**GLOBALIZATION, AMERICAN BUSINESS, AND THE IMPLICATIONS FOR LEGAL EDUCATION**

by Keyvan Tabari
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**INTRODUCTION**

The importance of international commerce for American business cannot be exaggerated. It has generated nearly one-third of the new jobs in the recent business cycle; exports have been crucial in the growth of countless industries; and the low cost of imports has been a major factor in controlling inflation. The promotion of international commerce is also a primary security strategy in the post-Cold War era, as global interdependence in pursuit of prosperity is perceived to be the best insurance against violent conflicts.

Two recent historic developments have altered the character of international commerce, while making its expansion possible. First, the collapse of the Soviet Union and the embracing of capitalistic economics by China have removed from the path of free enterprise the restraining ideology of wealth redistribution. Second, the leaping advances in technology have integrated markets and labor forces of distant lands. Now, to an unprecedented degree, international capital flows in all directions, skilled human resources move freely to fill jobs, goods may be produced anywhere, and all markets have become accessible to entrepreneurs.

These new opportunities pose serious threats to the existing economic order. Particularly, the fear that the expansion of international commerce may cause extensive job losses in the traditional sectors of American economy has given rise to a politically charged debate about its merits. To control the impact of international business, many proposals have been made to regulate it.

International commerce is, of course, already managed within the framework of a legal order. But the rules of this order are different from those of a domestic (national) legal system. Understanding these different rules is necessary for success in international business.

**INTERNATIONAL LEGAL ORDER**

To begin with, the international legal system lacks courts for adjudicating disputes. While occasionally ad hoc tribunals are established by interested governments to resolve isolated economic disputes between their nationals, the common alternative for settling international claims is arbitration pursuant to agreement of the parties. Furthermore, no international agency exists to enforce the arbitrators’ awards; the prevailing party has to rely on the enforcement machinery of the country where the losing side’s assets are located. Finally, often there is no international law for the arbitrators to apply. Instead, they frequently must refer to the domestic laws of the country designated by the parties.

The customs and usages that gradually emerge from commercial transactions generate the international legal norms. However, without a system of international courts to embody these norms in their rulings, they do not receive the force and mandate of precedents. There is another way for establishing binding legal rules: legislation by international conventions. The United Nations and other intergovernmental organizations originate the drafts of these conventions. But these drafts are rarely enacted into multinational legislation. While some noteworthy international conventions have finally been concluded—among them the conventions on contracts for the international sale of goods; on several procedural aspects of civil litigation, such as the limitation period, service, and discovery; and on enforcement of arbitration awards—they are few in number and govern only the nationals of the states that adhere to them.

International rule-making is, therefore, left largely to private contracts be-
between parties to international transactions. National governments, however, impose limits to their freedom of contract. For example, a nation may decree export restrictions to prevent its citizens from selling products or services to another country. Such intrusions by national governments could also be made retroactive, as in the case of currency controls that block the expatriation of the profits of foreign businesses. More drastically, a hostile new regime may choose to expropriate the assets of a foreign business. Expropriation has even been carried out without a fair compensation. Assessing the likelihood and the extent of these political risks is part of the due diligence required for any international venture.

Just as these risks are posed by the intrusive role of the nation-states in international trade, sometimes national governments render protection against them. Thus, government (or quasi-government) agencies, such as export-import banks and export development corporations, aim at insuring their nationals against certain risks of international commerce. Similarly, through trade agreements, governments attempt to remove the barriers to foreign markets facing their nationals. The beneficial prospects of such favorable interventions by the national governments must be taken into account in any international business plan.

**International Agreements**

Because of these considerations, international commercial negotiations are inherently complicated. The process becomes even more complex when the parties manifest dissimilar expectations rooted in different cultural values. For instance, in negotiating a contract an American would ordinarily be more interested in limiting his exposure, while his foreign counterpart might focus on enlarging the scope of his authority; the American would aim at direct expression of his goals, while his counterpart might prefer circumspection; the American would seek pragmatic solutions to the problems, while his counterpart might insist on logical consistency; and the American would want clarity in the projected plans of action, while his counterpart might desire the flexibility of nuanced vagueness. These objectives, observed in dealing with different nationalities, might well be compatible, but their synthesis requires understanding and finesse.

In crafting an international agreement, even the basic task of communication can be difficult. In order for the parties to express their intent unmistakably, a shared language is essential. English may well have become the lingua franca of global commerce, but often it is not the native tongue of one or more of the parties to the negotiations. In such circumstances, the same word could have different connotations for various parties, allowing for potentially conflicting interpretations. The awkward language sometimes found in international agreements and conventions is symptomatic of this problem and the unsatisfactory attempts to deal with it.

Nonverbal communications are equally important in international negotiations. They, too, are rooted in the diverse cultural backgrounds of the parties. What is an innocuous pause for one party in response to a proposal during the negotiations could appear portentous to another, and thus adversely affect the negotiations.

Disparate cultures also produce distinct styles of negotiations. Some emphasize bargaining for every transaction, while others aim at long-term relationships. Some require decision-making by consensus, while in other cultures one person makes the

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significant decisions. A practice that is acceptable in some cultures might appear unethical in other cultures. All of these differences must be fully taken into account for the international negotiations to reach fruition.

The ultimate test of a successfully negotiated contract comes during its implementation. The smooth administration of international agreements depends on the parties’ agreement: formation, administration, and the resolution of disputes. American attorneys are generally equipped by aptitude, training, and experience to perform the essential legal tasks of assessing the potential risks and articulating the client’s message clearly and persuasively. Their service in international commerce will be even more productive if they meet certain special qualifications.

First, they should have adequate training in public and private international law, and international relations, as well as in the relevant major legal systems of the world. Second, they should develop the aptitude for sensitivity to cultural differences in order to accommodate them in pursuit of their client’s objectives. Third, they should act more as facilitators than as advocates, since the international legal context is not adversarial. Fourth, they should assume a lower profile, because their clients’ international business partners often perceive the customary active role of an American attorney as too aggressive and threatening. Fifth, they should be general counselors more than narrow specialists, as their clients’ success usually rests not on prevailing in any specific issue, but on a systemic treatment of many factors. Sixth, they should learn to work with other indispensable aides and advisers to their clients, including interpreters, international relations experts, country specialists, social scientists, and local counsel. Seventh, they should gain experience in distinct areas specific to international commerce, such as export control, currency exchange regulations, international dispute resolution, international taxation, payment of international debts, and international financing.

**CONCLUSION**

The increasing involvement of American business in international commerce is both unavoidable and desirable. A more developed international legal system would encourage commerce by enhancing the needed stability and predictability. National governments should help by agreeing to multinational conventions that are beneficial and fair to all and by foregoing restrictive unilateral regulations. The success of private international contracts hinges on understanding the differences between the parties that are often due to cultural factors. In negotiating, and in administering these contracts, as well as in resolving international commercial disputes, American business could benefit greatly from the counsel of lawyers with the proper aptitude, training, and experience in international law.

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