

A Guide to Foreign Law Source Materials and Foreign Counsel†

I. Foreign Law Source Materials

A. THE BAD NEWS AND GOOD NEWS

All right, so you need to research the foreign law before you contact the foreign lawyer. How do you find the foreign law? Your greatest mechanical difficulty is the absence of complete, reliable, accessible, and regularly updated foreign law source materials. International business practice is not the armchair, ivory-tower domain of loose-leaf law; anyone who attempts it must learn to do his preliminary work with incomplete, poorly translated, conflicting, aggressively scrounged and laboriously catalogued materials.

There is another side to the equation, however, and it well-nigh balances the first. The following are elements of the good news.

First, your client's foreign law problems do not require an encyclopedic knowledge of foreign law. Typically, a Texas office practitioner with a foreign business practice needs quick access only to foreign tax, corporation and minerals law. If his client is a bank he also needs the foreign negotiable instruments law and exchange control regulations. If his client is an exporter he will also be concerned with foreign commercial law and statutory requirements for distributorships and sales representation agreements. If his client sells services, foreign labor law and professional licensing requirements will also be relevant. If those services are offshore, add shipping and flagging laws. The point is that, although your search for foreign law sources will

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never end, it is not difficult to develop a practical working foreign law library that covers the rudiments of your regular clients' recurring business.

Second, the more you deal with foreign lawyers, the more you will realize that this rudimentary library of yours is probably more complete, *as applied to your client's particular business*, than the law sources your foreign colleague has readily at hand.

There may be several reasons for this. In many countries, for example, the lawyer sees himself solely as a litigator or a scrivener who can speak or write better than his fellow citizens and understands the general principles of law but does not purport to have read, or have immediate access to, current legislative materials. This is especially true in undeveloped, civil law countries, where the lawyer's intellectual orientation is that of a generalist who reasons from broad code principles, not that of an innovative business structurer who keeps up-to-date on matters like taxes, labor regulations, exchange controls and finance. Also, in many countries the legal profession is divided into specialized subprofessions (solicitor/barrister, *notaire/avocat/avoue/conseil juridique*, etc.) and is traditionally isolated from other professional functions (the tax advice of an accountant, for example, or the adversary expertise of a nonlawyer commercial arbitrator), so that no single "lawyer" is called upon to cover as broad a field of professional service as the typical U.S. general practitioner. Furthermore, from the standpoint of even the most skilled lawyers in the most developed countries, the business operations of U.S. clients often appear esoteric and require the acquisition of special materials not normally found in the foreign lawyer's office. Some examples of business operations which may seem routine to a U.S. lawyer but appear occult to his foreign colleague are: oil and gas operations, franchising, risk capital syndication, and the licensing of industrial processes.

Third, you do not have to go back to the basics every time you commence work in a new foreign country. Many groups of countries share common legal traditions and reciprocal treaty commitments, so your research materials from one country may shed considerable light on another. For example, the antitrust law of the European Community is the same in West Germany as it is in France, at least for purposes of treaty commitments enforced in the Community court. The civil law countries, as one group, and the former British Commonwealth countries, as another, also have many legal institutions in common. (If you ever have waded through the Mexican corporation law, it will not take you long to learn how French corporations work. A tax and corporate structure for vessel operations in U.K. waters will probably work offshore New Zealand too.)

A final weight in the balance is that each year foreign law materials are becoming more accessible to U.S. lawyers in reliable published form. The problem of foreign law sources has gone through a sea-change over the last

three decades. In the 1950s sources were hard to come by; except for *Martindale* and a few pioneering tax services, one usually obtained foreign law materials directly from foreign counsel, typically in the form of photocopies from his library plus his own translations if needed. As a result, the sources were scarce but quite accurate. In the 1960s and into the 1970s sources multiplied (more looseleaf services and other releases from established publishers; reasonably authoritative texts published by local governments and international public agencies), focusing, typically, on foreign investment in countries needing capital. In the period from the mid-1970s to the present the number of publications increased manyfold, but the average quality has declined. Inexperienced commercial publishers indulged "foreign" and "international" topics beyond the point of discrimination, releasing many poorly translated, loosely edited works. Meanwhile, as investment conditions deteriorated in many target countries, governmental publications became fewer and more tendentious, while several authoritative commercial looseleaf services were discontinued for lack of subscribers. Today the problem is not so much finding sources of foreign law as being certain of the reliability and continuity of the sources one has found.

B. HELPFUL SOURCES

There are some recommendable foreign law sources which are commonly found in the libraries of law schools, bar associations and large law firms.

1. *General*

Martindale-Hubbell Law Digests

A unique and venerable institution, with its own peculiar pluses and minuses. The geographical coverage is by no means exhaustive (currently only 55 countries are treated). The summaries are often overbrief, but they are revised annually by prominent law firms who value their reputations. In short, sparse and sketchy, but up-to-date and reliable.

U.S. Department of Commerce Publications

Sometimes evasive, always bland, but numerous and inexpensive. Typically in pamphlet or booklet form, not regularly supplemented or up-dated. Countries of current commercial importance get the full treatment, with Overseas Business Reports ("OBRs") on a wide range of business law topics ("Establishing a Business in . . .," "Marketing in . . .," "Basic Data on the Economy of . . .," "Import Tariff System of . . .," "Preparing Shipments to . . .," "Licensing and Exchange Controls in . . .," etc.); others receive shorter shrift. In the foreign-investment minded 1950s there was an excellent series of paperback books ("Investment in . . .") on likely target

countries (Brazil, Colombia, Indonesia, Central America, Mexico, etc.), but they are unsupplemented and now obsolete.

2. Taxation

Diamond, *Foreign Tax and Trade Briefs* (Matthew Bender)

These ubiquitous little maroon books have been around for a long time. Their coverage is increasing (89 countries now). Looseleaf, with dated and reasonably frequent supplements. Overly abbreviated and sometimes cryptic, but a good place to start. Their younger sibling, *International Withholding Tax Treaty Guide* (a misnomer, because it describes both treaty and nontreaty withholding), is well organized for quick reference.

Income Taxes Worldwide (CCH)

This ambitious looseleaf service aimed to cover more than 100 countries and had reached 78 before it was discontinued in December 1982. It was particularly strong in the U.K. trading and post-colonial spectrum because it was based on *Income Taxes Outside the United Kingdom* (nonlooseleaf but annualized), which the U.K. Board of Inland Revenue publishes.

Tax and business law services of international public accounting firms

Distributed free to clients and friends; updated irregularly; quality, coverage and detail vary among firms and individual countries. Among them: Arthur Andersen & Co., *Tax and Trade Guides* (some available in local language as well as English); Ernst & Whinney, *International Business series*; Deloitte Haskins & Sells, *International Tax and Business Service* (looseleaf); Price Waterhouse & Co., *Information Guides*; Touche Ross, *Executive Digests*, *International Reports* and *International Business Studies*.

Tax Treaties (CCH)

Definitive, looseleaf, indispensable to tax-structuring between the U.S. and other developed countries.

3. Corporation Law

Commercial Laws of the World (Foreign Tax Law Association, Inc.)

Originally something of a misnomer, because the materials consisted mainly of foreign corporation codes. More recent releases cover business law topics. Foreign-language texts appear in English translations of varying quality, but there are some real gems (e.g., commentary and texts on the United Arab Emirates). Looseleaf on poor-quality paper; irregularly supplemented in unhandy binders.

4. *Commercial Law*

Digest of Commercial Laws of the World (Oceana)

A surprisingly good service considering its pot-pourri of subject-matter (contracts, doing business, agency, negotiable instruments, business entities, etc.) and individual local authorship. Looseleaf, irregularly supplemented, good binders. Useful for exporters.

5. *Petroleum*

Petroleum Legislation (Barrows)

Looseleaf, frequently supplemented digests of oil and gas law and developments. Maps, news, some analysis. The best place to start.

Basic Oil Laws and Concession Contracts (Barrows)

Full texts, ingeniously ferreted out (don't be surprised to find a copy of your client's "secret" production sharing contract) and presented in English translation. Expensive but invaluable to international oil and gas practitioners.

National Oil Company Statutes (Barrows)

A somewhat misleading title for an enormously useful collection of organic acts and incorporation instruments of state oil entities. All are presented in English, unfortunately unaccompanied by foreign language texts.

6. *Licensing*

Eckstrom, *Licensing in Foreign and Domestic Operations* (Clark Boardman); Melville, *Forms and Agreements on Intellectual Property and International Licensing* (Clark Boardman/Sweet & Maxwell).

Both thoughtful, thorough, looseleaf, well-indexed and regularly supplemented in good binders.

7. *Franchising*

American Bar Association Section of Antitrust Law, *Survey of Foreign Laws and Regulations Affecting International Franchising*.

8. *Regional Services*

a. European Community

Common Market Reporter (CCH). Looseleaf; well-indexed; particularly strong in anti-trust. A useful fourth volume, *Doing Business in Europe*, contains digests of tax and business laws of 14 countries, both within and without the Community.

b. Latin America

OAS Publications. These include: a good collection of *National Constitutions* in both local language and English, with fairly frequent updates; the standard *Statement of the Laws* series; and *Mining and Petroleum Legislation in Latin America* (since 1984 published looseleaf by Oceana).

c. Andean Common Market

Alas, nothing good yet. It appears that ANCOM may die of senility before its birth is adequately chronicled in looseleaf English.

9. *National Services*

The CCH offerings include *Canada Corporations Law Reporter* and other looseleaf services on Canada. Of course, commercial publishers in each developed country have their own offerings (frequently looseleaf and quite accurate) for local lawyers. The problem is language. Among local services in English *Gore-Browne on Companies* (Jordan & Sons; looseleaf) is a particularly trenchant entry on U.K. corporation law, which would be even more useful for foreigners if it included an updated text of the Companies Act itself. Pinheiro Neto, *Doing Business in Brazil* (Matthew Bender; looseleaf; updated with frequent "Legal Letters" and "Special Alerts") affords a reasonably comprehensive view of the changeful legal landscape of Brazil. Eibun-Horei-Sha, *EHS Law Bulletin Series* provides awkwardly bound English translations of Japanese legislation.

There are several competent responses to the previous dearth of materials on Middle Eastern countries. Among them: Hall, *The Business Laws of the United Arab Emirates*; Karam, *Business Laws of Saudi Arabia*; and Karam, *Business Laws of Kuwait* (all Graham & Trotman; looseleaf); and Glick, *Trading with Saudi Arabia* (Allanheld, Osmun/Croom Helm). México Fiscal publishes *Impuesto Sobre la Renta, Impuesto al Valor Agregado, Legislación Mercantil*, and others including, among non-tax matters, an especially welcome *Legislación Sobre Inversiones Extranjeras*; all looseleaf, full-text, Spanish-language.

Many useful introduction-to-business-law books are distributed free by foreign banks and the investment-promotion offices of foreign governments. Examples: Hoagland, *Company Formation in Mexico* (Lloyds Bank); Arntzen and Bugge, *Doing Business in Norway* (Den norske Creditbank); and Banca Commerciale Italiana, *Vade-mecum for foreign investors in Italy*.

10. *Periodicals*

Department of State Bulletin and the U.S. Department of Commerce's *Business America*.

These tend to describe the world in bowdlerized Washingtonese, but they

helpfully record current treaty developments and new departmental publications.

International Legal Materials (American Society of International Law; bi-monthly).

This reproduces in English many valuable items of foreign legislation. For that and other reasons it is a “must” for the international business lawyer’s library.

The American Bar Association Section of International Law and Practice.

The Section publishes, in addition to monographs and practice materials on foreign law, a very readable quarterly, *THE INTERNATIONAL LAWYER*, which particularly in recent years has emphasized transnational business law subjects. The best approach is to join the Section and subscribe to all its publications.

II. Foreign Counsel

A. THERE’S NO SUCH THING . . .

There are two points a U.S. lawyer should remember, as warning signals against slipping into the expensive error of believing it is easy to choose foreign counsel. The first is that lawyers serve a different function in the United States than they do almost anywhere else in the world. It is difficult to grasp the magnitude of that difference. One way to try is by considering the relative incidence of lawyers in the population. To cite figures at the extreme, Japan has less than 15,000 lawyers, the United States about 622,000, which on the basis of 1982 population comparables works out roughly to 268 lawyers per 100,000 population in the United States and 13 lawyers per 100,000 population in Japan. The numbers for other developed countries are less sparse, but impressively nearer the Japanese than the U.S. end of the spectrum.

There are two possible explanations for these remarkable statistics. One hypothesis is that U.S. lawyers are largely nonessential—that we are busy doing things that don’t really need doing, as witness the fact that those things are not done by lawyers in foreign countries. An alternative explanation of the statistics is that lawyers in the United States do things which need doing but in other countries those things are done mostly by non-lawyers—by accountants, executives, bureaucrats, commissars, Zen abbots, witch-doctors, Mafia *capos*, fakirs, country squires, feather-merchants and other assorted Movers & Shakers. Certainly, this latter explanation is more flattering to our profession.

A second thing to remember, as a talisman against believing that foreign lawyers are easy to choose, is that in most countries the “legal profession,”

as we know it, is not a single profession, but several—including professions which may bisect, overlap, or entirely end-run our own. In France, for example, litigation was historically handled by two professions: barristers (*avocats*) and pleading-writers (*avoués*). Corporate charters, wills, and other public documents were drawn by notaries (*notaires*). Business planning, structuring and tax advice was done by “legal counsellors” (*counseils juridiques*), who didn’t even have to have legal training. Only recently have firms of *avocats* been formed to perform the full-service functions of a U.S. law firm, and even today the largest firm of *avocats* in Paris has only about 50 lawyers. In the U.K., barristers and solicitors belong to entirely separate professions. The barristers are required to practice alone; solicitors are allowed to join in firms. Although some solicitors’ firms are quite large and influential, they have traditionally viewed their professional function rather narrowly, with the result that they do not handle many elements of an international business practice on the U.S. model.

Civil law countries generally preserve the distinction between lawyers (*abogados*, *avocats*, etc.) and notaries (*notarios*, *notaires*, etc.), but there are local variations. In Guatemala, for example, lawyers may function as both *abogados* and *notarios*, and in the Netherlands enterprising attorneys and notaries have formed amalgamated firms, which provide substantially all the services of a large U.S. law firm. In the Netherlands Antilles, the more imaginative notaries have launched into tax planning and business-law advice as well as the traditional documentary functions of a notary.

The result of all those differences is that, quite literally, there’s “no such thing” as a “lawyer” in most foreign countries. The American word “lawyer” doesn’t even translate into most foreign languages because it connotes a broader function than any single professional person performs abroad. Therefore the client’s often-heard question “What lawyer do you recommend in Country X?” is usually a Wrong First Question. The right question is: “I want to accomplish thus-and-so in Country X. What local professional help can you recommend?”

B. CHOOSING

The best choices of foreign counsel come from personal experience—if not yours, then the experience of a discerning U.S. international lawyer who has actually worked with the recommended foreign lawyers, ideally in their offices abroad. Failing experience, there are directories. Like foreign law sources, they are a mixed bag. Here are some helpful ones, all annualized.

Russell Law List

Very selective: only one recommended firm per city; in many important cities (and several countries), no recommendation at all. No biographical

information, but firm names, mailing addresses, Telex and telephone numbers.

Martindale-Hubbell

Two separate listings, really. One gives names and addresses only, and is not very helpful because the lawyers, though screened, are not rated. The other contains “cards”—for countries where they are ethically permissible—showing biographical details, bank references and, most helpfully, specimen clients.

The International Bar

A section of *The American Bar*. Contains names and addresses, specialties, etc., but not banks, clients or biographical details; listed lawyers are screened but not rated. Has a separate list of “patent and trademark agents.”

The Bar Register

Information as in *The International Bar*, plus representative clients. Has separate lists for certain specialty fields.

The International Law List

British-oriented and published in London. Biographical rudiments as per *The International Bar*; screened but not rated. Good for British Commonwealth areas.

For an absolutely cold choice your best approach is usually: Look at *Martindale* first; cross-check with any listed “specimen clients” you have access to; consider it quite a plus if a likely choice is recommended by *Russell*; look to *The International Bar* and other available directories for corroborative details on most recent addresses, etc.; then compare your tentative choice with the local-counsel roster of a U.S. multinational experienced in the area, or run it by an experienced international lawyer. Beware of out-of-date recommendations. People die; senility strikes; political “ins” become “outs,” etc.

C. MOTIVATING

There is a great deal of useful printed advice about the care, feeding, cajoling and chastising of foreign counsel. For example, Lyon, “Selection and Use of Foreign Counsel”, in *Private Investors Abroad*, 213 (Matthew Bender, 1975); Werner, Choosing Foreign Counsel, in *Private Investors Abroad*, 87 (Matthew Bender, 1967); Brudno, Negotiations With Foreign Lawyers—An American’s Lawyer’s View, in *Private Investors Abroad*, 23

(Matthew Bender, 1965). Mostly it comes down to common sense. Here are eight common sense reminders.

- 1) Check out conflicts of interest and competing clientele thoroughly but realistically.
- 2) Be explicit in your assignments. Bring your foreign lawyer into the picture. If he is worth choosing he is probably worth taking into your confidence.
- 3) Settle the fee basis in advance. Request billings at frequent regular intervals.
- 4) Insist on knowing who within the foreign firm will be primarily responsible for your work and who will actually do it. Beware the client-pleasing legal executive who shines on the golf course but delegates the nitty-gritty.
- 5) See that the foreign lawyer's bills are handled promptly. Don't shirk your responsibility to evaluate them for your client. Make certain that misapprehensions and dissatisfactions (on either side) are ironed out quickly, before they fester.
- 6) Face up to the linguistic problem. For maximum communication the foreign counsel should correspond in his native language and you in yours, and each of you should be able to read the other's language. If that is not possible bear in mind the substantial risk you are running and try to guard against it. Remember: translation is an art, not a science. There is no such thing as a perfect translation. (*Traduttori traditori* or, as a friend of mine puts it, "Translations are linguistically accredited treachery.") If a foreign lawyer provides you with translated materials be certain that they have been reviewed *and initialed* by a responsible bilingual lawyer of his firm, not some nameless flunky in his "Translation Department."
- 7) Express appreciation for good work. Lawyers the world over tend to be ego-driven Brownie-point chasers; discerning praise still means more than fees to most of us. Don't stint it.
- 8) Be sensitive to nationalism and politics. Usually, foreign counsel function as lawyers' lawyers. As your foreign lawyer's "client" you will be there today and gone tomorrow. He has to stay. It will be hard for him to live down a politically unpopular position he takes on your behalf. (In some countries it may be hard for him to survive it!) Encourage him to shed his political inhibitions when he advises you privately, but don't try to bully him into taking unpopular positions publicly.