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International Business Transactions: A Primer for the Selection of Assisting Foreign Counsel

Written assistance in obtaining well-advised, affordable legal advice, in connection with an international business transaction, is meagre by almost any standard. Perhaps somewhat paradoxically, the consequences which can flow from the lack of such advice can be anything but meagre.¹ Unanticipated, transactional overhead costs, arising from political, economic and/or legal factors within the country or countries connected with the transaction, can and often do turn expectancies of profit return into illusions of simple capital recovery. Reasons in each case may be slow in appearing and often are *sui generis*, but a client with a well-advised lawyer materially minimizes venture risk by enabling the lawyer to work with an affordable, competent lawyer, or other persons performing a comparable role, in the country or countries connected with the transaction.

Accompanying the "inevitable complications which result from communicating over thousands of miles" are the different ways of doing business,² different operative legal rules (both "law on the books" and sometimes "law in fact"), different attitudes about dispute resolution, different roles played by legally trained persons in varying countries,³ universally different nuances of language, as well as different expectations and/or perceptions about roles to be played in

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¹Book value (capital flow and reinvested earnings) of direct investment abroad as of January 1, 1974, was 107.2 billion dollars (U.S.), while book value of direct investment into the United States was 21 billion dollars (U.S.). Neither of the figures reflects asset value of investment, a probably higher sum in each case. Bureau of Economic Analysis, International Investment Division, Department of Commerce. In 1974, OPEC countries alone reportedly invested about 60 billion dollars worldwide, and 11 of those billions in the United States, Los Angeles Times, February 6, 1975, at 1, col. 3.

²Werner, R.L. *Choosing Foreign Counsel* in SOUTHWESTERN LEGAL FOUNDATION, PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1967 (Matthew Bender & Co.) [hereinafter "Werner"].

³Lalive, J., *Negotiations with American Lawyers—A Foreign Lawyer's View*, 12 PRAC. LAW. No. 7, at 71, 1966 [hereinafter "Lalive"].

the immediate transaction. Aggravating these differences are the disparate cultural values and, in many instances, religious beliefs which enter into the transaction through the participation of each involved person, both legally trained and otherwise.

Working to overcome such differences, in the consummation of a successful transaction, is a certain predisposition toward consensus which, properly attended, stands good chance of maturing to long-term, mutually advantageous agreement. On-scene, well-advised, affordable "local counsel" is a *sine qua non* of proper attendance.⁴

Selection of Counsel

Selection of counsel is essentially a two-step process which first involves the ascertainment of possibly appropriate counsel and secondly requires a face-to-face period of time spent with each of such counsel.⁵ The overhead cost of the second step is indispensable and should be discussed forthrightly with a client.

1. Ascertainment of possibly appropriate counsel (usually from one to four or five) can best be done before traveling to the country or countries about which advice is needed.

Ultimate responsibility to a client and the need to be the final judge of any ambiguities in communicated advice require that selected counsel be able to communicate with you in a language or dialect with which you feel entirely at ease. The potential for difficulty is most acute where one might be lulled to comfort by a general history of language similarity. In the middle of a telephone call from the United States to England, the English telephone operator interrupted the conversation to politely inquire if the "call was through." When informed that the call was not through, the line was disconnected, the operator apologized and made efforts to get the "call through." Communication between persons from the United States and those from Australia require special care. For example, "To root means to have sexual intercourse, so if you go to a rugby match, make sure you 'barrack' for your favorite team."⁶ This common jargon essential is so obvious as to require no further comment.

Ascertainment of the client's needs and limitations, not only in terms of the likely issues (legal and otherwise) involved in the transaction but also with respect to total legal overhead costs acceptable to the client, is a necessary first step in

⁴For example: Must the lease portion of a sale and lease back transaction in Canada be filed with the Registrar of Deeds in registrable form? What is the anticipated pace of change in the operation of the Fair Trade Commission in Japan? Does the legal effect given in Ghana to trademarks registered in the United Kingdom extend in like manner to what protection is offered to servicemarks in the United Kingdom?

⁵Robert Werner has strongly recommended the same position. *Supra*, note 2, at pp. 90-91.

⁶Los Angeles Times, August 25, 1974, at Part VII, at 2, col. 1. Minimizing cultural diversity by trying counsel's most comfortable language during social moments is usually desirable and fun.

finding appropriate counsel. Projected, total legal costs for a transaction of an ongoing nature do not usually present undue difficulty except possibly where the client has a business practice of fixing permissible legal costs to a percentage of projected revenues or other business indicator. Selected counsel of widely recognized competence often charge fees, for their services, which are high by most standards in the United States. Taking into consideration any fees to be charged for services to be rendered and if legal overhead costs are not a material factor in the transactions, such counsel are not difficult to locate.

Apart from general ability, it is important to decide upon the kind of counsel one wishes to have involved in the transaction, *i. e.*, should selected counsel be visibly involved in helping to shape consensus toward final agreement, or is counsel's role to simply render requested advice? Must selected counsel already be familiar with the general business style to be used by the client? Is it desirable or necessary that selected counsel have certain personality traits to participate successfully in the transaction? Are selected counsel's political and/or family affiliations of any consequence? Is it desirable that counsel have, or have easy access to, any areas of special competence? This, in turn, underscores the need for care in selecting counsel affiliated with a law firm of certain size and kind of practice, or of possibly selecting counsel not licensed to practice at a particular Legal Bar or at any Legal Bar.⁸

Local sources within one's own country can usually be found for reference to names of counsel who may be contacted for further reference or ultimate use. Persons who previously have been involved with international business transactions, connected with the relevant country or countries, often are affiliated with the "international" law sections⁹ of lawyers' professional associations (*e. g.*, Bar Associations) in major, urban areas of one's country. On the faculty of most universities near major cities, where legal studies are done, there is usually someone who is familiar with the "international area" who can provide references. Such academics often have practiced in that area and continue to be involved, giving them knowledge of a quick range of possibly suitable counsel and access to similarly inclined academics on other faculties, who, in turn, may have quick suggestions. Within one's country, business

⁸The relative quickness of business decision-making by United States businessmen contrasts markedly with the Japanese style.

⁹Such considerations may arise, for example, in France, Japan, The Peoples Republic of China, The United Kingdom, and the United States. *Cf.* Temu, *The Employment of Foreign Consultants in Tanzania: Its Value and Limitations*, 3 THE AFRICAN REV. 69 (1973).

¹⁰In the United States, such sections or "committees" may have various other names, such as "international and comparative law," "international trade," "comparative law," etc., and in one or more Bar Associations there may be several such sections or committees. For example, a telephone call to the offices of the Association of the Bar, City of New York, or the Los Angeles County Bar Association may be helpful.

enterprises which have previously been involved in international transactions¹⁰ often keep lists of counsel with whom successful work has been done. Typical enterprises include financial institutions, such as banks, and enterprises which perform accounting functions in connection with international fiscal matters.¹¹ One or more departments of the government may provide formal, and often informal, assistance in suggesting counsel. For example, in the United States, names of counsel, willing to be of assistance to Americans, are filed by nearly all United States diplomatic posts with the Bureau of International Commerce, Department of Commerce, Washington, D.C. In each foreign country the formal, compiled list also is kept at the major United States diplomatic post there. The Martindale-Hubbell Company's *Law Directory* (Currently Volume 5, 1975) contains references to legal counsel in most countries. Counsel in another country with whom an American lawyer has worked may have suggestions to offer him regarding experience with counsel in the country or countries of immediate interest. Not to be overlooked is the college or university alumni list available to its alumni containing present places of residence. From initial inquiries, one or more names of recommended counsel often begin to emerge several times. A distillation of from one to four or five names will usually form a pool from which counsel, possibly appropriate for the transaction, should most likely emerge.

2(a) The face-to-face meeting with possibly appropriate counsel begins at home. It may be prudent to ask appropriate consular personnel about inconvenient days for meetings of a business nature.¹² Arranging the date for a meeting by writing or telephoning two months before the desired date is usually desirable. If a shorter lead time is necessary, counsel may have some difficulty in agreeing to a suggested meeting time due to familiar reasons such as scheduled appointments or a typically long over-due vacation.

Initial request for a meeting should generally reveal its nature and that of the transaction, but careful attention to the latter revelation, if immediately made, should involve consideration about the differing roles placed by counsel in many countries and, in particular, often differing notions about the existence of conflicts of interest and any duty of non-disclosure.

Arrival in the country at least a day ahead of the meeting provides time to check with the nearest diplomatic post of one's country regarding the names and locations of any business enterprises from the home country currently operating in the nearby area. A quick visit or telephone call to appropriate enterprises may reveal some information about one or more of the counsel with whom the meeting is scheduled, as well as some possible local factors to be especially considered

¹⁰These may be referred to as "multinational" or "transnational" transactions.

¹¹*Accord*, Werner at p. 88.

¹²For example, in Afghanistan the "weekend" runs from Thursday noon through Friday, Saturday and Sunday being workdays. The United States Department of Commerce has compiled a list of similar information concerning 135 countries.

while engaging in the transaction. The nearest diplomatic post also may be able to offer some information which was not received from government sources at home.

2(b) Balance between responsibility to the client and most lawyer's perception about a basic universal appropriateness for their business practices and legal system's way of doing things makes it mandatory that the American and foreign counsel immediately deal with and dispel any stereotype impressions of each other. For example, lawyers from the United States are often considered slick and omnipresent, yet foolish.¹³ Legally trained persons in the Far East are sometimes considered lacking in understanding when silent.¹⁴ European lawyers are often considered ill-informed about business practices common in the United States.¹⁵ On a first visit with counsel in the Channel Islands a few years ago, counsel quickly expressed a series of feelings by remarking that, "Oh, your company has flown you in a jet all the way over here to talk about this problem." A jocular, short history of the Channel Islands then followed and was ended with recitation of two or three legal maxims in French. Stereotyping is usually more subtle, but the importance of carefully watching for its presence (on both sides) is only matched by its potential harm to full communication. Certain generalizations are usually accurate about counsel and the roles they perform in different countries, and as such, may be useful starting points in one's thinking. Once any stereotyping has been put aside, a candid exchange can begin about counsel's optimal role in the transaction.

A rather general description of the parameters of your transaction makes easy an inquiry about whether counsel has participated in a similar transaction on previous occasions. A more general description makes easier the entry into discussion about counsel's participation in other international business transactions; and, of course, the topic can be explored at any desired length.

After explaining that a client would probably feel uncomfortable working with persons, with detailed knowledge of the transaction, who possibly have an affiliation of any kind (legal and otherwise) with a possible present or future competitor, it is appropriate and highly desirable to make direct inquiries about the names and kinds of other business enterprises with which counsel may be affiliated. Such an approach may make unnecessary an interchange about differing perceptions of what constitutes a potential conflict of interest¹⁶ together with possible, accompanying nuances of ethnocentricity.¹⁷

With the conflict of interest consideration aside, one can begin to reveal more about the transaction as a groundwork for first asking counsel what potential

¹³See Lalive at pp. 74, 76, 78, 80.

¹⁴*Cf.* Lalive at p. 88.

¹⁵See Werner at pp. 98-99.

¹⁶See Werner at pp. 95, 96.

¹⁷*Cf.* Lalive at p. 76.

legal and other considerations may be envisioned on the basis of what is known about the transaction at that point. Responses will usually give some indication about counsel's probable enthusiasm for becoming involved with the transaction. Scant response may evince a certain caution about your obtaining free information,¹⁸ caution as a way of generally doing business,¹⁹ or a lack of general knowledge about possible problems associated with the transaction. At this point, it may be desirable to indicate the anticipated monetary value of the transaction. The anticipated value may merit the major attention of someone less experienced than the person with whom one is talking. In exploring the subject with senior counsel in a law firm (or other association of counsel), one will, of course, want to spend some time actually talking with the person who will be primarily concerned with the transaction on a day-to-day basis. Mention of the anticipated value of the transaction may result in fuller response regarding possible considerations relevant to the transaction and, in any event, lays groundwork for later discussion about the possible cost of counsel's participation in the transaction.

The possibility of some kind of formal and/or informal governmental approval, being required in connection with the transaction, is usually a potential consideration, and counsel should be queried on this point. Responses should satisfy any concern about a likely governmental attitude toward this particular kind of transaction as well as counsel's basis for forming an opinion, whether grounded in past experience in such matters, ready access to persons who can provide such information²⁰ or based upon informed speculation. Response to questions about governmental approvals and/or attitudes may be more detailed if a possibly potential problem or two in this area are suggested.²¹

¹⁸Such caution may make prudent reciprocal caution during discussion about counsel's compensation.

¹⁹Conclusion about the nature of such caution must necessarily be subjectively gleaned from the totality of impressions you accumulate during the entire time spent with counsel.

²⁰If appropriate, political affiliations possibly may be gently probed at this point.

²¹Knowledge about governmental activity in the United States may be acquired prior to meeting with counsel by perusing publications such as the weekly CONGRESSIONAL INDEX, THE WEEK IN CONGRESS, published by the Commerce Clearing House Inc., or the weekly DEPARTMENT OF STATE BULLETIN, published by the Office of Media Services, Bureau of Public Affairs, Department of State. For information regarding places other than the United States one may check the bi-weekly BULLETIN OF LEGAL DEVELOPMENTS, published by the British Institute of International and Comparative Law. The BULLETIN and bi-weekly *Fleet Street Letter*, published in London in limited number of copies, contain brief descriptions of governmental developments in most countries as well as in certain international organizations. More general sources, and usually somewhat less current, include the United States Tariff Commission, Report on Trade Barriers, (T C Pub. 665, vols. 1-11, 1974); Bureau of International Commerce, DEPARTMENT OF COMMERCE, OVERSEAS BUSINESS REPORTS (to date); NAT. ASS'N OF CREDIT MANAGEMENT, THE DIGEST OF COMMERCIAL LAWS OF THE WORLD (1972-1974); BUSINESS INTERNATIONAL CORP., INVESTING, LICENSING & TRADING CONDITIONS ABROAD (1959-1975); Price Waterhouse & Co., INFORMATION GUIDES FOR THOSE DOING BUSINESS OUTSIDE THE UNITED STATES (1961-1975); and Touche Ross & Co., *Business Studies* (1968-1975). Some financial institutions, such as the Bank of Tokyo, also periodically publish material dealing with international transactions.

Consideration regarding counsel's compensation should begin before discussion with counsel. Counsel's possible flexibility in arriving at a compensation arrangement often is circumscribed by statute²² and/or other rules governing permissible compensation practices.²³ Nevertheless, discussion about a desired arrangement for determining compensation²⁴ usually can proceed with some latitude within locally prescribed limitations. It may be that receipt of selected counsel's short note which merely says, "For Services: \$100,000 (U.S.)," will be acceptable for you. A request for further clarification of how that sum was determined may raise unstated perceptions of possible distrust and quiet indignation if the manner of compensation is not openly reviewed in detail at the outset.

Several kinds of arrangements may be discussed. One of the largest corporations in the United States requires that counsel explain in writing and with particularity how each hour of "billed time" has been spent as to every separate matter being handled by counsel for the client. Pragmatic considerations associated with such a practice make it fair that the client additionally and fully pay counsel for the time spent in recording such data. Some counsel may consider the administrative element in gathering such records simply too burdensome to make participation in the transaction attractive. Such an arrangement does permit one to follow counsel's handling of all or part of a transaction with considerable closeness and to participate, where desirable, in the total thinking involved in deciding how particular phases of the transaction should be handled. Where the transaction is only one of scores of matters of immediate concern, the arrangement also permits rapid historical reference whether counsel is being compensated periodically during the course of the transaction or whether reference is desired in connection with possible future transactions.

Another possible compensation arrangement is an analog to the "retainer" practice in the United States: counsel receives an agreed, fixed sum in exchange for any amount of desired advice given and other work done within an agreed period of time. If fair compensation for a fair amount of quality work is desired in the compensation arrangement, the use of a retainer may involve the risk that counsel will be overcompensated for actual work performed during the agreed period, or a risk that counsel will be undercompensated seriously enough so that nuances of discomfort, usually manifested by a relatively decreased priority given

²²*Accord*, Werner at p. 97.

²³In the United States, rules limiting compensation arrangements may be prescribed by the canons of ethics of the Bar of a State and possibly by the courts as well as by statute. It should not be assumed that limiting rules in any one State are necessarily the same in another State.

²⁴In the United States, such an arrangement is usually called "billing" and may incorporate use of words such as "contingency fee," "billing by time," "retainer" and "disbursements." *See also* Lalive at p. 74; Werner at p. 97.

to the assignment, will start to become apparent. Compensation in the retainer arrangement, of course, includes a monetary value to be assigned to the desirability of a long-term professional relationship between the two counsel and, perhaps, with the client. The arrangement does strongly encourage initial communication and, to some extent, flexibility between counsel during early phases of the transaction. Relatively frequent reviews of the retainer arrangement are recommended coupled with close record-keeping.

A third commonly used compensation device, is a basic combination of the "billing time" and "retainer." Strong, initial encouragement is provided to full and open communication if a retainer arrangement is agreed upon with regard solely to counsel's advice, not requiring counsel's further research, given by telephone or similar device. The sum agreed upon should be reviewable, without special request by either party, at three or four agreed time periods during the course of the transaction. Easy access by telephone lightens the cost and time of routine paperwork and provides assurance that the choice of counsel has been correct. If any research and other specific tasks should be required of counsel, the research and tasks should be paid for according to an agreed fee schedule, not less than counsel's usual charge for similar work. If completion of the transaction promises to take many months or if the transaction will likely be ongoing in nature, counsel's submission, every three months, of a statement of compensation due and owing, together with a brief description of work performed, would be useful. Preparation costs of the quarterly statement also may be submitted by counsel. Payment should be made in a currency most convenient for counsel.

Once an acceptable arrangement has been discussed and if counsel appears to be a person whose association is desired in the transaction, approach of the usual time for having a midday meal provides opportunity to build upon an agreed relationship or to learn more about counsel in the several particulars discussed. Things one can learn during a meal, less easy to see in an office setting, include threshold indications of whether the prospects of involvement with the transaction and the professional association are worth the investment cost of a pleasant meal, as well as the selection of an eating place²⁵ (including possible choices offered) possibly helping to indicate how much counsel is a part of the total environment outside of the office. A shared meal may offer the only chance available to observe counsel in a social setting which could one day include the client, other parties, and necessary governmental representatives. Should counsel not be appropriate for the transaction, a previous dining appointment easily ends the exploration. Counsel may inquire whether the use of other counsel

²⁵The practical wisdom of inviting an international visitor to dine at a place of "his nationality" (e.g., a "German" dining place in New York or an "American" dining place in Vienna) obviously is arguable from culinary, transcultural, and other points of view.

is under consideration during the transaction and, occasionally, may ask for particular names. Depending upon all of the circumstances involved, you may wish to answer with full candor.²⁶ Ending the meeting with counsel by promising to be in quick communication regarding the discussions has been pleasant and appropriate.²⁷

Conclusion

One who has made an effort to find "the right" counsel, to work with in connection with an international business transaction, views with quick skepticism any suggestion that there is one, proper way to find such persons. *Omnis definitio periculosa est.*²⁸ "You will learn only by experience."²⁹ Nevertheless, some suggested techniques along the lines modestly indicated in this paper, have been worth the trying.

²⁶*Cf.* Werner at p. 98. On occasion, counsel have not wished to be professionally associated with other counsel in a transaction.

²⁷*Accord.* Werner at p. 98.

²⁸Lalive at p. 15.

²⁹Werner at p. 101.

