Some Thoughts on International Business Law and the Education of the International Legal Practitioner

Juscelino F. Colares*
Syracuse University College of Law

Introduction:

One of the distinctive characteristics of mature democracies is public confidence in the "rule of law." The rule of law, or *l'état de droit*, as the term is known in countries following the civil law tradition, is nothing more than the profound belief that democratically-created law ought to be the guiding principle by which the conduct of individuals should be judged. In light of the ever present temptation of even legitimately elected governments to misuse power, an educated citizenry holds firm to the belief that only a regime of laws, not rulers, can provide for the effective, secure and full exercise of its civil and political rights. Yet, the reach of the rule of law and its virtues, such as predictability, transparency and finality, extends far beyond the public/political sphere. Indeed, the growing expansion of this concept in international business deserves much of the credit for the past quarter century's increase in both trade and economic development.

The rule of law has actually become the concept that harmonizes the operation of the domestic and international laws that govern the conduct of international business. In an increasingly interdependent world, this unifying force serves as the common ideology of lawyers who navigate the legal framework that governs the cross-border transactions of their clients. Notwithstanding the importance and status of the rule of law as the centerpiece of this professional culture, lawyers, who are trained in different legal traditions, are constantly

* Associate Professor of Law, Syracuse University College of Law; J.D. (2003), Cornell Law School; Ph.D. (1994), Political Economy, the University of Tennessee; LL.B. (1989), summa cum laude (and first-in-class honors), Universidade de Brasília/Universidade Federal do Ceará, Brazil. Prior to joining the faculty at Syracuse University College of Law in 2005, Professor Colares practiced law in Washington, D.C. and in Brazil.

challenged to operate across multiple legal systems, often with colleagues that may not be aware that they have quite distinct views on the scope and content of domestic laws and international treaties. Thus, awareness of the existence of such differences as well as knowledge of the multi-tiered nature of international law must be imparted on students and practitioners of international business law.

I. The Multiple Sources of International Business Law

A. The Importance of National Law in International Practice

International business transactions ("IBTs") are often complex, and require at least some basic knowledge of the relevant law and legal systems. Knowing what the rules of the game are becomes not only prudent but essential. However, even experienced international lawyers cannot be expected to know all aspects of the laws of other countries. It is important that persons engaged in international business have a competent legal advisor available to assist them in navigating the local laws of the countries in which they conduct business.

Consider the example of a Brazilian entity negotiating with a U.S. corporation to establish a joint venture manufacturing plant in São Paulo. It will be extremely useful for the Brazilian company to understand how U.S. law affects the decisions of its American counterpart. There are a variety of U.S. laws that affect the decisions made by the U.S. company on such matters as: (1) how profits are to be received by the U.S. company; (2) how financing can be arranged; (3) controls on the export of U.S. technology; (4) the form of relationship between the U.S. and Brazilian companies; (5) limits on payments that may be made by the U.S. company to Brazilian officials; (6) salary payments to U.S. employees; (7) the availability of insurance; (8) the payment of customs duties on imports; (9) how the U.S. company is organized; and (10) the kinds and forms of international contracts used.

Many other examples can be given, but the above list at least suggests the pervasive influence of the law, and the complex legal issues that may arise when a business relationship is contemplated by prospective partners from two or more different countries. However, this complexity is not circumscribed to the realm of legislated law. For example, the legal systems in Latin America and continental Europe reflect the influences of civil and customary law. In contrast, the United States has a common law system inherited from Great Britain. The common law system places great importance on the value of prior court decisions. This gives the courts and judges a distinctive place of importance in the American and British legal systems—a matter of profound importance for business partners in and outside of the United States. In addition to concerns about potentially applicable domestic laws, it also is important to consider the existence of international norms and how they apply in IBTs.

B. Sources of Law Bearing on IBTs

The legal regulation of international business may be examined within three different legal contexts: private, national, and international law. Private law regulates the business relations between parties according to their freedom to contract. Thus, in the arena of private law, one is concerned with such matters as enforcement of contracts, formation and conduct of businesses, resolution of private disputes, and related matters. Under the Western legal systems, parties to a transaction have considerable discretion in negotiating the private contractual rules that govern their business relationship.

National public law regulates the outer limits of private conduct in the business world. These constitute a set of non-derogable norms that sovereign states enact in areas where government regulation is deemed essential. Such law regulates, for example, trade through import tariffs and other taxes, licensing, export and import controls, product quality control, and

related measures. Such government regulations may be based upon a wide variety of public interests, such as national security, health and safety, environment and conservation, free and fair trade and even anti-competitive concerns.

Finally, the international law that is created by treaties and agreements between governments regulates the trade relations between nations and has an impact on IBTs. A principal example is World Trade Organization ("WTO") law, under which more than one hundred governments have agreed to progressively reduce import tariffs by agreeing not to discriminate among goods and services imported from or provided by any member and by prohibiting discrepancies in the treatment of foreign and domestic goods and services. These principles as well as the ensemble of the WTO agreements restrain the discretion of governments, thus promoting predictability, a highly appreciated notion in IBTs.

C. International Commercial Dispute Resolution

Students who are new to the study of international business law are often surprised to learn that most of the legal rules applying to a business transaction derive not from international sources, but from national sources. There is no international legislative body invested with powers to establish general rules of private conduct, nor is there an executive body with worldwide police powers to enforce such attempts at universal rulemaking. This absence of universally accepted international lawmaking bodies means that one must identify the individual nations that have jurisdiction over the matter to determine which law applies and how it will be enforced.

That task may be relatively simple if the entire transaction occurs within the jurisdiction of only one country. Suppose, for example, a buyer from Brazil comes to the United States, purchases goods under a contract negotiated and signed in the United States, and makes payment

and receives delivery of the goods in the U.S. This transaction will be subject to the jurisdiction of U.S. courts and U.S. law if a dispute arises over the quality of the goods.

Where a transaction occurs within multiple jurisdictions, however, the task of deciding the applicable law and finding a court with jurisdiction becomes more difficult. In such a transaction, the parties can either choose the applicable law and the dispute resolution system, or they can leave the matter undecided. If the parties to an IBT actively choose the applicable law and the dispute resolution forum, the outcomes of disputes can be more predictable. Returning to the previous example, if the buyer and the seller conduct portions of the transaction in both Brazil and the United States, they can exercise their freedom to contract and specify in the sales agreement which nation's law will apply and which nation's courts will have jurisdiction over any disputes arising from the contract. By taking this course of action, the parties will know ahead of time the laws that will govern the conduct of the transaction and the appropriate place to file a claim if a dispute arises.

Where the parties fail to contractually specify the applicable law and the method of dispute resolution, the dispute can become more complex if it is not clear which nation has jurisdiction over the dispute. In an effort to simplify such matters, nations have entered into treaties and agreements that address questions, such as jurisdiction of courts, enforcement of foreign court judgments, and regulatory cooperation. For example, the United Nations Convention on Contracts for the International Sale of Goods (CISG) is one of the most ambitious efforts to resolve questions of law in international sales transactions. The CISG establishes widely accepted legal norms applicable to the sale of goods in IBTs. The CISG can govern international contracts dated after January 1, 1988 between parties in the ratifying nations. The United States, Japan, and several other countries around the globe are signatories to the CISG.

However, even where such specific treaties apply, disputes between buyers and sellers of goods are resolved in national courts rather than in international tribunals. Thus, to avoid the risks of litigation in a foreign country, parties to international trade contracts often choose to settle their disputes in private arbitration proceedings rather than in judicial courts.

II. The Legal Profession in a Fast-Integrating Global Economy

A. Foreign Lawyers

To understand how the practice of law differs among professionals of different countries one must recognize that there are significant differences among the major legal traditions in the modern western world. Roughly, one may divide these traditions into three separate groups: Anglo-American common law, Romano-Germanic civil ("civil") law, and Socialist law traditions. Of the major legal traditions, the civil law tradition has the greatest prominence geographically and is most influential on new developing legal systems. Since the collapse of the Soviet Union and Communist Party rule in most socialist states, there has been a perceptible change in the law of formerly socialist countries to adopt Western legal concepts, principally those based on the civil law tradition.

There are, of course, some legal systems that may be considered hybrids or sub-traditions of the three major groups of law, and others that are entirely different. For example, one may find significantly different strains of legal tradition in East Asia and in the nations with strong religious traditions (e.g., Muslim Law or Jewish Law). Some less developed countries have legal systems which are based on customary law (e.g., some countries in Africa).

In dealing with the legal traditions of other countries, one must bear in mind that law is the embodiment of the historical, cultural, and social value development of particular society. For example, an American or European business person investing in an East Asian country is

dealing with more than simply a different set of rules; the differences in law reflect more fundamental differences in cultural and social values. The differences in legal traditions have practical consequences for business persons engaged in foreign trade and investment.

The training and background of an attorney from another legal system also may be different from that of attorneys in the client's homeland. For example, under the Anglo-American system, the profession of practicing attorneys has a significant amount of influence over legal education through the organized Bar. In contrast, universities operating in Europe and Latin America, which follow civil law tradition, tend to control legal education with little involvement of the practicing Bar. While most students of Anglo-American law expect to practice as lawyers, many students in the civil law systems undertake the study of law as their general university education, with no intention to practice law after graduation. In such countries, most legal training occurs at the undergraduate level. In contrast, the legal education of American law students consists of postgraduate training beyond the first university degree. American law students, therefore, focus their education in law more upon their future responsibilities as practicing lawyers.

There are also fundamental differences in the way law is transmitted and taught. The civil law tradition values legal rules or norms that are identified and articulated by scholars. The Anglo-American system, with its emphasis upon judicial precedent, tends to focus more upon judicial decisions, although this brightline distinction has blurred somewhat in recent years. With the increasing dominance of statutory law in America since the New Deal Era, the truth is that American legal education has increasingly focused upon legislative rules and legal classification, so that the difference between the civil law method and the Anglo-American "case method" has been diminishing with the passage of time.

The status of lawyers varies significantly from one country to another, depending upon socioeconomic and political conditions. Membership in the legal professional in the United States is generally considered as prestigious, and is associated with wealth, power and influence. In contrast, according to Ordem dos Advogados do Brasil, the Brazilian Bar, there were 322 law schools in Brazil in 2007, with over 590,000 students enrolled. There are over 570,000 lawyers in Brazil, and the legal market is saturated with poorly prepared attorneys.

B. Lawyers in the U.S. Legal System

Each of the 50 states in the U.S. has a bar association which is the professional organization responsible for the regulation of lawyers. American lawyers generally are required to study for four years in an undergraduate institution, attain a Bachelor's degree, study an additional three years in a nationally approved law school, and attain a Juris Doctor degree as a result of that course of study. In addition, almost all of the state bar associations and supervising state authorities require that a graduate of a law school successfully complete a comprehensive examination of their knowledge of generally accepted "common law" principles and the statutory laws of that particular state.

The practice of law includes the giving of legal advice, the drafting of legal documents, and the representation of clients before courts and other legal forums. Lawyers are the only persons allowed to practice law in the United States. Lawyers may practice law individually or may choose to associate with other lawyers to form a law firm. Law firms may have as few as two lawyers or as many as several hundred.

The government is represented by lawyers who prosecute individuals charged with crimes or violations of civil statutes. All citizens are allowed to be represented by a lawyer in any case before a court. Those who are prosecuted by the government for crimes which can be

punished by a jail sentence of more than six months, but who cannot afford a lawyer, are provided with a free court-appointed lawyer.

Judges are usually lawyers who have practiced law for a number of years and have become noted for their knowledge and experience. State judges often are elected by the people and must stand for reelection. Federal judges are appointed by the President of the United States and must be approved by a majority vote of the Senate. Federal judges serve for life, provided they do not engage in any serious misconduct which would justify their removal from office.

The American judicial process is based on the adversary system. The court is viewed as a neutral arena where the opposing parties can argue their cases to either an impartial jury of citizens or an impartial judge. All serious criminal actions and most significant civil suits are heard by a jury of average citizens. These citizens are chosen on a random basis and are expected to render a fair and unbiased determination based upon the facts presented at a public trial. Even where a jury is utilized to decide the legal contest, a judge presides over the proceedings to ensure that the rules of procedure are followed. These are standard rules which govern the type of evidence, testimony, and legal arguments which may be introduced in the courtroom.

C. American Lawyers and Their International Business Practice

Lawyers may assume a wide variety of roles in business transactions, depending upon the country in which they practice. In the United States, lawyers have always had very important roles in business, politics and government, and in other positions of leadership. Business persons frequently rely upon lawyers, and they are particularly important in IBTs. The traditional role of the lawyer is to protect and advise the client with respect to her legal rights. However, some

lawyers also assist by providing advice on business matters, including opportunities for business in the United States or in other countries.

American lawyers perform a wide variety of tasks, but many are considered specialists and only work on certain kinds of specialized legal matters. International trade is considered a specialty and a business client should consider hiring such a specialist if she plans to conduct business in the international arena. An American lawyer can provide a wide range of legal services to a U.S. or foreign business person, including, but not limited to: (1) advice on U.S. law; (2) preparation of petitions to governmental agencies; (3) negotiation, review and advice on contract proposals; (4) coordination of financing efforts with banks; (5) client representation before government agencies and courts; and (7) service as legal agent in the United States.

There are about 150,000 lawyers in the United States. Although it may be difficult for a foreign business person to select a lawyer from among the many choices, there are sources of information to assist in that decision. Persons who have been involved in IBTs between the United States and other countries may make recommendations of names of lawyers who have experience in the specific area of trade, and who may be available to represent foreign clients in the United States. The American Bar Association (ABA) is the largest national private membership organization for lawyers in the U.S. The ABA headquarters are in Chicago, Illinois. The organization includes a group known as the "Section on International Law" whose members are lawyers who are interested in and/or practice in some aspect of international law. Law professors also may be familiar with lawyers who practice in international law and trade. Some law professors also are lawyers and represent clients in international trade matters. The *Martindale-Hubbell Law Directory* is a useful book which lists names of lawyers and indicates areas of specialty, background and experience.

The United States is a federal system, with a central national (federal) government and a separate government for each of the fifty states. Because the United States is a federal system with both national and state law, there will be certain state law requirements that must be met in addition to national law requirements. If a foreign businessman plans to do business with or in a particular state, it is important to seek the advice of a lawyer who is licensed to practice in that state.

A major difference in the nature of practice in the legal profession in the United States is the association of lawyers in large urban law firms. While lawyers in Latin America and continental Europe will also form business partnerships for the purpose of providing legal services, these entities tend to remain small as they normally are organized around family ties. By contrast, firms in the United States are much larger, better organized, and their lifespan is independent of their lawyer-partners' survival.

In fact, over the last century, these firms have expanded enormously in the number of their partners and associates, and they have become national and international. Firms typically have offices in several American cities and, increasingly, in foreign cities. This larger scope of operations is largely explained by and accounts for the growth, degree of specialization, and their capacity to service their clients' needs in an expanding global economic environment.

The growth of economic activity in the past fifty years, largely a result of a more rules-based international business environment, has inevitably led to the present trend towards concentration in legal firms operating in the United States and abroad. While large American firms have adopted very aggressive expansion strategies abroad, European and Latin American firms have had a mixed reaction. Some foreign firms, reflecting a defensive attitude, have pushed for greater protection and monitoring against the unlicensed practice of law in their own

countries. Others have decided to actively engage in this process by the pursuit of affiliations with and even acquisitions of U.S. firms.

By positioning themselves as regional and even global leaders, large American firms (and some European firms) have made huge gains during the last two decades of economic expansion. Their survival at the present scale, however, largely depends upon the continued economic stability of their multinational clients. However, the occurrence of eventual economic downturns should not be feared so long as further consolidation of the rule of law takes place. To those who can master its complexity, its stabilizing effect holds the promise of an expanding profession.

Conclusion

The growing economic interdependence of our age requires the attention of all who are involved in international business education and practice. Adherence to the principles underlying the rule of law alone, though essential, does not suffice. In an environment where IBTs are increasingly more sophisticated, legal practitioners must be aware of the complex legal landscape in which they operate and be cognizant of differences in legal cultures throughout the world. The latter knowledge can often shed much light on how to interact with their foreign colleagues. Legal education often focuses on differences in the content of applicable norms in cross-border transactions. To be truly effective, however, it must also impart on students the systemic importance of these legal-cultural influences.