WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Simon Evans

Group General Counsel,
ArcelorMittal

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THE SPEAKERS

Simon Evans
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Joint CEO & Managing Partner, DLA Piper LLP

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Partner & Co-Head – Corporate Practice
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Samantha Mobley
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Partner, Cleary Gottlieb Steen & Hamilton LLP (Paris)

TO THE READER:

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished Guest of Honor's personal accomplishments in his career and his leadership in the profession, we are honoring Simon Evans, General Counsel of ArcelorMittal, with the leading global honor for General Counsel. ArcelorMittal is the world's largest steel company, operating in approximately 60 countries. His address will focus on key issues facing the General Counsel of an international corporation. The panelists' additional topics include operating in diverse countries and multiple regions; capital markets transactions; compliance; international litigation; and cross-border mergers and acquisitions.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel.

Jack Friedman
Directors Roundtable
Chairman & Moderator

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Simon Evans
Group General Counsel

Simon Evans is Group General Counsel and Vice President of ArcelorMittal, the world's leading steel company.

Mr. Evans joined the company in September 2001 as General Counsel and is based in the London corporate office. He has over 20 years' experience in corporate and commercial law in both industry and private practice.

Formerly, Mr. Evans was European Counsel at Rohm and Hass Company (now Dow Chemical) and prior to that he worked at the law firm Taylor Joynson Garrett, London.

Mr. Evans is a graduate of Oxford University and the College of Law, Guilford. Mr. Evans is married with three daughters.

ArcelorMittal

ArcelorMittal is the world's leading steel and mining company. Guided by a philosophy to produce safe, sustainable steel, it is the leading supplier of quality steel products in all major markets, including automotive, construction, household appliances and packaging. ArcelorMittal operates in 60 countries and employs about 260,000 people worldwide.

As the world's leading steel and mining company, our business operations extend from the mining of iron ore and coal to the production of the full range of steel products and services. Innovation permeates everything we do at ArcelorMittal: from the scientific expertise of our research and development (R&D) department to getting employees in other functions throughout the group to think about what they could do differently. Our innovative thinking leads to improved performance, increased sustainability and solutions to global challenges.

ArcelorMittal's operating philosophy is to produce safe, sustainable steel, and reflects our deep commitment to protecting and improving the environment in which we work and live. Steel is an infinitely recyclable material: steel can be used and used again in the steelmaking process. Across the steel industry, carbon dioxide (CO_2) emissions per ton of crude steel made are now half what they were 40 years ago.

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JACK FRIEDMAN: Good morning. I am Jack Friedman, Chairman of the Directors Roundtable. We have a special program today, presenting the leading world honor for corporate counsel to Simon Evans of ArcelorMittal. Our mission is to organize programming for Boards of Directors and their advisors, who include General Counsel, bankers, accountants, top executives, and the CEOs who work with the Boards.

The Directors Roundtable is a civic group that has held 800 events in 21 years in 14 countries. I am the volunteer Chair. We have never charged a penny for anybody to attend any event.

The format today is that our Guest of Honor will make his opening remarks, followed by a brief presentation by each of the panelists related to his or her specialty. The speakers will then have a roundtable discussion among themselves, and later with the audience.

The transcript of the event will go out to about 150,000 leaders globally.

In terms of our Guest of Honor, I'd like to mention a few of the highlights of his career. Simon came from an Army family, which automatically means that he started with a multinational outlook at a young age, and his later background was Oxford University PPE; the College of Law at Guildford; and private practice with the firm then called Taylor Joynson Garrett. He then became European counsel for the chemical company Rohm and Haas; followed by his current position as the GC for the last ten years at ArcelorMittal. Additionally, he is a fan of rugby and cricket, and he's married with three daughters. Before the program I asked him about having three daughters with good manners, and as their father, having to have good manners himself. Daughters can be demanding children for their dads.

It is a pleasure to have Simon Evans make his opening remarks.

SIMON EVANS: Thank you, Jack! Good morning, ladies and gentlemen. A free event is always a good way to get the crowds in, so I'd like to congratulate you on that! Thank you, everyone, for coming. I think it's just as well we didn't hold this yesterday, because there were lively demonstrations across the city.

I must begin by thanking the Directors Roundtable for this recognition. I feel very honored to receive this award, which I accept on behalf of not just myself, but all my colleagues at ArcelorMittal, and it's very much a shared honor.

Apparently, I'm meant to enlighten you all, to start with, about ArcelorMittal, the company — some of you are more familiar with it than others — and then maybe make a few remarks on what it means, what a general counsel faces in such an organization. Then we have a number of distinguished panelists who can help us discuss other matters afterwards.

Being a lawyer — a quick disclaimer at the beginning — all these remarks I make are, of course, my personal views and should not be taken as official ArcelorMittal company policy.

ArcelorMittal is the world's largest steel manufacturing group, and also one of the largest mining groups in the world, with operations in over 20 countries around the world: Europe, North America and South America, Africa and Asia. Turnover last year (2010) was U.S.$78 billion. We have 270,000 employees around the world, making key material for use in the construction industry, automotive, household appliances, and countless other products, of course. Our product is fully recyclable: steel is one of the most recycled products in the world.

As you may be aware, ArcelorMittal is headquartered in Luxembourg, but has listings in Luxembourg, Brussels, Paris, Amsterdam, Spain, and New York. So, for example, we do press releases in three languages — English, French and Spanish; our main Board of Directors come from at least six different nationalities. So I think it's certainly true to say that if any company is international, then ArcelorMittal is an international group, which is perhaps a theme that we can pick up during today's discussion.

It's a group that's grown very rapidly over the last two decades, through mergers, acquisitions, joint ventures and privatizations, as well as significant organic growth.

In the ten years that I've been General Counsel at ArcelorMittal, the number of

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employees in the listed group has increased, from about 16,000 up to today's 270,000. So that, itself, has been certainly an integration challenge. The phenomenal growth of this company has, of course, been led very much by the bold and visionary CEO, Lakshmi Mittal, and it's worth saying, perhaps, that whilst there are a lot of multinational industry groups, in the steel sector this was revolutionary in its time. Up until that occurred, the steel industry had been very much single-country-based companies. It's not an easy industry to succeed in, having historical cyclicality and this old heavy industry image. The lessons of the recessions of the early 1990s and 2008-2009 certainly resonate in today's uncertain times as the world struggles with global imbalances and sovereign debt issues in Europe. If there are any finance ministers or European commissioners here, I encourage them to resolve this situation as soon as possible for all of our interests!

JACK FRIEDMAN: We're going to pass these remarks on!

SIMON EVANS: Thank you, yes. They may be busy elsewhere but we all wish them success in resolving these local difficulties!

The rise of emerging economies is a key feature of today's world-impacting international groups, and whether they're there as the markets for these companies' products or as competitors for customers or for scarce raw materials. Amongst those emerging economies, China stands out as the most obvious example. In our industry, for example, 45% — nearly half — of the world's steel is actually made within China today; and China is also the world's largest consumer of steel.

This presents opportunities and also challenges. In China, in particular, national state rules designate certain sectors — and steel is included in those — as strategic, and therefore, foreign ownership of those companies is restricted. So we are limited to operating in those countries through

joint venture vehicles, which of course have their own challenges, and again, a topic which may develop today.

In an ideal world we probably wouldn't need any lawyers. I don't want to upset anyone in the room! Anyway, the world isn't ideal at the moment, so no worries from that perspective!

So, what *are* the challenges facing the General Counsel of a multinational company, and what is his or her role? I'm supposed to say a few words on this topic. There are obviously a number of so-called stakeholders. First, of course, is the company's Board of Directors, and the General Counsel is needed to provide advice to the board and senior executives. He and his team help the company find its way through the legal minefield of today's complex world. There are legal risks and regulations covering just about everything today, from securities law to the environment, from employment law and data protection, privacy issues, to antitrust. Of course, that's multiplied by the 70 or 80 or more countries that large international groups operate in. If that isn't enough, sometimes these laws actually conflict with each other: for example, in international trade law. Then, just in case those Boards of Directors weren't already focusing, there is an increasing trend toward imposing personal criminal liability on directors — it is certainly something that we see more of across the world, as a way of making those directors pay attention.

Identifying the legal risks is, of course, only part of the role. The real challenge is to develop the solutions to mitigate those risks, and of course, within the time constraints of whatever urgent transaction we might be dealing with, as well as the cost and budgetary pressures.

So the company needs skilled lawyers who also know and understand the business and strategy of the company. That means not only legal participation in business internal discussions, but also getting close to the actual operations and understanding them. This includes visiting the manufacturing sites or the mines. As I was saying earlier to one of the panelists, the expression being "at the coalface" is generally used metaphorically by most of us, but then if you have actually been half a mile underground in a coal mine in Kazakhstan, you know that this has a slightly more literal and tangible meaning, as I've experienced myself.

A close working relationship and partnership between business and legal is vital. Of course, the in-house lawyer must know when and how to use the external resources of private practice lawyers. Some of you may fall into that category, so you'll be pleased to know that we value those sorts of services. They've got to be used judiciously to leverage their own in-house capability.

The subject of corporate governance remains topical, as shareholders and regulators around the world struggle to work out the best model for governance. Much has been said about the important role of non-executive directors ensuring independent oversight, board diversity and effectiveness of board committees; as well as the comparative advantages and disadvantages

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of single-tier and dual-tier boards (the latter being more typical in the civil law jurisdictions).

In considering the role of the legal function in the context of corporate governance, one hears a lot of debate about organizational structures and particularly reporting structures in large groups. One question is whether the in-house lawyers should all report directly to the group general counsel or to business divisional heads or some matrix structure, which often ends up being the case. Another is whether the general counsel should report to the chief executive (generally regarded as the best practice), or to the CFO, or elsewhere in the organization. A third question is whether the general counsel should be on the board or, as is a widely held view, present at the board not as a director but as an advisor, and in some cases, also as the company secretary.

These structural and organizational issues are important, particularly for the large corporate group, but no one of these is the sole determinant of good governance, which is, instead, really determined by the combined effect of numerous interlocking pieces of the jigsaw. Even then, there is the all-important question of corporate culture. However many boxes a company's governance can tick, if the corporate culture — the internal ethos — is weak, the risk of failure is higher, if managers are tempted to cut corners or to hide problems from investors. That is clearly illustrated by, unfortunately, numerous examples such as Enron and others, or perhaps more recently one reads in the news issues of a similar nature affecting Olympus.

Achieving the balance between entrepreneurship, profit and integrity is vital for the long-term success and sustainability of the organization. The general counsel has an important responsibility to assist senior management in the maintenance of this corporate integrity. There are the rules and tools, such as the company's code of business conduct, compliance program, policies and training, which are all important components of the supporting architecture. Ultimately, however, as is widely recognized, it is leadership from management and the so-called "tone from the top" which are vital to the integrity of the organization.

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Questions such as whether the general counsel should be directly responsible for compliance, taking on the role of chief compliance officer, or whether that makes him too much of a policeman, are debated in some organizations, and there is no single absolute rule which works for all organizations. The financial sector may be different, of course, from the manufacturing industry. But in the end, whatever the situation is, the general counsel has to bridge the gap between business counselor and regulatory advisor, so as to provide integrated advice to management.

In international business, there are many challenging parts of the world, of course, where culture and business practices are different — if that's not sounding too euphemistic! This tension can test an organization's integrity, as has been seen in recent years in the case of certain highly regarded companies which have faced FCPA investigations in the U.S. and in Europe, resulting in very large fines and significant damage to their reputations.

Managing these risks requires strong leadership and determination by individual companies. But what business wants and needs, really, is a level playing field. In this respect, there is much work being done by international bodies such as the UN, OECD, EBRD and World Economic Forum PACI initiative, as well as by NGOs such as Transparency International and others. Some progress *has* been made toward achieving that level playing field. However, there remains a long way to go, and in today's difficult economic situation, there is a risk of slipping backwards.

Many of the risks associated with emerging countries are linked with a less well-established legal system or rule of law. Doing business in such countries requires, of course, additional due diligence and risk assessment, and I think we may return to this subject in the discussion later.

At the same time, the public scrutiny of companies continues to intensify, aided by the increasing speed of modern media communication making information accessible around the world in seconds and shortening the available response time for management, and raising the standards expected of those multinationals.

Corporate responsibility is now very much mainstream. The welfare of employees, health and safety, protecting the environment, supporting local communities, and good governance are all rightly in the limelight today. This agenda is pushed by the different stakeholders: employees' representatives, governments, regulators, NGOs, and the media, customers, suppliers and shareholders. ArcelorMittal, for example, is a member of the FTSE4Good Index, as well as the Dow Jones Sustainability Index.

There is increasing awareness of globalization linking the economies of different countries and regions of the world, and the same goes for attempts to address

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global issues such as greenhouse gas emissions and climate change. Even before the current financial crisis, the world's governments were struggling to agree on ways of updating the Kyoto Protocol to limit the impact of climate change. This led some, such as the EU, to set their own unilateral CO_2 reduction targets. Whilst well-intentioned, this creates a serious risk — in energy-intensive industries such as steelmaking — of shifting those CO_2 emissions from within the EU to other countries with less regulation and placing producers in the EU at a competitive disadvantage. So, while European producers invest in greener technology, they are looking for a level playing field with their global competitors.

Whilst on the subject of level playing fields — or the lack of them — one issue affecting lawyers in the European Union (and others indirectly) which *could* be remedied more easily is the issue around the failure of the European Commission and the European Court to recognize the legal professional privilege for EU antitrust advice given by in-house lawyers, whilst they at the same time recognize the professional legal privilege for private practice lawyers who are often governed by the same professional bodies (Bars and Law Societies) as many of the in-house lawyers. Such unjustifiable discrimination has a detrimental impact on antitrust compliance of companies in the EU, which is an important goal for the regulators, and this should be corrected as soon as possible. Again, I know those European Commission officials are very busy with other things, but I just mention that.

So, in the light of these challenges, how does an international company organize its legal services, its legal department? I've already touched on the subject of the structure and reporting arrangements, and the need to find the right balance between business alignment and independence of the in house lawyer. Of course, the bigger the organization, the more important internal communication is, to avoid misunderstandings and ensure alignment. Corporate functions, such as legal, have an important role to play in this information liquidity within the company, sharing information with other corporate teams such as finance, HR, M&A, purchasing, and all the other corporate functions, as well as the business divisions in the group.

One of the potential benefits of an international corporation is that you can have an international legal department. So, for example, in ArcelorMittal, the Global Legal Leadership Team, as we call it, is composed of twelve people, made up of ten different nationalities from around the world. That breadth of experience and diversity is a great asset for the group, that we can share best practices from around the world, and we do.

Over the last few years, outsourcing has been very topically and much debated; not least the outsourcing of legal services. This has changed the international legal landscape, as many alternative legal providers have entered the legal marketplace and caused the traditional law firms to rethink their business model and adapt in different ways.

Similarly, as companies face cost pressures, they, too, are adapting their own models. Some may expand their in-house legal department on the basis that the in-house lawyers, employed lawyers, actually cost less than private practice lawyers on an hourly basis. Others may choose to outsource certain activities, and some international companies may have a natural offshoring arising from their geographically diverse legal team.

So, given all that, how does one assess the performance of the legal function? How does one measure it? It's not easy. Although maybe I should say that clearly, the wise heads of the Directors Roundtable have been able to do that on this occasion with this award today, for which we are honored.

JACK FRIEDMAN: I'm always impressed by the accumulated billing rates of the whole panel put together.

SIMON EVANS: That's a scary topic! But the danger is that in the short term, in some companies, the legal department may just be seen as a cost center, and therefore simply somewhere to make savings. Sometimes the difficulty is that when the legal function *is* doing a good job, and controlling and mitigating those legal risks, the potential downside of what has been avoided is not always clear; whereas unfortunately, if the company suffers a serious legal problem, management may belatedly recognize the value of avoiding a repetition.

Of course, part of the answer is that executives do see what can happen to other companies when mistakes are made, and this is a healthy reminder. Nevertheless, it is part of the general counsel's role not only to control the legal costs in an efficient way, but also to ensure that his or her team is focused on adding real value, and to

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demonstrate that value that the team adds to the organization.

Good litigation results or successfully completing M&A or bond transactions may speak for themselves. But in other areas — contracts, compliance, and day-to-day activity — these are also fundamental to an organization's reputation and future.

Finally, I'd just like to mention maybe one other challenge which many lawyers and general counsels and other professions face, which is the so-called work/life balance. This is a subject on which I'm not sure how qualified I am to advise, other than to finish my remarks with a big "thank you" to my wife and family for their loyalty and forbearance during my legal career.

Then let me finish by thanking all of you for listening, for your attention, and I look forward to the panel discussions, and thank you, again, to the Directors Roundtable for this award. Thank you.

JACK FRIEDMAN: Thank you.

Before we turn to our next speaker, I just wanted to ask you a question. In the States, we have 50 similar jurisdictions, although Louisiana has some French law background. The power of national regulation is largely centered on Washington. It's rather inconceivable how a company can deal with the regulatory environment in 60 different countries. For example, the compensation is different; the rights of employees are different; the intellectual property rights or enforcement are different. How do you organize the legal department to deal with this huge variety?

SIMON EVANS: Well, I wouldn't plan to do it all myself! No, we have a significant sized legal department, and that's not unique to us, we have specialists in different areas. So, we have a corporate legal department — a sort of corporate center, shall we say — where we have certain specialists in certain areas, and then in each

of our operational countries, we have a legal team.

JACK FRIEDMAN: So there are some in the U.K., in Europe, and some are in the local countries?

SIMON EVANS: Yes. We have lawyers in London, Luxembourg and in other cities in Europe and worldwide, and they are all very closely linked in speaking to each other. We have a regional structure of lawyers, so we have six regional general counsels around the world who form a regional general counsels' team with me. Then I have a corporate legal team and together, all those people who work together, talk together, and integrate with their local management, as well as corporate management. We do our best to meet the challenges.

JACK FRIEDMAN: Thank you. We'll get back to this topic.

I'd like to introduce Sir Nigel Knowles, who is the Joint CEO and Managing Partner of DLA Piper, and he'll make some brief opening remarks in his area.

SIR NIGEL KNOWLES: I spend a lot of time with clients, but don't deliver any legal advice, much to the pleasure of our professional indemnity insurers and my partners. So when adding up the collective charging rate, I don't count. I haven't got a charging rate. If I do give advice, it's part of my own Change for Good program.

But I do believe that general counsel, heads of legal, and partners in law firms are leaders in their own right, and I'm delighted to be part of this event honoring your achievements as a leader in the field of general counsel, and for ArcelorMittal, which is a great business. I think, as leaders, we have all got to be aware of more than just the law. We've got to be aware of what's going on around us in the world. So this morning, I want to talk about trust. Of course, I understand that the expression, "Trust me, I'm a lawyer," is not the most compelling offer out there right now.

When Ipsos MORI conducted their annual survey of trust — and this was confined to the U.K.; actually, I think it applies around the world — they don't, unfortunately, single out lawyers as a profession, but 72% of people did say, apparently, that they trust judges. I'm not sure whether that's something to be pleased about or frightened about — 72%. University professors scored slightly higher. But politicians were at the bottom of the table, with 14%, and journalists slightly higher at 19%. Now that might not surprise us, but I was genuinely perplexed and concerned that the next of those professions in the table astonishingly — to me, at any rate — was business leaders, with just 29% of them expected to tell the truth the first time. Behind that headline figure — I don't want to try to explain — lies a much more disturbing reality about business trust.

So, more specifically, I want to talk about the emergence of a serious trust deficit between business and the general public, a deficit that grew slowly over many years, but as a result of globalization; I mean, you can see it all around you. Globalization, the global economic crisis, the explosion of 24-hour media coverage, which is now instant, and the media are where it's happening far sooner than business leaders, and the growth of social media, mean that the trust deficit could, in some cases, look more like a chasm.

I want to talk about the profound implications that has for business, and suggest some

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ways that it might be regained. As someone who leads a major international business, because we are — we're in 31 countries, 76 offices — and who advise major international businesses, we're all entrenched in the concept of the trusted advisor for whom trust is so central in everything we do. This crisis of trust has profound implications for all of us, if we are going to benefit in the future, and if the world is going to turn itself around. Because without trust, what have we? Never before has success of business been so critical to the future of the world. Business will take the strain where the public person sometimes can't.

So, restoring trust is therefore an urgent and important task, not only for business leaders, but for all of us. We are leaders in our own chosen subject, and it simply can't wait.

DLA Piper did commission a report by the leading opinion research consultancy, Populus, a few months ago, and I want to share a few of those findings and consider the implications. There are some reasons for optimism, and of course, the findings are the result of feedback from lots of FTSE chairmen, CEOs, CFOs, COOs and non-executive directors. So this is not the view of DLA Piper; this is the view of corporate Europe and the world, if you look at the companies in the FTSE. They are all over the world.

The first finding was that today, a business has got to be prepared to explain and to justify its actions to their stakeholder audience. That includes, now, obviously, shareholders, employees, customers, business partners, suppliers, the media, governments, regulators and NGOs. Simon covered all that in what he had to say. But only ten years ago — and I'm not suggesting they were the good old days — the stakeholders were probably *only* shareholders. Now, it's a far different array of people you've got to look at.

Now, following the global financial crisis and globalization and the proliferation of social media, everybody feels able to comment about anything. One FTSE chief executive told us that people feel more able to judge — non-experts in the media, in the government and the public, feel able to say just what they think. A lack of technical expertise is no longer a barrier to having a view as to whether something is right or wrong. I thought only my wife had that characteristic, but it seems that everybody has that characteristic!

Senator George Mitchell, our chairman emeritus, once told me that when he went to the senate, what he realized was that you can speak on any subject at any time for any length of time, without the obligation of either possessing or conveying any useful information! These sorts of things now are really present all around us. The 24-hour news cycle is widely seen to have forced companies to respond more quickly at times of corporate crisis, and all business leaders acknowledge that the media have considerable power to influence perceptions of corporate trustworthiness. We saw that in the Gulf of Mexico oil spill, where I'm sure Tony Hayward of BP saw what was happening for the first time, along with everybody else, on television, and was immediately asked to say what was he going to do about it. What could he say?

Statements made in one country — this is another point — in one country, can be construed entirely different in another country — and in some cases, in some countries where you don't even have a presence, because of different cultures, different interpretations. So we've really got to be aware of that. So, ArcelorMittal says, "We want to be the world's safest steel company, as well as the most admired," and we know where they are present; we know that they are in a multi-language, multicultural situation. And they've got to be careful — real pressure on them to get it right, so many times and in so many diverse situations.

A second key finding from the report is that trust at a senior level is intrinsically based around individuals and personal relationships. Individuals can earn trust, and companies can often lose it. We can all think of examples of how this has worked to good and bad effect. But consider the most effective: Steve Jobs, regrettably no longer with us. But what a great leader, and an advocate of the Apple brand. Sir Richard Branson is another example, as are Warren Buffett and Lakshmi Mittal. All guys who are really respected in the global business marketplace for having got it right *and* being leaders.

Thirdly, we discovered that overt trust strategies where some businesses are pursuing corporate social responsibility and trying to *buy* trust doesn't work. Trust is a consequence of a pattern of consistently positive corporate behavior, and is *not* something that can be created for special occasions. You can't buy trust; you've got to earn it.

Finally, Populus found that the people we talk to thought that regulation wasn't necessarily the way through all of this. You can't legislate your way out of the current difficulties into an environment of trust.

I think that must be right. We've all got to exist with some regulation around us, but just think about it. When a regulation is imposed, most people think this is something else to get around. "We've got

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to apply all our brains and all our efforts to try and find a way around this regulation." My own view is clear: regulation is what you *must* do, but best practice is what you *should* do. You can't regulate trust into existence, and you can't legislate to make people trustworthy.

As a chairman of a FTSE company said, you've got to trust your colleagues. Your customers have got to trust you. You've got to trust your shareholders. Top management have got to trust each other to foster a culture with trust, which at its heart, is very important for any leader.

You can rationalize all of this down to a number of things, with all your stakeholders and you've got to work out who they are.

We've got to communicate better as individuals. We have got to be transparent. So if we say we are going to do something in six months' time, I think we've all got to say, did we do it? Actually, if we did do it, were we successful? Did we fail? If we failed, why did we fail? Are we going to do something more about it? We've got to be accountable, and with all our stakeholders.

So I'm going to explain that — you got that completely right and consistent with our report.

We must all now change our habits, to start earning back trust, to start the rebalancing, the deficit in business, because building trusted businesses is the right thing to do — because it is a source of competitive advantage. Put very simply, if nobody trusts each other — everybody's checking everything that everybody else does — if you *do* trust each other, you've only got to do it the first time. So you can achieve a lot more if you trust each other, because trust is a key driver of business success, business success the world desperately needs right now; but more importantly than all of that, because life is so much simpler, so much more enjoyable and fruitful, if you can all be trusted and trust each other.

There are just a few words, food for thought. Thank you, and if any of you want to refer to any of that during questions, I would be happy to participate. Thank you.

JACK FRIEDMAN: Before we go on to the next speaker, I wanted to open this up — before the other panelists make their opening remarks, I'd like to throw in a question about an issue you raised, to the whole panel, and then we'll get back to the presentation.

As a brief introduction, we have Samantha Mobley, who is a partner and leader of the Global Competition Practice of Baker McKenzie; and we have Richard Price, the partner and co-head of the Corporate Practice of Shearman & Sterling here in London, although he lives in France. John Brinitzer is the partner at Cleary Gottlieb Steen & Hamilton in Paris. And we have Rani Mina, who's a partner at Mayer Brown, in the litigation area. As I say, we'll get back to their comments.

There was a time in the boardroom, if you had some controversy with outsiders, such as the government or private litigation, you'd refer to "we versus them." Who was "we"? "We" was the company and all the management and all the board members and so forth. That was the "we versus them." Then after Enron, investors said, "The independent directors weren't on top of things," and so forth. So, "we" became the independent directors.

Then, more recently, "we" has become "I." As soon as there's a problem, "I" want to know if my D&O policy covers *me*, not just all the independent directors. It's gone so far that at least one Director has actually asked the Board for permission, at his own expense — not asking the company to pay a penny — to bring his personal attorney to every board meeting. We're not talking about a critical meeting where they're going to vote on some major M&A deal or some colossal decision which was scary for them to have legal liability. He said *every* board meeting.

So the question I'd like to give back to everybody here is, "In today's environment how are people able in top management and the board to work in a trusting way when down the road you don't know if you're going to be a witness against each other?" Does anybody have some comment of working with clients about this issue of trust?

SAMANTHA MOBLEY: I can comment from an antitrust perspective. As you may know, recently, the antitrust area has become criminal for individual directors who participate in cartel activity. What we've seen is a renewed interest, I would say, amongst individual directors on the board, and around compliance in the antitrust area, precisely because their neck is now on the line. The companies that tackle this new problem best are those companies that proactively acknowledge that this is now not only a risk for the company, but it's also a risk for the individual. They address that at the board level, and address how to help the director feel comfortable that the business is compliant, and that the director is in a position where he can turn around to the regulator and say, "I did know about that incident that occurred, because my company has put in place the best policies and the best procedures, and there was no way that the company could have addressed that particular thing that's gone wrong."

So, in my view, the companies that do it best are the companies that are able to address the issue proactively with the

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individual, recognizing that the individual has a personal liability at stake.

RICHARD PRICE: I'm going to make an observation that there's no question that an individual director liability gets the attention of the board, and as a result, the board will be much more focused on the particular issue at hand. From a societal perspective, that's not such a bad thing.

SIR NIGEL KNOWLES: I would say that from the point of view of a non-executive director, they have got to be more selective in terms of the sort of boards that they join. For example, if they join the board of a company that does not seem to have good governance, if they are a director of a company where there's been board evaluation and recommendation for improvement which has not been followed, or where they believe the CEO doesn't listen or does not take any notice of them, you've got to decide: are you doing it for the money, or are you doing it because you want to discharge your obligations properly in accordance with what is required from an independent, non-executive director?

That gets down to — I'm quite surprised that more non-executive directors don't say, "I'm not prepared to be on a board of a company that behaves like that, and I'm leaving." Knowing nothing at all about it, but hazarding a guess, I suspect lots of independent directors over the years have gone native and not challenged the executive enough and perhaps need the money and don't decide to leave out of principle. I think more of that needs to happen.

SAMANTHA MOBLEY: I think that building trust comes down to three things: credibility, reliability, and intimacy; and all of that can be undermined by too much of a focus on self-interest. So if there is a trust issue amongst a board or with your colleagues, it's really fundamentally going to be an issue with one of those things that I've mentioned, and so I think that you can build trust by focusing on those things and just changing your behavior slightly, dialing it up a bit in a particular area where you might feel there is a lack of credibility. Intimacy is the hardest one — to allow yourself to be intimate with your colleagues in a way which builds trust.

> "Achieving the balance between entrepreneurship, profit and integrity is vital for the long-term success and sustainability of the organization. The general counsel has an important responsibility to assist senior management in the maintenance of this corporate integrity."
>
> *— Simon Evans*

JACK FRIEDMAN: When I spent time in London in the '60s, I remember that the head of Shell Oil was quoted in *The Wall Street Journal* as saying, "I serve on the British Leyland Manufacturing Board, and I asked the question, 'Why do we have so many models with inefficient runs? We make a little of this and this, so we don't have economies of scale properly.' In all the years I was there, I never got a decent answer." I said to myself at that point, "If the head of the first, second or third largest oil company, who's sitting on the Board of an auto company, can't get an answer to questions, what hope is there for *any* director, *anywhere*, to get the information needed to have an independent judgment?"

SIMON EVANS: The personal liability of the directors, the increased focus on the non-execs, *they* know that the ones that weren't asking the questions five years ago, ten years ago, know they should be. The companies' management knows they need to provide the information to directors, because they're entitled to it. It does work much better now, because the idea that you just turn up once a month for lunch and then sign off and go home, is long gone. Some non-executive directors were dramatically underpaid, with the responsibility they may not realize they were taking! But now, you get full information; if you don't get information, as a non-executive director, you should ask for it, and people do ask for it. I think there's a much better flow, much better trust as a result; a much better exchange of information. And hopefully, better governance, because those directors bring their expertise from those other companies — they were on different boards at other companies, or CEOs of other companies — and they bring that expertise to the board. That's how it's supposed to work.

It's not perfect, but I think companies have moved a long way, and I think it's a very important question.

JACK FRIEDMAN: I just want to ask John Brinitzer and the other people here who work on deals — when you're doing deals, does every entity in a corporation that's remotely involved with the deal have their own body of attorneys? Does everybody say, "I have to have my own counsel to sign any document?" Has it gone that far in terms of legal representation?

JOHN BRINITZER: Within a particular organization?

JACK FRIEDMAN: No, within all these organizations and leaving out the litigation side.

JOHN BRINITZER: For a cross-border M&A transaction or a securities transaction, it's typically centralized at the home office, with counsel running it from a central location and calling on the local expertise. The organization itself would involve participants from local jurisdictions to the extent there are specific local law issues arising, but otherwise, not if it's just a question of liability protection of the

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local jurisdiction; that would be handled centrally, in my experience, actually.

JACK FRIEDMAN: Thank you all. To continue on, our next speaker is Richard Price. So, go ahead.

RICHARD PRICE: Thanks, Jack. Good morning, everyone. As Jack mentioned, I'm a capital markets lawyer, and this is an interesting, if not surreal, time to be a capital markets lawyer in Europe, helping companies raise capital in these topsy-turvy markets that we're encountering. Just to give you one example: yesterday, we priced a high-yield (which means sub-investment grade) bond offering for a Nordic issuer. We issued a ten-year U.S. dollar-denominated bond, and got better pricing than the current yield for Italian government bonds. So in the eyes of investors, this small sub-investment grade company from the Nordic region is a better risk than the Italian government. Who would have thought we'd be encountering something like that.

One thing that has come out of the global financial crisis is that companies have to look to diverse sources of capital, to raise capital, for their corporate needs. And this is playing out in both debt and equity.

In the equity markets, we're seeing a globalization, a continued globalization of the capital markets, and the rise of exchanges in new markets, particularly in Asia, and maybe I could turn it over for a little bit of audience participation and ask you if you can name, or we can collectively name, the top five exchanges for IPOs last year, in the world.

AUDIENCE MEMBER: Hong Kong?

RICHARD PRICE: Hong Kong was number one; that's correct.

AUDIENCE MEMBER: Singapore?

RICHARD PRICE: Singapore, not on the list.

AUDIENCE MEMBER: Portugal?

RICHARD PRICE: Not on the list.

JACK FRIEDMAN: If you don't give the right answer, they're going to take your college degree away and make you go back to college!

RICHARD PRICE: How about some more obvious ones?

AUDIENCE MEMBER: London?

RICHARD PRICE: London? London was, interestingly, not on the list.

AUDIENCE MEMBER: NASDAQ.

RICHARD PRICE: NASDAQ, not on the list. I think I heard someone say New York. New York *was* on the list. Number two.

AUDIENCE MEMBER: São Paolo.

RICHARD PRICE: Not on the list.

AUDIENCE MEMBER: Shanghai.

RICHARD PRICE: Shanghai, yes. Shanghai was number four. Tokyo was number five. We will give a gold prize for the person who can get number three. I have to confess — I didn't even know this city had a stock exchange.

AUDIENCE MEMBER: You're going to have to tell us.

RICHARD PRICE: Shenzhen. Number three.

Another — and this trend, actually, is continuing into this year, even though the equity capital markets have been pretty quiet. Roughly $50 billion was raised on Asian exchanges and IPOs, 30 billion in European exchanges, and 25 billion in U.S. exchanges, year-to-date.

Why are we seeing this surge of interest in Hong Kong, in particular? It largely boils down to Hong Kong's proximity to China. Most of the action with Hong Kong listings is from Chinese companies. Hong Kong is the only exchange in China that is open to foreign investors, so for Chinese companies, Hong Kong serves as a gateway to global funds and global investors, but it's still fairly close to home.

As we all read about in the newspapers, Hong Kong is also beginning to attract foreign issuers seeking to tap Chinese capital. That's largely valuation-driven. They can

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get higher multiples on the Hong Kong exchange than they may be able to get on comparable exchanges in the West.

In addition, a number of companies are IPOing or getting a second listing in Hong Kong, in order to raise their profile generally in Asia, and this is particularly true in the luxury goods segment. I didn't appreciate until yesterday that fifty percent of luxury goods sales in the world are in Asia. So for a luxury goods company like Prada, for example, they may want to list in Hong Kong in order to raise their profile with Chinese investors and potential customers, as well.

One reason issuers *don't* go to Hong Kong, despite what we might read, is lack of regulation. The Hong Kong market is actually heavily regulated. It's a fairly cumbersome and expensive process for a company to list on Hong Kong, and the Hong Kong monetary authorities are a very vigorous regulator in our experience, and in others' experiences, as well.

Another trend that we're beginning to see recently is the reemergence of New York as a listing venue, and why is that? The U.S. markets have proven less volatile recently than certainly the European markets, although they're not immune, by any means, from what's happening in Europe and elsewhere. Also, companies are getting more comfort around the regulatory regime in the U.S. and, in particular, Sarbanes-Oxley. Sarbanes-Oxley proved to be a huge deterrent for foreign companies to list in the U.S., and over time, a couple of things have happened: firstly, companies have become more comfortable with it; secondly, the rest of the world has caught up with many aspects of Sarbanes-Oxley, and the playing field has been leveled.

Finally, I should talk about London. Over the last five years, the London Stock Exchange has generally led the way as the market for non-domestic issuers doing IPOs. We would expect that to continue, although obviously, London has been affected by the recent European turmoil.

Switching to debt, in Europe we're seeing a really interesting — or at least, from our perspective — a really interesting trend in the debt markets, and that's a seismic shift away from leverage lending by banks in favor of the high-yield bond market. Until 2007, the vast majority of leverage financing in Europe — and this is financing for M&A transactions, financing for LBOs — the vast majority of this financing was provided by banks. European banks are now sitting on approximately $2 trillion worth of these leveraged loans and high-yield bonds, and with the capital constraints they now face, and the new capital requirements coming down the pike with all three, these assets are highly capital-inefficient for the banks, and they are quite keen to shrink their exposure to leveraged finance generally.

At the same time, we are approaching this massive wall of loans that were written in the boom years of 2005, 2007 that begin maturing next year that companies have to refinance. We don't expect, and people don't generally expect that the banks will be lining up to provide that refinancing themselves.

So these companies have really three options. One is to refinance the loans that are becoming due, with high-yield bonds, and that's really the obvious option, to refinance debt with debt. Another option is to refinance it with equity, and to some extent we'll see some of that, and hopefully as the equity markets become less volatile, we'll see a pickup in IPO and other equity capital market raising to refinance this debt. Then the third option, if those first two options fail, is to go bust, essentially. So I think we will see a lot of restructuring activity beginning next year.

Just to talk a little bit about high-yield bonds and the difference between high-yield bonds and leveraged loans, from an issuer's perspective, the positive of bonds vs. loans is that it's a reasonably permanent source of funding. You raise the money, the bonds are there and they become due seven to ten years later. Bank loans have much shorter tenors, they're subject to MAC clauses and the like, and the issuer is, to some extent, more hostage to the lender.

High-yield bond covenants also tend to be a bit looser than bank covenants. There are incurrence covenants as opposed to maintenance covenants, so they just restrict actions that the company can take. They're not required to maintain certain financial ratios in order not to go into default, and that's certainly a big plus.

On the negative side, although high-yield covenants may be looser than bank covenants, they're much more rigid, and because high-yield bonds are issued to hundreds and potentially thousands of investors, they're drafted in such a way that they're intended to remain in effect, unamended and unwaived, throughout the term of the bond. It's very difficult and expensive for a high-yield bond issuer to have to go back to investors once the bond's been issued, to try to amend the terms.

JACK FRIEDMAN: Would they need a majority or supermajority amendment?

RICHARD PRICE: Yes.

JACK FRIEDMAN: They can't require a unanimous vote, obviously.

RICHARD PRICE: Well, interestingly, on money terms, it is unanimous, which

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makes it extremely difficult to do. That's a function of the U.S. Trust Indenture Act. The high-yield bond market in Europe really grew out of the high-yield market in the U.S., which is much more mature. High-yield deals in the U.S. are subject to something called the Trust Indenture Act of 1939, which basically provides that you can't change the money terms of a bond without the consent of every single bondholder. So to restructure a bond in a way that changes the economics is very difficult. There is no real opportunity to cram down changes.

Another negative, from the perspective of borrowers, is that many of these companies have never been to the capital markets before, and there's obviously a reasonably significant cost associated with accessing the capital markets for the first time, to come up with a disclosure document. That's what the lawyers do. Basically, they become, in effect, public companies exposing themselves to the market and having to disclose information to the market through the tenor of the bonds.

But we certainly see a potential for a huge surge in high-yield bond activity in Europe. The markets are extremely quiet right now. It's very difficult in spite of the deal that got priced yesterday.

JACK FRIEDMAN: Really?

RICHARD PRICE: Yes! It's extremely challenging to price any capital markets transaction in these markets. But we expect that once there's a little less volatility in the bond markets, we'll see a surge in high-yield.

In terms of the implications of this for law firms and for all of what I've described, I think it's increasingly important for international law firms to have global capabilities across practice areas, to be able to provide clients with advice, whether they're doing a listing in Hong Kong or a high-yield bond deal in Europe. Or if there's a junior mining exploration company, a listing on the Toronto Stock Exchange, is the most popular venue. Whatever the kind of company, it's increasingly important for law firms to have capability in all of these areas.

So I think law firms will continue to globalize. They'll beef up certain practice areas, like high-yield, particularly in Europe. U.S. high-yield practitioners are in high demand these days in this market. Firms will beef up their Asian capital markets capability, and we would expect restructuring lawyers to be in fairly high demand going forward.

JACK FRIEDMAN: For the audience, this is employment planning advice for you for free. You can mark it down and you didn't even have to pay him to know who would be hiring.

Let me ask you this quick, before we move on to the other speakers. Would you give us an idea of the variety or geographic spread of the financings that a company like yours would do? I'm sure it could be everything from currency to project finance, but I don't know what the variety would be.

SIMON EVANS: Okay. We, ArcelorMittal made a bit of a change over the last few years, partly for the reasons that Richard mentioned, two changes: First of all, going back a number of years, we moved from less debt at operational units and slightly more debt raising centrally, and that was based on the ability to get better funding with investment grade rating and so on. The other change over the last few years was less dependency on bank debt and moving toward bonds; again, for reasons just mentioned: that it gave a longer debt profile, and we were better protected going through the last economic crisis and anything that might happen now in terms of any repayment schedules. So, we have quite a well-spread debt profile, which is partly based on more bond debt and slightly less bank debt.

We haven't historically done a lot of project finance, although we do have a few such project finances on at the moment. They tend to be great for lawyers, because they're quite complex. They slow the company down sometimes. We've used them in some joint ventures in some parts of the world, external project financing. They are a bit more complicated. They may have certain balance sheet implications, of course. We do use them occasionally, but it isn't our primary way of raising funds.

Of course, our primary way of raising funds, I should have said at the beginning, is through our own cash flow, because our own cash flow from the organization is used for our own expansions.

JOHN BRINITZER: Simon's being very modest, so I'll toot ArcelorMittal's horn. ArcelorMittal reopened the debt and equity linked markets after the financial crisis in 2008 and early 2009 with a series

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of transactions: an equity linked, an equity deal, and several debt deals. All told, five or six transactions in a two- or three-month period, raising over € 10 billion–€ 12 billion, so it has been a very opportunistic and successful capital markets issuer.

JACK FRIEDMAN: Could you comment on the M&A aspect of capital markets?

JOHN BRINITZER: Well, I was going to speak briefly on cross-border M&A and issues arising in cross-border M&A transactions. I would take a case study of one of the most noteworthy cross-border M&A transactions of the last decade, which was Mittal Steel's acquisition of Arcelor in 2006. At the time, Mittal Steel was the largest steel producer in the world, and Arcelor was a close second. Actually, one of the contested features of the transaction was the order of that. Mittal Steel was a Dutch company, the controlling shareholder of which was an Indian national. It had grown exponentially over the past decade, both organically and externally, through numerous transactions primarily in the emerging markets. It was listed on the New York Stock Exchange and Euronext Amsterdam. Arcelor had resulted from the combination of the French, Belgian, Spanish and Luxembourg steel companies that had been restructured following the difficult periods of the 1980s and part of the 1990s. It was listed on the Spanish, Belgian, French and Luxembourg stock exchanges. Its operations were European-focused, but it also had operations in emerging markets, particularly in South America and in North America. Mittal Steel had global operations with focus on emerging markets, as I mentioned, but elsewhere as well.

The transaction raised many of the issues that one sees in cross-border M&A transactions, plus novel ones. It was quite a remarkable transaction in many respects. Briefly — I could take up the remaining time to talk about the transaction — but quite briefly, hitting some of the issues and how they presented themselves and were dealt with: on a political front, it was a controversial transaction, at least initially. It was perceived as a south-north transaction. I should mention, for those who don't recall, that it was initially unsolicited. It was launched in January of 2006 as an unsolicited transaction, the transaction taken directly to shareholders through an exchange offer and a tender offer, and the governments involved considered themselves to be stakeholders and took an active part in the review of the transaction, both directly, through their regulatory role, as well as indirectly in a more political role through public statements and various requests of Mittal Steel, such as to publish an industrial plan. So how the potential acquirer saw the industrial strategic logic for the transaction, what it would mean for local economies and for local labor forces, as an example.

From a regulatory perspective, it raised significant antitrust issues globally and required a global antitrust analysis. There were overlapping operations, in particular, in North America. From a securities law perspective, the European takeover directive had not yet come into force. Actually, it was coming into force in the midst of the transaction, and the securities, as I mentioned, were listed in six stock exchanges, so the takeover regulations of those six stock exchanges needed to be addressed. In particular, in Europe, a cohesive set of takeover regulations needed to be identified and complied with, and indeed, a lead regulator for the contents and the substance of the terms of the transaction needed to be identified. So that required coordination both on the regulator's side as well as on the offeror's side.

The securities were being listed in six jurisdictions, so the disclosure requirements needed to be addressed and harmonized through the listing document, which was a transaction in and of itself. In addition, and perhaps most importantly, this was not a static situation but a very dynamic situation, because Arcelor did not initially see the industrial logic of the transaction or was otherwise opposed to it, so it threw up an array of defensive measures which needed to be addressed. These ranged from active involvement in the regulatory review process, such as suggesting to the various regulators who were reviewing the terms of the offer and the transaction documents, some issues that they might be raising — these are known, at least in the U.S., as "bedbug letters" (i.e., sending a letter to the regulator indicating that it might want to look at X, Y or Z aspect of the transaction or require *pro forma* financial statements for X, Y or Z aspect).

Value-based offenses, including special cash distributions, dividends, share repurchases had to be dealt with in structuring the offer, such as by building in an automatic adjustment mechanism. Poison pill defense: Arcelor put a key asset into a Dutch trust, a stichting, as a way of ring-fencing it. This was an asset that Mittal Steel had agreed at the outset of the transaction to onsell to a competitor, in order to proactively address any antitrust issues, as well as synergy issues. So that had to be addressed, as well, and that was done through a "pocket" consent decree with the U.S. Justice Department that if the stichting could not be undone, an alternative asset could be sold in order to address antitrust considerations.

Last, but not least, at the very end of the game, a white knight defense was employed with a transaction with a Russian steel company that would have blocked Mittal

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Steel's transaction. This was addressed through, among other things, essentially a shareholder revolt, where a fifty percent threshold had been built into the white knight transaction that could only be rejected if fifty percent of the shareholders voting at an EGM rejected it – not fifty percent of those present, but fifty percent of the total shareholder base, which had been seen probably as an insurmountable threshold, but indeed it was reached.

So, in a nutshell, a six-month deal – actually, a nine-month deal, in hopefully not more than five or ten minutes, as an example of the type of issues that arise in cross-border M&A transactions.

JACK FRIEDMAN: A few years ago we hosted the Global General Counsel of Microsoft here in London. His firm had an important competition law issue in Europe. Regarding competition proceedings before judges, the Panelists said that they are professional and in-depth, and that was fine. They said there was a problem with administrative proceedings before the trial. The parties are sitting there and a junior official comes in to hear you. Often no one with actual authority is hearing your presentation and there is no question and answer.

At a trial, the judges may say, "You had your day before the administrative agency and we defer to their expertise."

Are there any comments anybody would like to make about administrative proceedings or the process?

SIMON EVANS: Dominance allegations relating to Microsoft would be very different and wouldn't apply to us. The whole regulatory system around antitrust is complex; it is bureaucratic. The U.S. system is a bit different from the European one, but the European system is actually criticized – you refer to the separation between the administrative and the court system in the U.S. – in the EU, you get that different form of criticism in that the European

Commission is accused of being both an investigator and judge imposing the fines, although of course there are appeal procedures with courts. It's become more and more complex, and the official jotting down notes may be doing as much good as anybody else in the room sometimes.

JACK FRIEDMAN: Well, without saying that anybody on the Panel is necessarily giving their *personal* opinion, what is the opinion among business leaders about the whole regulatory process system for the EU, not just antitrust? Are people happy with it? From where is the reform supposed to come?

SAMANTHA MOBLEY: I think that this debate, and in particular the differences between the two models that Simon has raised, is very topical, because in fact you may know that we're looking at a wholesale reform of our U.K. competition regime, and ministers have been given a couple of options in terms of enforcement and in, for example, the conduct area. One is, you're going to have to take this to a court like they do in the U.S., and you're going to have to prove your case in front of the judge. The other is, we'll just do it as the Europeans do it, like we've been doing it for the last few years. So it's on the ministers' table at the moment to make the choice between the two. I suspect they'll stick with the European system, which as Simon says, is flawed in the sense that the investigator is also the person you take your case to.

I've had plenty of experiences, as you suggested, of having a CEO presenting the antitrust case to a case officer that looks half his age. That needs to change. So one of the proposals that we've put forward to reform the U.K. system, for example, is that the CEO, or equivalent, ought to have the right to have their day in front of the person who's going to make the decision, if you're going to stick with this administrative system as opposed to move to the court system.

JACK FRIEDMAN: We are going to hear from Samantha Mobley on her topic now.

SAMANTHA MOBLEY: I'm just going to say a few words on the topic of compliance, really following very much on the comments that Simon made earlier. Congratulations, by the way, Simon, for your recognition, to both you and your team!

My data point for these comments is the fact that the world's first global law firm has conducted a series of risk management roundtables with international global general counsel, and we've been doing these sessions over the last five years, and probably obtained the views of about eighty general counsel. I really wanted to touch very briefly on five points. One is actually one that Simon's already picked up, which is this tone from the top point.

I think five years ago, general counsel, post-Enron, were very aware of the fact that risk

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now needed to be proactively managed, as opposed to the general counsel's role just being a firefighting role. But they were having real difficulty in persuading boards that money ought to be spent on this proactive compliance. Peer benchmarking was used to say, "Oh, well, they're doing it," or "Look how they got into trouble."

I think now, today, top-level commitment is seen as a no-brainer by pretty much everybody, including board members. It may have to do with the personal criminal liability that's been mentioned before. It also may be to do with the proliferation of stakeholders that's been mentioned by Nigel. But today, everybody agrees you need strong CEO/board statement around compliance, and compliance has got to be an item on a board or board committee agenda at least every quarter.

The second point is around structuring the compliance function. It's the structural and organizational issues that Simon referred to. I think five years ago, the idea of a compliance officer separated from legal or internal, was definitely very much in the frame, but there was no real talk of a compliance function beyond that officer. Today, it's completely different. Now we have many companies that have, in fact, established formal board committees focused on legal risk management, including lawyers, auditors, business managers, etc. Also, the compliance function is now out in the business. A lot of companies, in each of their particular businesses, have compliance champions to take responsibility for this area, but at the same time, have said to senior managers, "You can't just delegate this to the compliance officer. It's your responsibility to make sure that your part of our business has a compliance culture."

The third point is around risk assessment and identifying legal risks. Five years ago, everybody was focused on, "Well, what are the really key legal risks for our business?" So people were focused, in those days, even then, on bribery, but also antitrust and fraud were the key areas that were

mentioned as needing to be proactively managed. Then, when we headed into the recession in 2008 and 2009, there was certainly a recognition amongst general counsel that compliance is even more important, because it's in the moments when there's a real squeeze on budget that people are tempted to break the rules. In the face of an impending double dip, that's a particularly pertinent point today.

Now, the focus is not so much on which areas we have to manage; the focus is more where, in particular, we need to manage them, and Transparency International has been mentioned already, the index that identifies the most risk countries. Most recently, GCs are looking around for other data points, not just transparency, but other data points, and looking to see which countries are the most risky. China is definitely one that's been mentioned before and is on the list.

The fourth point is around what are the policies and procedures you ought to implement to manage the risks that you've identified. Training is considered a soft audit and therefore a focus. Third-party intermediaries — five years ago, nobody thought that we ought to be training our third-party intermediaries. A number of companies now do that, and also conduct pretty sophisticated due diligence on their third-party intermediaries.

There has been a lot of debate over the years about how to incentivize individual compliance out there in the business, and five years ago people were talking about making sure that compliance was part of your expected performance. These days, people have hardened and moved on to perhaps making 10% of your performance bonus dependent on delivering on compliance measurables.

There's been some talk about the ultimate steps you might take to avoid risk, including pulling out of a risky business area, pulling out of a country, or indeed vertically integrating in a country so you don't have intermediaries who might go off and bribe officials.

In the M&A space, there was a lot of talk initially around how you go in and do due diligence to find out what's happening. More recently, there's a recognition that it's going to be very hard to find out in due diligence the things that are, by definition, covert and secret in nature.

So the discussion today is more around going in and implementing processes and procedures to root out the problems and try and manage those problems as soon as you've bought the business.

Finally, in the ongoing monitoring space, five years ago the talk was all about the need to conduct audits, and what the best practice in conducting audits was. Audits are still important today for specific and suspect problems, but the theme these days is more around ongoing monitoring. Often companies will make sure that their internal audit is routinely and regularly going in and conducting exercises, whether or not there's a problem, just to pick up whether the organization has a culture of compliance.

JACK FRIEDMAN: Thank you. Before we go to Rani on litigation and arbitration, I have a question for the whole Panel.

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I was involved with a panel at a conference on technology in the boardroom. I was in the role of being an independent director and there was a corporate crisis. I said, "Bring in the chief information officer and let's just have him or her collect all the information from the different divisions." Everybody in the audience who was a tech person started laughing, and I said, "Why?" They said, "Databases are so decentralized in companies that even the chief information officer doesn't know all the databases, and the software can be incompatible." At other programs, I've heard people say, "The first thing we did in a crisis was try to collect all the documents." What are "all" the contracts and other legal documents? Does somebody know where all the documents are? How do you pull everything together at the beginning of a crisis to find out what is going on?

RANI MINA: Well, often, with great difficulty. The starting point is to identify who the key individuals are in terms of the particular issue that has arisen, and really to have them identify where the key documents are and the key evidence sits. But you're quite right — it can be spread amongst lots of different countries' jurisdictions; there doesn't tend to be a centralized place in which all of the documents are kept. Even once you've engaged in that process of identifying who the key individuals are and where the documentary evidence sits, there are often issues with relation to the collection process. Collecting electronic documents is quite a complex activity in itself, and once you have done that, you run into issues about transferring those documents and that evidence amongst different countries in terms of data protection and privacy. So it can be very difficult when you are faced with that type of issue.

JACK FRIEDMAN: There was an article in *The Wall Street Journal* saying that Siemens, in their big investigation, had spent $500 million on the investigation apart from the billion dollars of penalties. According to the article, part of the

problem was that people in the Indian subsidiary said it's against Indian law for them to help their parent company in certain aspects of the investigation, so they were not cooperating. In Brazil, they had a similar problem — it's against local law to do this so we're not going to do it. You own the local company. They're your subsidiary. They are not helping. The issue is how can a parent collect documents globally?

SIMON EVANS: It's true that in a large organization, particularly one that's grown incrementally, data can be located all over the place.

Your question about subsidiaries is interesting, because where it's not a 100%-owned subsidiary, you do have the minority shareholders, and then you're going into all sorts of complexities about what information can be shared with the parent, even if you own a high percentage of the company.

There's a difference between a litigation, where you've got court orders demanding documentation, much more the U.S.-U.K. type of discovery process, and the different continental system, of course. In terms of an internal investigation, then: again, it can be very, very complex, and organizations have their crisis management teams preserving the confidentiality of the documentation that is also all part of it. But from time to time, organizations have to do as you say and it's not always easy.

JACK FRIEDMAN: We were told in the States, if I get this right, that France passed a law that if you do an investigation, you have to tell the target, the employee who's the subject of the investigation, something like within 48 hours, within two days, that they're the subject of an investigation, whereas in the States, the tradition is you'd better get your facts straight first, before you tell someone you're doing an investigation. In other words, the fact that you're collecting the information doesn't mean that they're guilty or not guilty, but you'd better do your homework before you walk in and say, "We're investigating you."

SIMON EVANS: The whole whistleblowing thing is very different on each side of the Atlantic.

JACK FRIEDMAN: Right. So, the American companies were very concerned about how they're going to reconcile it.

As another example, one of the Big Four accounting firms did the audit for a Chinese company. The company raised money in America, which it is alleged was done on a fraudulent basis with false bank records that they had procured. The American government said that the accountants must bring in their work papers. The Chinese government said that if you do that you're violating Chinese law. Either government could shut down the accountants in that country. Of course, the accountants say the operations in each country are legally separate. We now have the two governments giving orders which could harm the Big Four accounting firm, depending on what it does.

So again, a comment about if you have a litigator or anybody else dealing with threats from two sides and you have one client going, "I'm law-abiding, but what do I do?" Does anyone have any advice on that one?

RANI MINA: Well, those types of issues do arise quite regularly. There are different standards that are applied by different countries in terms of what information they're allowed to share as between other

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countries, and from a client's perspective, it can be a very difficult thing to understand. In one jurisdiction, they're being told that they need to produce certain documents, and then they run into problems in terms of producing those documents from another country. Those are issues that do come up quite regularly, and particularly with the accounting firms, who have quite deliberately organized themselves in that way so that they are separate entities operating in each of these jurisdictions. One of their concerns is precisely that they don't want to really be in a position where they are being forced to hand over their clients' confidential documents to regulators in other jurisdictions.

SIR NIGEL KNOWLES: My only observation would be to say that I think it depends whether it's internal or external. It depends whether it's global or multi-jurisdictional. I think it's about speed and resource and response, because if you, for example, are headquartered in the U.K. but you have a bit of a problem in the Asian-Pacific region, you can't say, "Well, we'd better go buy an air ticket and get out there to see what's going on." You've actually got to be immediately on the ground. Therefore relevant global resources, able to act immediately, before things disappear, people disappear, people change their stories, externally, internally, whatever, is the really important dynamic on things of this nature.

JACK FRIEDMAN: Have you ever had a situation where your lawyers in numerous countries have a conference call and say, "What are the privacy rules for emails where you are? We don't want something in one country to create problems elsewhere." Do you ever have a huge conference call among large numbers of partners?

SIR NIGEL KNOWLES: I'm sure we've done everything, ridiculous or otherwise.

But I mean, the other point about what we're talking about here is, if you get global resources and are able to make a global response in circumstances like this, you've got people on the ground who embrace and understand the local culture, who can go and talk to regulators with whom they probably have a relationship. That also helps the speed of response, because there are, as you've suggested, many different ways of doing things in different parts of the world. One thing for certain is, everything's done; the world is a three-legged stool, isn't it? You've got the Americas, Europe, the Middle East, and Africa. You've got Asia-Pacific. They're all different. Within each region, it can be very, very different. You really have got to talk to a regulator in a country, in a different culture, by having people who understand it in the same culture. I think that's increasingly important. You can't do the fly-in, fly-out routine as effectively.

> "But in the end, whatever the situation is, the general counsel has to bridge the gap between business counselor and regulatory advisor, so as to provide integrated advice to management."
> — *Simon Evans*

JACK FRIEDMAN: I'm going to invite Rani to speak. Rani, will you make your remarks?

RANI MINA: Thank you, Jack.

As Jack has said, I'm a partner in the Commercial Dispute Resolution group of Mayer Brown in London. Mayer Brown has been lucky enough to work with Simon and some of his colleagues in various jurisdictions on a range of interesting matters over the years. So I'd just like to start by saying it's a real privilege for Mayer Brown to attend this morning and to take part in this program honoring Simon, and we'd like to offer our congratulations to Simon for this honor, and to thank him, Jack and the Directors Roundtable for including us.

In my opening comments, I wanted to touch on some high-level themes in inter national cross-border disputes, which I hope that we can then explore further in the panel discussion.

It's been said a few times already this morning that globalization has been a key feature of business in recent decades. What that means, in practical terms, is that corporations are increasingly established or have a presence in a number of jurisdictions; part of their business activities take place abroad; or they're transacting with foreign entities; and that may often include foreign states and state-controlled entities.

So, it's against that background that questions of governing law, jurisdiction and enforcement have become increasingly prominent, both during contractual negotiations for cross-border contracts, and also in the disputes that may arise subsequently under those contracts. In fact, these issues are at the very top of the agenda for many corporates who transact with foreign states or state-controlled entities, given the real prospect of sovereign debt defaults leading to cross-border disputes under those contracts.

So I'd like to dive into those issues by looking first at the negotiation of the cross-border contract. I've already indicated that there are three key considerations in terms of the choice of governing law, the choice of jurisdiction, and the enforcement of rights and obligations under those contracts.

The choice of governing law is a really crucial issue. It would be a mistake to treat it as some form of boilerplate clause, because it can make the difference between what is at the outset a profitable contract, and what may later turn out to be a deeply

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unprofitable contract after the dust has settled following a dispute.

The governing law affects many different aspects of the contract. First and foremost, it affects the nature and scope of the rights and obligations of the parties, including the rights of termination under those contracts. It affects what remedies may be available for breach, so in each country, you would want to ask whether there is, for example, a monetary award available under those governing laws, and if so, how would that be quantified? Is an injunction available on an urgent basis? Can you get specific performance of obligations? In fact, the governing law can affect whether a claim can be made at all, since the limitation periods do differ quite significantly between countries.

Just to give you an example from a recent matter that I'm working on, I have an Italian client that has two supply contracts with the same German company. The first contract is governed by English law, and the second is governed by German law. The client has come to us because they have a substantial breach of warranty claim which potentially stretches back over a seven-year period, and I think most of the audience will know that under English law, the standard, reasonably generous, limitation period is six years. But under German law, there's a strict two-year limitation period. So what the client is faced with is the real prospect that there may be no claim for products supplied under that German contract which fall outside of that two-year limitation period.

Of course, governing law doesn't just affect the substantive rights of the parties. It also affects the procedure and evidence that may be required for any claim that you wish to bring. So different countries, as we've been hearing, have different rules on discovery or disclosure of documents. There are different rules on the way in which evidence needs to be presented, and different rules also on the access that you might have to the other side's witnesses prior to any hearing. More fundamentally, there is the issue of whether the dispute is going to be determined by a judge or a jury.

Jurisdiction is of equal importance, and here, the choice in negotiating the contract, is whether you may want to give exclusive or non-exclusive jurisdiction to the national courts of a particular country, or alternatively, whether you want to confer jurisdiction on an arbitral tribunal. On that point, it should be kept in mind that particular difficulties can arise when corporations are contracting with foreign states and state-controlled entities, since the defense of sovereign immunity can be raised to challenge jurisdiction and often is raised.

The issue of sovereign immunity from court proceedings is determined by reference to national laws, and different countries have different ways of striking a balance between protecting the rights of those who enter into commercial transactions with states, and the legitimate interest that sovereign states have in preserving their immunity from proceedings of national courts.

Actually, those risks can be addressed in part by including an arbitration provision in such contracts, because the conclusion of an arbitration agreement by a state or a state-controlled entity generally carries with it an implied waiver of immunity in respect of the arbitral process, and this general rule of international custom and law is in fact confirmed by the national laws of various countries.

The cost and time scale of proceedings in different jurisdictions is also a key factor that needs to be considered when selecting a jurisdiction. Here, I would suggest that it's important not just to focus on the differences in lawyers' fees and arbitrators' fees, although that obviously is to be taken into account, but it's equally important to consider whether a particular jurisdiction has cost-shifting rules, and if that jurisdiction does, what proportion of costs might be recoverable from the other side, or

might your client be required to pay. On the other side of that is whether a particular jurisdiction provides for the possibility of cost protection via the making of a well-timed settlement offer, for example.

There are a number of other considerations in these areas, but I'm just going to mention the main issue with respect to enforcement, and that is whether the orders or awards of the preferred forum, the forum that you select for this contract, are going to be enforceable in the country where the contract debtor is located, or the various countries in which their assets may be located. Clients are often surprised to learn, for example, that judgments issued by the English courts are not readily enforceable in the U.S., whereas judgments issued on a pan-European basis are enforceable.

JACK FRIEDMAN: Would you just amplify? I just assumed that whatever the British courts say is good enough for us.

RANI MINA: Yes, as I said, it's often surprising to learn that that's not the case. As between England and the U.S., there is no bilateral treaty on the reciprocal enforcement of judgments, so that enforcing an English judgment in the U.S. is a matter of the United States' domestic law on enforcement, which may vary between states. In Europe, there has been great progress made in implementing EU-wide regulations, so that there is a large measure of standardization and enforceability of judgments amongst European countries.

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Of course it's not always the case that a cross-border contract will contain a carefully considered jurisdiction and governing law clause. It's not uncommon for there to be a governing law clause but no jurisdiction clause. Sometimes there's no clause at all. Or, alternatively, the parties may agree on a non-exclusive jurisdiction clause or some form of hybrid clause. So the situation might exist where one party can be sued only in their home country, whereas with the other party, it's possible to sue them in any jurisdiction.

So, when you have a dispute arising out of that type of contract, you get the range of similar issues arising in terms of the substance of the dispute and the rights and obligations of the parties, procedural issues, practical issues and tactical issues. Just as a starting point, it would be necessary to consider where proceedings can be commenced, whether jurisdiction can be contested, where your client would prefer to sue, where it's best for them to sue, and then having worked that out, how best to obtain and maintain that preferred forum on behalf of your client.

Any one of those issues can change the outcome of a cross-border dispute. So it does mean that these are issues that parties are increasingly locking horns over, and that they are issues which need to be considered at an early stage of any dispute.

Thank you.

JACK FRIEDMAN: Thank you. You can see from a content point of view, the variety of things that Simon has to deal with. It's almost unbelievable. I can't even imagine all these issues that have been raised in just one program.

I'd like to welcome anybody who'd like to come up and say hello to the speakers. Thank you, Panelists, for sharing your expertise, and thank you, Simon, for accepting our invitation to be honored.

SIMON EVANS: Thank you, Jack.

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Sir Nigel Knowles

Joint CEO and Managing Partner

Sir Nigel Knowles is joint CEO and managing partner of DLA Piper. He has been managing partner since 1996 and in that time has led its growth from a regional U.K. law firm to what is now the world's largest law firm. Globally, DLA Piper has a turnover in excess of £1bn.

Career History

Sir Nigel Knowles joined the Yorkshire firm, Broomheads, as a trainee in 1978 and was admitted to partnership in 1984, specializing in corporate finance, private equity and mergers and acquisitions. He quickly moved into the management sphere and in 1990 was appointed head of the commercial group at Dibb Lupton Broomhead (following the merger of Broomheads and Dibb Lupton, which took place in 1988). Sir Nigel's career quickly accelerated from there and he was appointed to the board and the role of deputy Managing Partner in 1995, finally becoming Managing Partner in 1996.

Since that time, Sir Nigel has led the practice through a host of successful mergers. From a largely U.K. presence, the firm has expanded into Continental Europe, Asia and the Middle East. DLA Piper continues to retain a strong regional presence in the U.K. with a total of eight offices. The Continental European practice has expanded rapidly and now has offices in Austria, Belgium, Central & Eastern Europe and the CIS, France, Germany, Italy, the Netherlands and Spain. The Asian practice has grown steadily since opening in Hong Kong in 1988 and now includes offices in Bangkok, Beijing, Shanghai, Singapore and Tokyo. In 2006, DLA Piper's first Middle East office opened in Dubai, and was swiftly joined by offices in Abu Dhabi, Kuwait, Oman, Qatar, and Saudi Arabia.

Perhaps most notably, in January 2005, Sir Nigel was instrumental in the single largest transatlantic law merger in recent history when DLA integrated with U.S.-based firms Piper Rudnick and Gray Cary Ware & Freidenrich LLP. In the same year Sir Nigel was named Partner of the Year by *Legal Week* and DLA Piper was named Global Law Firm of the Year at The Lawyer Awards and Law Firm of the Year at the Legal Business Awards.

DLA Piper

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Samantha Mobley

Partner & Leader – Global Competition Practice

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Samantha Mobley is head of the EU, Competition & Trade Practice of Baker & McKenzie's London office. She is also the leader of Baker & McKenzie's Global Antitrust and Competition Group, comprising a team of over 300 competition and antitrust specialists worldwide.

Samantha has extensive experience in all areas of EC and U.K. competition law and is an eminent name in the cartel field and an experienced merger control specialist. She has been involved in numerous cases coordinating the merger aspects of multi-jurisdictional transactions and regularly defends clients involved in international cartel investigations and prepares antitrust and competition programs for clients in all industry sectors.

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Richard Price

Partner & Co-Head – Corporate Practice

SHEARMAN & STERLING LLP

Richard Price is the head of our European capital markets practice and the co-head of our European corporate practice group. Prior to his relocation to London in August 2003, Mr. Price was based in Singapore, where he led our capital markets practice in Southeast Asia and India and, prior to that, was based in our Toronto office. He has extensive experience in representing both issuers and underwriters in a wide range of international corporate finance transactions. He has overseen investment grade debt, high yield debt and equity offerings by issuers in a wide range of industries. Mr. Price's practice includes providing advice to corporate clients regarding U.S. federal securities laws, mergers and acquisitions, corporate governance and other corporate matters. Mr. Price is a frequent speaker on U.S. securities law issues, international corporate finance transactions and corporate governance matters. He sat on the Competitiveness Working Group Committee of the Stock Exchange of Singapore and the Corporate Governance Committee of the Government of Singapore. He is cited as a leading corporate finance lawyer in the most recent editions of *Chambers Global, Chambers Europe, Chambers U.K., The Legal 500* and *Legal Experts.*

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We have also advised on some of the world's most notable transactions and matters, representing: the Yukos shareholders in their $100 billion compensation claim against Russia; Cadbury in its $19.4 billion acquisition by Kraft; Panama Canal Authority in its $5.7 billion canal refinancing plan; IntercontinentalExchange in its acquisition of The Clearing Corporation and formation of a credit default swap clearinghouse; The Dow Chemical Company in its acquisition of Rohm & Haas and sale of Morton International and its calcium chloride and Styron businesses; Suncor Energy in its $15.8 billion merger with Petro-Canada; Brazilian conglomerate JBS in its acquisition of U.S. poultry company Pilgrim's Pride through a bankruptcy proceeding; Société Générale in combination of its asset management operations with Crédit Agricole's; and Sterlite in its $500 Million Convertible Bond Offering in India.

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Rani Mina

Partner

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Rani Mina is a partner in the Commercial Dispute Resolution team at Mayer Brown International LLP in London. She focuses on commercial dispute resolution and international arbitration in the banking and finance, IT and telecommunications, outsourcing and procurement and mining sectors. Rani has wide experience of acting for financial institutions, companies, corporate trustees, directors and shareholders, private equity funds and joint ventures in complex litigation and international arbitration.

Rani has a particular interest in the reforms to civil litigation costs arising out of Sir Rupert Jackson's review and in alternative litigation funding generally. She has written a number of articles on these issues and provided comments for media publications.

A selection of notable engagements includes:

- Acting for a corporate trustee in an arbitration arising out of pipeline shipping arrangements between oil producers in Russia and Kazakhstan.
- Acting for an international bank in a claim against a Middle East bank arising under a letter of credit.
- Representing a large airline in an ICC arbitration involving a significant IT outsourcing dispute.
- Represented one of the world's leading suppliers of intelligent market information in a complex network and IT outsourcing dispute.
- Represented an Israeli telecommunications company in a claim against a global mobile telephone operator for termination of an IT outsourcing contract.
- Conducted proceedings on behalf of the investment arm of a major U.S. corporation to prevent the improper variation of rights attaching to its shares in a U.K. investee company.

Rani is a graduate of Griffith University (LLB, First Class Honours; BA 1998). She is admitted as a Solicitor-Advocate (Higher Courts Civil Proceedings), as well as admitted as a Solicitor of the High Court of England and Wales and the Supreme Court of Victoria and High Court of Australia.

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John Brinitzer

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John D. Brinitzer is a partner based in the Paris office.

Mr. Brinitzer's practice focuses on international capital markets, mergers and acquisitions, and corporate transactions. He is distinguished as a leading capital markets lawyer by Chambers Global.

Mr. Brinitzer joined the firm in 1990 in New York and became a partner in 1999. From 1992 to 1996, he was resident in the Paris office, and returned to Paris in 2000 following four years in New York. Mr. Brinitzer received a J.D. degree from Harvard Law School in 1990 and a B.A. degree, *summa cum laude*, from Amherst College in 1986.

Mr. Brinitzer is a member of the Bars of New York and Paris. His native language is English and he is fluent in French.

Cleary Gottlieb Steen & Hamilton LLP

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