, para. 4. The ABA raised this issue at the first meeting, but it was not included in any of the Brussels' drafts until after the parties met on October 18, 1993. See Oct. 19, 1993 Brussels draft, *supra* note 109. The language was refined thereafter, but the principle was accepted at that time. See generally ABA/Brussels file, *supra* note 117.

220. Griffin Feb. 18, 1997 Interview, *supra* note 96. According to Cone, the predecessor B List similarly protected a B List foreign lawyer's attorney-client privilege. CONE, *supra* note 1, at 10:14.

221. The nondiscrimination provision states:

To the extent permitted by Belgian law, and except as otherwise expressly provided in this Agreement, U.S. Lawyers registered on the Foreign Lawyer List ["B List"] of either of the Orders shall have the rights and privileges, and be subject to the obligations, of Tableau Lawyers who are members of the Order.

Agreement, *supra* note 3, art. 6, para. 4.

222. See *Brussels Bars' Position Paper*, *supra* note 61. U.S. Lawyers in Brussels primarily objected to the "three year waiting period" contained in the Position Paper. Among other reasons for their objections, U.S. lawyers did not want to be disadvantaged when compared to other lawyers. See generally ABA/Brussels file, *supra* note 117. Each side stuck to their respective position until the June 17, 1993 Brussels draft, *supra* note 109.

sion represents the ultimate success of the ABA negotiators in convincing the Brussels Bars that as a general rule, U.S. lawyers should not be subject to stricter rules than other lawyers in Brussels.

There are two other provisions, not located in the "Conduct and Privileges" section of the Agreement, that should be considered "ethics" provisions. One provision specifies that the trust account rules apply only to B List lawyers in a partnership or cooperation with *tableau* lawyers or *stagiaires*, and only with respect to matters having a primary nexus with Belgium.²²³ Another provision provides that B List lawyers must comply with the professional liability insurance requirements, but may do so by providing written assurances that the U.S. lawyer possesses the level of coverage required.²²⁴

The Agreement contains rules concerning discipline, as well as provisions specifying the appropriate conduct. However, because cross-border practice is involved, conflicts of laws issues inevitably arise with respect to discipline. In comparison to other cross-border practice situations, the conflicts of laws provisions in the Agreement are deceptively simple. If a B List lawyer violates a rule of the Brussels Bar, then the lawyer is responsible for

In that draft, Brussels negotiators agreed to immediate partnership provided a lawyer in the U.S. firm had been established in the B List for one year or the firm had been established in Brussels for one year before the Agreement. The ABA agreed to this one year waiting period in the Sept. 18, 1993 ABA draft, *supra* note 109. See also CONE, *supra* note 1 at 10:22 (identifying this issue as one of three primary points on which there was disagreement); Kilimnik, *supra* note 2, at 276-77. Some jurisdictions give foreign lawyers less than full membership in the bar association or impose limitations on foreign lawyers that are not imposed on local lawyers, particularly limitations on the foreign lawyers' ability to associate in firms with local lawyers.

223. Agreement, *supra* note 3, art. 8, para. 2. This concept appeared in the ABA's first draft. See Mar. 2, 1993 ABA draft, *supra* note 109. This draft limited this provision to situations in which U.S. lawyers were in a cooperation with *tableau* lawyers and to matters involving the practice of Belgian law. *Id.* The Brussels Bar questioned the latter condition in their next draft by bracketing this language. See Apr. 30, 1993 Brussels draft, *supra* note 109. This issue was not resolved until several drafts later. See Aug. 3, 1993 Brussels draft, *supra* note 109 (accepting ABA proposals). The language was revised for the final agreement, but the concepts remained substantially the same.

224. Agreement, *supra* note 3, art. 8, para. 3. This concept appeared in the ABA's first draft. See Mar. 2, 1993 ABA draft, *supra* note 109. The Brussels Bars indicated in their next draft that they wanted the assurances to cover both the *level* and the *scope* of coverage. See Apr. 30, 1993 Brussels draft, *supra* note 109. This issue was not resolved until several drafts later. See Aug. 5, 1993 ABA draft, *supra* note 109 (accepting "scope" requirement). The language was revised for the final agreement, but the concepts remained substantially the same.

that violation, regardless of whether that rule conflicts with any other rule to which the lawyer is subject. Conversely, if a lawyer is on the Joint List, and if the Brussels rule conflicts with a U.S. ethics rule to which the lawyer is subject, the U.S. rule takes precedence. The advantage of this approach is that it appears to provide a clear decision on the “conflicts” issue. This contrasts, for example, with certain CCBE Code of Conduct provisions, which do not specify which rule to use if two rules conflict.²²⁵ This also contrasts with the approach used in the revised ABA Model Rule of Professional Conduct 8.5, which does not always provide a clear rule, but instead requires the lawyer to use the rules of the jurisdiction in which the lawyer’s conduct has “its predominant effect.”²²⁶

With closer scrutiny however, the “conflicts” rule in the Agreement may not be as entirely clear as it first seems. The Agreement requires U.S. B List lawyers to use the Brussels ethics rules with respect to their practice “within *and* relating to Belgium.”²²⁷ In contrast, the Agreement requires U.S. Joint List lawyers to use the Brussels ethics rules with respect to his or her practice “within *or* relating to Belgium.”²²⁸ Issues could thus arise concerning the significance, if any, between the use of “and relating” for B List lawyers, and “or relating” for Joint List lawyers; the difficulty of defining “within” Belgium in the age of telecommunications; the difficulty of defining “relating to Belgium”; and the difficulty of determining whether to recognize the difference between the B List’s use of the word “and” and the Joint List’s use of the word “or”, especially because one

225. See *CCBE Code, Part I, supra* note 11, at 36-37 (discussing whether conflict exists between CCBE’s confidentiality provisions and candor to court provisions and, if so, how they should be resolved).

226. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.5(b)(2)(ii) (1997). This rule provides that if the lawyer is licensed in more than one jurisdiction and if the lawyer is not involved in litigation, then the applicable ethics rules are the rules of the jurisdiction in which the lawyer principally practices unless the particular conduct clearly has its predominant effect in the other jurisdiction in which the lawyer is licensed, in which case those rules apply. See generally *Symposium: Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 715 (1995) (containing articles supporting and criticizing revised ABA Model Rule 8.5).

227. Agreement, *supra* note 3, art. 6, para. 1.

228. *Id.* at art. 6, para. 2. No explanation appears in the correspondence for this discrepancy. The Heads of Agreement did not contain language this specific. The “and/or” distinction was contained in the first drafts of the Agreement following the Heads of Agreement, but was never discussed or addressed. Thus, it appears simply to be an oversight. See generally ABA/Brussels file, *supra* note 117.

expects more obligations under the B List to be broader, but the disjunctive used in the Joint List creates greater obligations. Consequently, the conflicts of law provisions in the Agreement may be vulnerable to many of the same critiques directed against ABA Model Rule 8.5. The dispute-resolution mechanism of the Joint Supervisory Committee, however, may reduce the potential for problems with these conflict issues. Lawyers may be more comfortable with the possibility of conflicting provisions when they know their conduct will be reviewed by a committee with representatives from both jurisdictions, rather than by representatives with an interest in enforcing their own provisions.

This "dispute resolution" approach is one of the major features that distinguishes the Agreement from the "ethics and discipline" provisions found in any of the other comparable regulatory schemes. Even with respect to the other "ethics and discipline" provisions, the Agreement compares favorably with other schemes for regulating cross-border practice. For example, the Agreement provides far more guidance than is currently found in GATS. The parties to the GATS agreement could not agree on an Annex for Legal Services and the very general provisions in GATS do not provide this level of detail.²²⁹ Moreover, the Working Party responsible for these tasks under GATS has not yet begun to provide any specific guidance on the appropriate ethics and discipline rules in a cross-border practice setting.²³⁰

The Agreement also offers far more detail on ethics and discipline to facilitate cross-border practice than NAFTA. With respect to Foreign Legal Consultants, Annex 1210.5 to NAFTA sets forth some requirements for the parties involved.²³¹ Paragraph

229. See *supra* note 30 and accompanying text (discussing negotiations surrounding inclusion of legal services in GATS). One article has offered a proposed annex for legal services. This proposed annex provided that registered legal consultants be subject to the same disciplinary procedures and consequences as full members of the host bar. It also required the host authorities to notify the home jurisdiction of the results of any proceeding in the host jurisdiction and vice-versa. The proposed annex additionally required the Member States to create a GATS Common Code of Professional Conduct to be applied to registered legal consultants. As envisioned, however, the GATS Common Code of Professional Conduct apparently is not a substantive code, but rather establishes principles for resolving conflicts in the rules of professional conduct between different Member jurisdictions. Chapman & Tauber, *supra* note 2, at 978-79.

230. See *supra* notes 42-43.

231. NAFTA requires the parties to "to encourage its relevant bodies to consult with the relevant professional bodies designated by each of the other Parties regarding the development of joint recommendations on the matters referred to in paragraph 2."

2 of Annex 1210.5 presumably includes authority to address ethics and discipline.²³² To date, however, the Trilateral Lawyers Working Group formed to develop such standards has barely broached the topic of the ethics and discipline systems that apply to Foreign Legal Consultants.²³³

In contrast to GATS and NAFTA, the existing EU legislation is reasonably specific with respect to the issues of ethics and discipline. The EU Establishment Directive, like the Agreement, requires the migrant lawyer to use the Host State's ethics rules

NAFTA, *supra* note 4, Annex 1210.5, § B, para. 3, 32 I.L.M. at 652, Annex 1210.5 ' B, para. 4, 32 I.L.M. at 652. Section A of Annex 1210.5 contains a comparable provision. It requires the parties "to encourage its relevant bodies in their respective territories to develop mutually acceptable standards and criteria for the licensing and certification of professional service providers and to provide recommendations on mutual recognition to the Commission." *Id.* at Annex 1210.5, § A, para. 2, 32 I.L.M. at 652. *See also supra* note 55 (regarding whether TLWG was formed pursuant to Annex 1210.5 Section B or pursuant to both Sections A and B).

232. Paragraph 2(b) encourages "development of standards and criteria for the authorization of foreign legal consultants in conformity with Article 1210" and paragraph 2(c) encourages consultation regarding "other matters relating to the provision of foreign legal consultancy services." *Id.* at Annex 1210.5, §B, paras. 2(b-c), 32 I.L.M. at 652. Thus, the TLWG clearly has authority to reach an agreement which addresses ethics and discipline. By way of comparison, Section A of Annex 1210.5 explicitly provides that these standards may be developed with regard to "conduct and ethics — standards of professional conduct and the nature of disciplinary action for non-conformity with those standards. . . ." *Id.* at Annex 1210.5, ' A, para. 3(d), 32 I.L.M. at 652. Thus, one would expect the TLWG formed pursuant to Section B to address these topics as well.

233. Nelson Mar. 10, 1997 Telephone interview, *supra* note 42. Unlike the Agreement, the NAFTA Model Rule negotiated, but not yet recommended, by the TLWG does not contain separate sections entitled "ethics" or "discipline." Nor does the NAFTA Model Rule address these topics in any comprehensive manner. *Id.* Instead, there are a few isolated provisions in the NAFTA Model Rule which touch on these topics. For example, Rule 4(a) (ii) of the NAFTA Model Rule conditions FLC status on a lawyer being "subject to effective regulation and discipline by a legally recognized body or public authority." *See* NAFTA Model Rule, *supra* note 55, at Rule 4(a) (ii). The primary motivation for this provision is Mexico's lack of a mandatory discipline system. Nelson Mar. 10, 1997 Telephone Interview, *supra* note 42. Rule 20, which is entitled "Professional rights and duties," refers to only one ethics provision. *See* NAFTA Model Rule, *supra* note 55, at Rule 20. It states that a FLC "enjoys the same professional rights, and has the same professional duties respecting client confidentiality, that apply to lawyers in the host Party." *Id.* Other than Rule 20, nothing in the NAFTA Model Rule governs the status of the FLC in the Host's Bar Association. Although there has been no comprehensive treatment of ethics and discipline, other rules, such as those involving advertising, scope of practice rules, and forms of association, touch on matters that might be covered in the signatory countries' ethics codes. *See generally* NAFTA Model Rule, *supra* note 55.

with respect to "all the activities he pursues in its territory."²³⁴ Unlike the Agreement, however, no provision is made for the situation in which such rules might conflict with the Home State's rules. With respect to the issue of discipline, the EU Establishment Directive, like the Agreement, subjects the established lawyer to the disciplinary system of the Host State.²³⁵ However, although the EU Establishment Directive provides for a consultation process between the Home and Host States, it does not establish a regularly-constituted committee nor does the "consultation" process appear to have a "dispute resolution" focus.²³⁶

One difference between the EU Establishment Directive and the Agreement concerns the conduct by the migrant lawyer which triggers application of the Host State's ethics provision. Interpreted literally, the EU Establishment Directive seems to use geography as its touchstone when it states that the Home State ethics rules apply with respect to activities pursued in the territory. The Agreement, in contrast, uses an approach that is both geography *and* subject matter bound.²³⁷ Thus, in my view,

234. EU Establishment Directive, *supra* note 19, art. 6, para. 1. For comparison purposes, the Lawyers' Services Directive, *supra* note 16, provides in relevant part that: 1) a lawyer representing a client in legal proceedings or before public authorities "shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the member State from which he comes." *Id.* at art. 4, para. 2. 2) a lawyer pursuing other activities "shall remain subject to the rules of professional conduct of the member state from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the Host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity." *Id.* at art. 4, para. 4.

This Directive contained other provisions as well indicating for a specific issue whether Host or Home State ethics rules applied. The Directive may be less than satisfactory, however, insofar as it expects a lawyer to abide by both Host and Home State rules. *Id.* This may not be possible in all situations.

235. EU Establishment Directive, *supra* note 19, art. 7, para. 1.

236. *Id.* at paras. 2-5. For comparison purposes, the Lawyers' Services Directive, *supra* note 16, permitted the Host State to refer violations of the Host State's ethics rules to the Home State, but did not grant the Host State disciplinary power over the lawyer. *Id.* at art. 7, para. 2. In this respect, the Lawyers' Services Directive is similar to the treatment of Joint List lawyers.

As an aside, a regularly-constituted dispute resolution committee might be difficult to maintain in the EU given the number of states subject to the EU Establishment Directive in comparison to the bilateral Agreement.

237. Compare *supra* notes 163-67 and accompanying text with *supra* note 234. As discussed earlier, the Agreement provides that B List lawyers are bound by the Brussels

the Agreement clearly covers a fax sent from the United States to Brussels concerning a Brussels matter, whereas this result would not be so obvious in a comparable EU situation under the EU legislation.

Another difference between the Agreement and the EU Establishment Directive concerns the issue of the migrant lawyer's membership in the Host Bar Association. Problems arise concerning the rights and responsibilities associated with such membership. The language in the Agreement which prohibits discrimination against the migrant lawyer is arguably stronger and provides more rights than the language in the EU legislation.²³⁸

The ethics and discipline provisions in the Agreement are both similar to, and different from, the provisions in the ABA Model FLC Rule and the IBA's Rejected FLC Guidelines and Proposed General Principles. Similar to the Agreement, the ABA Model FLC Rule provides that an FLC is subject to both the ethics rules and discipline system of the Host U.S. State, protects the FLC's professional privilege, and implicitly contains a non-discrimination provision by making the FLC entitled to all the rights and obligations that apply to a member of the bar of the State.²³⁹ The IBA's Rejected FLC Guidelines would have required the FLC to abide by the ethics rules and discipline system

ethics rules with respect to their practice "within and relating to Belgium." In contrast, Joint List lawyers are subject to the CCBE Code with respect to matters "within or relating primarily to Belgium." In other words, for Joint List lawyers, this geographic requirement is explicitly an alternative to the subject matter requirement. My prediction, however, is that if the issue arises, the Joint Supervisory Committee would construe the Agreement similar to NAFTA so that the subject matter and geographic requirements are alternatives. Compare NAFTA, *supra* note 4, art. 1210(1) with Sciarra, *supra* note 46, at 2 n.3.

238. See EU Establishment Directive, *supra* note 19, art. 6, para. 2. Article 6 states that "[l]awyers practicing under their home-country professional titles shall be granted appropriate representation in the professional associations of the host Member State. Such representation shall involve at least the right to vote in elections to those associations' governing bodies." *Id.* (emphasis added). In contrast to the "appropriate" language, the Agreement grants foreign lawyers the right to full membership in the Bar, with corresponding rights and obligations, except as specifically exempted; these exemptions generally redound to the benefit of the U.S. lawyer. See Agreement, *supra* note 3, art. 6, para. 4.

239. See ABA Model FLC Rule, *supra* note 10, §§ 5(a) (ethics provisions) and 6 (discipline). The ABA Model FLC Rule, and the IBA's REJECTED FLC GUIDELINES, actually go further than the Agreement with respect to professional privilege. Whereas the Agreement requires the Brussels Bars to take steps to protect the U.S. lawyer's privilege, the ABA Model FLC Rule and the IBA's REJECTED FLC GUIDELINES affirmatively provide that the FLC is entitled to the privilege. *Id.* at § 5(b)(iii); IBA's REJECTED FLC GUIDE-

of the Host State, contained a nondiscrimination requirement, and required that the FLC be entitled to the lawyer's privileges. The Proposed General Principles are substantially similar.²⁴⁰ None of these other schemes, however, employ the flexible dispute resolution mechanism found in the Agreement nor do they contain a conflicts of law provision.

In sum, with respect to ethics and discipline, the substantive provisions in the Agreement do not differ profoundly from the provisions found in other cross-border arrangements. The legislative history, however, suggests that the Agreement negotiators considered these issues with a new degree of particularity and consideration. The bilateral nature of the Agreement permitted the parties to anticipate the likely issues with a degree of specificity not possible in a multilateral agreement. Once again, the most innovative aspect of the Agreement is its dispute resolution mechanism for resolving concerns over ethics and discipline.

Time will tell, but the flexible "dispute-resolution" approach may represent a new and interesting way to deal with the issue of conflicts in ethics rules, rather than simply subjecting the established lawyer to the Host State's discipline. At the same time that the dispute resolution provisions promote flexibility, the rigid ethics and discipline provisions provide needed clarity as to the applicable rules.

3. The "Forms of Association" Rules

The "forms of association" rules in the Agreement, like the scope of practice provisions, provide distinct advantages to U.S. lawyers registered on the B List rather than on the Joint List. The Agreement authorizes U.S. lawyers registered on the B List to form, at any time, "Partnerships with *Tableau* Lawyers" and

LINES, *supra* note 9, art. H, para. 3. No specific reference to privilege is found in the IBA PROPOSED GENERAL PRINCIPLES. IBA PROPOSED GENERAL PRINCIPLES, *supra* note 9.

240. See IBA's REJECTED FLC GUIDELINES, *supra* note 9, §§ F(4)(b) and H (ethics provisions) and I (discipline). Although the IBA's REJECTED FLC GUIDELINES require the "Code of Ethics or its equivalent, and all other laws, rules and regulations of the Host Authority . . . [to be] non-discriminatory and objectively justifiable by the public interest," a later provision notes that the Host Authority may subject the FLC to the same limitations as those imposed on regular lawyers, especially with respect to permission to affiliate with a law firm. *Id.* at § 4(H)(1 - 2); IBA *compare* IBA PROPOSED GENERAL PRINCIPLES, *supra* note 9, IIB (nondiscrimination provision), III(A)(4) and IV(B)(4) (providing that lawyer must use Host ethics rules).

“Cooperations with *Stagiair[e]s* and/or *Tableau* Lawyers.”²⁴¹ In contrast, U.S. lawyers registered on the Joint List are not permitted to form co-operations or become partners with *stagiaires* or *tableau* lawyers.²⁴² The terms “partnership” and “cooperations” are specifically defined in one of the “whereas” clauses.²⁴³

The Agreement thus grants U.S. lawyers three of the items they wanted: 1) the ability to become partners with Belgian *tableau* lawyers without a waiting period of three years, as initially proposed by the Belgians; 2) the ability to employ and work with Belgian *stagiaires*; and 3) the ability to work with Belgian *stagiaires* without a waiting period of one to two years, as proposed by the Belgians once they agreed that U.S. lawyers could hire Belgian *stagiaires*. These points represent clear victories for the ABA.²⁴⁴ In return, however, the Brussels Bars received some-

241. Agreement, *supra* note 3, art. 2, para. 1 (Cooperations) and art. 3, para. 1 (Partnerships). The Partnership provision has two conditions. First, all U.S. lawyers in the partnership who are established in Brussels must register on the B List. Second, one of the U.S. lawyers in the partnership must have been registered on the B List for one year or, alternatively, as of the effective date of the Agreement, the U.S. law firm had maintained an establishment in Brussels for one year. *Id.*

242. *Id.* at art. 2, para. 2 (Cooperations) and art. 3, para. 2 (Partnerships).

243. The terms “Cooperations” and “Partnerships” are defined as follows:

WHEREAS the ABA wishes to maximize the opportunities for U.S. Lawyers to practice within their fields of competence in Brussels; to form cooperations, including but not limited to arrangements involving association (*i.e.* relationship with a “collaborateur” or “medewerker,” whether or not reflected on the stationery of the lawyers involved), cost-sharing, and mutual recommendation, but not including partnerships (hereinafter collectively “Cooperations”), with *Tableau* Lawyers and *Stagiair[e]s*; and to form partnerships with *Tableau* Lawyers (hereinafter “Partnerships”).

Id. at eleventh “Whereas” clause.

This definition was refined relatively late in the drafting stage. *See, e.g.*, May 11, 1994 ABA draft, *supra* note 109 (revising language to be more inclusive); May 18, 1994 Brussels draft, *supra* note 109, (agreeing that cooperations “may include so-called external cooperations”).

244. *See supra* note 222 (discussing elimination of three year waiting period to become partners with Belgian *tableau* lawyers). On the second issue, the Brussels Bars initially took the position that U.S. lawyers registered could form cooperations with *stagiaires* only if they were registered on the B List and also were partners with *tableau* lawyers; the Bar rules also prohibited Belgian *stagiaires* from serving as an employee. This Brussels position was unacceptable to the U.S. lawyers. *Compare* Jan. 14, 1993 Brussels Draft, art. 5 with Mar. 2, 1993 ABA draft, art. 6, *supra* note 109. By the next draft, Brussels team dropped its requirements; it proposed that B List lawyers who were partners with *tableau* lawyers could enter into cooperations with *stagiaires* immediately; all other B List lawyers could enter into cooperations with *stagiaires* once the *stagiaires* had completed the first year of their stage. *See* Apr. 30, 1993 Brussels draft, *supra* note 109. The Brussels negotiators agreed to drop this waiting period requirement at the same

thing they wanted because the Agreement provides that “[s]ubject to the transitional provisions of Article 12, U.S. lawyers shall not form or maintain Cooperations with Belgian Jurists.”²⁴⁵ A similar provision prohibits U.S. lawyers from becoming partners with Belgian Jurists.²⁴⁶ Moreover, although the Brussels Bars abandoned their position requiring a one year

time they agreed to drop the three year partnership wait. See Sept. 16, 1993 Brussels draft, *supra* note 109. The employment status issue was not resolved until Mar. 1994. See *supra* note 204. See also CONE, *supra* note 1, at 10:22 (identifying this issue as one of three primary points on which there was disagreement).

245. Agreement, *supra* note 3, art. 2, para. 3. This issue remained hotly contested for a lengthy period. For example, even after the parties switched to the Heads of Agreement approach, they still could not agree on this concept. In September 1993 for example, ABA representatives wrote:

This [issue] appears to be the most difficult part of the Summary [of Heads of Agreement] in terms of substance. We have found that the language of the draft you presented on Thursday created some serious concerns among some of our colleagues because it would have breached a fundamental premise on which we have been operating, namely that the eventual agreement *must not impair the ability of those American lawyers who do not wish to register on the B-list to carry on their practices as they have thus far done and as permitted under Belgian law.* (emphasis in original).

Letter from Steven Nelson, ABA negotiator, to Carl Bevernage, Brussels negotiator (Sept. 18, 1993) accompanying Sept. 18, 1993 ABA draft, *supra* note 109. This issue appears to have been resolved at a meeting on October 18, 1993, at which time the U.S. representatives agreed to the Brussels approach. Compare Oct. 19, 1993 Brussels draft with Oct. 19 and 22, 1993 ABA drafts, *supra* note 109.

This issue was among the most difficult, however, for U.S. lawyers in Brussels. This issue appears throughout the correspondence from U.S. lawyers in Brussels to the ABA negotiators. See generally ABA/Brussels file, *supra* note 117. Indeed, even after the agreement was signed, one of the U.S. lawyers in Brussels complained, *inter alia*, about the agreement’s “lack of attention that has been given to the specific interests of the Belgian lawyers who are currently partners or associates with U.S. firms in Brussels.” The response included the following:

I assume from your letter that your principal concerns continue to be those relating to the application to senior Belgian lawyers of the requirements of the stage. While the ABA negotiators made every effort to obtain the agreement of the Bar to provisions that would have exempted from at least some requirements of the stage Belgian lawyers having a certain level of experience in the practice of law, that effort met with unalterable opposition from the bar for reasons of fundamental principle. This was not a result that could have been altered by any sort of “last minute effort” on anyone’s part, nor was it a result that should have come as a surprise to anyone. As I made clear to those who attended our consultations, and to you . . . during the course of our telephone conversation in May, this was an area in which we simply did not expect the Bar to compromise, notwithstanding our best efforts.

Letter from Steven Nelson, ABA negotiator, to U.S. lawyer in Brussels (Aug. 16, 1994), found in ABA/Brussels file, *supra* note 117.

246. Agreement, *supra* note 3, art. 3, para. 2.

waiting period before a U.S. lawyer could cooperate with a *stagiair*, the Agreement does provide that a U.S. lawyer may not rely on a *stagiair* with less than one year's experience for advice on Belgian law.²⁴⁷

The Agreement is also significant because it permits *stagiair* and *tableau* lawyers to cooperate with, or be partners of, the entire U.S. law firm provided that two conditions are satisfied.²⁴⁸ The conditions specify first, that all lawyers in the firm who are or become established in Brussels must register on the "B List." Secondly, they require that one of the firm lawyers registered on the B List must be a partner.²⁴⁹ This provision stands in contrast to requirements in some countries, such as Mexico, which do not permit local lawyers to be partners with an entire U.S. firm.²⁵⁰

One of the issues facing the Agreement drafters involved the issue of the Belgian *patron*, who is the *stagiair*, or apprentice lawyer's mentor. The issue arose because the Agreement permits U.S. lawyers to form cooperations with Belgian apprentices, or *stagiaires*, and because the Agreement does not require the U.S. lawyer to associate with a registered Belgian *tableau* lawyer. After some negotiations, the drafters agreed that any *tableau* lawyer, including lawyers outside the firm, could serve as the mentor, or *patron*, of the Belgian *stagiair*.²⁵¹

247. *Id.* at art. 4, para. 2; *see supra* note 244 (discussing historical background of this provision).

248. *Id.* at art. 2, para. 5 (Cooperations) and art. 3, para. 4 (Partnerships). *See also id.* at art. 12, para. 5 (applying to transition provisions).

249. *Id.*

250. *See, e.g.* Hansen, *supra* note 55, at 19 (regarding Mexican partnership with Mexican law firms); NAFTA Model Rule, *supra* note 55, at Rule 15(b). During the final drafting stages, the ABA negotiators and U.S. legal community in Brussels took a close look at, and revised the Agreement language on this point. As Steve Nelson reported to the ABA negotiating team, "[t]here was some concern [by U.S. law firms in Brussels] that the Bar might try to limit participation in the Cooperations or Partnerships to U.S. Lawyers registered on the Foreign Lawyer List thus requiring, in the case of a Partnership, that it be separate from the U.S. Law Firm's global partnership." Letter from Steven C. Nelson, Agreement Negotiator, to ABA Negotiating Team (Harwood, Griffin, Oberreit, Sher, Vinje) (May 9, 1994).

251. Agreement, *supra* note 3, art. 2, para. 2. The original proposal by the Brussels Bars required the firm *itself* to have a "foster parentship" with a member of the Brussels bar of at least ten year's seniority if the firm employed *stagiaires*. This first proposal also provided that no member of the firm could qualify as the *stagiaire's* patron, even if the firm lawyer otherwise satisfied the requirements. *See* Aug. 8, 1992 Brussels Position Paper, *supra* note 109. The ABA response objected to these requirements. *See* Sept. 4, 1992 Nelson/Griffin Letter, *supra* note 91. The Jan. 14, 1993 Brussels draft, *supra* note

In addition to these key provisions, the Agreement contains many provisions that specify the nature of these arrangements. For example, the Agreement explicitly addresses the office sharing arrangements of U.S. lawyers who have entered into a cooperation with a *stagiair* or *tableau* lawyer. If the cooperation is limited to "mutual recommendation," then the U.S. and Belgian lawyers may maintain separate premises.²⁵² In contrast to this provision, U.S. lawyers are required to share premises with the *tableau* lawyers with whom they are partners.²⁵³

The Agreement also specifies that the permissible cooperations and partnerships may include multi-national partnerships ("MNPs").²⁵⁴ The Agreement permits the *stagiair* or *tableau* lawyer to form a cooperation with, or be a partner of, the entire U.S. law firm, even if some U.S. lawyers are not registered on the lawyer lists. The Agreement also stipulates that U.S. lawyers may be employees of the firm, even though registration and the Brus-

109, required a "third party 'patron' unless the firm had a *tableau* lawyer of 5 year's seniority." The ABA's Mar. 2, 1993 draft, *supra* note 109, employed different language, but essentially accepted the requirement of five years seniority because the ABA draft noted that the *stagiaire's* patron would have to have the requisite seniority, which currently was five years. Thus, although the language was refined in later drafts, agreement in principle on this point was reached relatively early in the negotiations. See also CONE, *supra* note 1, at 10:22 (identifying this as one of three principal points of difference).

252. Agreement, *supra* note 3, art. 2, para. 1. This paragraph states that, "[e]stablished U.S. Lawyers participating in or associated with any such Cooperation may share office premises with the participating *Tableau Lawyer(s)* and/or *Stagiair[e]* or, in the case of a Cooperation that is limited to mutual recommendation, may maintain separate premises." *Id.* The use of the word "may" in the first clause suggests that U.S. lawyers may, but need not share office premises with *tableau* lawyers or *stagiaires*. On the other hand, the use of the word "may" in the second clause suggests that mutual recommendation is the only type of cooperative arrangement in which U.S. lawyers may maintain separate premises. Thus, the word "may" in the first clause effectively means "must" unless a mutual recommendation cooperation is involved. This interpretation is consistent with the legislative history. See June 6, 1994 letter from Steven Nelson to Carl Bevernage.

[W]e have had considerable difficulty understanding the difference between 'internal' and 'external' cooperation. . . . [W]e are proposing that the operative provision in which the issue really arises, namely paragraph 1 of Article 2, be revised simply to make it clear that separate premises are permissible only where the cooperation is limited to mutual recommendation.

Id. This change was accepted.

253. Agreement, *supra* note 3, art. 3, para. 1.

254. *Id.* at art. 2, para. 3 (Cooperations) and art. 3, para. 3 (Partnerships).

sels Bar rules ordinarily prohibit that.²⁵⁵

Other details covered by the Agreement include the manner in which a firm utilizing such cooperations or partnerships should hold itself out to the world. The Agreement permits a U.S. law firm to "carry on its practice in Brussels under the name that it uses in the United States" *provided that* the firm has at least one partner, U.S. or Belgian, in the Brussels office.²⁵⁶ The Agreement permits the use of this name even when a *tableau* lawyer is a partner and even though the Brussels ethics rules previously prohibited this.²⁵⁷

The Agreement is also quite specific with regard to the stationery U.S. lawyers must use. The basic approach is similar to that used in Rule 7.5 of the ABA Model Rules of Professional Conduct.²⁵⁸ If U.S. lawyers form a partnership with a *tableau* lawyer, the Agreement *requires* the partnership stationery to name the partnership and to identify all resident partners in Brussels and the bars of which they are a member.²⁵⁹ The Agreement *permits*, but does not require, the partnership stationery to identify other resident lawyers practicing in Brussels, including their bars and professional titles of origin. There are also rules governing stationery where collaboration, rather than a partnership is involved.²⁶⁰

On the one hand, one could argue that regulation should not operate at this level of detail, but should be left to the marketplace.²⁶¹ On the other hand, from the perspective of the lawyers engaged in cross-border practice, it may be desirable to ne-

255. *Id.* at art. 6, para. 5; *see supra* note 203-05 and accompanying text (discussing Brussels Bars' relaxation of no employees rule for U.S. lawyers).

256. *Id.* at art. 5, para. 3.

257. Agreement, *supra* note 3, at art. 5, para. 3; *see also* Nelson Mar. 10, 1997 Telephone Interview, *supra* note 42.

258. This provision provides, that "[a] law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.5, Firm Names and Letterheads (1997).

259. Agreement, *supra* note 3, art. 5, para. 1.

260. *Id.* at paras. 1-2. The stationery issue with respect to collaborations was one of the topics of the final negotiations. The Brussels Bars wanted to add a statement that, "[t]he names of the external collaborators may not be mentioned in the stationery." *See* May 18, 1994 Brussels draft, *supra* note 109. This issue ultimately was resolved by referring to the Brussels Bars rules and noting that U.S. lawyers should follow those rules. Agreement, *supra* note 3, art. 5, para. 2.

261. *See Transnational Law Practice, supra* note 2, at 762-63.

gotiate an Agreement on these kinds of mundane points so that the firm knows exactly what the position of the regulators will be and thus knows exactly where it stands.²⁶² Indeed, the importance of these “firm name” and “stationery” issues to the negotiators is demonstrated by the fact it required approximately one year for the parties to resolve these issues.²⁶³

The “stationery” provision that applies to cooperations is comparable to the “partnership” stationery provision. The stationery must include several items. It must state the name of the law firm, if any; identify any established U.S. lawyer who is a partner and the bars of which that person is a member; identify the *stagiair* or *tableau* lawyer with whom the U.S. lawyer is cooperating, and the bars of which that person is a member; and provide “an indication of the nature of the Cooperation in a form consistent with the nomenclature and representation ordinarily approved by the Orders for use by *Tableau* Lawyers and *Stagiair[e]s* in respect of similar Cooperations among themselves.”²⁶⁴ As with partnerships, the Agreement permits the stationery of firms involved in cooperations to identify other resident lawyers in the Brussels office, including their bars and professional titles of origin.²⁶⁵

Two additional sets of provisions related to the “form of association” proved controversial in the negotiations. The first group of provisions was the transitional provisions found in Article 12. The problem was that U.S. firms in Brussels wanted to ensure their ability to continue with their existing personnel with minimal disruption. But the Brussels Bars wanted to stop U.S. firms from employing Belgian *jurists* and did not want to compromise on the training period or “stage” that is normally required before a Belgian *jurist* could become a *tableau* lawyer.

262. For example, one attorney told me about a situation that occurred in Germany in which one agency purported to require the firm to list the names of all partners, whereas another agency found that misleading and forbade the firm from doing so. The firm was caught in the middle of the warring agencies.

263. The first exchanges between the parties revealed their disagreement. The Belgians indicated that they wanted the firm name, as used in Brussels, to include the name of at least one Belgian partner provided there were any. This was not acceptable to U.S. negotiators. Compare *Brussels Bars' Position Paper*, *supra* note 61 with Sept. 4, 1992 Nelson/Griffin Letter, *supra* note 91; accord *CONE*, *supra* note 1, at 10:22. The parties reached agreement on this issue in August 1993, when the Belgians agreed to the ABA approach. See Aug. 3, 1993 ABA Draft and Aug. 6, 1993 Brussels draft, *supra* note 109.

264. *Id.* at art. 5, para. 2.

265. *Id.*

Additionally, the Brussels Bars did not want a different set of rules for *tableau* lawyers working in a U.S. firm than for other *tableau* lawyers.

The “grandfathering” compromise reached is detailed and the result of much input from the U.S. firms in Brussels, many of whom were trying to address the situation of a specific lawyer or lawyers in their offices.²⁶⁶ Generally, the Agreement “grandfathers in” partnerships and cooperations existing shortly before the parties signed the Agreement. U.S. lawyers who were partners with Belgian *jurists* in June of 1994, when the parties finalized the Agreement, could continue that partnership with that individual. The *jurist*, however, was required to register as a *stagiair* and serve the training period. This partnership is permitted as part of the “transition” even though the Agreement otherwise forbids partnerships between U.S. lawyers and *stagiaires*.²⁶⁷ Moreover, U.S. lawyers are permitted to form new partnerships, even with Belgian *jurists* turned *stagiaires*, provided that the U.S. lawyer was in cooperation with the *jurist* in June 1994, and the cooperation lasted three years.²⁶⁸ The Agreement further provides that if a Belgian *jurist* who is licensed in the U.S. resided outside Belgium, then the Belgian *jurist* can continue his or her partnership or cooperative arrangement with a U.S. firm. However, the *jurist* must register on the *tableau* or *stagiair* list

266. See generally ABA/Brussels file, *supra* note 117. These transition provisions first became the focus of negotiation in approximately May 1993. These provisions generated strong discussion within the U.S. legal community in Brussels as the ABA negotiators attempted to refine the language and address the specific concerns of as many firms as possible. See, e.g., Letter from Steven C. Nelson, Agreement Negotiator, to Joseph P. Griffin and Walter Oberreit, Agreement Negotiators (May 3, 1993) (noting intention to ask U.S. firms “to give us in written form descriptions of the factual situations that they are concerned with that they feel might not be consistent with either our draft or the counterdraft of the Bar Councils, together with any solutions they would propose by way of transitional measures.”). Not all firms were happy with the ABA negotiations, however. See *supra* notes 146 and 245 and accompanying text.

One commentator has described these provisions as,

“somewhat similar to those that had been adopted in France when the *conseils juridiques* became a regulated profession. . . . Generally, the Brussels provisions allowed cooperations and partnerships between legal counselors existing on June 1, 1994 to become cooperations and partnerships under the ABA Agreement if appropriate entries on the A and B Lists were made or applied for prior to January 1, 1995.”

CONE, *supra* note 1, at 10:28.

267. Agreement, *supra* note 3, art. 12, para. 3.

268. *Id.* at art. 12, para. 2.

when the *jurist* moves back to Brussels.²⁶⁹

Without these "transition provisions" the Agreement probably could not have been completed. Unless it addressed the specific situations of the various lawyers and firms, the ABA negotiators undoubtedly would have lost the support of U.S. firms in Brussels, and thus lost their credibility. By the end of the negotiations, both sides appeared relatively satisfied. The Brussels Bars made available the names of Brussels lawyers who could offer advice to *stagiaires* and suggested that the training period could be adjusted to suit the more senior status of the *jurists*, some of whom had been practicing law for years.²⁷⁰

The final provision related to the "forms of association" was also controversial. One of the "Administration" provisions of the Agreement requires two actions from U.S. lawyers who form partnerships with *tableau* lawyers. They must first submit the agreement between the U.S. lawyer and the *tableau* lawyer concerning the formation of any partnership for approval to the Brussels Bar with whom they register.²⁷¹ The U.S. lawyers must then submit, for information purposes, the partnership agreement among themselves. Or if no written agreement exists, a written confirmation that the partnership agreement does not conflict with the provisions of their agreement with the *tableau* lawyers.²⁷²

According to ABA negotiator Joe Griffin, some Belgians had

269. *Id.* at art. 12, para. 4. Comparable to the other transition provisions discussed *supra* notes 267-68, this provision permits the U.S.-licensed Belgian *jurist* to become a partner of the U.S. firm after three years of cooperation, even if the *jurist* becomes a *stagiair* and even though a U.S. lawyer ordinarily cannot be partners with a *stagiair*. *Id.* This issue appears first to have been flagged in the cover letter accompanying the Feb. 11, 1994 ABA draft, *supra* note 109 (reporting telephone call from Belgian jurist resident in New York who was willing to comply with Agreement upon his return to Belgium, but who would not be able to satisfy *stage* until then and did not want this fact to disqualify lawyers in his firm from registering on B List or Joint List). At the end of the negotiations, the Brussels representatives indicated that they were concerned that this would be a large loophole. To the extent that few lawyers were involved, they suggested handling these cases on an *ad hoc* transitional basis. See Letter from Joseph P. Griffin, Agreement Negotiator, to Steven Nelson, Agreement Negotiator (May 19, 1994) (reporting concerns of Brussels representatives). Apparently the ABA representatives allayed these concerns because the provision remained in the Agreement.

270. See Letter from Carl Bevernage, Brussels Negotiator, to Steven Nelson, ABA Negotiator (July 26, 1994) (identifying representatives who could advise Belgian *jurists* and French order *stagiaires*).

271. Agreement, *supra* note 3, art. 8, para. 1.

272. *Id.*

heard stories of Belgian partners treated like second class citizens in foreign firms.²⁷³ Because the heads of the Brussels Bars retain the power under their rules to examine partnership agreements and intervene in the event of a dispute, some of the Belgians wanted this same power with respect to the partnerships between U.S. and Brussels lawyers.²⁷⁴ This prospect disturbed many of the U.S. lawyers. Joe Griffin stated that one of the U.S. lawyers in Brussels explained that he would not even show his partnership agreement to God.²⁷⁵ Some other U.S. lawyers in Brussels said their partnership agreements forbade them from showing the agreement to anyone, even their spouses.²⁷⁶ When the U.S. lawyers checked, however, they discovered that the Brussels Bars' rules did give them the right to see these partnership agreements.

After learning more about the concerns of the Belgians and the importance of this issue to some of the Belgian negotiators, the ABA negotiators agreed to this provision.²⁷⁷ The ABA negotiators based their agreement on the belief that the discrimination situation that concerned the Belgians would not arise often, if at all. Additionally, there was a safety valve in the form of the Joint Supervisory Committee. Finally, the negotiators knew that many firms would have a summary of their partnership agreement they submit for tax purposes that would be sufficient to satisfy the Belgian requirements.²⁷⁸ Finally, as shown in the "Im-

273. Griffin Feb. 18, 1997 Interview, *supra* note 96.

274. *Id.* The first draft submitted by the Brussels Bars stated: "Article 9 Submission to the Bar of cooperation and partnership agreements." See Jan. 14, 1993 Brussels draft, *supra* note 109. The ABA countered with a proposal that U.S. lawyers be permitted to provide written assurances that the partnership agreement does not contain any provisions that improperly discriminate against *tableau* lawyers or *stagiaires* and invited the Brussels Bars to provide a list of the substantive criteria against which they judged partnership agreements. See Mar. 2, 1993 ABA draft, *supra* note 109, art. 10. The ABA included this requirement in its next draft, however, and added a sentence that those firms without written partnership agreements could provide written assurances of non-discrimination. See May 14, 1993 ABA draft, *supra* note 109. The Brussels representative initially had a difficult time believing that some U.S. firms did not have a written partnership agreement, but ultimately agreed to the additional proviso. See Oct. 18, 1993 Brussels draft, *supra* note 109. Once an agreement in principle was reached, the drafting of the final agreement language was not controversial. See generally ABA/Brussels file, *supra* note 117.

275. Griffin Feb. 18, 1997 Interview, *supra* note 96.

276. *Id.*

277. *Id.*

278. *Id.*

plementation" section, this provision has not proven to be a great problem since the signing of the Agreement.

These provisions constitute the "forms of association" provisions in the Agreement. Judged from the perspective of the migrant U.S. lawyer, the Agreement contains among the most liberal forms of association provisions. For example, the forms of association provisions in the Agreement are certainly more specific than GATS because the GATS working party had not yet had the opportunity to develop standards for lawyers.²⁷⁹ The NAFTA legislation similarly lacks substantive content. The Agreement is substantially more liberal than even the pending NAFTA Model Rule which permits U.S. lawyers to form partnerships with Mexican lawyers, but requires Mexican lawyers to maintain the majority interest in such a firm.²⁸⁰ As a result, the pending NAFTA Model Rule would not permit U.S. firms to open a branch office with Mexican lawyers. The Agreement is also more liberal than the IBA's Rejected FLC Guidelines because the Agreement permits U.S. lawyers who are employees to work in a Brussels office, whereas the IBA's Rejected FLC Guidelines would have reserved to the Host State the right to prohibit this. The IBA Proposed General Principles are silent on this issue except for a general nondiscrimination provision.²⁸¹ Even the EU Establishment Directive allows EU Member States to prohibit lawyers from serving as salaried employees in a firm, provided the prohibition applies with equal force to the Host State's

279. See *supra* notes 40-43 and accompanying text.

280. See generally NAFTA Model Rule, *supra* note 55, at Rule 15(b); Hansen, *supra* note 55, at 19. As discussed *supra* note 55, joint recommendation of this Model Rule is being withheld pending a determination of the Mexican Government's position on these issues.

281. Compare *supra* note 204-05 and accompanying text (discussing "employees" exception under terms of Agreement) with IBA'S REJECTED FLC GUIDELINES, *supra* note 9, § H(2) and with IBA PROPOSED GENERAL PRINCIPLES, *supra* note 9, at II(B).

"[T]he rights and obligations of members of the legal profession regulated by the Host Authority, including permission to affiliate with a law firm with one or more persons who are fully licensed by the Host Authority only if and to the extent that they comply with, and are subject to, the same ethical and professional rules and standards as applied to fully licensed lawyers in the Host Jurisdiction."

See IBA'S REJECTED FLC GUIDELINES, *supra*. The comment provides that "Foreign Legal Consultants should be permitted to affiliate with local law firms as partners and/or employees, subject to regulation by the Host Authority and in a manner which preserves the independence of the legal profession of the Host Jurisdiction." *Id.*

lawyers.²⁸²

Interestingly, the Commission's first draft of the EU Establishment Directive was even more restrictive with respect to "forms of association." That early draft contained an "up or out" provision. This provision forced the established lawyer to integrate into the Host Profession after five years or leave the Host State. This "up or out" provision would certainly have disturbed existing office arrangements and forms of association. After vigorous objection, the Commission revised its proposal. The final EU Establishment Directive eliminated the "up or out" provision.²⁸³ Thus, the Agreement and the EU Establishment Directive are substantively similar in that both permit the migrant lawyer to practice indefinitely using the lawyer's Home State title, without completely integrating into the Host State's legal profession although the Establishment Directive makes full integration easy to accomplish.

In addition to their having similar underlying principles, many of the details of the Agreement and the EU Establishment Directive are similar. The EU Establishment Directive contains a "firm name and stationery" rule. It leaves to the Host State the decision whether to require the resident migrant lawyers to be identified and the legal form of the grouping to be mentioned.²⁸⁴ Like the Agreement, the EU Establishment Directive endorses the idea of multinational partnerships. It notes though, that a firm has to comply with the Host State's rules on branch offices and groupings, insofar as compliance therewith is justified by the public interest in protecting clients and third parties.²⁸⁵

The integrated approach to forms of association issues

282. Compare EU Establishment Directive, *supra* note 19, art. 8 (stating that "[a] lawyer using the home-state title in a Host State may practise as a salaried lawyer in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise to the extent that the host Member State so permits for lawyers registered under the professional title used in that State.") with *id.*, art. 11, para. 1 (noting that Article 11 permits joint practice in the same manner as in the Home State unless "incompatible with the fundamental rules laid down by law, regulation or administrative action in the host Member State . . . [provided] compliance therewith is justified by the public interest in protecting clients and third parties.").

283. See *supra* note 19 (discussing history of EU Establishment Directive); Hague Proceedings, *supra* note 20, at 429-30 (Remarks of John Toulmin, C.M.G., Q.C.) (summarizing relationship of CCBE Draft Directive and Commission draft directive).

284. EU Establishment Directive, *supra* note 19, art. 12.

285. *Id.* at art. 11.

found in the Agreement is similar to that found in the ABA Model FLC Rule. The ABA Model FLC Rule provides that FLCs may be partners with, employed by, or in turn employ, U.S. lawyers licensed in that jurisdiction.²⁸⁶ Moreover, because FLCs are subject to the same ethics rules as U.S. lawyers, the rules on firm names and stationery operate similarly to the provisions in the Agreement.²⁸⁷

In sum, the forms of association provisions in the Agreement appear to be among the more liberal provisions addressing these issues. Other than the obligation to submit one's partnership agreement, the forms of association provisions do not treat B List and Joint List lawyers substantially different than *tableau* lawyers. Indeed, with respect to the employment status of U.S. lawyers, the Agreement permits U.S. lawyers to do something which Brussels lawyers cannot do. What may be most notable about the Agreement, however, is the ability of the parties to negotiate the detailed "transition" or "grandfathering" provisions which attempt to address the concerns of all parties, while still reaching an agreement. The ability of the parties to compromise and to treat Belgian *jurists* differently depending on whether they were employed by, or partners in, U.S. law firms before the Agreement was signed, may be one of the Agreement's most interesting and creative aspects.

4. Miscellaneous Provisions

In addition to the scope of practice, "ethics and discipline," and "association" rules, the Agreement contains additional rules which can be characterized as "miscellaneous provisions." The Agreement provides, for example, guidance for the charging of fees. The Brussels Bars may charge B List lawyers fees that are "reasonable and comparable" to those charged to ordinary *tableau* Brussels lawyers and may charge Joint List lawyers "reasonably reduced fees."²⁸⁸

286. See *ABA Model FLC Rule*, *supra* note 10, § 5(b).

287. See *supra* note 260.

288. Agreement, *supra* note 3, art. 9, para 2.

For Joint List lawyers, the ABA initially proposed a "nominal" fee. See Mar. 2, 1993 ABA draft, *supra* note 109. Although the Brussels Bars initially questioned the term "nominal," see Apr. 30, 1993 Brussels draft, *supra* note 109, they accepted it in their June 17, 1993 Brussels draft. In the Heads of Agreement, however, the approach was much more general. The relevant paragraph did not distinguish between B List and Joint List lawyers and only said fees should be "reasonable." See generally ABA/Brussels file, *supra*

Another miscellaneous provision is the “non-discrimination” provision found in Article 10. Like the “non-discrimination” provision found in the “conduct and privileges” section,²⁸⁹ this provision stems from the early negotiations during which the Brussels Bars proposed that U.S. lawyers be treated substantially different than other foreign lawyers in Brussels.²⁹⁰ The ABA negotiators, echoing comments heard from the U.S. legal community in Brussels, insisted that U.S. lawyers not be treated disadvantageously in comparison with each other, in comparison with other non-EU firms, and even in comparison with lawyers and firms from EU countries.²⁹¹ The parties ultimately separated the single nondiscrimination clause contained in early drafts and placed it both in the “conduct and privileges” section and in its own section.²⁹² The current version of this section states that the rights of a U.S. lawyer under the Agreement, or otherwise, shall not be abridged by reason of nationality, professional qualification, or membership in a bar or legal profession of any third country.

Other miscellaneous provisions are found in the final section of the Agreement. They specify that all three language versions of the Agreement are authentic. They also note the date when the Agreement becomes effective and that the Agreement continues in force indefinitely unless and until terminated by either party upon one year’s written notice.²⁹³

Article 13, entitled “Reciprocity,” provides one reason why the Agreement might be terminated. The Agreement obligates

note 117. Although “nominal” was used in the May 6, 1994 ABA draft, *supra* note 109, the May 11, 1994 ABA draft, *supra* note 109, used the “reasonably reduced fees” language found in the final agreement.

289. Agreement, *supra* note 3, art. 10, paras. 1, 2.

290. See *supra* notes 221-22 and accompanying text.

291. See, e.g., Letter from U.S. firm in Brussels to Walter Oberreit, Agreement Negotiator (Oct. 26, 1992) (noting that agreement should contain “most favored nation”-type clause with respect to U.S. firms so that no U.S. firm could be treated better than any other U.S. firm); Mar. 2, 1993 ABA Draft, *supra* note 109, art. 4 (stating that “[t]he BRUSSELS BAR COUNCILS will afford U.S. Lawyers on Foreign Lawyer Lists, on a nondiscriminatory basis, the same rights and privileges as those to which members of the bars of Member States of the European Communities other than members of the BRUSSELS BAR COUNCILS are entitled; provided that”); Memorandum from Joseph P. Griffin and Steven C. Nelson, Agreement Negotiators, to U.S. Law Firms in Brussels (Oct. 29, 1992) (attaching list of issues given to Brussels group at October 29, 1992 meeting); accord Nelson Mar. 10, 1997 Telephone Interview, *supra* note 42.

292. See generally ABA/Brussels file, *supra* note 117.

293. Agreement, *supra* note 3, art. 14, paras. 1, 3.

the ABA to use its best efforts to ensure that Brussels lawyers have access to the U.S. legal market.²⁹⁴ The Agreement further provides that after a three year period, the Brussels Bars will be free to impose restrictions on U.S. lawyers from States without a Foreign Legal Consultant rule.²⁹⁵ Reciprocity often is a contentious issue when lawyers or countries attempt to negotiate cross-border practice agreements.²⁹⁶ Here too, much disagreement centered around the subject of reciprocity.²⁹⁷ The Agreement's

294. *Id.* at art. 13, para. 1.

295. *Id.* at art. 13, para. 2.

296. See generally CONE, *supra* note 1, at 1:14, 2:28-31. The IBA's REJECTED FLC GUIDELINES, which initially contained a "reciprocity requirement" abandoned this concept. This change was explained in the "Discussion and Analysis" section which accompanied the guidelines:

In light of the concerns expressed by numerous organizations, including the German Bar Association, the Netherlands Order of Advocates, the Norwegian Bar Association, the Belgian National Order of Advocates and the Swiss Bar Association, to the effect that (i) reciprocity was excluded from GATS, and (ii) liberalization of trade in legal services is unlikely to be promoted by a reciprocity requirement, this clause has been deleted from the current draft.

IBA'S REJECTED FLC GUIDELINES, *supra* note 9, at 14. The IBA PROPOSED GENERAL PRINCIPLES similarly omit any reciprocity requirement. IBA PROPOSED GENERAL PRINCIPLES, *supra* note 9. Interestingly, some U.S. commentators have concluded the opposite, namely that the lack of reciprocity requirement hinders rather than promotes liberalization of trade in legal services. See, e.g., Flores, *supra* note 2, at 179-80; see also Chapman & Tauber, *supra* note 2, at 970-71.

297. The topic of reciprocity was the subject of disagreement. The reciprocity provision first made its appearance approximately eight months into the negotiations in a rather cryptic note by the Belgians. See Apr. 30, 1993 Brussels draft, *supra* note 109 (stating that "ARTICLE 15 BELGIAN/BRUSSELS LAWYERS PRACTICING IN THE U.S.A. *Mutatis mutandis* offer draft model rules for the licensing of Foreign Legal Consultants"). The ABA counter-offered with a provision that would have stated, "[t]he ABA will make best efforts to persuade the bars of the states of the United States to adopt the provisions of any ABA recommendation on foreign legal consultants." See May 14, 1993 ABA draft, *supra* note 109. In subsequent drafts, the Belgians used the ABA language, but bracketed it to indicate that it required further discussion. See June 17 and Aug. 3, 1993 Brussels drafts, *supra* note 109. Then, in the first draft of the Heads of Agreement, the Belgians once again used language suggesting the ABA had the power to enact reciprocity provisions. See Sept. 13, 1993 Brussels draft (Bevernage), *supra* note 109. The ABA negotiators responded that they could not "agree to 'state-by-state' reciprocity, which [they] believe[d] [went] beyond what is reasonably needed to ensure the ability of Belgian lawyers to practice in the relevant states." The ABA's revised language opened the way for the "3 year review" period when it provided, "[t]he Agreement assumes the members of the Brussels Bar will continue to have reasonable and practical opportunity, either as legal consultants or full members of the State Bars in the United States to carry on the practice of law in commercially-important States such as New York which already permit such practice." See Sept. 18, 1993 ABA draft, *supra* note 109. Discussion ensued through many more drafts. The ABA ultimately helped end the deadlock when it suggested the three year review. See Sept. 22, 1993

handling of the issue is interesting because it postponed the evaluation of reciprocity until after the Agreement's existence for several years, perhaps postponing or avoiding entirely some of the battles that hampered other negotiations. Thus, it is unclear at this time whether this reciprocity provision will significantly affect the ability of U.S. lawyers to provide legal services in Brussels.

IV. IMPLEMENTATION OF THE AGREEMENT

The first, and probably most difficult, step to take to facilitate cross-border practice is reaching an agreement. But, as the EU experience has shown, implementation of any agreement can also raise problems.²⁹⁸ To date, the anecdotal evidence sug-

Brussels draft, Oct. 15, 1993 ABA draft, Oct. 18, 1993 Brussels draft, Oct. 19, 1993 ABA draft (proposing three year review), October 19, 1993 Brussels draft, Oct. 21, 1993 Brussels draft, December 15, 1993 ABA draft, Jan. 3, 1994 Brussels draft, Jan. 13, 1994 ABA draft, *supra* note 109.

298. Having legislation does *not* mean it will be implemented without question. Numerous issues arose over the years about the scope of the EU's Lawyers' Services Directive, the Diplomas Directive, and the right to establishment for lawyers (even in the absence of a directive). *See, e.g.*, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, [1996] 1 C.M.L.R. 603 (discussing suspension by Milan Bar Council of German lawyer with office in Milan; ECJ held, *inter alia*, that holding oneself out on stable and continuous basis from ongoing established base invokes establishment not services; that Host Member State conditions that may hinder establishment must fulfill four conditions; and that Member States must take account of equivalence of diploma and, if necessary, compare knowledge and qualifications required with those persons concerned); Vlassopoulou v. Ministerium für Justiz, Bundesund Europaangelegenheiten, Case C-340/89, [1991] E.C.R. I-2357, [1993] 2 C.M.L.R. 221 (noting Germany's refusal to recognize credentials of Greek lawyer practicing in Germany; ECJ ruled that Germany must examine to what extent knowledge and qualifications obtained correspond to those required by rules of Host State; Host State can ignore qualifications only if they did not satisfy "real and imperative" requirements); Kraus v. Baden-Württemberg, Case C-19/92, [1993] E.C.R. I-1663 (discussing German law graduate who used Scottish LL.M. degree without paying required fee to bar; ECJ held that use of postgraduate university degree obtained in another Member State may be subject to authorization proceeding proportionate to subject matter and restricted to verify propriety of grant of degree); Commission v. French Republic, Case C-294/89, [1991] E.C.R. I-3591, [1993] 3 C.M.L.R. 569 (explaining why ECJ struck down several of France's requirements implementing "in conjunction with" provision in Lawyers' Services Directive; opining, *inter alia*, that Member States may not require foreign lawyers: 1) to act in conjunction with local lawyer where lawyer's service is not mandatory or before non-judicial authorities; or 2) to retain local lawyers in order to conduct proceedings in civil cases where lawyer services are compulsory); Commission v. Germany, Case 427/85 [1988] E.C.R. 1123, [1989] 2 C.M.L.R. 677 (discussing that ECJ considered, *inter alia*, several points in Germany's regulations implementing "in conjunction with" requirement in Lawyers' Services Directive; first, provisions must be limited to

gests that the process of implementing the Agreement has been relatively satisfactory, if somewhat slow.

The Agreement calls for registration of all established U.S. lawyers within six months of the signing of the Agreement.²⁹⁹ When U.S. lawyers tried to comply with this provision, however, they discovered that the Brussels Bars' failed to develop the appropriate registration forms.³⁰⁰ Some U.S. lawyers who applied before the forms' development were told to simply send a letter requesting registration, which they did.³⁰¹ Ultimately, however, after consultation with U.S. lawyers, the Dutch and French Orders of the Brussels Bars jointly developed their registration forms.³⁰² According to one of the Joint Committee members,

enable foreign lawyer to comply with applicable procedural and ethical rules; second, provisions requiring constant presence of local lawyer during oral proceedings, with local lawyer assuming role as authorized representative, are disproportional and therefore incompatible with Treaty); *Gullung v. Conseil de l'Ordre des Avocats du Barreau de Colmar & Saverne*, Case 292/86, [1988] E.C.R. 111, [1988] 2 C.M.L.R. 57 (examining where France had denied admission to dual French and German national previously disciplined in France for violations of professional ethics, who thereafter became *rechtsanwalt* in Germany; ECJ rejected, *inter alia*, argument that Lawyers' Services Directive required France to recognize German license where licensed was denied for reasons relating to dignity, good reputation, and integrity); *Ordre des Avocats au Barreau de Paris v. Klopp*, Case 107/83, [1984] E.C.R. 2971, [1985] 1 C.M.L.R. 99 (examining Paris Bar's rejection of application of lawyer practicing in both Paris and Dusseldorf offices; ECJ held that Treaty forbids Host States from denying access solely on ground that he simultaneously maintains office in another Member State); *Thieffry v. Conseil de l'Ordre des Avocats a la Cour de Paris*, Case 71/76, [1978] E.C.R. 765, [1977] 2 C.M.L.R. 373 (discussing Belgian *avocat* excluded from Paris Bar after he passed French Bar exam and his Belgian law degree was recognized as equivalent by University of Paris; ECJ found this incompatible with establishment); *See Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* Case 33/74, [1974] E.C.R. 1299, [1975] 1 C.M.L.R. 298 (discussing Netherlands lawyer residing in Belgium who was denied right to appear in Netherlands court; ECJ held that national law cannot impose residency requirement in these circumstances and held that Articles 59 and 60 had direct effect). *Jean Reyners v. Belgian State*, Case 2/74, [1974] E.C.R. 631 (explaining how Belgium excluded lawyer from list who was Dutch national and otherwise qualified as Belgian lawyer; ECJ held, *inter alia*, that lawyer may not be prohibited from carrying on profession by reason of nationality in another EC Member State, and Treaty of Rome's exclusion for governmental authority did not exclude lawyers).

299. Agreement, *supra* note 3, art. 1, para. 1.

300. Griffin Feb. 14, 1997 Telephone Interview, *supra* note 94.

301. *Id.* Joe Griffin reported, for example, that when he sent his letter asking to register, he received a letter back telling him to consider himself registered. To his knowledge, no fee was requested or paid. *Id.*

302. Telephone Interview with Walter Oberreit, Agreement Negotiator (Mar. 3, 1997) [hereinafter Oberreit Mar. 3, 1997 Telephone Interview]. Mr. Oberreit indicated that he had commented on drafts of the registration forms before they were made final.

the forms appear daunting, but the Brussels Bars handle them in a very flexible manner.³⁰³

It appears that there is no easily accessible way of determining the numbers of U.S. lawyers who register with the Brussels Bars. The ABA maintains no such list.³⁰⁴ Nor does the list appear to be readily accessible from the Brussels Bars.³⁰⁵ At my request, Walter Oberreit estimated that as of March 1997, the Brussels Bars registered approximately eighty U.S. lawyers, virtually all of whom chose the B List.³⁰⁶ Mr. Oberreit observed that this figure of eighty lawyers represents a sharp increase over the handful of U.S. lawyers who had registered on the B List before the signing of the Agreement.³⁰⁷ He further estimated that this figure represented approximately fifty percent of the U.S. lawyers in Brussels.³⁰⁸ When queried as to the Brussels Bars' satisfaction with a registration percentage close to fifty percent, he indicated his belief of their satisfaction with the level of compli-

303. *Id.*; see Forms (Appendix B).

304. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

305. This author initially asked Joe Griffin how I could determine the number of U.S. lawyers who registered with the Brussels Bars. He was not sure and, at his suggestion, I contacted Walter Oberreit in Brussels. Among other things, I asked Mr. Oberreit if this information was publicly available. He indicated that it was not. Mr. Oberreit's figures came from conversations with officials of the Brussels Bars and he was not given precise numbers by the French Bar. See Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

306. *Id.* Mr. Oberreit reported that at his request, the Brussels Bars checked their files to come up with a number. He was advised by the Dutch Language Order of the Brussels Bar that 80 lawyers had registered on the B List, 36 of whom were U.S. lawyers. The French Language Order reported that 200 lawyers had registered on the B List, but that it could not report how many of these were U.S. lawyers. Based on these figures, the recent increase in registration on the B List, and the fact that the U.S. lawyers have encouraged relatively equal registration among the Dutch and French Bars, Mr. Oberreit estimated that 75 to 80 U.S. lawyers were registered on the B List. *Id.*

Although there is only one Joint List, a lawyer must register on it either through the French Order or the Dutch Order. By March 1997, no lawyers had registered on the Joint List via the Dutch Order; three U.S. lawyers had registered on the Joint List via the French Order. See Letter from Walter Oberreit, Agreement Negotiator, to author (Mar. 4, 1997) (on file with the *Fordham International Law Journal*).

307. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

308. *Id.* Mr. Oberreit suggested that to estimate the percentage of U.S. lawyers in Brussels registered, I compare the number 80 with the listings in the 1997 Martindale-Hubbell listing for Brussels, scheduled to be released in March 1997. He indicated that prior Martindale-Hubbell directories would be less useful since "things change very quickly" regarding U.S. lawyers practicing in Brussels.

Before the Agreement was signed, U.S. negotiators predicted that most U.S. lawyers would register. See Stewart, *supra* note 71 (quoting Walter Oberreit as saying he was "confident that most American firms will register once the rules are in effect.").

ance under the Agreement.³⁰⁹ The Brussels Bars apparently recognize that some U.S. lawyers not yet registered may do so at some point in the future when Belgian *jurists* in their firms retire.³¹⁰ Thus, while not all Belgian *jurists* affiliated with U.S. firms registered on the list of *tableau* lawyers or *stagiaires*, many *jurists* have.³¹¹

One of the most interesting things, according to Walter Oberreit, is that in light of the Agreement the Brussels Bars revised their B List forms for all lawyers, not just U.S. lawyers.³¹² Hence, although there are some differences for U.S. lawyers, the Brussels Bars generally treat all the lawyers on their B List in a manner similar to that negotiated in the Agreement for U.S. lawyers.³¹³ Furthermore, he reports that it is the Agreement, rather than the Agreement with the Law Society of England and Wales, that served as the model for the B List revisions.³¹⁴

In short, the Agreement appears relatively effective in facilitating registration on the B List. Judging by the results, the conditions in the Agreement are apparently more acceptable to U.S. lawyers than the conditions placed on the prior B List. In contrast, the Agreement appears less effective in encouraging registration on the Joint List by U.S. lawyers with no desire or need to be on the B List. Unless the U.S. lawyers have something to gain from registration, they appear not to be following the Agreement, which, after all, is not binding because of the ABA's lack of authority to bind all U.S. lawyers.³¹⁵

309. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

310. *Id.* If, for example, a firm had a senior Belgian *jurist*, who did not want to sit for the Belgian Bar exam, the choices facing the lawyers in the firm would be to remove the Belgian *jurist* from the firm or wait until the Belgian *jurist* retires to register. Obviously, in this situation, the U.S. lawyers might prefer to wait before registering on the B List.

311. *Id.*

312. *Id.*

313. *Id.*; *accord* Letter from Marc van der Haeger, President of the French Order of the Brussels Bar, to Steven Nelson, Agreement Negotiator (Jan. 27, 1995) (on file with the *Fordham International Law Journal*). "[T]he [French] Bar has decided to apply the principles of the ABA agreement to all foreign lawyers established in Brussels in order to preserve equal treatment and to facilitate all future registrations on the Foreign Lawyer List and the Joint List." It will be interesting to observe whether the Brussels Bars change the B List rules for EU lawyers because of the adoption of the EU Establishment Directive.

314. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

315. See *supra* note 308 and accompanying text; *accord* Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

The Agreement permits the Brussels Bars to charge a fee in connection with registration. With respect to B List lawyers, the fees are to be "reasonable and comparable to those charged by the Orders to *Tableau* Lawyers and *Stagiair[e]s* of equivalent seniority."³¹⁶ The Agreement appears to permit the Orders to charge reasonably reduced fees to U.S. lawyers on the Joint List. The Brussels Bars initially set the fees for B List lawyers at a rate comparable to that paid by the most senior *tableau* lawyers.³¹⁷ After protest by the English, however, the Brussels Bars revised these fees.³¹⁸ The revised fees are now set according to the seniority of the B List lawyer as measured by the number of years the lawyer has been admitted to any bar.³¹⁹ The current fees for the B List range from BEF 15,000 to 25,000. The Dutch Order charges the same fees for registration on the Joint List as on the B List whereas the French Order charges a reduced flat fee of BEF 8,000.³²⁰ Although Mr. Oberreit heard no complaints from US lawyers about the level of these fees, he suspects that these fees may contribute to the reasons why certain U.S. firms remain unregistered on the B List.³²¹

The Agreement itself contained a section entitled "Implementation." Among other things, this Implementation section established a Joint Supervisory Committee that was assigned several tasks. The Joint Supervisory Committee was to monitor the

316. Agreement, *supra* note 3, art. 9, para. 1.

317. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

318. *Id.*; see also *Lawyers' Fury Over Brussels 'Tax'*, THE LAWYER 9, Mar. 28, 1995, at 5 (reporting British law firms' protest over proposals to charge up to £400 per lawyer per office for registration on foreign lawyer list, noting that British expected fees on "C List" to be around £30 per person); *Brussels: UK firms protest over Brussels 'fees'*, INT'L LAW., May 1995, at 3.

The fact that English lawyers were the ones protesting might strike some as ironic. According to a report prepared by the ABA Section on International Law and Practice, if a law firm with which a lawyer is affiliated has a practice in England and wishes to add a partner who is an English solicitor, all partners in the firm, regardless of location, must register with the Law Society and pay a substantial registration fee. The result can be annual fees for the law firm in excess of US\$100,000. *ABA Model FLC Rule*, *supra* note 10, at 234 n.71.

319. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

320. See Letter from Walter Oberreit, Agreement Negotiator, to author (Mar. 4, 1997) (on file with the *Fordham International Law Journal*). As of May 1, 1997, the exchange rate for the Belgian franc was approximately 35 BEF/US\$1. See N.Y. TIMES, May 1, 1997, at D15. Therefore, computed at this exchange rate, the fees for B List lawyers range from US\$420 to US\$700; the fees for Joint List lawyers are equivalent to US\$224.

321. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

implementation and observance of the Agreement and attempt to resolve any problems or issues arising in connection with its implementation.³²² It was to consider any adaptations or revisions of the Agreement that may be required by reason of any changes in applicable law, regulations, intergovernmental agreements, or other circumstances beyond the control of the Orders or the ABA.³²³ It was to review the Agreement in light of actual experience after it had been in operation for three years.³²⁴ The Joint Supervisory Committee also was to provide consultation to the Orders in connection with disciplinary matters involving U.S. lawyers.³²⁵

The Belgians identified six individuals as members of the Joint Supervisory Committee.³²⁶ U.S. members of the Joint Supervisory Committee include Steven Nelson, Joseph Griffin, Walter Oberreit, and Paul Sher, all of whom were among the negotiators of the Agreement.³²⁷ The ABA did not develop any special procedures for the appointment, retention, or rotation of the U.S. members of this committee.³²⁸ Rather, the ABA's Special Advisory Committee on International Activities selected as the Joint Committee members several of the Agreement negotiators because of their extensive contacts with their Belgian counterparts and the relationship of trust that had evolved.³²⁹ The Joint Committee met one time, for dinner, after the signing of the Agreement.³³⁰

The monitoring required by the Agreement has been passive rather than active, but the U.S. members of the Joint Supervisory Committee assume that, given the size of the U.S. legal community in Brussels, they would hear if U.S. lawyers had any

322. Agreement, *supra* note 3, art. 11, para. 3.

323. *Id.*

324. *Id.*

325. *Id.* at art. 7, para. 3.

326. See Letter from Karel Van Alsenoy, *Stafhouder* of the Dutch Order of the Brussels Bar, and Georges-Albert Dal, *Bâtonnier* of the French Order of the Brussels Bar, to the President of the ABA (unidentified) (Jan. 25, 1995) (on file with the *Fordham International Law Journal*). These individuals include: Georges-Albert Dal, Karel Van Alsenoy, Francois Glansdorff, Carl Bevernage, Marc van der Haegen (with the substitute Lucette Defalque), and Jacques Steenbergen (with the substitute Jozef Sloomans).

327. Griffin Feb. 14, 1997 Telephone Interview, *supra* note 94.

328. *Id.*

329. *Id.*

330. Griffin Feb. 18, 1997 Interview, *supra* note 96.

problems with the Agreement.³³¹ One of the Joint Committee Members, Joe Griffin, described fellow Committee member and longtime Brussels practitioner Walter Oberreit as their “early warning system.”³³²

Only one incident came to the attention of the U.S. members of the Joint Committee.³³³ After a U.S. lawyer registered on the B List in early 1996, the Brussels Bar with whom he registered asked him to complete the registration form’s section requiring details of the *cabinet*, or office, of the *avocat* with whom he was established. The Bar then requested a copy of the firm’s agreement with the Belgian lawyer. The inquiring lawyer was concerned about providing the document because it included compensation levels for the Belgian lawyer. The lawyer sought advice from Joint Supervisory Committee Member Joe Griffin and information about how other lawyers handled such a request. Joe Griffin responded with an explanation of the negotiating history of the “partnership” provision. Although he noted that in his view, the Agreement did not require production of an agreement in the absence of partnership with a Belgian lawyer, he nevertheless encouraged the lawyer to turn over details of the agreement with the Belgian lawyer. He pointed out that the ABA had been assured of confidentiality, that Belgian firms routinely turned over these documents, and that the Bar’s concern was discrimination against Belgian lawyers.

At Mr. Griffin’s request, the inquirer then spoke with Walter Oberreit, another Joint Committee Member. Mr. Oberreit knew of no other inquiries of this sort. He recommended that the inquirer not “make a big deal out of it,” but “white out” the compensation levels and ensure the clarity of the “independence notwithstanding employment” provisions. Accordingly, the inquirer stated his intention to prepare a short form summary of the agreement, to be signed by the Belgian lawyers. As far as Joe Griffin recalls, this solution proved satisfactory.³³⁴ Committee representatives report that they have not heard of any other problems or concerns with respect to the partnership agreement

331. *Id.*

332. *Id.*

333. See generally ABA/Brussels file, *supra* note 117.

334. Telephone Interview with Joseph Griffin, Agreement Negotiator (May 1997).

provision.³³⁵

In addition to monitoring the implementation of the Agreement and attempting to resolve any problems, the second obligation of the Joint Committee is to monitor changes in applicable law, regulations or intergovernmental agreements requiring revisions in the Agreement. As far as the U.S. Joint Committee members know, there have been no such changes.³³⁶

The third obligation of the Joint Committee is to review the Agreement in light of actual experience after its operation for three years.³³⁷ The Joint Supervisory Committee members believe that the Brussels Bars are pleased with the Agreement and its manner of implementation.³³⁸ No formal three year review occurred, although both sides have indicated a desire to schedule a meeting in the future. ABA representatives indicate that they have no reason to believe that the Brussels Bars are displeased with the Agreement.³³⁹

The fourth obligation of the Joint Committee is to be available for consultations in connection with any disciplinary matters. The U.S. Committee members have not been consulted in

335. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302; Nelson Mar. 18, 1997 Telephone Interview, *supra* note 55.

336. Griffin Feb. 18, 1997 Interview, *supra* note 96. The U.S. Committee representatives may soon want to evaluate whether any changes are necessary in light of the adoption of the EU Establishment Directive, *supra* note 19. Walter Oberreit indicated that a B List Lawyers' Committee, of which he is one of two U.S. representatives, has suggested to the Brussels Bars that the stationery provisions in the EU Establishment Directive are different than and less informative than the Brussels Bars' own rules. The B List Lawyers' Committee has suggested that Belgium may want to adopt implementing legislation that requires the B List lawyers to follow the current Brussels rules concerning stationery. See Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

337. Agreement, *supra* note 3, art. 11, para. 3.

338. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302; Nelson Mar. 10, 1997 Telephone Interview, *supra* note 42.

339. Griffin Feb. 18, 1997 Interview, *supra* note 96; Nelson Mar. 18, 1998 Telephone Interview, *supra* note 42. The Agreement provides that "[t]he Committee will in any event review this Agreement in light of actual experience after it has been in operation for three years." Agreement, *supra* note 3, art. 12, para. 3. According to Mr. Griffin, two and a half years into the Agreement, no specific arrangements had been made for the three-year review. *Id.* Mr. Oberreit had speculated that it was quite possible that neither side would initiate the three year review. See Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302. Although the three year period has passed, Steve Nelson believes such a meeting will occur in the near future. See Nelson Mar. 18, 1998 Telephone Interview, *supra* note 55.

connection with any disciplinary matters.³⁴⁰ Furthermore, Walter Oberreit believes that he would hear something if any disciplinary matters involving U.S. lawyers existed.³⁴¹

In addition to the provisions related to the Joint Committee, the Agreement requires both the ABA and the Brussels Bars to take certain steps to further implement the Agreement. For example, the Agreement requires the Brussels Bars to provide any necessary derogations from their rules.³⁴² On January 27, 1995, the French Language Order of the Brussels Bar advised the U.S. members of the Joint Supervisory Committee that it, and the Dutch Order, made the necessary changes to their rules and enclosed a copy of these changes.³⁴³ This representative further advised that "the Bar has decided to apply the principles of the ABA agreement to all foreign lawyers established in Brussels in order to preserve equal treatment and to facilitate all future registrations on the Foreign Lawyer List and the Joint List."³⁴⁴

The Agreement also requires the Brussels Bars to "use their best efforts to persuade the relevant Belgian authorities to conform existing and future professional cards of U.S. Lawyers to the provisions of [the] Agreement."³⁴⁵ U.S. representatives do not have information as to steps the Brussels Bars' officials took to comply with this provision, but they are also not aware of any

340. Griffin Feb. 18, 1997 Interview, *supra* note 96; Nelson Mar. 18, 1998 Telephone Interview, *supra* note 55.

341. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302. Mr. Oberreit indicated that he would not have heard about situations if the *bâtonnier* or *stafhouder* simply called a U.S. lawyer to suggest that the U.S. lawyer had violated the Bar rules, such as the advertising rules. This type of interaction would remain private, provided the U.S. lawyer complied. But Mr. Oberreit is sure he would have heard about any situation in which the Bar wanted to pursue discipline. *Id.*

342. Agreement, *supra* note 3, art. 11, para. 1.

343. See Letter from Marc van der Haeger, President of the French Order of the Brussels Bar, to Steven Nelson, Agreement Negotiator (Jan. 27, 1995) (on file with the *Fordham International Law Journal*); see also Griffin Feb. 18, 1997 Interview, *supra* note 96.

344. Letter from Marc van der Haeger, President of the French Order of the Brussels Bar, to Steven Nelson, Agreement Negotiator (Jan. 27, 1995) (on file with the *Fordham International Law Journal*); see generally Nederlandse Orde van Advocaten, Guidelines and Information Concerning the Registration of Foreign Lawyers in Belgium and With the Brussels Bar (May 22, 1996), *supra* note 86.

345. Agreement, *supra* note 3, art. 11, para. 1. As mentioned in Section II(A), *supra* notes 74-76 and accompanying text, in addition to registering with the relevant Belgian Order, U.S. lawyers practicing in Belgium also need a work permit (or "professional card") from the Belgian Government.

complaints by U.S. lawyers in Brussels.³⁴⁶

In addition to imposing duties upon the Brussels Orders, the Agreement requires the ABA to take certain steps. The required steps include urging U.S. lawyers to comply with the terms of the Agreement.³⁴⁷ After the finalization of the Agreement, the ABA negotiating team advised U.S. lawyers practicing in Brussels of that fact and urged them to register.³⁴⁸ As noted earlier, the number of registered U.S. lawyers increased significantly, although the numbers currently fall far short of the Agreement provision that all U.S. lawyers established in Brussels register.³⁴⁹

The Agreement also contains something that amounts to a reciprocity provision. This provision, which was also the subject of negotiation, requires the ABA to use its best efforts to ensure that Brussels lawyers have a reasonable and practical opportunity to practice in the United States as either Foreign Legal Consultants or full members of the state bars.³⁵⁰ The ABA efforts to satisfy this provision are twofold. First, the ABA considers that its promulgation and ongoing endorsement of the Model Rule for the Licensing of Legal Consultants satisfies this provision.³⁵¹ Second, the ABA asked the Brussels Bars to advise them if they have any particular complaints or if there is any particular state with which they are having problems, so that the ABA may negotiate more directly with that state.³⁵² To date, the ABA has received no complaints.³⁵³ Hence, although the Agreement permitted it,³⁵⁴ the Brussels Bars have indicated no intention to im-

346. Nelson Mar. 10, 1997 Telephone Interview, *supra* note 42; Nelson Mar. 18, 1998 Telephone Interview, *supra* note 55.

347. Agreement, *supra* note 3, art. 11, para. 2.

348. Griffin Feb. 18, 1997 Interview, *supra* note 96.

349. See *supra* note 308 and accompanying text.

350. Agreement, *supra* note 3, art. 13. See *supra* notes 294-97 (discussing legislative history of this reciprocity requirement). One commentator has stated that this reciprocity provision is "in seeming potential violation of GATS." CONE, *supra* note 1, at 10:29. When questioned about this, one of the ABA negotiators dismissed this point by noting that the Agreement is not between governmental entities. Griffin Feb. 18, 1997 Interview, *supra* note 96.

351. Griffin Feb. 18, 1997 Interview, *supra* note 96.

352. *Id.*

353. *Id.*; Nelson Mar. 18, 1997 Telephone Interview, *supra* note 55.

354. Agreement, *supra* note 3, art. 13, para. 2. This paragraph notes that the Brussels Bars' ability to impose restrictions is "without prejudice to the rights and freedoms of U.S. lawyers and their law firms then established in Brussels." This last clause presumably means that such restrictions could only be imposed prospectively on new U.S.

pose restrictions on U.S. lawyers.³⁵⁵

In discussing implementation issues, a natural question is whether the Agreement has had any practical effect on lawyers' lives. The anecdotal evidence suggests that although the Agreement prompted small changes, it probably has not changed U.S. lawyers' lives significantly. Some firms undoubtedly changed their stationery in light of the Agreement and registration on the "B List."³⁵⁶ Some firms saw changes with respect to their Belgian partners, employees, or lawyers with whom they cooperate, some of whom began the *stage* or training session.³⁵⁷ Some firms changed the manner in which they attribute any advice on Belgian law.³⁵⁸ Walter Oberreit speculates that those U.S. lawyers registered on the B List may be more attentive to the Brussels Bars' rules on advertising, especially the bans on references to specialization or specific clients.³⁵⁹ Otherwise, however, U.S. lawyers advise that there are no notable changes in U.S. lawyers' behavior attributable to the fact that lawyers are now subject to the Brussels Bar's ethics rules.³⁶⁰

Although not truly an implementation issue, it is interesting to inquire about the familiarity with this Agreement on the part of Brussels lawyers not involved with U.S. law firms, and U.S. lawyers outside of Brussels. The answer appears to be "not very familiar, if at all." The existence of the Agreement was not widely

lawyers coming in from those states without an FLC rule. This interpretation is confirmed by one of the Agreement negotiators. See Nelson Mar. 10, 1997 Telephone Interview, *supra* note 42.

355. Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302; Nelson Mar. 10, 1997 Telephone Interview, *supra* note 42; Nelson Mar. 18, 1997 Telephone Interview, *supra* note 55. See Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 *FORDHAM INT'L L.J.* 1501 (1998) (providing detailed discussion of status of *ABA Model FLC Rule*).

356. See generally ABA/Brussels file, *supra* note 117.

357. *Id.* Steve Nelson, for example, reports that as a result of the Agreement, his firm of Dorsey & Whitney has formed partnerships and cooperations with Belgian lawyers. See Nelson Mar. 10, 1997 Telephone Interview, *supra* note 42.

358. Walter Oberreit advised me that he does not know how U.S. firms are responding to Article 4, paragraph 2 of the Agreement concerning citation of Belgian lawyers as the source of Belgian law. The Agreement provides multiple methods of attribution including a signature line and reference in the text to the Belgian lawyer upon whom the U.S. lawyer has relied. See Oberreit Mar. 3, 1997 Telephone Interview, *supra* note 302.

359. *Id.*

360. *Id.*

reported in the United States.³⁶¹ Indeed, as far as I know, the entire Agreement has never before been publicly published. My own experiences convince me that the relatively few academics who are familiar with cross-border legal services generally were unfamiliar with the Agreement until they learned of it at recent AALS Conferences.³⁶²

The Agreement seems to be similarly unfamiliar in Brussels, except to those directly involved in its negotiation or implementation. Joe Griffin believes that most "rank and file" Brussels lawyers are unaware of the Agreement. According to Mr. Griffin, the Brussels leaders who negotiated the Agreement took no extraordinary steps to publicize the existence of the Agreement. Mr. Griffin suspects that the Agreement might prove controversial with many of the "rank and file" Brussels lawyers.³⁶³

In sum, there probably are many different perspectives from which one can examine implementation issues. On the one hand, the Agreement could be said to be remarkably successful in the sense that both parties appear pleased with it and it has created no significant problems. Alternatively, the Agreement might be considered a success insofar as it provided a framework for regulating foreign lawyers in Brussels, and insofar as that framework is the result of significant negotiation and give and take and thus addresses many of the parties' needs. Alternatively, one probably could call the Agreement less than successful if one compared the fifty percent registration rate with the

361. See Stewart, *supra* note 71 (discussing Agreement); See also *U.S. Lawyers*, *supra* note 71 (reporting on Agreement).

362. The Agreement was very briefly discussed at two AALS Annual Meeting Programs. See *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility and International Business Law*, presentation at the Association of American Law Schools Annual Meeting, Joint Program of the Sections of International Law, Professional Responsibility and cosponsored by the Sections on Comparative Law and Graduate Programs for Foreign Lawyers (Jan. 1997); *Providing Legal Services Across Borders - Challenges for North American Lawyers and Lessons from European Experience*, presentation at the Association of American Law Schools Annual Meeting, Joint Program of the Sections on North American Cooperation and Graduate Programs for Foreign Lawyers (Jan. 1996).

363. One can only speculate as to the reasons why such "rank and file" members might object to the Agreement. Historically, however, lawyers appear to have objected to cross-border practice both out of concerns for client protection and integrity of the legal protection, as well as out of concerns for protecting their own market share. See generally Chapman & Tauber, *supra* note 2, at 951-54 (summarizing justifications offered against liberalization of legal profession); *Transnational Law Practice*, *supra* note 2, at 750-62.

stated requirement that all U.S. lawyers established in Brussels register. Moreover, for the fifty percent of U.S. lawyers not yet registered, one does not know if this failure is due to a perception that the Agreement fails them. In short, only time will tell which perspective prevails.

V. *ANALYZING THE STRENGTHS AND WEAKNESSES OF THE HYBRID MODEL FOR FACILITATING CROSS-BORDER LEGAL PRACTICE*

Because the efforts at regulating cross-border legal practice are relatively few and far between, it is useful to evaluate the strengths and weaknesses of any such agreement, in an effort to learn more about which models are or are not successful. This Agreement's hybrid model illustrates several strengths. One of the first strengths of this approach is the fact that the Agreement exists. In comparison to GATS, NAFTA, the IBA, and the EU, the Agreement is successful in that the parties were able to agree on specific terms in a relatively short time. Whereas GATS and NAFTA left specific agreement on provisions to a later time, the Agreement worked out details on the scope of practice, forms of association, and ethics and discipline issues. Moreover, even though the EU recently adopted an Establishment Directive, this Directive required many years to develop.³⁶⁴ In contrast, the Agreement was negotiated within approximately two years of the date the Brussels Bars first approached the ABA.

The second advantage of this hybrid model, as reflected by the Agreement, is that it serves as a framework for a much broader agreement. After the Brussels Bars negotiated the Agreement, they used it as a framework for revising their B List rules, which apply to all foreign lawyers. Thus, if one attributes the successful and relatively quick negotiations to the fact that it was a bilateral, rather than multilateral agreement, this framework permits one to achieve a multilateral result through more efficient bilateral negotiations.

A third advantage of this hybrid approach is that it works. A review of the negotiation file reveals that the parties engaged in vigorous face to face exchanges on all issues. This give and take

364. If one measured from the date of the Treaty Establishing the European Economic Community, commonly known as the Treaty of Rome, then the Establishment Directive has been almost 40 years in the making. *See supra* note 19.

occurred both as to general principles, as well as to specific drafting language. Consequently, by the time of the Agreement's approval, each side had fully aired its position, understood the concessions given and benefits obtained, and was willing to live with them. Thus, to my surprise, issues that had been the subject of heated debate in the negotiation stage appear to be "nonissues" in the implementation stage. While all issues may not be completely resolved from an analytic perspective, the pragmatic and flexible approach taken in the Agreement seems to work.

Moreover, to the extent that issues arise in the future, the parties will address them at a time period in which they will know even more about each other, will have built up a reservoir of trust, and presumably will be in a better position to address each others' concerns. In this respect, this hybrid model reminds me of Austria's approach to the issue of implementing the CCBE Code of Conduct. Although the CCBE Code, by its terms, requires the signatory parties to "implement" it into national law, the Austrian approach was to publish the CCBE Code next to the Austrian regulations governing lawyers. One of the Austrian representatives to the CCBE advised me that he thought the better approach was to publicize the CCBE Code in Austria so that lawyers became familiar with it, and worry about officially adopting it later.³⁶⁵ Walter Oberreit, for example, mentioned that those U.S. lawyers who had been in Brussels in the "old days" when the Bar was hostile to U.S. lawyers felt somewhat apprehensive about the Agreement because they believed that the Brussels Bars might be tempted to abuse their discretion under the Agreement. They have not seen, however, that the Bars take pride in what they perceive as their progressive approach towards foreign lawyers. If a track record of trust and cooperation can be developed, these U.S. lawyers presumably will be more understanding and trusting of the Brussels Bars if and when a problem arises.

365. In this respect, this hybrid model reminds me of Austria's approach to the issue of implementing the CCBE Code of Conduct. Although the CCBE Code, by its terms, requires the signatory parties to "implement" it into national law, the Austrian approach was to publish the CCBE Code next to the Austrian regulations governing lawyers. One of the Austrian representatives to the CCBE advised me that he thought the better approach was to publicize the CCBE Code in Austria so that lawyers became familiar with it, and worry later about officially adopting it. See *CCBE Code, Part II, supra* note 11, at 384-85.

Another advantage of the hybrid model is that those who were living the situation negotiated the provisions. Their real world experiences made the Agreement more realistic and more likely to be accepted. One might contrast this approach with the approach reflected in the EU Commission's first draft of the Establishment Directive. This Draft, which rejected the approach negotiated by the CCBE, contained several provisions with which a majority of EU lawyers simply could not live. As a result, the draft languished for several years before its revision and adoption.

In short, the hybrid model illustrated by the Agreement appears to have many advantages and to be a model worth considering when faced with the issue of the appropriate regulation of cross-border legal practice. This model, however, is not without its weaknesses.

One of the weaknesses of this approach is that access to information may be limited during the negotiation period. While the ABA/Brussels file certainly reflects many efforts on the part of the ABA negotiators to keep the U.S. legal community in Brussels apprised of developments, the file also reveals at least a few attorneys who felt that decisions were being presented to them without their input or approval. This criticism, however, probably could be made of all the models because they all, in one form or another, are negotiated through representatives.

Agreements negotiated under this hybrid model might also be criticized because of the fact that they are negotiated by the interested parties. Two diametrically opposed criticisms could be made based on the identity of the negotiating parties. On the one hand, one commentator suggested that in the GATS context, the ABA negotiators did not represent themselves particularly effectively.³⁶⁶ On the other hand, one might have concerns that the Agreement does not adequately protect clients' inter-

366. See CONE, *supra* note 1, at 2:3.

[T]he ABA . . . had functioned as both client and its own lawyer and, in its dealings with the governmental trade negotiators, had not taken the rather obvious step . . . of hiring trade lawyers on a professional basis to represent it in the negotiations. One function of these lawyers would be to stay close to the negotiations and to anticipate and avert surprises. Admittedly, hiring lawyers costs money, but the handlers of ABA policy might have been thought sympathetic to that feature of legal practice.

Id.

ests, but protects the lawyers' interests instead. In other words, the interested parties represented themselves too effectively, rather than not effectively enough.³⁶⁷ For example, with respect to the issue of whether U.S. lawyers would wait three years before becoming partners with *tableau* lawyers, neither side seemed to be discussing this issue from the perspective of the clients' interests, which presumably should be one of the leading justifications for regulation.³⁶⁸ A related problem is that if the negotiations are handled by the parties who are directly and immediately involved, they may look at the issues from an immediate gain perspective, rather than taking the larger and longer view. For example, other EU countries are reportedly unhappy with the Brussels Bars because they believe that they should not have "agreed to disagree" on the issue of whether U.S. lawyers can advise on EU law.³⁶⁹ They believe there is no room for reasonable minds to disagree on this issue. A party to a hybrid model Agreement might be willing to compromise in order to get an agreement it desires, even if such compromise is inappropriate.

On the other hand, this weakness might be present with other models as well. For example, some commentators have suggested that the U.S. Government GATS negotiators improperly "sold out" lawyers when they agreed, at the eleventh hour, to a deal in which lawyers' interests were compromised for the sake of agreement on something else.³⁷⁰ What is worse was the sense that lawyers were traded away for something insignificant.

Another criticism of the hybrid model is that the final product may be limited by the number of perspectives heard in the negotiations. If the process is relatively closed, this lack of input may lead to weaknesses in the agreement. The "rank and file" Belgians, for example, reportedly had little knowledge or input into the final Agreement. While their viewpoints may have been voiced by others, the actual voices of these lawyers might have

367. See generally *Transnational Legal Practice*, *supra* note 2, at 752.

368. The ABA representatives opposed the waiting period because it "would place American law firms in Brussels at a competitive disadvantage with EC law firms, particularly the Brussels offices of London solicitors." The Brussels representatives "replied that the Brussels bar thinks it need the waiting periods to protect it against U.S. firms which otherwise would attract the best talent at the Brussels bar. . . ." See Memorandum from Sydney Cone, Attendee at August 8-9, 1993 Meeting, to ABA Negotiators (Aug. 23, 1993) (summarizing meeting).

369. See *supra* note 191.

370. See Dillon, *Unfair Trade?*, *supra* note 30.

brought something new to the negotiations. Similarly, some U.S. lawyers criticized the negotiations because they did not include the Belgian *jurists*, who would be affected by the Agreement. While the ABA negotiators had reasonable explanations about why the negotiations did not include the *jurists*, those individuals might have contributed a perspective, and a worthwhile change in the Agreement. At a minimum, these *jurists* might have had less of a tendency to feel disenfranchised if the negotiations had included them.

Once again, however, one must query how much better the other models are on this point. Even in government to government negotiations, the number of voices heard and considered may be in direct proportion to the efforts of the negotiators. For example, although the U.S. Trade Representative certainly solicited lawyer input on GATS, I have seen at least one letter asking ABA representatives to comment on a draft position within one week's time. Certainly the number of perspectives one can obtain during that time period is limited. Moreover, I suspect that if you ask the "rank and file" U.S. lawyer about GATS, and whether their input was solicited, most do not even know that GATS exists. Moreover, the agendas of the negotiators in a government to government model may not be the interests of the client or another otherwise acceptable agenda. One can imagine a goal of either "getting a deal, any deal" or "getting a deal on widgets, which are viewed as more important than lawyers or clients."

Another criticism of the Agreement's hybrid model might be the imprecision of the terms. When one looks at the Agreement, one certainly notes places where there is no Agreement or the Agreement is imprecise. Because this is a bilateral agreement, it is possible that the parties may be willing to tolerate more ambiguity than they would with a multilateral agreement. On the other hand, to the extent that ambiguity is a function of compromise, it is possible that ambiguity is more likely to arise in a multilateral agreement than in a bilateral agreement. For example, the EU Establishment Directive permits a visiting lawyer to appear in court in cooperation with a lawyer from the Host State. The European Court of Justice ultimately declared Germany and France's implementation of this provision uncon-

stitutional.³⁷¹ The Agreement has a similar "cooperation" provision. This language, however, went through many drafts and refinements. To date, there have been no problems with the implementation of this provision. Thus, it may be, that the greater dialogue possible with a bilateral agreement will result in fewer ambiguities than one otherwise would have.

On a related point, it may be that the hybrid model, such as that reflected by the Agreement, is in effect simply an illusory agreement. The ABA in fact gave very little, if anything, in return for the changes made by the Brussels Bars. Additionally, the ABA's promise in the Agreement that "all" U.S. lawyers established in Brussels register turned out to be an empty promise because only fifty percent of U.S. lawyers registered.

On the one hand, although the hybrid model may be an illusory contract, that does not make it worthless. The Brussels Bars reportedly are content with the improvement in registration. Moreover, the Agreement serves as a framework for further changes and additional registrations of other lawyers. Thus, it may be that an "illusory" approach, which eases into things, has distinct advantages. In some situations, however, this illusory approach may not be desirable to all parties.

A final weakness of the hybrid approach may be that it is more likely to yield piecemeal results, rather than an agreement negotiated on a government to government basis as part of an overall package. U.S. lawyers in Japan, for example, remain dissatisfied with the progress made in their negotiations with the Japanese Bar. They undoubtedly welcome the leverage available through government to government negotiations. In such a situation, the hybrid model would offer distinct weaknesses.

CONCLUSION

In sum, it appears that there certainly are situations in which the hybrid model will be a desirable model to use to determine the appropriate provisions facilitating and governing cross-border legal practice. While a significant body of literature probably exists on negotiation theory which might support these points, my own observations suggest that this hybrid model would work well when several conditions are present:

371. *See supra* note 179.

You can identify two sides, both of whom believe they have something to gain from the negotiations;

There is fairly centralized power in the Host State so that regulations can be adopted without much bureaucratic hassle;

The parties have, or are able through negotiations to, develop a sense of trust between the parties. This trust may be based on the prior relationship, the size of the group negotiating and ability to get to know each other, and the parties' interdependency, among other factors;

The private sector representatives take their obligations to look out for the interests of clients seriously, and seem less concerned about protecting lawyers' own interests;

The lawyers providing cross-border legal services are willing to tolerate a certain amount of uncertainty and risk with respect to ethics and disciplinary issues;

The parties are familiar with, or educable about, each other's legal culture and expectations so that it is possible to negotiate; and

The negotiators, particularly the private representatives, consult their constituencies often enough so that the group understands both sides, trusts the negotiators, and a certain number are willing to comply with any resulting agreement.

In short, from my perspective, the Agreement is an example of the advice Professor Richard Abel suggested. The last of his recommendations was that powerful jurisdictions with major commercial or regulatory centers should use their leverage to negotiate the lowering of foreign barriers while avoiding a "beggar your neighbor" trade war.³⁷² The Agreement may be a model other jurisdictions want to consider, particularly because it may lead to maintaining their "major role." Thus, Sydney Cone may be correct when he observes that although the global approach represented by a model Foreign Legal Consultant rule can set a general tone to advancing the foreign legal consultant, cross-border legal practice ultimately is regulated in discrete jurisdictional pieces. "[T]here are no shortcuts to this process. The necessary domestic and bilateral negotiations are often tedious and rarely glamorous."³⁷³ The Agreement represents the culmi-

372. *Transnational Legal Practice*, *supra* note 2, at 763.

373. Sydney M. Cone, III, *FLC's Face Licensing Hurdles in Host Countries*, NAT'L L.J., Oct. 7, 1996, at C2.

nation of such efforts and demonstrates the value of the hybrid approach and the tedious and unglamorous negotiations required to reach such an agreement.

APPENDIX A

AGREEMENT

BETWEEN THE AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
Represented by: President

Hereinafter called: the "ABA"

AND THE FRENCH LANGUAGE ORDER OF THE BRUSSELS BAR
With statutory seat at the
Palais de Justice
Place Poelaert
1000 BRUXELLES
Represented by:
Bâtonnier

THE DUTCH LANGUAGE ORDER OF THE BRUSSELS BAR
With statutory seat at the
Gerechtsgebouw
Poelaertplein
1000 BRUSSEL
Represented by:
Stafhouder

Hereinafter called the "Orders"

WHEREAS each Order regulates aspects of the professional practice of its members who are full members (admitted to the "tableau" - hereinafter "Tableau Lawyers") or are trainees (registered on the list of "stagiair[e]s" - hereinafter "Stagiair[e]s");

WHEREAS the Orders have rules (hereinafter "Foreign Lawyer List Rules") concerning the terms and conditions on which Tableau Lawyers and Stagiair[e]s may form Cooperations and Partnerships (as hereinafter defined) with other lawyers who are members of foreign bars or of equivalent foreign professional bodies of lawyers;

WHEREAS the Foreign Lawyer List Rules provide that foreign lawyers who form certain cooperative arrangements with Tableau Lawyers or Stagiair[e]s must register on one of the lists of

foreign lawyers maintained by the Orders (hereinafter "Foreign Lawyer Lists");

WHEREAS certain members of bars of the United States who are not Tableau Lawyers or Stagiair[e]s (hereinafter "U.S. Lawyers") are resident or regularly present in Brussels and maintain respective establishments in Brussels from which they provide legal services (hereinafter "Established U.S. Lawyers");

WHEREAS many U.S. Lawyers are partners in or otherwise associated with law firms the majority of the partners in which are U.S. Lawyers and which have establishments in Brussels from which they provide legal services (hereinafter "Established U.S. Law Firms");

WHEREAS some Established U.S. Lawyers are registered on the Foreign Lawyer Lists but others are not, and the Orders wish to encourage Established U.S. Lawyers not listed on a Foreign Lawyer List to register on a second list that they intend to create and maintain jointly for that purpose (hereinafter the "Joint List");

WHEREAS Established U.S. Lawyers hold professional cards issued by the Belgian Ministry of the Middle Classes or work permits issued by the regional Ministries of Employment and Labor, unless exempted by applicable law;

WHEREAS members of the Orders and the ABA, as a practical matter, enjoy generally comparable opportunities to provide legal services in, respectively, the United States and Belgium, in that the professional rules applicable in most major U.S. economic centers of interest to tableau Lawyers and Stagiair[e]s afford Tableau Lawyers and Stagiair[e]s substantial opportunities to provide legal services in those centers, and in that Belgian law and the rules of the Orders afford U.S. Lawyers substantial opportunities to provide legal services in Brussels;

WHEREAS the Orders and the ABA wish to recognize this general comparability of practical opportunities;

WHEREAS the Orders wish to improve the practice opportunities for Tableau Lawyers and Stagiair[e]s and to expand opportunities for U.S. Lawyers to register with the Orders;

WHEREAS the ABA wishes to maximize the opportunities for U.S. Lawyers to practice law within their fields of competence in

Brussels; to form cooperations, including but not limited to arrangements involving association, cost-sharing, and mutual recommendation, but not including partnerships (hereinafter collectively "Cooperations"), with Tableau Lawyers and Stagiair[e]s; and to form partnerships with Tableau Lawyers (hereinafter "Partnerships");

WHEREAS while the ABA does not have the authority to prescribe the conduct of U.S. Lawyers, it can make recommendations to U.S. Lawyers, and many U.S. Lawyers are members of the ABA and abide by the rules and recommendations of the ABA;

WHEREAS it is in the best interests of U.S. Lawyers, Tableau Lawyers, Stagiair[e]s, and their clients that the rules applicable to U.S. Lawyers, to Cooperations between U.S. Lawyers and Tableau Lawyers and Stagiair[e]s, to Partnerships between U.S. Lawyers and Tableau Lawyers, and to relationships between U.S. Lawyers and Belgian citizens who are resident in Brussels and hold Belgian law degrees but are not Tableau Lawyers or Stagiair[e]s (hereinafter "Belgian Jurists") be clarified in accordance with the principles recognized immediately above;

WHEREAS the ABA and the Orders have agreed to the arrangements hereinafter set forth, to be brought into force as of October 1, 1994 (hereinafter the "Effective Date");

NOW THEREFORE THE ORDERS AND THE ABA AGREE AS FOLLOWS:

ARTICLE 1 REGISTRATION

1. A U.S. Lawyer who becomes an Established U.S. Lawyer shall, within six months thereafter, register with one of the Orders in accordance with this Article.
2. An Established U.S. Lawyer who has a Belgian law degree and all other qualifications requisite for registration on the list of Stagiair[e]s or the Tableau shall register as such with one of the Orders and, upon such registration, shall not be deemed a U.S. Lawyer within the meaning and for the purposes of this Agreement.
3. Except as provided in paragraph 5 of Article 2 and in paragraph 4 of Article 3, any U.S. lawyer who intends to form or par-

participate in a Cooperation with one or more Tableau Lawyers or Stagiair[e]s, or a Partnership with one or more Tableau Lawyers, shall before doing so register on the Foreign Lawyer List of one of the Orders. Any other U.S. Lawyer may also register on the Foreign Lawyer List of one of the Orders.

4. All Established U.S. Lawyers who are not registered on the Foreign Lawyers List of one of the Orders shall register on the Joint List. Any U.S. Lawyer registered initially on the Joint List who thereafter registers on a Foreign Lawyers List will be deregistered from the Joint List.

ARTICLE 2 COOPERATIONS

1. U.S. Lawyers registered on the Foreign Lawyer Lists may form Cooperations with Stagiair[e]s and/or Tableau Lawyers at any time. Established U.S. Lawyer(s) participating in or associated with any such Cooperation may share office premises with the participating Tableau Lawyer(s) and/or Stagiair[e](s) or, in the case of a Cooperation that is limited to mutual recommendation, may maintain separate premises.

2. Where a U.S. Lawyer on a Foreign Lawyer List forms a Cooperation with a Stagiair[e], any Tableau Lawyer having the requisite seniority (currently five years on the tableau) may be the patron of the Stagiair[e] whether or not the U.S. Lawyer has formed a Partnership or Cooperation with the Tableau Lawyer.

3. Except as provided in paragraph 5 of this Article, U.S. Lawyers not registered on the Foreign Lawyer Lists shall not form Cooperations with Stagiair[e]s or Tableau Lawyers. Subject to the transitional provisions of Article 12, U.S. Lawyers shall not form or maintain Cooperations with Belgian Jurists.

4. U.S. Lawyers registered on the Foreign Lawyer Lists or the Joint List may form Cooperations with, or include in Cooperations formed in accordance with paragraph 1 of this Article, members of the bars or equivalent professional bodies of third countries, whether or not established in Brussels, subject to any legal restrictions or conditions affecting the rights of such third-country lawyers to establish themselves in Brussels independently. The U.S. Lawyers participating in such Cooperations shall encourage the participating third-county lawyers established in Brussels to comply with the provisions of this Agree-

ment in the same manner as if they were Established U.S. Lawyers and, subject to their doing so, they shall be entitled to the benefits of this Agreement to the same extent as U.S. Lawyers.

5. U.S. Lawyers who are not themselves Established U.S. Lawyers but who belong to an Established U.S. Law Firm may participate in any Cooperation formed in accordance with paragraph 1 of this Article without being registered on a Foreign Lawyer List or the Joint List, provided that (a) at least one U.S. Lawyer who is a partner in that Established U.S. Law Firm is registered on a Foreign Lawyer List and (b) any and all Established U.S. Lawyers who belong to that Established U.S. Law Firm are registered on a Foreign Lawyer List.

ARTICLE 3 PARTNERSHIPS

1. U.S. Lawyers registered on the Foreign Lawyer Lists may form Partnerships with Tableau Lawyers at any time, provided that *all Established U.S. Lawyers* who are partners in any such Partnership are registered on the Foreign Lawyer Lists and that either (a) one of the U.S. Lawyers participating in such Partnership has been so registered for at least one year or (b) all of the U.S. Lawyers participating in such Partnership are members of an Established U.S. Law Firm that has maintained an establishment in Brussels for at least one year as of the Effective Date. Any Established U.S. Lawyer(s) participating in or associated with any such Partnership shall share office premises with the participating Tableau Lawyer(s) and/or Stagiair[e](s).

2. Except as provided in paragraph 4 of this Article, U.S. Lawyers not registered on a foreign Lawyer List shall not form Partnerships with Stagiair[e]s or Tableau Lawyers. Subject to the transitional provisions of Article 12, U.S. Lawyers shall not form or maintain Partnerships with Stagiair[e]s or Belgian Jurists.

3. U.S. Lawyers registered on the Foreign Lawyer Lists or the Joint List may form Partnerships with, or include in Partnerships formed in accordance with paragraph 1 of this Article, members of the bars or equivalent professional bodies of third countries, whether or not resident or established in Brussels, subject to any legal restrictions or conditions affecting the rights of such third-country lawyers to establish themselves in Brussels independently. The U.S. Lawyers participating in any such Partnership

shall encourage the participating third-country lawyers established in Brussels to comply with the provisions of this Agreement in the same manner as if they were Established U.S. Lawyers and, subject to their doing so, they shall be entitled to the benefits of this Agreement to the same extent as U.S. Lawyers.

4. U.S. Lawyers who are not Established U.S. Lawyers but who belong to an Established U.S. Law Firm may participate in any Partnership formed in accordance with paragraph 1 of this Article without being registered on a Foreign Lawyer List or the Joint List, provided that (a) at least one U.S. Lawyer who is a partner in that Established U.S. Law Firm is registered on a Foreign Lawyer List and (b) any and all Established U.S. Lawyers who belong to that Established U.S. Law Firm are registered on a Foreign Lawyer List.

ARTICLE 4 PRACTICE

1. U.S. Lawyers registered on either of the Foreign Lawyers Lists or the Joint List shall be free to render legal services in Brussels and to provide advice and representation regarding all matters as to which they are consulted, provided that they shall be prohibited from rendering advice and representation as to matters governed predominantly by the national laws of Belgium except as provided in paragraphs 2 and 3 of this Article.

2. A U.S. Lawyer registered on a Foreign Lawyer List may provide advice and representation concerning matters governed in whole or in material part by Belgian law on the conditions that (a) the U.S. Lawyer's advice as to any question of Belgian law is based on the advice of and rendered in consultation with either a Tableau Lawyer, a Stagiair[e] who has completed at least one year of stage and has obtained the CAPA/BUBA of the appropriate Order, or a similarly-qualified lawyer who is a member of another bar in Belgium, and (b) such Tableau Lawyer, Stagiair[e] or other lawyer is identified as the source of such advice, whether by inclusion of his or her name on the stationery of the U.S. Lawyer where permissible, through signature or co-signature of the relevant opinions, or otherwise.

3. A U.S. Lawyer registered on either a Foreign Lawyer List or the Joint List may provide advice and representation concerning matters involving ancillary issues of Belgian law, on the condi-

tion that the U.S. Lawyer's advice as to any question of Belgian law is based on the advice of and rendered in consultation with either a Tableau Lawyer, a Stagiair[e] who has completed at least one year of stage and has obtained the CAPA/BUBA of the appropriate Order, or a similarly-qualified lawyer who is a member of another bar in Belgium.

4. A U.S. Lawyer shall not have the right to appear as a lawyer before any Belgian judicial or administrative tribunal except if and to the extent permitted by the rules of such tribunal and then only in a manner consistent with the limitations and conditions applicable to such U.S. Lawyer in relation to advice on matters of Belgian law.

5. Without prejudice to the provisions of any eventual agreements between the ABA and the Council of the Bars and Law Societies of the European Community (CCBE), or between the United States and the European Union, concerning the practice of U.S. Lawyers within the European Union as a whole thing, nothing in this Agreement shall be read as affecting in any way the practice of European Union law as such by U.S. Lawyers in Belgium. It is, however, understood that the registration of U.S. Lawyers on either the Foreign Lawyer Lists or the Joint List shall not be construed as conferring upon such U.S. Lawyers any right to practice before Institutions of the European Union that they would not enjoy in the absence of such registration.

ARTICLE 5 STATIONERY AND FIRM NAME

1. If one or more U.S. Lawyers form a Partnership with one or more Tableau Lawyers, the stationery used by the Partnership shall state the firm name of the Partnership, the identify of each resident partner in the Brussels office of the Partnership and the bar of which each such resident partner is a member. The stationery used by the Partnership may also state the identity of other resident lawyers practicing in the Brussels office of the Partnership who are not partners, including their bars and professional titles of origin.

2. If one or more U.S. Lawyers form a Cooperation with one or more Tableau Lawyers and/or Stagiair[e]s, the stationery used by the U.S. Lawyer(s) shall state the law firm name, if any, under which the U.S. Lawyer(s) practice(s), the identity of each Estab-

lished U.S. Lawyer who is a partner in that law firm and the bar of which each such Established U.S. Lawyer is a member, together with the names of the Tableau Lawyers and/or Stagiair[e] participating in the Cooperation, the bar of which each of them is a member and an indication of the nature of the Cooperation in a form consistent with the nomenclature and presentation ordinarily approved by the Orders for use by Tableau Lawyers and Stagiair[e]s in respect of similar Cooperations among themselves. The stationery used by the U.S. Lawyers may also state the identity of other resident lawyers in their Brussels office, including their bars and professional titles of origin.

3. An Established U.S. Law Firm that has at least one partner, whether or not a U.S. Lawyer, in its Brussels office may carry on its practice in Brussels under the name that it uses in the United States even if one or more of its partners, including some or all of the partners in its Brussels office, are Tableau Lawyers.

ARTICLE 6 CONDUCT AND PRIVILEGES

1. A U.S. Lawyer registered on a Foreign Lawyer List shall conduct his or her practice within and relating to Belgium in accordance with the rules of ethics and practice of the Order with which he or she is registered, provided that such rules shall be applied in accordance with the principles set forth in the CCBE Common Code of Conduct, *mutatis mutandis* and with the procedures set forth in Article 7 for the resolution of conflicts with the rules of any United States bar of which the U.S. Lawyer is a member.

2. A U.S. Lawyer registered on the Joint List shall conduct his or her practice within (both geographic and subject matter) or relating primarily to Belgium in accordance with the rules of conduct and practice set forth or referred to in the CCBE Common Code of Conduct except that, where such rules impose upon the U.S. Lawyer any obligation which conflicts with any obligation imposed upon him or her under the rules of any United States bar of which he or she is a member, the U.S. Lawyer may comply with the latter rules.

3. The Orders will protect and defend the professional privileges, including both attorney-client privileges and attorney-at-torney privileges, of U.S. Lawyers registered on their respective

Foreign Lawyer Lists and, insofar as shall be permitted under Applicable law, of U.S. Lawyers registered on the Joint List, in the same manner as they defend the professional privileges of their members.

4. To the extent permitted by Belgian law, and except as otherwise expressly provided in this Agreement, U.S. Lawyers registered on the Foreign Lawyer List of either of the Orders shall have the rights and privileges, and be subject to the obligations, of Tableau Lawyers who are members of that Order.

5. As the independence of U.S. Lawyers is guaranteed by the rules of professional conduct applicable to them as members of bars of the United States, they shall not be precluded, by reason of registration on a Foreign Lawyer List or otherwise, from having the status of employee in a law firm or partnership.

ARTICLE 7 DISCIPLINE

1. U.S. Lawyers registered on the Foreign Lawyer List of each Order shall be subject to the disciplinary authority of the Batonnier/Stafhouder and Council of the Order in the same manner and to the same extent as members of the Order, subject to the provisions of this Agreement. Whenever it is determined that a U.S. Lawyer is in breach of any obligation imposed upon him or her under the rules referred to in paragraph 1 of Article 6 which may be in irreconcilable conflict with an obligation imposed upon him or her under the rules of any United States bar of which he or she is a member, the Stafhouder/Batonnier or the Council of the Order shall invite and consider the views of the ABA or the relevant State Bar Association before imposing sanctions for such breach.

2. If seized of a complaint in respect of the conduct of a U.S. Lawyer registered on the Joint List, the Batonnier/Stafhouder or Council of either Order may request the *United States bar of which the U.S. Lawyer is a member to take appropriate disciplinary action*, and the ABA shall, at the request of the Order concerned, render all assistance which it is reasonably capable of providing in facilitating such a request and the response thereto. However, if the Council of the Order concerned shall consider that the U.S. Lawyer has engaged in conduct constituting a violation of the rules applicable to him or her under paragraph 2 of Article 6,

the Order concerned may *suspend or deregister* the U.S. Lawyer from the Joint List provided that, where the United States bar to which such a request has been addressed commences disciplinary proceedings against the U.S. Lawyer, the United States bar concerned may request the Order concerned to suspend its consideration of the matter until those proceedings have been completed.

3. Any problems arising in connection with disciplinary matters relating to the conduct of lawyers registered in accordance with, or participating in relationships referred to in, this Agreement shall, upon the request of the ABA or either of the Orders, be submitted to and, if possible, resolved by the Joint Supervisory Committee established in accordance with paragraph 3 of Article 11. The role of the Joint Supervisory Committee shall be strictly consultative, and it shall not be seized of or have decisional responsibility in individual cases.

ARTICLE 8 ADMINISTRATION

1. Where one or more U.S. Lawyers form a Partnership with one or more Tableau Lawyers, the Tableau Lawyer(s) shall submit to his, her or their Order(s) for approval the agreement between the U.S. Lawyer(s) and the Tableau Lawyer(s) concerning the formation of such Partnership, and the U.S. Lawyers participating in the Partnership, if there are more than one, shall submit to such Order(s) for information the partnership agreement among themselves or, if no written agreement exists, a written confirmation that such partnership agreement does not conflict with any provisions of their agreement with the Tableau Lawyer(s).

2. The requirements of the Orders concerning the accounts in which clients' funds are kept (CARPA) shall apply only to U.S. Lawyers on Foreign Lawyer Lists having Partnerships or Cooperations with Tableau Lawyers or Stagiair[e]s and with respect to transactions, disputes or other matters having a primary *nexus* with Belgium.

3. A U.S. Lawyers registered on a Foreign Lawyer List shall comply with the requirements established by the Orders and applicable to all members of their respective Orders in respect of professional liability insurance but may satisfy those requirements by

providing appropriate written assurances that the U.S. Lawyer has at least the level of coverage called for by such requirements.

ARTICLE 9 REGISTRATION FEES

1. The Orders may charge U.S. Lawyers registered on their Foreign Lawyer Lists fees that are reasonable and comparable to those charged by the Orders to Tableau Lawyers and Stagiair[e]s of equivalent seniority.
2. The Orders may charge reasonably reduced fees to U.S. Lawyers on the Joint List.

ARTICLE 10 NON-DISCRIMINATION

1. The rights of a U.S. Lawyer under this Agreement shall not be abridged by reason of nationality, membership in a bar or legal profession of any third country, or association with members of a bar or legal profession of any third country.
2. Nothing in this Agreement shall operate to limit the rights and privileges to which a U.S. Lawyer may be entitled by reason of nationality, professional qualification, or membership in a bar or legal profession of any third country.

ARTICLE 11 IMPLEMENTATION

1. The Orders shall implement this Agreement by providing for appropriate derogations from any of their respective rules and requirements that would otherwise be applicable and shall use their best efforts to persuade the relevant Belgian authorities to conform existing and future professional cards of U.S. Lawyers to the provisions of this Agreement.
2. While it is understood that the ABA has no authority to impose the requirements of this agreement on U.S. lawyers, the ABA undertakes strongly to urge U.S. Lawyers to comply with the terms hereof.
3. There shall be a Joint Supervisory Committee, consisting of representatives of the Orders and of the ABA, which shall monitor the implementation and observance of this Agreement and shall attempt to resolve any problems or issues arising in connection with its implementation. The Committee shall, in addition, consider any adaptations or revisions of this Agreement that may

be required by reason of any changes in applicable law or regulations, intergovernmental agreements or other circumstances beyond the control of the Orders or the ABA. The Committee will in any event review this Agreement in light of actual experience after it has been in operation for three years.

ARTICLE 12 TRANSITIONAL PROVISIONS

1. The transitional provisions contained in this Article shall prevail over any other provision of this Agreement with which they are in conflict.

2. A U.S. Lawyer who maintained a Cooperation with a Belgian Jurist on June 1, 1994, and who is registered on a Foreign Lawyer list on the *Effective Date* or applies for such registration within three months thereafter may (a) continue such Cooperation, provided that such Belgian Jurist applies for registration on the list of Stagiair[e]s or the Tableau of one of the Orders within three months after the Effective Date and is eligible for such registration under the standards ordinarily applied by the Orders and (b) form a Partnership with such (former) Belgian Jurist at any time after that Cooperation shall have continued for at least three years, including any part of such period that shall predate the Effective Date, even if the (former) Belgian Jurist is still a Stagiair[e] at the time the Partnership is formed.

3. A U.S. Lawyer who maintained a Partnership with a Belgian Jurist on June 1, 1994, and who is registered on a Foreign Lawyer List on the Effective Date or applies for such registration within three months thereafter may continue such Partnership, provided that such Belgian Jurist applies for registration on the list of Stagiair[e]s or the Tableau of one of the Orders within three months after the Effective Date and is eligible for such registration under the standards ordinarily applied by the Orders.

4. A Belgian Jurist who is also a member of a bar in the United States, who has been resident outside Belgium at all time since the Effective Date and who, within three months after resuming residence in Belgium, applies for registration on the list of Stagiair[e]s or the Tableau of one of the Orders and is eligible for such registration under the standards ordinarily applied by the Orders, shall be permitted to continue any Cooperation or Partnership in which he or she has been engaged with U.S. Law-

yers while resident outside Belgium and, provided that any such Cooperation shall have continued for at least three years in the case of a Stagiair[e], to enter into Partnership with such U.S. Lawyers.

5. U.S. Lawyers who are not Established U.S. Lawyers but who belong to an Established U.S. Law Firm may participate in any Cooperation or Partnership formed or maintained in accordance with any of paragraphs 1 through 3 of this Article without being registered on a Foreign Lawyer List or the Joint List, provided that (a) at least one U.S. Lawyer who is a partner in that Established U.S. Law Firm is registered on a Foreign Lawyer List on the Effective Date or applies for such registration within three months thereafter and (b) any and all Established U.S. Lawyers who belong to that U.S. Law Firm are registered on a Foreign Lawyer List on the Effective Date or apply within three months thereafter for registration on a Foreign Lawyer List.

6. A Belgian Jurist who maintains a Cooperation or Partnership with one or more U.S. Lawyers under the conditions set forth in any of paragraphs 1 through 3 of this Article and who applies for registration on the list of Stagiair[e]s or the Tableau within three months after the Effective Date and is eligible for such registration under the standards ordinarily applied by the Orders shall not be prohibited, prevented or dissuaded by the Orders from continuing such Partnership or Cooperation except on grounds, apart from the prospective status of the Belgian Jurist as a newly-registered Stagiair(e), that would justify a prohibition of such Partnership or Cooperation under the rules of ethics and practice of the Order with which he or she is registered, applied in a manner consistent with the provisions, purposes and intents of this Agreement.

7. All provisions of this Agreement relating to Partnerships between U.S. Lawyers and Tableau Lawyers shall apply with equal force to Partnerships between U.S. Lawyers and Stagiair[e]s that are permitted under the provisions of this Article. A U.S. Lawyer who participates in a Cooperation or Partnership with a Stagiair[e] pursuant to the provisions of this Article shall be entitled to rely upon the advice of such Stagiair[e] for purposes of paragraphs 2 and 3 of Article 4 without regard to the requirement set forth in each of those paragraphs that such Stagiair[e]

have completed at least one year of *stage* and obtained the CAPA/BUBA of the appropriate Order, provided that such Stagiair[e] shall have participated in such Cooperation or Partnership, or Cooperation followed by Partnership, for at least one year at the time such advice is given.

8. The Orders shall be free to make such changes to the Foreign Lawyer List Rules as may appear appropriate from time to time, provided that no such change shall apply to U.S. Lawyers registered on the Foreign Lawyer Lists, regardless of when they shall have registered, if the consequence of such change would be to restrict or limit the rights and privileges of U.S. Lawyers either under this Agreement or under the Foreign Lawyer List Rules in effect on June 1, 1994.

ARTICLE 13 RECIPROCITY

1. It is a premise of this Agreement that members of the Orders will continue to have a reasonable and practical opportunity, either as legal consultants or as full members of the State bars in the United States, to carry on the practice of law in those States which currently permit such practice and that existing rules permitting such practice will not be made more restrictive. The ABA undertakes to use its best efforts to the end that this premise will remain valid and to encourage the adoption of rules conforming to the ABA Model Rule for the Licensing of Legal Consultants by States not presently having such rules.

2. At the time of the three-year review provided for in Article 11, the Orders, after consultation with the Joint Review Committee established under that Article, shall be free to consider the imposition of reasonable and proportional restrictions on the practice in Brussels of U.S. Lawyers who are not members of the bars of States which have adopted rules conforming substantially to the ABA Model Rule for the Licensing of Legal Consultants, without prejudice to the rights and freedoms of U.S. Lawyers and their law firms then established in Brussels.

ARTICLE 14 FINAL PROVISIONS

1. This Agreement shall enter into force on the Effective Date and thereafter shall continue in force indefinitely unless and un-

til terminated by the Orders of the ABA upon one (1) year's written notice.

2. As a transitional matter, the provisions of this Agreement relating to the Joint List shall be inoperative until the regulations and procedures for the Joint List shall have been adopted by the Orders, and any and all obligations of U.S. Lawyers relating to registration on the Joint List shall be suspended until that time.

3. This Agreement has been concluded in English, French and Dutch language versions. Each version is equally authentic.

IN WITNESS WHEREOF each party has caused this Agreement to be signed on its behalf by its duly authorized signatory this *6th* day of August, 1994 at New Orleans, Louisiana in the United States of America.

For the American Bar Association

For the French Language
Order of the Brussels Bar

For the Dutch Language
Order of the Brussels Bar

APPENDIX B

*STANDARD APPLICATION FORM FOR REGISTRATION ON
THE LIST OF MEMBERS OF FOREIGN BARS
ASSOCIATED WITH THE BRUSSELS BAR*

To: Monsieur le Bâtonnier de L'Ordre Français des Avocats
du Barreau de Bruxelles
Palais de Justice
1000 Bruxelles

Monsieur le Bâtonnier,

I have the honour to hereby submit to the Order an application for registration on the List of Members of Foreign Bars established in Brussels.

I enclose the following documents:

1. the original certificate delivered by my Home Bar/Law Society certifying: (i) that I am duly registered with such Bar/Law Society, (ii) the date of my first registration, (iii) that I have not incurred any disciplinary sanction, and (iv) that I have complied with probationary training period imposed by my Home Bar/Law Society;
2. a photocopy of my identity card or of an extract of my passport issued in my home country;
3. a photocopy of my professional card or of my work permit;
4. a photocopy of my registration with the Belgian municipality where I reside or, alternatively, the indication of the measures taken to ensure an effective running of my Brussels office;
5. a draft specimen of the stationery that I intend to use in Belgium, mentioning the address of my future office in Brussels and my professional title and my Bar/Law Society;
6. a draft specimen of the stationery that I intend to use outside Belgium;
7. a certificate of good standing issued by the competent authority of my home country;

Furthermore, I undertake:

1. to submit my professional activity in Belgium to the disciplinary jurisdiction and to the regulations and decisions of the

Brussels Bar, without prejudice to any derogatory proceedings and rules which would be provided by an agreement between the Brussels Bar and my Home Bar;

2. not to practice Belgian law, except under the following conditions, without prejudice to the more detailed provisions of an agreement with my Home Bar:
 - a) except for matters involving ancillary issues of Belgian law, I will base advice as to any question of Belgian law on the advice of and render such advice in consultation with a member of the Bar or a stagiaire who has completed at least one year of stage and has passed the professional exams of the Bar, or a similarly qualified lawyer who is a member of another bar in Belgium;
 - b) I will in all cases identify the source of such advice, whether by inclusion of such lawyer's name on the stationary used by me, or through signature or co-signature of the relevant opinions;
1. to conform to all provisions of any agreement concluded with my Home Bar;
2. to pay the registration fees fixed in accordance with Art. 443, para. 1 of the Belgian Judicial Code or by Art. 10 of the new Brussels Bar regulations;
3. to abide by the various provisions of the new Brussels Bar regulations relating to the handling of clients; funds, without prejudice to the provisions of any agreement concluded with my Home Bar.

I furthermore confirm, upon verification with my insurance company, that the activities carried out from my Brussels office shall be adequately covered by a profession liability insurance (minimum 15,000,000 BEF per occurrence).

I remain fully at your disposal for any further information you might require.

Yours respectfully,