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CROSS-CULTURAL CURRENTS IN INTERNATIONAL LAW

INTRODUCTION

There is a tendency for American businesspeople and legal practitioners to accept as a given the legal environment in which they live and work. Many are not fully aware of the cross-cultural roots of American jurisprudence. Furthermore, our laws continue to evolve in parallel with legal developments elsewhere. As they change in response to dynamic international legal cross-currents, the evolution of our legal systems in turn affects legal developments abroad.

AMERICAN LAW IS INTERNATIONAL LAW

Some of you may be thinking, “He is talking about International Law—but he has never said what International Law is.”

It may be helpful to discuss the concept of international law, and why it is important.

We need to realize that American law *is* International Law, and that to understand American law fully one needs to understand how it evolved from foreign law. Only then are we on our way to a comprehensive appreciation of how law works in business here and abroad.

To use some oversimplified examples, our laws of property are derived from British laws of real estate and personal property, but basic principles of British real estate law now are applied to and govern such things as licensing of technology and other intellectual property including trade secrets, copyrights, patents, and trademarks.

By contrast, our commercial laws, including our Uniform Commercial Code on Sales, derive not from the property courts of England, but from the “Law Merchant” as it developed over the trade routes from Africa, China, and Arabia and was adjudicated as a concomitant of the spice and silk trade in the great trade fairs of Scandinavia and Iceland (sometimes

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called “althings”) and Europe. It is no accident that the seat of the European Common Market is now in Brussels, Belgium—the seat of one of the oldest and greatest European trade fairs—and now the seat of trade law development for the New Europe.

A knowledge of the foreign origins of our laws will result in a view that laws of foreign lands are not quite so alien. For example, Islamic Law, as practiced in Saudi Arabia, is essentially ecclesiastical law. As such, contract or loan clauses calling for an unearned profit (*i.e.*, interest) may be unenforceable in Saudi Arabia. Consequently, one may encounter an “Islamic” deal with a Saudi lender who does not demand interest, but demands partnership by insisting upon receiving an equity “piece of the action,” or participation, instead of interest. This substitutes for the interest and “points” on a financing that might be structured as an interest-bearing loan in the United States.

This may appear quite foreign, but analogous situations occur in our culture. Most states still have some consumer credit and anti-loansharking statutes that limit the interest that can be charged to certain classes of persons (*e.g.* consumers) on certain types of transactions. The origin of these “usury” type statutes was in the ecclesiastical courts of England and Europe that forbade church members and others from charging interest on financings. We still have the vestiges of religious laws prohibiting interest, and, just like the Arabs, we routinely find ways to get around them.

But foreign derivation does not necessarily dictate permanent alienation. For example, when escorted to a local zoo, Australian visitors to our country enquired, “Do you have any Australian animals here?” “They’re ours now,” the zookeeper replied.

Similarly, you might say that America’s laws are ours now, and so they are—but not quite. Just because our American law has been derived from foreign law does not make our law into international law. As United States residents, it is interesting for us to be aware of the international law implications of what we do.

Internationalizing our understanding of the law gives us a better picture of how commerce actually works here. Thus, people who dabble in real estate need to become aware of certain reports and tax liabilities that may result from dealing with foreign nationals in real property. Indeed almost no real estate changes hands in this country unless the seller has executed a “Non-Foreign Affidavit” or else otherwise demonstrated

compliance with federal laws regulating real estate ownership and sales by foreign nationals.

In the commercial law area, one should be aware that Article Two on Sales of the Uniform Commercial Code as enacted in all states has been amended by federal law adopting the United Nations Convention on the Sales of Goods as the law of each state. This means that when buying or selling goods in a transaction with a foreign seller or buyer, Americans are subject to having the contract re-written by the United Nations Convention without our knowledge.

“Who cares?” you might ask. “What difference does it make?” you might wonder. This may not seem consequential. However, the two laws work differently. United States sales law is *pro buyer*. It is easy to enter into a contract, all one has to do is agree on the *quantity* of goods to be purchased or sold (and have sufficient writing to support this agreement) and American sales law will *write* the rest of the contract. However, it is also easy for a buyer to get *out* of his United States sales contract. If the goods purchased are defective, are not as described, or do not meet express or implied warranties, the buyer can send them back and usually get his or her money back.

International sales under the United Nations Convention on Contracts for the International Sales of Goods work in an almost completely opposite way. This sales law is much more *pro seller*. Under the United Nations Convention it is quite difficult to *make* a contract. The parties have to agree completely upon virtually all of the important contract terms. But it is also difficult for the buyer to get *out* of a contract. The buyer can give the goods back only if the breach or non-conformity is *very* substantial. Otherwise, for less serious problems the remedy is a simple price adjustment. This makes sense, since it is very expensive to ship goods back and forth across the seas to fix relatively minor problems.

It is important to remember that this is United States *state* law, not foreign law. But, as stated above, our United States law is international law. There are many more examples of the effects of international law on United States transactions in areas from immigration law, to mergers and acquisitions, to criminal prosecutions involving national extradition treaties and drug laws, to businessmen perfecting their rights worldwide pursuant to treaties applicable in the United States, to American yachtsmen having their boats built overseas, to United States businesses selling overseas utilizing letters of credit and terms of sale.

UNITED STATES CITIZENS HAVE AN ADVANTAGE OVER FOREIGNERS IN UNDERSTANDING INTERNATIONAL LAW.

Why is this so? An Indiana resident negotiating a deal in Illinois needs to be sensitive to differences between Illinois and Indiana law. If one distributes goods or does business in all 50 states—a common experience for an American businessman—one is automatically required to be aware of the laws of 50 jurisdictions. This awareness arises from a familiarity with our multistate and federal system of government to the differences from state to state and to the overriding influences of federal laws.

As an example, let us look at a United States manufacturer distributing goods through distributors in all 50 states. Distribution is a sale of goods, involving the laws of sales, terms of sale, warranty terms, and disclaimers and differences between the provisions of buyers' orders and sellers' acceptances of such orders.

Distribution rights also constitute a kind of license, which raises issues of quality control, use of name, promotion of goods, protection of technology, and the like. Distribution rights usually constitute a restriction on a manufacturer's and a distributor's rights to compete freely. That is, they restrict the rights of each to sell to or to buy from anyone, anywhere at any price. Consequently, antitrust problems relating to rights to terminate the distributor, price setting concerns, territorial restrictions, customer restrictions, and non-competition clauses enter into the equation. Other aspects include dispute resolution, arbitration, choice of law and forum, and the like.

This list is not exhaustive, but is indicative of the incredible amount and complexity of law that bears upon a United States manufacturer's sales contracts with its distributors.

Since one can handle this in one state for all 50 states—and United States businesspeople routinely do—one can handle this in 50 countries overseas as well. Because the issues will be the same—not just similar—exactly the same.

The laws, however, and their application will be very different; yet we already can handle 50 United States jurisdictions—why not 50 more? By way of example, the businessperson who is acquainted with the Uniform Commercial Code's Article Two on Sales in the United States now needs to think United Nations Convention on Sales for international sales; so also for licensing, think foreign distribution and licensing laws; for anti-

trust, think Treaty of Rome in Europe, and dealer and agent termination laws (and United States antitrust laws—which have extraterritorial application) everywhere. For dispute resolution, think international arbitration.

Dealing in the global marketplace should not intimidate the American businessman. Good United States business executives are better equipped to deal with the complexity of overlapping laws abroad because they are used to dealing with them in this country. It is a matter of daily survival here.

CONCLUSION

This discussion has introduced us, as United States citizens, to what we already live with daily—United States law—from the perspective of the vaster body of world laws of which our laws are an integral part.

From our perspective as United States residents, international law is analogous to a two-way mirror. We can see and reflect “through the looking glass” of international law how we fit into the larger legal scheme of things, and how it is that we, as citizens of the United States, are international citizens as well. Similarly, once we Americans begin to see ourselves as part of the international community, we can see ourselves enhanced by the reflection of the international law that is part of the warp and woof of our daily life and commerce. This international perspective makes us better American citizens and better businesspersons.

Just as, from a distance, one sees a reflection from either side of a two-way mirror, while, up close, one sees through the mirror to the world on the other side of the pane, so we, as Americans, have perspective on the best of both worlds within and without the United States.

To summarize, United States law is international law; United States residents have the advantage of an international vantage point, should we choose to recognize it; and American businesspeople demonstrate their international expertise over a wide range of legal problems in their day-to-day businesses.

From my perspective as an international lawyer, I hope that your professional and personal lives will be continually enhanced by the burgeoning role of international trade and law in our economy. We can begin to see ourselves more as both Americans and internationalists as we peer at and through, reflect upon, and are reflected by, the two-way mirror of international law in the United States.