INTERNATIONAL BUSINESS LAW

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About September 20, 1937, while Herbert B. Turner and Mildred Turner Copperman were traveling together in Italy, Turner handed to Mildred Turner Copperman a sealed envelope previously marked by him, "Property of Mildred Turner Copperman." As he did so, he said, "These are yours." In the envelope was a certificate for 150 shares of stock of the Massachusetts Mohair Plush Company. Two days later, in the presence of a notary and two witnesses, Turner signed his name on the back, filled in the name and address of Miss Copperman, and delivered the certificate to Mildred Turner Copperman, who accepted it. Turner's intention at that time was to make an absolute gift to Mildred Copperman to take effect at once.

It was subsequently argued by the administrator of Turner's estate that the validity of the transfer was to be judged by the law of Italy, and that certain formalities required by that law for the making of gifts in general had not been observed.[1]

Although Justice Qua ruled that "it is true that whether or not there is a completed gift of an ordinary tangible chattel is to be determined by the law of the situs of the chattel," he found in this particular case in favor of Mildred, because shares of stock were not "ordinary tangible chattels." But indeed, the outcome might have been different, had the subject matter of the transaction been other than the gift of a certificate of stock.

What parties in a case like this might overlook is that under the Common Law system a gift is a voluntary transfer without consideration and, therefore, not a contract. But in the countries that base their legal systems on the Justinian Code, we find that a gift is a contract and, therefore, must have a causa (an underlying reason, similar to our concept of quid pro quo); also, other requirements for the validity of contracts would have to be observed.

Prior to World War II we might have felt justified to pay only a passing attention (if any at all) to instances such as this. Matters involving international law were not too frequent. But that picture has drastically changed, more drastically than is generally surmised.

International private law is no longer exclusively the concern of people interested in personal law; neither is it of interest only to big business. With the expansion of world trade, the problems resulting from international commerce may well become every businessman's concern.

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1. Morson v. Second National Bank of Boston, 306 Mass. 588, 29 N.E. 2d. 19 (1940)

In the "Introduction" of the report of the Randall committee,[2] we find the statement that "the policies pursued and the actions taken by the United States in respect to foreign economic policy profoundly influence the destinies of all of the peoples of the world."

And as one of the three fundamental principles for the strength of our domestic economy the commission lists "the maintenance of a broad free market for goods and services."

The commission feels that "the economic welfare of the United States would itself be directly promoted by an increased movement abroad of sound investment by United States nationals and corporations."[3] Many remarks in the Randall report, by authors in the field of foreign commerce, point out how this country has become the world's center of commercial and industrial activity. One author goes so far as to point out that "as the United States goes, so goes the world."[4] There are a number of reasons for the position which the United States occupies in world trade: (1) the decline of the United Kingdom as a center of world commerce and international finance; (2) the huge financial resources of the United States; (3) unequaled manufacturing and distribution methods; and (4) political leadership in the cause of the free nations.

Notwithstanding these facts, we find that the idea that foreign commerce has become a "must"--in other words that, as a nation, we will have to balance our exports against our imports--is not yet the common cause of every American businessman, let alone of every citizen. Yet, the conclusion is unavoidable that, with increased production methods[5] on the one hand, and the continued leadership of this country in world affairs on the other hand, we will have to realize that we are forced to consider international--that is, global--trade as essential to our nation. This may well be one of the many consequences of our "awesome responsibility of world leadership."[6]

The preceding might point out the huge problems the United States as a country is facing. Yet, we find that in large portions of this nation isolationism is still very much alive. And it is only logical to expect this attitude more in the Midwestern regions than in coastal areas. Such ports as New York, Boston, Philadelphia, Baltimore, Newport News, New Orleans, Houston, Los Angeles, San Francisco, and Seattle are well aware of their position in matters of export and import

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2. Report to the President and the Congress, Commission on Foreign Economic Policy, Washington, D.C.: U.S. Government Printing Office, Jan. 1954.

3. Id. at 16.

4. E. E. Pratt, Modern International Commerce, New York: Allyn and Bacon, Inc. 1956, p. 31, et.seq.

5. We can hardly begin to guess what the new developments in atomic energy may mean in terms of increased production methods. That increased production requires increased distribution, has been clearly pointed out by such marketing experts as Peter Drucker A.O.

6. Randall report, Supra note 2.

trade. And under the leadership of farseeing organizations such as Chambers of Commerce, Associations of Commerce and the like, we find a movement for active participation in world trade in such centers as Chicago, Detroit, San Antonio, Cleveland, etc.

The advent of the St. Lawrence Seaway is making more and more people conscious of the position the Midwest may be taking in matters of world commerce.

It is evident that many cities in the Midwest are alert to the benefits which may be derived from the Seaway project. However, it seems that not enough people realize the many problems with which we shall have to cope, and what is involved in bringing about the desired outcome.

Farsighted business leaders in Detroit, Toledo, and Cleveland have already expressed concern as to how the new opportunities, which they foresee, may be best utilized.

And even in cities as distant from the Seaway as Indianapolis, Chicago, and Milwaukee, responsible business circles realize that they too will be affected and, therefore, have already formed planning committees.

Yet, it is amazing that so little is being done about effectively paving the way for this future development.

World trade--be it export trade, or import trade, transportation, or financing--is a technical process. As one author eloquently expresses it: "The greatest success can be achieved by 'creeping before you walk, and walking before you run.'"7

But to be ready for "the run on world trade" in 1959--the year that the seaway project is scheduled for completion--we should learn to creep and walk in the intervening years. We in the Midwest must prepare ourselves for this coming event. We must create the proper "climate" for international trade. This involves extensive informing of the public as to the necessity of world commerce and its being a "two-way street." In other words, the worker in the automobile industry should be made to realize that part of his income depends on continued exports of automobiles--and other American products--. And he will be made to understand that such continued exports can only be possible if foreign countries can pay for their American purchases by selling their products in this market.

Furthermore, we shall have to provide adequate trading, warehousing, transportation, and banking facilities for this forthcoming development. In fact, we may have to educate a special category of "foreign traders," who will find employment as exporters, importers,

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7. Supra note 4 at 45.

financiers, warehousemen, shippers, marketing research analysts, etc. It seems to me evident that the institutions of higher learning will find that they have a great task to fulfill when they see their role of community leadership clearly. And three years is only a short span of time.

The question that should occupy us in this respect is: How do we--as schools of business administration--meet this challenge? How shall we adequately prepare this new generation of world-traders-to-be? I feel there is only one answer: by setting up curricula now that will provide for the training of these business executives.

One of the significant courses that must be developed in such a curriculum, it seems to me, is a course in "International Business Law."

We may ask ourselves (1) what the objective of such a course would be; (2) what general concepts should be developed; and (3) what specific topics should be dealt with.

Objectives

The main objective should be to familiarize the person engaged in foreign trade with certain fundamental legal concepts that govern commercial transactions. For instance, the businessman who exports or imports merchandise from France (a civil law country) should have knowledge of the fact that title will pass only on delivery of the goods to the buyer.[8] He cannot reason that, because he uses such shipping terms as f.o.b., or c.i.f., the opposite party has the same understanding of these terms. This becomes unusually clear when the term "f.o.b." is used. The American exporter who has to ship, say flour from Minneapolis to Antwerp, Belgium, f.o.b. New York, will consider that he has fulfilled his part of the contract if he hands the goods to a carrier at the first point of arrival in New York; from there on the goods are the buyer's, who will have to bear such expenses as hauling the goods from the terminal to the docks, etc. However, the European buyer may well feel abused: in his terminology, f.o.b. means free on board, that is, free on board ship. And, as far as title transfer goes, he will feel that no title transfer took place at the terminal. In other words, what our business executive should realize is that commercial transactions and legal concepts are not universally alike. And not only should he become acquainted with laws of other countries, but also with our domestic laws pertaining to foreign commerce. Quite often, in my teaching of the regular Business Law courses, I make allusions to different (or similar) rules of law in other countries. It has happened more than once that students later come up to me with the remark that they have never realized that other

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8. Delivery can be either physical or symbolic, or manifested by such acts as delivery of certain commercial documents.

countries have developed legal systems just as we have done. In our teaching of International Business Law we have an unusual opportunity to bring about better international understanding in the field of business transactions.

With all this, I feel it almost unnecessary to state that it should not be our objective to make international lawyers of our students. But I feel that they should have sufficient understanding of foreign legal systems to determine where they should turn for legal advice abroad. To illustrate my point: suppose that an American businessman is planning to establish a manufacturing plant in the Netherlands; consequently, he wants to buy real estate. The deed that must be executed will be drawn up by a "notary," an official with quite a training in law. This notary is also an advisor in certain legal matters. For other legal advice, our businessman will have to turn to an "advocate," a practicing attorney. The familiar distinction in England between solicitors and barristers may be familiar to people in the legal profession, but the businessman engaged in foreign trade should also be familiar with the distinction in order to know with whom to consult in case he needs legal counsel abroad.[9] One may well suggest that it would suffice to direct our citizens to our official representatives abroad, in other words, to the American embassies and consulates in foreign countries. In a number of cases, that would be satisfactory indeed. But there are many instances where the American businessman will not bother to see his government's representatives, for a number of reasons. I remember a number of instances where I had to counsel American businessmen who chose to bypass the embassy. I feel that for such cases we should educate our students where legal advice can be had, and the importance of understanding the legal implications of the contemplated business transactions and the steps that have to be taken. I feel that this can best be achieved if we treat the subject matter on a comparative basis, so that a clear understanding of foreign law and foreign legal institutions can be obtained through comparison with domestic law and institutions. Thus, as objectives of a course in International Business Law I should like to list the following:

(a) to familiarize the students with the legal concepts--here and abroad--pertaining to matters of foreign commerce.

(b) to familiarize the students with the idea that the structure of legal machinery may differ in the various countries.

(c) to familiarize the students with the existence of different legal systems, such as the common law, the civil law, the Islamic law, etc.

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9. For further information, particularly pertaining to the introduction of evidence of foreign law into our courts, see: John C. McKenzie and Antonio Roses Sarabia, The Pleading and Proof of Alien Law, 30 Tulane Law Review 373 (1956).

(d) to familiarize the students with the idea that different political ideologies and economic developments may cause the different countries to have more or less stringent regulations pertaining to the operations of business.

In other words, I should like to see the application of Schumpeter's theory of the interdependence between the legal, political and economic spheres and the field of international trade, but with special emphasis upon the legal sphere.

General Concepts

In discussing what general concepts should be developed, we may think both in terms of geographical and subject matter areas.

(a) Geographical areas

It is obvious that we can never hope to cover all the laws of all the countries of the world. In fact, it would be ridiculous to advocate such a goal. No businessman, or lawyer, can ever be expected to obtain such knowledge. But we can greatly simplify the student's understanding by grouping countries together that can be grouped together from a legal viewpoint. For instance, most of the Middle Eastern countries are governed by Islamic law; continental Western Europe is heavily influenced by French law, etc. Following this train of thought, we should divide the world into a number of legal spheres: the common law area, the civil law area, the Islamic law area, etc. It is obvious that only broad generalizations can be given. For instance, both France and The Netherlands have a civil law system. In fact, The Netherlands' Code is heavily influenced (due to the Napoleonic period) by the French Code. Yet, we find that in France ownership of a separate apartment in an apartment building is possible, but such ownership is impossible according to the Dutch Code--superficies solo cedit (who owns the land, owns anything attached to it).

(b) Subject matter areas

In order to indicate what subject matter areas ought to be included in a course on International Business Law, we must first ask ourselves what International Law is. Primarily, it is foreign substantive law; furthermore, it is both the domestic and the foreign conflict of law; finally, it is elementary foreign procedural law. If I had to define it, I would follow Whitney's definition of international law, ".....the rule or working means by which international conflict is avoided, above all in the field of trade and commerce."[10] And inasmuch as any kind of trade between two nations necessarily involves at least

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10. William Dwight Whitney, Anti-Trust Law and Foreign Commerce, The Record of the Association of the Bar of the City of New York, Vol. II, No. 3 (March, 1956) p. 134, et. seq.

two systems of law, the student should be made to realize the existence of other systems.

For instance, in our system we consider the agreement between two independent corporations whereby each party agrees to confine its selling efforts to a pre-determined limited area illegal, hence void. But in a number of countries an agreement such as this would be enforced by the courts, because in such countries, freedom of contract is considered more important than unrestricted competition.[11] In other words, we must distinguish between "foreign trade" (export and import trade within our country) and "foreign commerce abroad" (acts and events inside foreign countries). It is only on the basis of this distinction that we should interpret the Sherman Act, as it deals with "trade and commerce with foreign nations"; in other words, the quoted provision of the Sherman Act deals with export and import within this country.[12]

We shall have to teach our students how they should try to understand foreign legal systems; this will not always be an easy matter. Cultural, linguistic, and socio-religious barriers may easily cause misapprehensions of alien law.[13]

It seems to me obvious that a course as presently contemplated is not an easy one to teach. It should be "one of our first concerns as teachers not to overtax our students."[14] We should mainly expose the students to the basic legal problems of international commercial transactions, their implications and principal applications. In this way our students will acquire an awareness of the existence of international differences, not only between systems of substantive law but also between systems of conflict of laws. Rheinstein suggests the presentation of some cases in which an American party has been exposed to a situation where the application of conflict rules is different from that under our system. Furthermore, our businessmen will want to know whether, in a Code country, they can rely on the text of a Code, or whether they still have to search for judicial precedent. According to some authors, the existence of a code is fundamentally a negation of lawmaking through the establishment of judicial precedents.[15] Nevertheless, these authors concede that laws, i.e. legal language--are, as is the case with any language, only an imperfect method of communication.

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11. Id. at 137.
12. Id. at 139.
13. Gamal Moursi Badr, reviewing Law in the Middle East, Tulane Law Review, 459 (1956).
14. Max Rheinstein, The Use of Foreign Materials in Teaching Conflict of Laws, Lectures on The Conflict of Laws and International Contracts, University of Michigan Law School (1951), p. 165, 166.
15. Supra note 9 at 372.

Courts interpret the language of a code and, in making their interpretations, are guided by the actions of their predecessors. That does not necessarily mean that decisions of a Court of last resort in a Code country will bind the courts after a first impression. In Mexico, for example, five decisions of the same tenor will establish a controlling precedent, but in Argentina one decision by the Supreme Court will establish a controlling precedent, while in Venezuela the courts are not bound by precedent at all.

Also, when it comes to the application of our anti-trust laws, we may find that our American courts sometimes hand down opinions which are not in accordance with the internationally accepted principle of the "comity of nations." It is this very aspect that has led Whitney to his statement that "the way that we are enforcing the American law today violates international law, is increasing our unpopularity abroad, and is hamstringing American business....."[16]

I remember an instance in which I published an article[17] in which I cited United States v. Eastman Kodak Company, 67 C.C.H. 920 (D. C. W. N. Y., December, 1954). Before I had even received a copy of the magazine, I had on my desk a letter from the secretary of the Netherlands Patent Office, asking me with what right the United States government had taken the attitude expressed in this case...He cited article 5 of the International Convention for the Protection of Industrial Property, in which it is clearly stated that a compulsory licensing can only be ordered three years after the patent has been granted and only then providing the patentee has no valid excuses for exemptions (free translation).

And in an article in the Netherlands Industrial Property Gazette, Mr. Vander Zanden denounces Section 44 of the Lanham Act as a flagrant violation of the international agreement regarding the protection of industrial property.[18]

We may have to point out that the right to fire an employee is not equally free in the various countries of the world. In fact, many countries require a permit issued by the government employment office, before an employee can be rightfully fired. And sometimes a permit is required before an employee can be hired. In other words, labor laws deserve special attention. The same is true for regulations pertaining to capital transfer: one is not at liberty to transfer capital as he pleases; a government permit is often required. Particular emphasis

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16. Supra note 10 at 134.

17. H. Zwarensteyn, Een belangrijke beslissing in de Verenigde Staten, Economisch-Statistishe Berichten, Rotterdam, The Netherlands, Nov. 2, 1955, No. 2003, p. 980.

18. J. W. Vander Zanden, Een Unieland mag geen wederkerigheid eisen, Biblad by de Industriele Eigendom, The Hague, The Netherlands, No. 10, 137.

will have to be given to the law of contracts as it is applied in the various countries. And as a concomitant point of importance we will have to emphasize the fact that the interpretation of a contract usually follows the law of the country where the contract was made. In other words, there are limitations placed upon contractual autonomy in the conflict of laws.

In a leading case,[19] decided in the middle of the last century, an English family while in England, contracted with a steamship company for passage from England to Mauritius. One of the conditions was the exemption of the company from liability for loss of baggage. When baggage was lost and a claim was put in, the Supreme Court of Mauritius ruled that French law should be applied; judgment was given in favor of the plaintiff. This case was subsequently appealed to the Privy Council, which delivered a judgment through the opinion of Lord Justice Turner, in which the rule of law was expressed as follows: "The law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it." Gradually, we find a shift in this strict attitude. And in an important case decided in 1937,[20] we find the following statement: "The legal principles which are to guide an English Court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply." In other words, parties can made an agreement as to what law of contracts will apply. This intention may even be implied by the Court. This might be illustrated by a 1929 ruling of the House of Lords.[21] In this case a contract was made for the delivery of sugar from Java to India. In the contract was an arbitration clause, reading as follows: "Any dispute arising under this contract is to be settled by arbitration of London brokers in the usual manner, and this submission may be made a rule of the High Court of Justice." According to the opinion of the House of Lords, this clause implied a choice of English law to govern the obligations under the contract.

Now, such a decision meets no objection when the applicable law is that of a country where the distinction between "jus" and "lex" (justice and law) is not too noticeable. But there are still a few countries where, in the event of discrepancies between the two concepts, that of "lex" will prevail over "jus." And our businessmen should be informed about this possibility. The more so, since here--in our country--citizens are used to the "jus" rather than the "lex" principle... When parties desire the law of a certain country to be applicable to

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19. The Peninsular and Oriental Steam Navigation Company v. Shand, 3 Moo. P. C. (N.S.) 272 (1865).

20. The King v. International Trustee for the Protection of Bondholders Aktiengesellschaft, 106 L.J. K.B. 236 (1937).

21. N. V. Kwik Hoo Tong Handel Moatschappy v. James Finlay and Company, A.C. 604 (1927). For more information on the subject see: Graveson, Ronald H., The Proper Law of Commercial Contracts as Developed in the English Legal System, Lectures on The Conflict of Laws and International Contracts, University of Michigan Law School, 1951, p.1. et seq.

their contract, it is often held that there should be a real connection between that country and the facts of the case. It goes without saying that when no specific agreements have been made as to what law shall be applicable, then the proper law shall be the law of the country where the contract was made. If a certain law is preferred, "it is obvious that the choice of law must be a serious one."[22] Batifol continues: "Is it reasonable to admit that a Brazilian selling coffee to a Japanese, may stipulate that the contract will be governed by Danish law? Such a provision seems to be the sign of an attempt to evade the clauses of one of the laws which would normally apply." Consequently, we come to the doctrine of the "real connection," which means that the country whose law was chosen by the parties had a real connection with the facts of the case. But this seems hardly in accordance with the admitted contention that "international contracts are so varied that it is necessary to admit the greatest liberty of the parties." Therefore, it is said, there should be complete liberty of the parties to choose any law they wish. And a great number of international contracts do indeed lack any connection with either the place of contracting, the place of performance, or the domicile of any party. Batifol mentions the example of a French company, buying corn in Argentina, and using the LaPlata grain contract form, issued by the London Corn Trade Association.[23] According to this contract, parties are subject to English law, although there is no apparent connection whatsoever with England in the case. At the same time, one should know that the French courts are known frequently to oppose ordre publique the application of foreign law. In other words, public policy is an important factor in the French legal system. From the foregoing it will be clear that the subject matter areas to be taught in a course on International Business Law will deal with the foreign substantive law, the foreign conflict of law, and foreign legal institutions insofar as these topics pertain to commercial transactions.

Specific Topics

After having analyzed the objectives of the course and the general areas to be covered, there remains for discussion what the course content should be. It might be wise to remember Rheinstein's earlier quoted suggestion,[24] that all we should attempt is to bring about an awareness in the student that international differences exist. It also seems obvious that we should only cover topics which pertain strictly to the field of commercial transactions. Such subjects as the validity

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22. Batifol, Henri, Public Policy and the Autonomy of the Parties: Interrelations between Imperative Legislation and the Doctrine of Party Autonomy, in Lectures on the Conflict of Laws and International Contracts, University of Michigan Law School, 1951, p. 68 et seq.

23. Id. at 78.

24. Supra note 14.

of a marriage--interesting as the question may be for the parties concerned--will have to be excluded from the course content.

The second general remark that should be made is that whatever subjects are covered, they should be taught on a comparative basis. Only then will the student derive a maximum of benefit from the course.

Without expressing any preference of sequence, I should like to list the following topics:

(a) Law of contracts: under this heading one may want to stress such features as causa v. consideration, the proper law of contract, illegality, public policy, and the freedom of contract.

(b) Law of sales: important items will be the transfer of title, interpretation of shipping terms, the efforts of the International Chamber of Commerce toward the uniformity of commercial terms, the caveat emptor v. caveat venditor rules, the rules pertaining to hidden defects, the rule of stolen personal property and the subsequent acquisition thereof by sale.

(c) Anti-Trust problems in the international sphere.

(d) Foreign government's regulation of business: this would include the discussion of monetary regulations such as the transferability of bank deposits, profits, etc. I do not feel that such topics as legislation concerning the prevention of double taxation should be included; this would make the course too highly specialized and too detailed.

(e) Foreign labor laws: the hiring and firing of employees, and working permits for alien employees in the foreign country.

(f) Negotiable instruments.

(g) Maritime contracts.

(h) Conflict of laws.

(i) Structure of foreign legal systems and legal institutions.

(j) Sources of legal aid abroad.

(k) Sources of foreign judicial literature and decisions.

(l) Commercial arbitration: the principles of the American Arbitration Association, the arbitration rules of the International Chamber of Commerce, special arbitration rules, execution of arbitration awards.

It goes without saying that this listing is not to be considered enumerative, but rather illustrative. In fact, if only a one semester, 3 credits course, were to be offered, it would be quite impossible to cover even the above mentioned topics. It is suggested that in such a case the student will do some reading of his own under the guidance of his instructor. Inasmuch as a course as presently suggested is new, it might be advisable to try it out first, on a seminar basis, having the students do their own research.

I believe that a course as suggested here would be a challenge to both instructor and students; and further, a contribution to the cause of international economic cooperation.