

***The "Law of the Other" in International Business Transactions—  
Foreign Perspectives in International Business Transactions  
Courses***

*By:*  
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American law teachers have long struggled with just which topics they should include in courses on international business transactions.<sup>2</sup> What balance should they strike among commercial transactions, investment transactions, international trade and many other different topics? There are so many topics to choose among; which will our students one day be able to make use of?

There is one aspect that all international business transactions have in common: they involve people who come from different legal systems. People from different legal systems bring different legal perspectives. One of the most important functions an international lawyer can play is that of bridge between two legal systems.

Every good negotiator is concerned with the perspectives of his or her negotiating partners. Every good lawyer is familiar with the perspectives of his or her clients. When legal matters are international, the need for such familiarity is heightened, since the lawyer's transaction partners are less likely to know the foreign legal system. Law is more culturally dependent than many other human activities.

Central to the effective conduct of international business transactions is a solid understanding of the perspectives of one's negotiating partners. While deals and applicable laws change, constant remains the fact that parties to international negotiations bring their own preconceptions of law and business. Those preconceptions<sup>1</sup> are not benign; often, without

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<sup>2</sup> See, e.g., TEACHING INTERNATIONAL BUSINESS TRANSACTIONS (Craig L. Jackson & Robert L. McGeorge, eds., 1995), ASIL Bulletin, June 1995 (surveying contents of courses and course books).

realizing it, parties substitute their conceptions of law as they know it for the true foreign law that they do not know. Unpleasant surprises can result.

Among the most valuable preparation that we can give to our students, in addition to technical knowledge of particular transactions, is facility to respond to foreign clients and lawyers from those foreign clients' and lawyers' perspectives. No matter where our students end up in practice, understanding of these different perspectives will help make them better lawyers.

Lawyers who are educated in the "Law of the Other"<sup>3</sup> can anticipate clients' questions without being asked. They can help clients avoid mistakes. They can keep clients—and themselves—safe from assuming similarities that do not exist between legal systems. They can be empathetic listeners to clients and partners from different cultures.

In teaching international business transactions I seek to prepare students to anticipate as lawyers the perspectives of their foreign counterparts. To strive for this goal, I focus on transactions that students already know in their domestic legal systems. When students look at transactions fundamentally familiar to them, they cannot easily dismiss differences. They must think about the transactions, not as deals new to them, but as deals that they may view in different ways. They can see those differences as products of different legal systems and cultures.

I focus on international contracts and international civil procedure. To bring to students foreign perspectives, I use not only applicable international conventions, but also foreign law that lies behind convention compromises and that forms the working assumptions of foreign counterparts. My students' foreign clients won't be surprised to discover that retentions of title do not work in American contract law or that easy appeal of facts is impossible in American civil procedure. My students' domestic clients won't be flummoxed when

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<sup>3</sup> Cf. MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW AND KNOWLEDGE* (discussing "the English doctrine of the 'mixed jury' allow[ing] resident foreigners to have law suits against English natives tried before juries composed half of natives and half of aliens.")

they find out that standard forms in consumer contracts are closely monitored abroad or that discovery abroad in litigation is an anathema.

This all sounds elementary and perhaps hardly worthy of note. But I believe that this commonplace is especially important and often overlooked when international transactions concern the United States. Americans are used to having it their way; non-Americans are used to giving Americans their way. Perhaps for that reason, we in the United States, rarely recognize just how much we in our legal system have, in our ways of thinking about the law, and in applying the law, diverged from what is more-or-less the conventional wisdom elsewhere on the nature of law and legal procedures. The United States is exceptional.

Most of the world conceives of law as a system of rules. That law is a set of established rules, applied deductively by finding facts and subsuming the facts under appropriate rules, and drawing legal conclusions, is second nature for most non-American jurists. Non-American jurists are surprised to find that their standard conceptions have become controversial among American jurists.

To an extent scarcely imaginable by foreign jurists, many American jurists see law differently. Where foreign jurists see law as abstract rules—as general principles that govern relations among citizens—and legal procedures as methods for determining legal rights, many American jurists have a different understanding and focus. For these American jurists, the law is the result of a lawsuit—the single point determined in a case—and legal procedures are an opportunity for parties to present their views on that particular point or, for that matter, to argue for their own point of view..

Earlier this term an American student asked in a domestic sales law class: “why is the United Nations Convention on the International Sale of Goods so much more clearly drafted than the Uniform Commercial Code?” I told the student that the Uniform Commercial Code is one of the best-drafted of American statutes. In fact, Americans tolerate legisla-

tive sloppiness scarcely conceivable in legal systems of our principal civil law trading partners.

If Americans pay too little attention to the rules that govern them, they pay inordinate attention to the procedures that implement those rules. Foreigners are amazed by the fixation of Americans on litigation. The opportunity to be heard is expanded to a “day in court” to tell one’s full story. The “standard judicial function” has been transformed from something other than “the impartial application of determinant existing rules in the settlement of disputes.”<sup>4</sup> That something else is the opportunity to tell a narrative, or to check government power, or to create new law.

These differences are not merely theoretical; they impact international legal practice directly every day and account for many misunderstandings.

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<sup>4</sup> H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971 (1977).