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REMARKS

ACCEPTANCE REMARKS BY THOMAS J. SKOLA UPON BEING NAMED THE 21ST ANNUAL LAWYER OF THE AMERICAS BY THE UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW

Thank you, Keith, for those kind words. It is an honor to accept this Award, especially in light of my illustrious predecessors. Thank you.

I would first like to make a brief historical note, one which I think will reflect the energy and charisma of the founder of the University of Miami Inter-American Law Review, Rafael Benitez, or "Benny." The first article I ever wrote for a legal journal was an article on the recognition and enforcement of foreign decrees in Argentina, which was published by the publication then known as *Lawyer of the Americas* (now known as the Inter-American Law Review) in June of 1972. I was practicing law at the time in New York City as a young associate having recently returned from working in Argentina, and met Benny at lunch through a mutual friend. During our conversation, Benny suggested that I write an article for a new law journal which he had just started a year or so before at the University of Miami Law School. I told Benny that as a young associate in a New York City law firm, I did not have a lot of free time to write articles, but I liked the idea. Benny retorted that I should simply create a hypothetical situation out of one of the matters I was working on for the law firm and write an article, and he would publish it in his journal. I spoke to Benny a few times during the next couple of months and Benny always asked: "Where is my article?" Finally, I decided I had to write it for Benny, since he was such a nice fellow and started such a worthwhile project. So I wrote the article and Benny had it published in June of 1972. Now, thirty-one years later, I return for a "Lawyer of the Americas" event! Life is certainly unpredictable and interesting!

Don asked me to say a few words on the topic: "What is an Inter-American Lawyer and how do you become a good one?"

Since I am a practicing transactional lawyer, in addition to being an Adjunct Professor at the University of Miami Law School over the past 16 years, I guess I need to mess a little bit with definitions before I proceed. First, I think a young lawyer should aim globally, not regionally. The globalization of international business and legal services has also resulted in a more "global" practice of law. There are very few transactional matters which do not have some type of global issue, such as tax, intellectual property and capital markets. Consequently, if I were a young lawyer, I would strive to become a "world lawyer, including the Americas." Secondly, we need to clarify what activities our world lawyer, including the Americas, will be primarily engaged in. "International Law" is too general and ambiguous. It can include areas of the law that have been traditionally considered part of Administrative Law: Immigration and Customs matters. Lawyers representing foreign nationals in purely domestic real estate transactions have also been known to say that they are practicing "International Law." Accordingly, I would prefer, for purposes of these remarks, to assume that our world lawyer, including the Americas, will focus on and be primarily active in "cross border transactions, both inbound and outbound."

The first question becomes: What skills need to be developed by our world lawyer, including the Americas, in order to be successful in the practice of cross border transactions? I submit that our young attorney should develop a *knowledge* and *feeling* of legal rules within a *cultural context*. Let me break this thought down into its various components:

- A. *Knowledge*. Knowledge is absolutely necessary, but it is not enough. Even with greater access to the Internet and thus most sources of law in most of the active business jurisdictions, there is not enough time in a day or money in your client's pocket to enable you to obtain "total knowledge" in any particular transactional matter, unless the matter is repetitive or very new and limited. For example, I once knew a young lawyer who practiced in New York City and worked on nothing else but airplane financing/leasing agreements for eight to ten hours daily during ten months. He developed a high quotient of knowledge in this specific area, but wound up leaving his law firm after the tenth month. Our young lawyer needs to develop something in addition to *knowledge* of legal

rules; he or she needs to develop a “feeling” for the importance, applicability and enforceability of legal rules in any particular jurisdiction.

- B. *Feeling*. Not all legal rules are equal - - some are more important, relevant, applicable and enforceable than others. This is really a variance of the old adage “theory” vs. “practice.” Brazilian lawyers have a wonderful expression in this regard: They say that certain rules are “stickier” (or more enforceable) than others (“leis que pegam e leis que não pegam”). Every time I think of this expression, I also think of an Italian friend of mine who told me one day how to cook pasta. He told me to cook the pasta and then throw it against the wall. If it “sticks” to the wall, it’s done; if it doesn’t “stick” to the wall, cook it some more! A good Brazilian example of this “sticky” point is that new tax laws in Brazil are normally passed in January of each year, some of which have a wide scope and substance. Brazilian tax attorneys, however, do not necessarily start researching and writing memoranda on these new laws immediately, since these new laws have not yet been regulated by the corresponding competent governmental agency and, many times, will never be “regulated” by the competent governmental agency (and thus never really become enforceable or applicable). Similarly, many jurisdictions have a requirement in the books that legal entities should hold annual meetings; nevertheless, most of these jurisdictions do not also provide for sanctions in the event that such annual meetings are *not* held. Consequently, many legal entities do not bother calling and documenting such meetings.
- C. *Cultural Context*. Different jurisdictions have different “ways” of resolving legal problems. Keith Rosenn wrote an article a few years ago on another wonderful Brazilian institution: “jeito,” a term loosely translated as “knack” or “way” and which Keith labeled as a “highly prized paralegal institution.” This article depicts the important role that the culture of each jurisdiction plays in determining “how” a lawyer should approach legal situations. Our young world lawyer, including the Americas, needs to become familiar with the cultural context in which he or she will be practicing cross border transactions. The

most obvious cultural/legal difference which comes immediately to mind is the fact that most Latin American and European jurisdictions have a civil law system while the United States, England and a few Caribbean jurisdictions operate within a common law system. The approach and reasoning in these two legal systems are quite different and normally directly affect the nature and resolution of most legal problems. For example, the civil law system relies on deductive logic (i.e. moving from the general code provisions to more specific factual situations), while the common law system tends to use inductive logic (i.e. moving from specific factual situations to more general legal principles). This orientation leads to significant differences in the characterization and resolution of cross border transactions, such as discovery and damages and the availability of equitable remedies. It also has a direct relationship to how you draft documents and structure your transactions, especially funding requirements and exit strategies.

The next question becomes: How does our young world lawyer, including the Americas, develop these skills? I have the following observations in this regard:

- A. *Work Ethic.* This is a skill which our young lawyer can start developing right now in law school. Be prepared! Read all relevant/significant materials and “outwork” or “out prepare” the other party or your adversary. The single most important factor in a successful legal career, in my opinion, is *preparation* and the lawyer’s ability to focus on the correct objective and be better prepared than anyone else at obtaining it. Learn how to ask penetrating questions, since you will be doing this throughout your professional career. You may be able, at times, to guess an answer to a question; it is much more difficult and less likely that you will be able to “guess” a good question, since you normally need to be *prepared* to ask good questions.
- B. *Language Training.* Language training is essential, not only in the spoken word but also in writing and knowledge of legalese. Become comfortable in writing legal documents in two or more of the languages used in your preferred jurisdictions (e.g. English, Spanish and Portu-

guesse in the Americas). It is curious that when an infant is uncomfortable, he or she will normally cry for his or her mother. When your client is seriously concerned about a particular legal problem, he or she normally prefers to speak to his or her lawyer in his or her “mother tongue.” If you are comfortable in this language, you will certainly understand the nature of the legal problem better and also know what *really* troubles your client.

- C. *Work and Study Experiences.* Seek work and study experiences in the geographical jurisdictions in which you wish to practice cross boarder transactions. There are many programs, both during the school year and the summer, that offer the opportunity to work or study in a different jurisdiction. Many law firms have either foreign offices or strong relationships with other foreign law firms and they may be able to provide this opportunity to you during your professional career. The most difficult hurdle to jump is simply deciding to do it and taking the time to find the most practical opportunity available.
- D. *Common Sense.* Our young lawyer should also develop plenty of common sense, which will be useful regardless of what area of the law he or she eventually focuses on. When I think of “common sense,” I think of a situation I was involved in when I was practicing law in New York City six or seven years out of law school. I was representing a group of Colombian businessmen that was marketing bi-centennial products in the United States and we were negotiating a commercial representation agreement with my client’s marketing firm. We spent the first hour around a table discussing such legal concepts as “force majeure,” “applicable law,” and “choice of forum.” When we finally recessed for coffee, my client called me over and said to me: “Tomás, *force majeure*, phooey; applicable law, phooey; choice of forum, phooey. I want *product and proceeds*.” I looked at him and said “Product and proceeds?” He then said to me: “Give them *force majeure*; give them applicable law; give them choice of forum, but give me *control* of “*product and proceeds!*” I started to think about my client’s remarks and they made a lot of “common sense.” Not only was this what the client wanted, and unless what the client wants is illegal or

irrational, the best thing a lawyer can do is give his or her client what the client wants! Furthermore, many times lawyers tend to get involved in a discussion of general legal principles and do not focus on whether these general legal principles do, in fact, affect the client's specific objectives. Or, the lawyer gets caught up in the "negotiation game" and strives to win every "battle" and perhaps ignores the effect of these negotiation battles on the client's ultimate objective. Sometimes it is better to lose a negotiation *battle* and win your client's *war*! In any case, a good sense of common sense should be developed by all young attorneys, especially our world lawyer, including the Americas.

- E. *Integrity*. The goal of our young lawyer should be to practice law and *enjoy* the practice of law for fifty years, *not* five years. A lawyer should recognize and develop integrity in his or her practice of law, regardless of what field of concentration. Integrity is developed, and recognized by others, simply by doing what is right, and it is not that difficult to determine what is right. Talking about common sense and integrity, I would like to recognize a special person in the audience, a lawyer with whom I had the good fortune of practicing law during fifteen years in Miami, and whom I consider to be the epitome of common sense and integrity, Henry H. Taylor, Jr. Henry, please stand and take a bow! Thank you, Henry, for being such a great role model for me during all those years.

In summary, if you want to be a world lawyer, including the Americas, active in cross border transactions, develop a knowledge and feeling of legal rules within a cultural context by combining language training and work and study experiences in different jurisdictions with a good dose of work ethic, common sense and integrity, and, believe me, you can't miss!

Thank you.