Prof. Dennis Campbell (ed.)

Transnational Legal Practice

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TRANSNATIONAL LEGAL PRACTICE

A SURVEY OF SELECTED COUNTRIES

Edited by

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PREFACE

That law and legal systems are well embarked on a process of transnationalization is a development recognized by numerous writers. The process has gained momentum with the growing need for cross-boundary approaches to protection of the environment, regulation of multinational enterprise, and the meeting of issues raised by the mobility of labor, the accrual and portability of welfare rights, and the existence of commodity cartels. In its most direct impact on the world's legal profession, the process has accelerated due to the simple fact that more firms are 'doing business abroad' and thus implicating their domestic attorneys in the intricacies of a foreign legal system.

Perhaps an accurate measure of the extent of the legal transnationalization process is the fact that there has been movement to better regulate the ability of the foreign lawyer to function, at least in some carefully-structured capacity, in various legal systems. A recent report of the American Bar Association concerned the function and regulation of foreign lawyers in nine jurisdictions of the United States (California, Connecticut, District of Columbia, Florida, Illinois, Massachusettes, New York, Pennsylvania, and Texas) and the function and regulation of American attorneys in nine countries (Belgium, Brazil, Canada, England, France, Germany, Italy, Japan, and Mexico). A recent directive of the Council of Ministers of the European Communities, adopted to 'facilitate the effective exercise by lawyers of freedom to provide services', relates only directly to members of the bars of the ten Member States, but the domestic legislation it may provoke could have a positive impact on the practice situation of other foreign lawyers, as well. Finally, the American Bar Association's Section on International Law has proposed the formation of a committee to work with bar organizations in other countries, the International Bar Association, the Inter-American Bar Association, and the *Union Internationale des Avocats* in matters concerning practice by lawyers in or involving the laws of more than one country.

Indeed, this amounts to recognition of an emerging reality: the transnational lawyer. What follows here is further recognition of this increasingly important dimension of legal practice. The introductory chapter seeks to portray the development, nature, and tone of transnational practice – and to document its significance. Thereafter, each practitioner-author examines those issues which would confront the foreign lawyer who seeks to enter that jurisdiction, either to practice on a regular basis or merely for the purpose of executing an isolated transaction.

Where relevant to the particular country, each author has sought to address the following issues: (1) the general requirements for the practice of law; (2) restrictions, if any, on non-citizens who wish to practice; (3) registration or other formalities imposed on lawyers licensed in other jurisdictions who wish to establish or conduct business in the respective country; (4) the current extent of activity by foreign practitioners in the respective country; (5) the nature of

activities permitted to foreign practitioners; (6) the extent and nature of co-operation and collaboration between foreign practitioners and local counsel; (7) the most effective means by which foreign practitioners can identify and contact appropriate local counsel, and (8) future developments, if any, which may affect the situation of the foreign practitioner.

In short, each chapter attempts to provide an introduction and set of guidelines for the foreign lawyer who may have transactions to undertake, either directly or through local counsel, in the respective country.

Each chapter has been prepared under the terms of laws, regulations, and practice as they prevailed in February 1981.

Dennis Campbell
Salzburg, Austria

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Introduction

DENNIS CAMPBELL AND JACK J. COE JR.

Emergence of Transnational Practice

The development of transnational legal practice has assumed importance in light of a broader process to which it is linked, the transnationalization of law and legal systems.[1] Technological developments in transportation and communication have diminished the significance of national boundaries in defining the scope of human and corporate activity. In response, national regulation has become more intense and collaboration between nations more prevalent. The result has been an inter-penetration of legal systems and a correspondingly complex regulatory environment.[2] While the transnationalization process is perhaps best symbolized by the contemporary prominence of the multinational company, the capacity to implicate manifold bodies of national and international law is not confined exclusively to large juristic entities.[3] Individual conduct, too, must anticipate multi-jurisdictional legal consequences. Therefore, clients representing all sectors are in need of legal services which transcend, substantively and geographically, national borders.[4]

The ability of lawyers to respond to client needs in an increasingly global environment depends in part on the relevant jurisdiction's[5] regulation of legal professionals.[6] Such regulation, in turn, is best analyzed in relation to its impact on the functions and the modes of transnational practice which are, by way of introduction, described in the following section.

Contours of Transnational Practice

Professor Henry de Vires has written, 'The lawyer, whether in government or private practice, finds himself increasingly confronted by situations requiring some knowledge of and confidence in dealing with a foreign legal system. As laws have multiplied and communication intensified, reference to foreign law has become part of the normal background necessary in the contemporary practice of law'.[7]

Such references may consist in applying foreign models to domestic legal problems.[8] Given client mobility, however, the more frequent scenario involves an analysis of the laws of another legal system as they apply directly to activities within the jurisdiction of that system.

Client mobility has required the legal profession to respond in kind. Two modes of multi-jurisdictional practice have emerged as lawyers endeavor to remain accessible to their clients.[9] One mode has been referred to as that of the 'traveling lawyer'[10] and is typified by the practitioner whose familiarity with the special needs of the client make it desireable to represent the client abroad

on an *ad hoc* basis in such matters as contract negotiation with foreign business partners and arbitration proceedings.[11] The second principal form of transnational practice may be referred to as the 'establishment' mode.[12] It is distinguished by the permanence of the lawyer's contact with the foreign jurisdiction.[13] While epitomized by the branch office concept[14] employed by many large law firms, as an avenue of involvement in a foreign legal system it need not involve more than a sole practitioner.[15]

The *ad hoc* mode of foreign involvement, in particular, is attributable to the greater incidence of international business by small enterprises.[16] It constitutes, perhaps, a greater portion of international legal business than that handled by branch offices of international law firms.[17] The activities of the traveling lawyer, however, are subject generally to less regulation than those undertaken through establishment.[18] This is because the former are difficult to identify and supervise[19] and, indeed, may be perceived as less threatening to local monopolies and consumer interests than the more permanent mode of foreign practice.[20] The latter, traditionally, has been more likely than the former to cause friction between the lawyers of one nation and the bar system of another.[21] Hence, despite the prevalence of the traveling lawyer's *ad hoc* approach, regulators, and to some extent commentators, when addressing transnational practice have concentrated on the foreign lawyer's ability to enjoy some type of permanent status within a given jurisdiction.[22] As a corollary, where regulation of the traveling lawyer does exist, it may through lack of publicity constitute a trap for the unwary.[23]

What one writer has characterized as the 'international law office'[24] has become a prevalent form of establishment in a foreign legal system. Frequently comprised of lawyers trained in different legal systems, these firms enjoy a wide range of expertise relative to foreign and international law. Through collaboration among staff members, a body so constituted is more easily able to provide legal analysis reflective of the whole of a client's transnational activities.[25] Predictably, problems concerning foreign and international law predominate in 'international' law offices though the areas of law within the competence of staff may be quite diverse.[26] For example, the extra-territorial antitrust implications of a proposed merger between enterprises registered in different nations and the multi-jurisdictional subtleties of an individual's estate plan may equally be appropriate for the firm to address.[27] Geographic diversity also is characteristic. Since client activities typically are global, matters entertained by a firm may span multiple hemispheres.[28] The seminal movement toward the establishment of international law offices came from United States firms which responded to the post-World War II proliferation of international trade and finance by establishing branch offices where their industrial and banking clients were most active.[29] Similarly, as Japanese and Western European enterprise has developed global markets for goods and investment capital, their legal advisers have found it desirable to be available near the market place. Market places have changed and expanded. The likely situs of the international law office no longer is confined to the traditional activity centers of Paris, London, and New York. American, English and French firms, for example, can be found throughout the Middle East. Hong Kong's emergence as a financial center similarly has

drawn foreign firms seeking to establish on various scales, as have Brussels, Singapore, and Tokyo.[30]

The permanence and composition envisioned by law firms seeking to establish in a foreign jurisdiction raises a series of issues less directly implicated in the occasional visits of the traveling lawyer. The composition of such firms often includes lawyers of different backgrounds who are qualified under the laws of different legal systems. Frequently, those qualified in the host state predominate. Though central to the effectiveness of such firms, the collaboration of such lawyers often creates professional problems under the host country's law.[31]

For example, partnership may be an impermissible form of association. Similarly, in Civil Law systems where the legal profession is regarded as a *profession libirale*, employment arrangements often will not be permitted between lawyers, for such are deemed to create a prohibited master-servant relationship.[32]

More basic problems, however, are restrictions on the right of a lawyer to practice in a jurisdiction in which he is not qualified and on the propriety of qualified lawyers associating with lawyers qualified only in another state. The title which the foreign lawyer may assume and the areas of law on which he may advise also raise sensitive issues.[33] With respect to these, the type and effect of regulatory impediment vary greatly from nation to nation. France and England traditionally have erected relatively few obstacles, while Germany, Belgium, and the United States have represented the other extreme.[34]

Often, however, the relevant regulation is distinguished by a failure to deal specifically with the endeavors of a foreign lawyer.[35] His activities in a given jurisdiction, however systematic, are not those traditionally attributable to the practice of law. Thus, the scope of permitted legal activities often is delineated through negative inference from the qualifications requisite to bar admission and the exclusive functions claimed by those duly admitted.[36]

The incongruity between traditional regulation and the needs of modern practice highlights a broader theme which is emerging with increasing clarity. It is the notion that transnational legal practice, whether transient or through establishment, involves the lawyer in functions qualitatively different from those of traditional practice.[37] The sole practitioner who crosses a border to prepare a testamentary document and the foreign branch of a large firm which caters to large multinational companies share in their endeavors the need to reconcile complexities of system interaction which, by definition, are not found in traditional domestic practice. The functions performed by lawyers in transnational practice have been variously described. One commentator writes of the international lawyer[38] as intermediary and comparativist.[39] The function of 'synthesis' is cited elsewhere.[40] However described in shorthand, the object of the transnational lawyer is to integrate the discreet and often disparate legal consequences which flow from international activity. Fundamental differences in legal systems, the coexistence of elaborate national regulations, and the subtleties and demands of language complicate the task. Local counsel often is indispensable, but the key role of transforming fragmented data into meaningful advice for the client remains the essence of the legal ability increasingly required in modern international practice.[41] In sum, transnational prac-

tice is a response to the needs of clients in a shrinking world. The modes, functions, and skills which constitute that response must continue to evolve to keep pace. Similarly, the dynamics of providing international legal services implicate various sectors which in turn must react. The sources and character of these responses highlight the emerging prominence of transnational practice and so provide a further preface to the chapters which follow.

Interdependent Sectors Respond

Responses to the changing contours of modern practice have come from many sectors. An indication of the broader transnationalization process, such responses include a heightened level of cooperation and consensus building within the greater legal community, judicial re-evaluations of impediments to foreign practice, and an increasing statutory recognition of the foreign lawyer. Further, legal education is beginning to acknowledge the special needs of transnational practice. A survey of selected developments in these areas provides benchmarks by which to gauge the continuing adjustment of law and legal systems to the needs of global practice. It also suggests the central issues that dominate discussions about transnational practice.

1. The International Legal Community – Consensus Building and Cooperation: As one scholar has written, the professional community of lawyers,

> 'though dispersed throughout the world and engaged in diverse occupations, constitutes a kind of invisible college dedicated to a common intellectual enterprise. As in the case of other disciplines, its members are engaged in a continuous process of communication and collaboration'.[42]

If the common intellectual enterprise corresponds to the broader process of transnationalization, those engaged largely in a private, multi-jurisdiction practice constitute a department within the greater college. Given this model, a second department would include, for example, those dedicated primarily to matters of public international law. While inter-departmental exchange is important, the need for communication and collaboration within a department is equally great. Further, given today's interdependence of social and legal systems, topics meriting discussion within a given department frequently will be generated by events occurring in other departments.

The abstraction of the department meeting as a vehicle for consensus building becomes more concrete through examples at the regional, the national, and the international levels. As early as 1924, a New York county bar association recommended legislation to allow foreign lawyers to be licensed to practice in specialized areas of foreign law.[43] The American Bar Association's Section on International Law exemplifies a national effort to facilitate professional interaction with a multinational focus. Such national bodies can be expected to become more prevalent as the transnationalization process continues. However, international collaboration can be said to represent a more significant trend.

For as one observer suggests, there is an 'inherent parochialism' in the collective experience of those reared and educated within the same national society.[44] If the goal is greater objectivity, values and attitudes internalized through an insular national experience will be better challenged at the international level.[45] The work of the International Bar Association (IBA) and the *Union Internationale des Avocats (UIA)*, therefore, is exemplary.

On several occasions[46], the IBA has convened to address, *inter alia*, the problems facing the transnational lawyer and to survey the prevailing situation with a view to offering recommendations. A topic of particular interest has been the ability of lawyers to render services in a country other than that of qualification. In 1972, under the joint sponsorship of the IBA and *UIA*, a conference of forty-two legal experts representing thirty-two countries[47] was held to discuss issues relative to foreign lawyers' activities. Both modes of transnational practice were considered; specifically, 'the lawyer who is asked to go abroad to advise or represent a client *ad hoc* for a specific matter, as well as the lawyer who wishes to establish his office or a branch office in a foreign country'.[48] Proceeding from an initial premise that in modern times the lawyer should be permitted to accept instructions from a client wishing advice or representation in a foreign jurisdiction, the conferrees' deliberation produced recommendations concerning the conditions under and the extent to which foreign practice should be allowed, and with what safeguards.[49] An example of international consensus building, the proposals which emerged concern many of the central issues associated with transnational legal practice. They provide a basis of comparison with which to evaluate the avenues open to a foreign lawyer in a given jurisdiction.

As reported in the *American Bar Association Journal*, the following recommendations, *inter alia*, were adopted:

1. Subject to proper controls, any lawyer should be free to be consulted in a foreign country. Preferably he should advise only on his native law in which he is competent to advise, and in the public interest he should obtain, where necessary, the assistance of a foreign lawyer competent to advise on any point of foreign law.
2. It is desirable that, in principle and subject to proper controls, a lawyer should be permitted to establish an office abroad and advise on any law.
3. A lawyer should be permitted to practice abroad either by himself or in partnership with other legally qualified lawyers from his own country, or in partnership with a locally qualified lawyer, or in partnership with qualified lawyers from other countries, subject to there being a majority of local lawyers in a partnership of more than two.
4. There is a clear distinction between a foreign lawyer undertaking noncontentious business and contentious business. As regards noncontentious business, there should be no restriction on the class or classes of business a foreign lawyer undertakes, provided that by so doing it does not infringe a monopoly vested in another profession. As regards contentious business, (a) no distinction should be drawn between his

undertaking civil and criminal proceedings unless it is drawn locally, (b) a foreign lawyer should not alone be given the right of representation in court unless the rules of the local bar so permit, and (c) a foreign lawyer should have the right to plead before any court or tribunal in which that right is not restricted to a local lawyer.

5. A foreign lawyer should be free to accept instructions from any person, body, or organization, whether consulted in his office or by mail.
6. When a foreign lawyer establishes an office abroad he should be required to register (a) with a local bar association or law society his name and address, legal qualifications, and the name of his national bar association or law society, (b) with his national bar association or law society his office address abroad, and (c) with both the local bar association and his national bar association or law society the names and legal qualifications of his partners.
7. A foreign lawyer who has established an office abroad should be required to abide by the code of professional ethics of the local bar association or law society, and the provisions of this code should prevail in instances in which they may be in conflict with the code of ethics of his national bar association or law society, provided that this should not prevent his national bar association or law society from imposing an additional ethical code on him while practicing abroad.
8. A foreign lawyer should describe himself in specific terms by his legal qualification in his own language, so as to avoid the public's being misled through its interpretation into local language, and when foreign lawyers practice in partnership, the description and legal qualifications of each partner should be set out specifically.
9. Any complaint against the professional conduct of a foreign lawyer should be made to and determined by the local bar association or law society, which should inform the individual's national bar association or law society of the facts in order that it may consider the desirability of instituting disciplinary proceedings against a foreign lawyer in his own country.[50]

The increasing inter-penetration of legal systems and consequent need for co-operation is evidenced further by the existence of arrangements between professional bodies in different nations. Assuming varying degrees of formality, such agreements are highlighted by the objects and acknowledgements of the Anglo-French Agreement of 19 September, 1975.[51] The pact formed between the Bar of England and Wales and the Senate of the Inns of Court on the one hand and the *Ordre des Avocats à la Cour de Paris*, on the other, provides for direct cooperation between certain French advocates and English barristers. Specifically, an *avocat* practicing before the *Cour d'Appel de Paris* may appear before a court in England or Wales if he is accompanied by a member of the English bar. English barristers are afforded the same privilege before the *Cour d'Appel of Paris* subject to the same proviso that the barrister be led by an *avocat* admitted to practice before that court.[52] The text of the agreement and statements by Senate officials acknowledge the propriety of barristers and *avocats* arranging

between themselves to use one another's chambers, a practice said already to exist at the time of the 1975 agreement.[53] The practice is not widespread[54], but some envision that eventually foreign lawyers from many countries will establish practices in the chambers of British barristers.[55] To this end, the General Council of the Bar of England and Wales has adopted rules regarding such cooperation.[56] The formal mechanism of bilateral agreement also will receive greater use. The 1975 agreement was intended to precede other pacts. Thus, negotiations have been undertaken with the Dutch Bar and with various professional bodies in Germany, Luxembourg, Denmark, and Milan.[57]

2. Judicial Advancement of Transnational Practice – Citizenship, Officers of the Court, and Official Authority: A survey of thirty-two countries[58] conducted by the International Bar Association in 1972 revealed that twenty countries admitted only their own citizens to the practice of law. Since that time, citizenship as a prerequisite to national bar membership has been held unconstitutional in the United States[59] and contrary to the Treaty of Rome[60], removed in England with respect to solicitors[61], and eliminated in Japan for lawyers.[62] Its decline in these systems removes a fundamental barrier to the transnational practice of law.[63] In addition, it signals a shift to an attitude more consistent with the realities of contemporary practice.

Two landmark decisions are important in considering judicial attitudes concerning the practice of law by non-citizens, that of the United States Supreme Court in *In Re Griffiths*[64] and that of the European Court of Justice in *Reyners v. Belgian State*.[65] Each rejected notions widely held about the qualities requisite to the practice of law and did so in the face of vigorous opposition.[66]

Prior to *Griffiths*, United States citizenship was a prerequisite to bar admission in a majority of the states of the United States.[67] The requirement was supported traditionally by several notions. State legislatures maintained that citizenship was essential to an appreciation of the spirit of United States institutions and to an ability to take the requisite oath to support the state and federal constitutions.[68] Other justifications stressed the lawyer's role as an officer of the court, the need for lawyers to be accessible by events in times of war and the peculiarity of Common Law *vis à vis* Civil Law.[69]

A judicial climate favoring alien lawyers began to emerge in the United States the early 1970s with the court's decision in *Graham v. Richardson*[70], which held that distinctions based on alienage were inherently suspect and, thus, required that the state proposing such distinctions must establish that citizenship was necessary to the accomplishment of a compelling state interest[71], a near-conclusive burden under an American constitutional analysis. Though *Graham* involved an alien's right to receive welfare benefits on an equal basis with United States citizens, the court's invocation of the 'compelling state interest' rule signaled the future application of the highest of judicial scrutiny where the rights of aliens were involved.[72]

Griffiths' abolition of citizenship requirements as obstacles to the practice of law was presaged by state supreme court cases which recognized the implications of *Graham*. For example, the California State Supreme Court said, concerning the exclusion of aliens from the practice of law: