

TOP 10 INTERNATIONAL LEGAL ISSUES FOR ASSOCIATIONS

This article first appeared in *Association Law & Policy*, January 2011.

by Jefferson C. Glassie



Jefferson C. Glassie

Nonprofit Organizations
+1.202.663.8036
jeff.glassie@pillsburylaw.com

Mr. Glassie, a partner in Pillsbury's Washington, D.C.'s nonprofit organizations group, represents associations and nonprofit organizations on a wide range of legal matters. Mr. Glassie has concentrated in the field of nonprofit membership organizations for more than 30 years. He has significant experience in international legal issues and is the author of *International Legal Issues for Nonprofit Organizations*, 2nd Edition, published by the American Society for Association Executives (ASAE).

There is a bold new world out there for trade and professional associations and other nonprofit membership organizations that are conducting activities internationally. The economic interdependence of nations and increasing global market for association members, programs, and educational services is driving a new focus on international activities. Many of the legal issues associated with international programs can be complex and daunting. United States law and the laws of other countries and jurisdictions overlap and are often inconsistent. Local legal counsel will generally be needed in order to ensure legal compliance by U.S. associations conducting activities in other countries. While many legal and structural issues for associations are similar, the organizations, members, leadership, and cultures will often be very different and dictate different results.

While the importance of certain issues will certainly differ based on the type of organization, below is snapshot of 10 key international issues relevant to associations and nonprofits.

10. Lobbying and Political Activities and Foreign Agents Registration Act

What do Russian spy Anna Chapman and former Congressman Mark

Siljander have in common? Both were targeted by the Justice Department for alleged violations of the Foreign Agents Registration Act (FARA), a statute from the 1930s aimed at identifying Nazi sympathizers. FARA requires "agents" of "foreign principals" to register with the Justice Department, disclose such relationships, and even label information being disseminated as propaganda. Associations that have members or directors who are primarily from outside the United States could potentially find themselves subject to FARA under certain circumstances. Those organizations that file and register under the Lobbying Disclosure Act (LDA) are exempt from filing under FARA (unless a representative of a foreign government or political party).

The LDA itself requires disclosure by registrants if a foreign company holds 20 percent or more ownership, or plans, supervises, controls, or finances the registrant's lobbying activities in the United States. In addition, under the LDA, lobbyists must advise legislators in communications if they represent a foreign entity. Note that under the Federal Election Campaign Act (FECA) no contributions may be made to political action committees by foreign nationals, though "green card" holders may contribute.

Of course, if a U.S. association is lobbying in another country, including also the European Union, registration as a lobbyist may also be required.

9. Export Controls and Embargoes

The U.S. export control laws and regulations have become less stringent since the days of strict controls on exports to the former Soviet Union, and the transmission to foreign nationals or countries (i.e., exports) of most everyday products and publicly available information (including information presented at association conferences) will not require license applications and approval by the Commerce Department. However, the trade embargoes administered by the Office of Foreign Assets Control (OFAC), Treasury Department, under the Trading With the Enemy Act (TWEA) and the International Emergency Economic Powers Act (IEEPA) are very stringent and complex. These embargoes prohibit virtually any type of transaction with nationals of embargoed countries, other than exchanges of information.

Major U.S. trade sanctions are in place in full against Cuba, Iran, and Sudan, though more limited embargoes of other countries are also in place (such as North Korea, Somalia, and Syria). In addition, there are specific prohibitions on any transactions with persons or entities on the Specially Designated Nationals (SDN) list, and care must be taken not to undertake transactions with such listed parties, which would include memberships, conference attendance, book sales, etc. However, OFAC has ruled that it is permissible for U.S. associations to accept memberships from embargoed

countries, accept dues payments, sell materials, and accept scholarly articles for publication, as long as no services are provided (note that profession certification of embargoed persons is considered a service and is prohibited). It is advisable for associations that may have interaction with embargoed countries to develop a protocol for checking the SDN list to avoid problematic transactions.

8. Antitrust

The domestic reach of the antitrust laws in the United States and application to trade and professional associations is well known. Under the Foreign Trade Antitrust Improvements Act, anticompetitive conduct outside of the United States that may have reasonably foreseeable effects within the United States will also be subject to U.S. antitrust laws. Many other countries, including countries of the European Union, have antitrust, or “competition,” laws that proscribe anticompetitive behavior. While the antitrust laws of other countries are different, because of the scope and high degree of sophistication of U.S. antitrust laws and government enforcement agencies, a reasonable rule of thumb would be that conduct deemed permissible under U.S. law should likely be permissible under the laws of other countries. It would be advisable for U.S. associations conducting activities overseas to make sure that antitrust compliance policies and procedures are specifically made effective to cover association activities outside the United States.

Note that many associations have sought antitrust protection for conduct outside the United States by

establishing Export Trading Companies under U.S. law. This requires a filing with the U.S. Commerce Department and annual reporting. An older type of similar entity, called Webb-Pomerene associations, may also be used for similar purposes and do not require a government filing (though the protections are more limited).

7. Contract Principles

It is always advisable when conducting activities outside the United States with other parties to have written contracts or agreements in place. The contracts should generally follow guidelines for acceptable contracts in the United States to ensure performance and minimize risks of liability. The laws of other countries should be expected to be similar when it comes to contract enforcement, though the most conservative course of conduct is to also have such contracts reviewed by local counsel in the other countries to ensure compliance with local law. It is advisable to ensure there are adequate provisions covering the following legal areas under a simple contract rubric, referred to by some as the WIPIT analysis:

- Warranty, specifications for work, services, or deliverables to be provided
- Intellectual property (trademark, copyright, and list) protection
- Payment requirements
- Indemnification
- Termination (it may be more difficult to terminate agents and employees in other countries)

It also is important to be aware of choice of law and forum clauses. Choice of law only determines which law will apply for the convenience of judges or arbitrators reviewing a dispute, while choice of forum clauses can be much more significant. It is not advisable to agree to have the forum for any disputes be in the other party's home country, unless it can't be avoided; better to choose a third country. Otherwise, the leverage for negotiation of disputes can favor the other party, which would be more comfortable in its home courts. Arbitration clauses are generally advisable, as will be discussed further below. It also is advisable to include contract language carving out the United Nations International Sale of Goods Convention and prohibiting bribes to comply with the U.S. Foreign Corrupt Practices Act.

6. International Arbitration and Litigation

Imagine this situation: Your association has a dispute with a company in France and your contract does not specify how disputes are resolved. The other party files suit in France and your organization has to defend and hire French lawyers. Or, you file suit in the United States and get a default judgment, but you can't get the courts in France to enforce the judgment, so you then have to also file suit in France. Seems pretty awful, doesn't it?

In the international context, it is usually much better to have an arbitration clause in any contract and to specify the country in which arbitration will be held. This is primarily because an international treaty for enforcement of arbitral

awards, called the New York Convention, requires that courts in countries belonging to the treaty (most countries do) enforce and give effect to the results of arbitration decisions, where courts of one country will generally not automatically give effect to court decisions in another country. As noted, it also is important to specify in which country the arbitration will be held. It would be best for U.S. associations to have the arbitration here in the United States, of course, but the other party is likely not to agree to that. So a third country can be named, and often both this and the prospect of arbitration will be enough to force a settlement of the dispute without arbitration. Even though arbitration is generally quicker and less expensive than litigation, it still is costly and can be a significant drain of time and resources.

5. Tax Issues

Questions are often asked about whether a tax-exempt organization may conduct certain activities outside of the United States in light of the rules of its tax exemption category. The answer is that the Internal Revenue Service takes a global view of tax exemption and the particular requirements, so that whatever activities are permitted here in the United States consistent with tax-exempt status will be permitted in other countries, and likewise that prohibited or restricted activities here will also be prohibited or limited outside of the United States. For example, limitations on lobbying and restrictions on political activity by Section 501(c)(3) organizations will be imposed overseas, but trade associations exempt under

Section 501(c)(6) that can engage in extensive lobbying here also can do so in other countries.

Of course, U.S. associations that do business in other countries have to comply with the tax and other laws of those countries, such as collecting Value Added Tax (VAT) if required. In addition, if there are significant activities, a U.S. association can be considered to have established a "permanent establishment" for tax purposes in the other country and be liable for all applicable taxes. Tax-exempt laws in most other countries are not like in the United States, and in many cases tax-exempt status will not be available or will be too limited or restricted to warrant seeking such a categorization. Note that many other countries also impose what is called "withholding" taxes on payments made outside of the country, which could include royalties, dividends, or interest payments. And, under Section 512(b)(13) of the U.S. Internal Revenue Code, payments of royalties and interest from a controlled subsidiary (which control may be by stock ownership or board appointment rights) are also subject to tax. So, it is very important to appropriately structure any revenue flows to and from a parent association in the United States to appropriately minimize exposure to tax.

4. Establishing Overseas Presence or Office

Beyond simply selling publications in other countries or holding international meetings, U.S. associations can take steps to establish a more direct presence in other areas to better serve members and constituents, deliver more robust

programs, or undertake efforts to influence governments and regulators in other countries. However, establishing overseas offices unleashes a whole host of practical and legal concerns. There are a number of options, depending on the association's purpose, culture, resources, and interests.

Associations may want to initially establish a foothold in another country by engaging an agent or consultant, or hiring an employee to conduct specific tasks. Such a minimal presence may not trigger corporate registration requirements or permanent establishment treatment for tax purposes, and may not even involve the formal lease of office space. Still, many other countries have laws and protections in place for foreign-hired agents, consultants, or employees, and regulatory concerns must be addressed. Sometimes there are statutory severance mandates when terminating agents or employees, which must be taken into account. Engaging an association management company with on-the-ground personnel, contacts, and experience may offer a good option to establish a significant presence without hiring employees or in some cases requiring corporate registration. Having such a broad range of expertise and resources available contractually, which relationship could be more easily terminated in the event the association's goals were not being met could be beneficial.

Some associations have the ability to work through local chapters or affiliates, such as in a federation or "franchise" model, and this may be a reasonable option, too. Of course, it is possible to set up a full-blown

branch office (where there is no separate local legal entity) or a subsidiary (where a separate legal entity is established and owned by the U.S. association). Both types of entities could be good long-term structural options, though a subsidiary may be preferable because it will serve to limit liability to the local entity. Note that most countries do not have similar corporate entities as in the United States; nonprofit, nonstock corporations are rare. Typically, a subsidiary may be a "company limited by guarantee," or similar legal entity. It is very important to have local counsel assist with establishment of branches or subsidiaries.

3. Certification

Conducting professional certification programs in other countries gives rise to a number of concerns. Of course, organizations that do not conduct such programs will not be interested, but expanding an existing certification program internationally will require special attention. Some may opt to retain the U.S.-centric nature of the credential, simply by making that credential available to those outside of the United States. This is an option, but the program should make clear that it does not take into account any of the various differences that might arise because of special aspects of practice in the other country.

If desiring a truly international credential, such difference will have to be addressed. This could be accomplished by establishing local country panels of experts to review and redefine the body of knowledge and practice parameters in that country, and the program

requirements and exams modified accordingly. Conducting an actual job or task analysis in the other countries may be advisable. It typically will not be enough just to translate the English exam into other languages. Since the integrity of a professional certification program is paramount, there will be little value or market in a credential that is not based on cogent criteria and assessments. Security of exams will also be important, and both legal and practical steps should be taken to minimize irregularities or breaches of security, especially in certain countries. It also is important to ensure that any ethics or disciplinary process is appropriate and available in the other countries so that the value and integrity of the credential can be maintained.

2. Copyright

The intellectual property of a nonprofit organization is often its most valuable property. We are in an age where many people are not cognizant of copyright law obligations, and infringement is fairly rampant on the internet and otherwise. Therefore, special care should be taken to protect the association's copyrighted materials, publications, and more. First, it is important to ensure that the organization owns or has the rights to use the copyright to its materials. Obtaining signed releases or assignments from authors and contributors is crucial to ensuring rights for the association. This is usually accomplished by having such authors and contributors sign the appropriate release forms. Note that under the "work-for-hire" doctrine in U.S. law, employees automatically transfer their copyrights in the scope of their

employment to their employers, but this is not the case for nonemployees, except in limited cases.

In addition, it is critical that any use of an association's copyrighted materials be covered by a written agreement, or license, providing permission and the scope of acceptable use to those using such materials. Whether as part of a comprehensive agreement or as a separate license, it is always advisable to have such permissible uses stated and enumerated in writing signed by the user (or subject to a click-through online agreement, as applicable).

There are international treaties that govern legal copyright matters, specifically the Berne Convention and the Uniform Copyright Convention. Essentially, these treaties provide copyright holders in the United States with the same copyright protection as nationals of other countries in those other nations. Although registration of copyrights in the United States is advisable, there is generally no need to also register copyrights in other countries because of these treaties (and many countries do not have copyright registration systems). There is no requirement for copyright notices (in the United States, *copyright, owner name, year*) domestically or abroad, but such use is advisable along with other terms of use and disclaimers.

1. Trademarks

Probably the most important concern for all nonprofit organizations and associations are trademark requirements. Trademark rights in the United States arise from common law, and registration with the United States Patent and Trademark Office (USPTO) is not required, though registration enhances protection. However, in most other countries, rights to trademarks are only obtained through registration. Therefore, it is vital that U.S. associations conducting activities overseas, particularly if setting up offices or having a substantial presence, must register their names and acronyms in countries where active. In many countries, the typical association name or mark may be too descriptive for registration, but usually the association's acronym may be able to be registered. Given the importance to an association's programs and brand to be able to own and use its name in other countries, trademark considerations are one of the very first things to consider when conducting activities overseas.

There is not a reliable global trademark treaty, as there is for copyrights, which makes this consideration all the more important. Associations with activities in many countries will simply have to maintain a portfolio of trademark registrations in all those countries and having experienced trademark

counsel is imperative. Note that there is a regional registration for the European Union which covers all the EU countries, and that is a valuable resource to help maximize efficiencies and protections.

Certainly, there are a host of details and factual analysis that will be necessary to protect your individual association, but being cognizant of these 10 key areas should help enhance the legal protection of activities outside the United States.

