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Introductory Notes: General Counseling for Foreign Investment

Cover Page Footnote

Stanhope S. Browne was educated at Princeton University (A.B. 1953) and Harvard (LL.B. 1956) and is a member of the bar in Pennsylvania and the District of Columbia. A partner in the firm of Dechert Price & Rhoades of Philadelphia, he maintains an extensive international practice.

INTRODUCTORY NOTES: GENERAL COUNSELING FOR FOREIGN INVESTMENT*

Stanhope S. Browne**

This article will first give a brief overview of the phenomenon of foreign investment in the United States. It will then examine in depth some of the things an American lawyer should keep in mind when dealing with a foreign business client and that client's home lawyer. Finally, it will touch upon a few substantive areas of United States law which are of particular relevance to the foreign investor. Other articles in this issue will discuss in greater detail the major substantive areas of law that are important in counseling the foreign client.

I. AN OVERVIEW OF THE FOREIGN INVESTOR

In the early 1970's the total amount of direct foreign investment in the United States was about \$13 billion. By 1980 that figure had increased to about \$65 billion, and is now in 1982 approaching the \$80 billion mark.¹ Obviously

* Editor's note: This introduction comprises the substance of the author's opening remarks as the keynote speaker of the First Annual Dickinson International Law Symposium, focusing on Foreign Investment in Pennsylvania. The further proceedings of the Symposium, which was jointly sponsored by the International Law Society and the Continuing Legal Education Office of the Dickinson School of Law, make up the remainder of this issue.

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1. United States Bureau of the Census, Statistical Abstract of the United States: 1975, (96th Edition, Washington, D.C. 1975), p.802, No. 1349, and id., (102nd Edition, 1980), p.833, No. 1495.

this increasing pace of development, (which is generally encouraged by the United States), is a major world economic trend. Some of its many related causes are:

1. Maturing economies in foreign nations, (especially European countries and Japan), and the need to develop new markets;
2. Flight from real or imagined economic and political instability at home -- the phenomenon of "capital flight";²
3. Fear of rising trade protectionism in the United States, leading to a perception that a foreign exporter to the United States should protect his American market by initiating production in the United States, inside our present and increasingly restrictive trade barriers;
4. Ease of entry into the United States, the world's largest single market and one which is in a stable political environment.

Until recently there has been a fifth contributing factor. When the American dollar was weak in international currency markets, it was relatively inexpensive for a foreigner to invest in manufacturing facilities in the United States. Conversely, the cost to the American consumer of foreign produced goods was steadily rising, encouraging the foreign producer to switch production to facilities in the United States. The recent strengthening of the dollar has reversed these trends.

Two things should be said about the foreign investor in

2. European businessmen in particular tend to be rather pessimistic about the future in Europe, and have a greater fear of war, major political upheaval, or severe depression than their American counterparts do.

general. First, he is less apt to use a systematic approach to investment in the United States than an American businessman would be. He will turn, almost by chance, to business or social acquaintances, or to family members for whatever advice he can gain about the United States. He is not as likely to do what an American might do, which would be to undertake a systematic study of the intended place of investment, using experts chosen for their special knowledge of the areas involved. Second, no matter how sophisticated the foreign investor may seem initially, he will probably be naive about many general aspects of American life, and particularly about business and legal practices. This cultural and linguistic barrier is an important factor and should never be underestimated.

II. ATTITUDES REGARDING LAWYERS AND OTHER PROFESSIONALS

What follows is a discussion of many of the specific differences between foreign businessmen and their lawyers on one hand, and their American counterparts on the other. All of the differences are ones of degree and are in some cases merely a slight shift of emphasis. They obviously differ in their magnitude from country to country, and from individual to individual. But this discussion, for the sake of clearly making its various points, will tend to describe these differences in absolute terms, and thus will exaggerate or even caricature them.

Foreign businessmen do not regard the legal system as a source of protection as much as an American businessman would. American businessmen tend to be fairly well attuned to the American legal system. Alexis de Tocqueville, the

Great french commentator on American society and government in the nineteenth century, said that American lawyers ruled American society.³ That observation, which still contains elements of truth, is rather disconcerting to strangers to our shores; at home they rely on protection other than the law. In single European countries, for example, societies tend to be more closed than in the United States. The typical European businessman approaching another in a business situation may well say, "My father did business with your father, and our children will do business with each other. We will do business, and we understand each other. We are never going to sue each other because our relationship is too important and our families have known each other too long." He will believe that such an understanding is all the protection he needs. Americans, who deal more frequently with total strangers in business matters, must make more use of the legal system.

Foreigners tend to regard the United States as much too legalistic and indeed too litigious. For example, a foreign businessman and his lawyer may well be upset by a typical lengthy American contract for the sale of a business, with its many representations and warranties about that business. Foreigners tend to have a more flexible view of contracts. An American businessman will say, "This is what the contract says; you have to live up to it." The foreigner, if he has contracted to sell on a long term basis some goods for which the price has dropped, and his buyer wants a cheaper price, is more apt to make an adjustment than his American

3. Alexis de Tocqueville, Democracy in America, A New Translation by George Lawrence, (Harper and Row, New York 1966), pp. 242-248.

counterpart. Foreigners do not like to go into American courts; they are afraid of litigation. They fear that the judges and juries will be prejudiced against foreigners, and that their own United States lawyers will not really be on their side.

The foreign businessman has a different view of the roles of accountants and lawyers. Accounting firms abroad are more often viewed as general business consultants, and they offer a broader range of services than do their American counterparts. Even the foreign officers of America's "Big Eight" accounting firms⁴ offer more services than do those firms' American offices. For example, the foreign businessman goes almost exclusively to accountants for tax advice; until recently, lawyers were seldom consulted on tax matters. Another example is the fact that many foreign accounting firms actually give legal advice, using staff lawyers.

Foreign investors seldom appreciate the sophistication of United States tax laws. They are more apt to play games with their countries' versions of the Internal Revenue Service and get away with it. One of the most difficult problems in counseling foreign businessmen is dealing with many people who are honest and above-board in everything they do, except that when it comes to taxes, they consider cheating the tax collector acceptable. Conversely, the foreign investor will probably be unaware of the helpful

4. Arthur Andersen & Company, Chicago; Arthur Young & Company, New York; Coopers and Lybrand, New York; Deloitte Haskins and Sells, New York; Ernst and Whinney, Cleveland; Peat Marwick Mitchell & Company, New York; Price Waterhouse & Company, New York; Touche Ross & Company, New York.

provisions of United States tax laws.

The role of foreign lawyers can also be very different. The legal profession is split in many countries. In England there are barristers, who prepare formal opinions and go into court; and solicitors, who prepare conveyances, form corporations, and give general advice. The french word for lawyer is avocat.⁵ But an avocat is viewed principally as someone who goes into court, although large french law firms are now spending more time giving business-related advice. There are two other related professions in France and Belgium. A notaire forms corporations, does conveyancing and similar work, whereas general advice is given by a conseiller juridique, or legal counselor.⁶ The latter profession is less restricted. Many conseillers juridique work for trade associations and accounting firms. The independent lawyers as such -- especially the barristers and avocats -- are the people to whom the businessman goes when he gets into trouble and needs to go to court. As a general rule, these independent lawyers are not viewed as a source of general assistance in business planning or contract drafting.

There is a subtle difference between a foreign lawyer's approach to the practice of law, and that of an American lawyer; a difference which should be mentioned at the risk of some exaggeration. The foreign lawyer tends to look upon the practice of law more as an academic exercise, whereas

5. Larousse's French-English Dictionary, Revised Edition, (Simon and Schuster, New York 1971).

6. Id.

the American lawyer looks upon it more as a practical way of getting something done for the client. When a client goes to a foreign lawyer and asks a question, he will generally receive an answer precisely geared to a very narrow view of the question he was asked. The foreign lawyer strongly believes that he must stand apart from his client's activities. The American lawyer will frequently try to take a more active role in whatever project brought the client to his door. Because the foreign investor remembers what he gets from his home lawyer, he will view his American lawyer's role more narrowly than will that lawyer himself.

The foreign investor may view his American lawyer's role in a more restrictive light for other reasons, too. He is used to getting his legal advice from other places, including:

1. Himself, for he may well have taken law as a field of undergraduate study;
2. The legal advisors in his industry's trade association;
3. Accountants, particularly for tax matters;
4. His banker, especially for foreign finance questions; and
5. General business advisors.

Not only will the foreign businessman restrict the role of his American lawyer; he will compartmentalize his advisors. The more sophisticated American businessman will confer with his accountant, his lawyer, his banker, and perhaps his management consultant all together in the same room, pose a problem and get them all to try to solve it together. The foreign businessman instead might go to a lawyer, but might not tell him everything, since foreign businessmen tend to be far more secretive than Americans. He might consult his

accountant and then go ask his banker the same questions. He might read leaflets from other banks and accounting firms. He would then try to synthesize all the various (and perhaps inconsistent) approaches into answers by himself. This approach makes things very difficult for the American lawyer, whose role as counselor to a foreign businessman should be to show him that the American lawyer can perform a larger role for him than he may think at first. The American lawyer should persuade his foreign client that it would be to his advantage to tell his whole story right from the beginning, describing what he is trying to achieve. The United States lawyer, acting in line with his own tradition rather than that of his foreign colleagues, should then try to help the client achieve that result, giving some practical advice along the way.

III. GENERAL SUBSTANTIVE ADVICE

Most advice given by the American lawyer will be the same kind of advice he is used to giving to his American clients in substantive areas of United States law. The special problems will not be substantive ones, but rather problems of client relations, as discussed above. There are certain exceptions, however. These exceptions are found in the special rules relating to foreign investments, (primarily reporting rules), and in special considerations in the antitrust, securities, tax, real estate, and banking areas. Some of these important areas are discussed in other articles in this issue. Nevertheless, a few comments would be in order concerning some aspects of general substantive United States law that will surprise the foreign businessman.

The first aspect is in the area of corporate law.

Foreigners are surprised at the ease and speed of incorporation, and the relative simplicity of corporate formalities in the United States. The taking of corporate action through the unanimous consent of shareholders and directors will be another new idea. Also, the concept of apparent authority of corporate officers is not widely held abroad, where reliance is more generally placed on published or registered powers. This concept of apparent authority will have to be explained to the client.

Another area in which the foreign investor is likely to be surprised is that of employee relations or labor law. Laws granting employees a voice in management, high termination indemnities, and very broad (and costly) social benefits are prevalent abroad. Foreign clients will not expect the relatively low social costs (of social security, unemployment compensation, and similar programs), the ability to fire employees -- especially high-level executives -- at will, and the almost complete absence of a labor voice in management decisions that prevails in the United States. They will regard American unions as much less militant than the ones they are used to dealing with at home.

IV. CONCLUSION

Working with a foreign business client can be a fascinating and rewarding experience, but it requires a sensitivity to differences that may not be readily apparent. Understanding those differences should be an American lawyer's first priority in counseling the foreign investor.

