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PERSPECTIVES

The International Legal Profession—The Fundamental Right of Association**

International Trade in Services

The transition from an agricultural and industrial society toward a "post industrial" service economy has reflected a major change in the developed world, perhaps the greatest change since the Industrial Revolution.[1] International trade in developed agricultural and industrial societies centers on exchange of goods. In contrast, trade in services, ranging from banking, insurance, shipping, and tourism to professional services, has distinct and often irreconcilable variations. Attempts at identification and quantification pose staggering difficulties. Barriers abound to free access to services in the international area.

Legal Services in International Transactions

Legal services are becoming increasingly linked to international markets. The interpenetration of individuals and entities operating in a global economy has increased international transactions, which, in turn, has focused attention on barriers faced by lawyers capable of and physically positioned to render maximum service to multinational public and private business enterprise. The President's *Report on the Trade Agreements Program, 1984-85,* seeks to include legal services as a subject for inter-

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1. Naisbitt, *Megatrends for Lawyers and Clients,* 70 A.B.A. J. 45 (1984).

national negotiation on the governmental level. It points to the barriers of licensing, certification, and standards affecting legal services as well as other service businesses including those related to financial, accounting, transportation, engineering, and construction services. The report supports the objective of facilitating "foreign practice" by lawyers without their being "subject to exactly the same regulations and qualifications as local lawyers."[2]

Barriers to International Practice of Law

Removing barriers to international practice of law requires a closer look at the obstacles to providing legal services in foreign countries, that is, countries other than that in which the lawyer is formally qualified to practice law. A distinction must be maintained between restrictions in a given country aimed at protecting the public against incompetence and those retained "primarily to protect their own lawyers from professional competition."[3] Full knowledge of the local language and submission to examination of character and fitness to practice in the laws of a country are justified means of assuring minimum competence. Limitations of citizenship and residence may be viewed as discriminatory barriers, insulating local practitioners from alien competition.

Separate from, and yet an illusive consolidation of, the barriers mentioned is denial of the right of association, that is, the right to organize single entities for the international practice of law, composed of members and associates of differing nationalities and residents performing the totality of legal services. Within a country this denial may take the form of a fragmented legal profession, restricted in function. Internationally, this denial may take the form of refusal to permit members of the bar of differing countries from organizing single legal entities with nationals and residents of different countries. These internal and external barriers cannot be properly understood without a brief overview of the organization of the legal professions in the United States and abroad and the role of an international legal profession.

2. *Annual Report of the President of the United States on the Trade Agreements Program 1984-1985*, at 43 (transmitted to Congress Feb. 1986). The Report points out that "as first established and then developed, GATT's framework has concentrated on trade in goods, not trade in services. With little international discipline in the services area, countries have been able to place many restrictions on service trade." *Id.* at 53.

3. A former president of the American Bar Association commented: "Many of the states that have created fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." Smith, *Time for a National Practice of Law Act*, 64 A.B.A. J. 557 (1978).

The Notion of "Practice of Law"

The "practice of law" in all countries is a monopoly granted with respect to legal services. Because of varying social and cultural factors, there is little uniformity in defining the scope of this monopoly. Perhaps the most commonly acknowledged activity constituting the practice of law is litigation in the courts, restricted to lawyers licensed to practice law in the country involved. Drafting legal instruments and giving legal advice are generally recognized as the practice of law in the United States, but in many countries, though viewed as normal functions of a legal profession, these activities are not formally regulated.

The Practice of Law in the United States

The American lawyer practices in a legal system that is a complex balance of national supremacy and state sovereignty within the framework of a common law inheritance. The practice of law in the United States has been regulated traditionally as an aspect of state sovereignty. A lawyer can be admitted only to the bar of a state of the Union and is confined to the practice of law in the state in which he or she is admitted. The American lawyer in interstate practice is subject to the restrictions imposed on foreign lawyers seeking to practice in the United States.[4]

Once licensed in a state, the American lawyer, practicing as a single, professional entity, has the most extensive right to exclude others from a broad range of activities relating to the "law." The American bar has challenged certified public accountants for offering tax advice, insurance agents for giving estate planning advice, and foreign lawyers for giving legal advice on their own law.[5]

Easy lateral mobility within the American legal profession encourages changes from one practice area to another. No matter what kind of legal work the American lawyer happens to be engaged in at any given moment, that person is still a lawyer. Although many young graduates start out as private attorneys, government lawyers, or members of the legal staffs of

4. *See, e.g.*, Florida Bar v. Savitt, 363 So. 2d 554 (Fla. 1978) (action by the Florida Bar against an interstate law firm with head office in New York and a partner of the firm, not admitted to practice in Florida, but assigned to supervise the operation of the Miami office, for an injunction to restrain from engaging in the unauthorized practice of law in Florida).

5. *See* Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 166-67 (cases and explanation); *see also In re* New York County Lawyer's Ass'n (Roel), 3 N.Y.2d 224, 144 N.E.2d 24, *appeal dismissed per curiam*, 355 U.S. 604 (1958), in which the highest court of the State of New York upheld an injunction restraining a Mexican lawyer from giving any advice with respect to foreign law or the rendering of any legal services in New York even though they pertained exclusively to a foreign jurisdiction.

corporations and stay in those positions for life, it is common to change from one sector to another.[6]

Corporate Counsel in International Legal Pratice

The corporate counsel, the in-house lawyer functioning as a full-time, salaried employee, retains the status as a member of the bar, in direct contrast to the counterpart abroad.[7] In the area of international legal services, corporate counsel has assumed a vital role in the international operations of large organizations. The head of the legal staff of a multinational corporation is usually an officer of the company, often a member of the board of directors. The French *avocat,* until recently, was not permitted to accept membership on a board of directors or to represent a party in dealings with administrative authorities.[8] The trend favoring

6. The Carter Professor of General Jurisprudence at Harvard Law School points out that "every significant aspect of our life as a nation is supervised, negotiated, litigated, regulated and legislated about by some 600,000 lawyers." Fried, *The Trouble with Lawyers,* N.Y. Times, Feb. 12, 1984, § 6 (Magazine), at 56, col. 3.

7. Hickman, *The Emerging Role of the Corporate Counsel,* 12 BUS. LAW. 216 (1957).

8. Professional confidentiality is treated quite differently in the United States and European Community countries. In Renfield Corp. v. E. Remy Martin & Co., 98 F.R.D. 442 (D. Del. 1982), the court held that in an antitrust action communications between a corporation and its French, in-house counsel were protected by the attorney-client privilege, although under French law, because of in-house counsel's status as a salaried employee, disclosure of the documents in question could not be refused. The court pointed out:

> The organization of the French legal profession is unlike that in the United States. In France, there are several categories within the practicing legal profession and each category performs a different function that, in the United States, would all be performed by an American lawyer . . . . For example, the "avocat" provides legal advice to clients and appears in court, but may not be employed by any person or organization. The "conseil juridique" is allowed to provide legal advice, but may not appear in court and may only be employed by, or associated with, other "conseils juridiques." . . . Thus, an individual who is employed by a corporation is not permitted by law to be on the list of "avocats" or "conseils juridiques." Nevertheless, these individuals are not prohibited from giving legal advice.

Id. at 444 (citations omitted).

In Australian Mining & Smelting European, Ltd. v. Commission of the European Communities, [1982] 34 Common Mkt. L.R. 264 (Ct. E. Comm. 1982), the Court of Justice of the European Communities considered for the first time the question whether confidential attorney-client communications were privileged against disclosure under Community law. The Court of Justice held that such a privilege does exist and that it applies in antitrust investigations undertaken by the Commission of the European Communities. The Court, however, recognized only a limited right of corporate clients to refuse their confidential communications with counsel, a right limited to communications between an "independent attorney" and a client for "purposes of the client's defense."

> [T]here are to be found in the national laws of the member-States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.

Id. at 323.

increased responsibility of corporate counsel in the United States is undoubtedly the result of factors of economy, the institution of programs of prevention, and the need for legal compliance with special legislation in the areas of securities marketing,[9] antitrust, tax, and the Foreign Corrupt Practices Act.[10] In the multinational corporate world, in-house counsel has emerged as a key United States practitioner in international transactions.

The Legal Professions Abroad

In contrast to the all-embracing scope of legal services permitted to the American legal profession, in many countries abroad, particularly in civil law jurisdictions, the tendency is to divide the legal profession into separate careers.[11] Japan has five legal professions other than the advocate: the judicial scrivener, the patent lawyer, the tax lawyer, the public accountant, and the notary.[12] In the typical civil law country, activities included within the notion of practice of law are performed by a notary as a separate legal profession, particularly in the drafting of important legal instruments and legal advice.[13] In contrast to the compliance-and-prevention approach of the American lawyer, in most countries, the true function of the traditional lawyer is still closely related to litigation. The advocate is normally consulted only when a dispute arises, and seldom in planning and drafting. Businesspersons, often law school graduates, are more apt to regard as their own responsibility negotiations and preparation of legal instruments that their American counterparts would refer to lawyers.[14]

The American Lawyer as International Practitioner

Though the differences are becoming a matter of degree and lessening as work habits are diffused internationally, the contrast between lawyers in the United States and their counterparts abroad remains noticeable. The lawyer, American international style, is a unique phenomenon. The

9. *See* Walker, *Capital Formation: Attorney Exposure*, 10 N.C. J. INT'L L. & COM. REG. 225 (1985); *see also Report by Special Committee on Lawyer's Role in Securities Transactions of the Association of the Bar of the City of New York*, 32 BUS. LAW. 1879 (1977).

10. For a thoughtful overview see Goebel, *Professional Responsibility Issues in International Law Practice*, 29 AM. J. COMP. L. 1 (1981).

11. *See* J. MERRYMAN, THE CIVIL LAW TRADITION 109-19 (1969).

12. *See* Brown, *A Lawyer by Any Other Name: Legal Advisers in Japan*, in LEGAL ASPECTS OF DOING BUSINESS IN JAPAN 205 (1983).

13. *See* H. DE VRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 61-62 (1981).

14. Lalive, *International Commercial Contracts: Negotiations with American Lawyers—A Foreign Lawyer's View*, 12 PRAC. LAW. 71 (1966).

breadth of services that the lawyer is permitted to offer is virtually unlimited, including the participation in business operations, client decisions, contract negotiations, and dealings with governmental authorities. Difficulties in selection of a lawyer who is a national of a foreign country are compounded by the divided structure of the legal profession abroad. The strict separation of services may make it impossible for the American businessperson abroad to receive from foreign counsel the all-embracing legal service permitted by American professional organizations.

Foreign Law and the American Lawyer

The net result of the combination of elements discussed above is to project the American lawyer into the foreign law area both in United States courts and in foreign-based transactions. With the increased frequency of international litigation in United States courts, the foreign law area of practice has increased. The expansion in the international jurisdiction of United States courts over foreign-based causes of action because of adoption of long-arm statutes, combined with new approaches to choice of national law governing international transactions, has compelled the American bar to become increasingly aware of matters of foreign law.

The New York Court of Appeals, the highest court of the State of New York, has pointed out that a member of the New York Bar may not claim ignorance of foreign law as an excuse: "When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign State."[15] In American procedural law, judicial notice statutes have further encouraged and even compelled the litigator in United States courts to "know the law" of a foreign state. The federal courts and the courts of most international trading states of the Union have such statutes. Under the judicial notice statutes, notice of the intent to raise the issue of foreign law suffices. Any relevant material or source, whether or not submitted by a party, and any testimony, whether or not admissible under rules of evidence, can be the basis for findings as to foreign law by the court. The court's determination is treated as a ruling on a question of law, fully reviewable de novo on appeal.[16]

15. *See Roel*, 3 N.Y.2d 224, 232, 144 N.E.2d 24, 28, *appeal dismissed per curiam*, 355 U.S. 604 (1958).

16. H. DE VRIES, *supra* note 13, at 29-46.

The International Legal Profession

Whether in litigation in a United States court or abroad, whether giving legal advice in international transactions or drafting legal instruments, the seamless web of legal problems requires that for the proper conduct of the matter the lawyer must be able to master the total legal situation, foreign as well as domestic or international. The law professional in international transactions is primarily an interpreter, a channel for communication between and among formally organized legal systems with differing national histories and experiences, traditions, institutions, and customs.[17]

With the requisite legal skills acquired in their home jurisdictions, international practitioners may advise on the law of other countries. Which other countries the practitioner selects will be determined primarily by linguistic expertise and the personal experience of residence, knowledge of, and confidence in dealing with the legal materials of a foreign country. A fluent reading knowledge of the language involved, as well as understanding of the legal system's concepts, methods, and techniques is essential.

The Fundamental Right of Association

In the international sector, the practice of law is a learned profession, rather than a trade or business. The skills and knowledge involved require a sharing of the experience of sister disciplines, of political science, economics, sociology, and even anthropology. The important barrier to be removed is that obstructing the right of association of members of legal professions in different countries or of different areas of practice in the same country. The appropriate technique for enforcing the right of association would seem to be collaboration by professional societies, rather than negotiations on the governmental level.[18] Law professionals should be free to associate, economically, socially, and professionally in the international practice of law, whether as single practitioners, or as members of component partnerships.

17. *See* Note, *Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice*, 80 HARV. L. REV. 1284 (1967).

18. Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COL. L. REV. 1767 (1983), informs us that "[n]egotiations between the governments of Japan and the United States have resulted in detailed talks between bar associations of the two nations." *Id.* at 1813 n.251.