



1988

Introduction: The Internationalization of Law and Legal Practice

Thomas E. Carbonneau
Penn State Law

Follow this and additional works at: http://elibrary.law.psu.edu/fac_works



Part of the [Legal Education Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Thomas E. Carbonneau, *Introduction: The Internationalization of Law and Legal Practice*, 63 *Tul. L. Rev.* 439 (1988).

This Article is brought to you for free and open access by the Faculty Works at Penn State Law eLibrary. It has been accepted for inclusion in Journal Articles by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

INTRODUCTION

THOMAS E. CARBONNEAU*

The coming of age of the international contract has pushed choice of law methodologies to the brink of obsolescence in transnational litigation. Global economic interdependence promises to divest national law and tribunals of their jurisdictional primacy. A true private international law is growing ever distant from the confines of municipality, the intricacies of renvoi, and the principles of localization. It is beginning to assume the trappings of an organic substantive law, properly suited to the exigencies of international commercial transactions. As alien parties and foreign commercial practices become commonplace before national courts, domesticity no longer provides a sufficient basis for adjudicatory or regulatory mandates. The evolution of commerce in the world community demands adaptive guidance of the law and a new role of its servants.

The Eason-Weinmann Colloquium entitled "The Internationalization of Law and Legal Practice," held in March 1988, addressed the challenges posed to conventional legal practice and rules of law by the evolution of the international marketplace. In light of the increasingly international character of commercial transactions, could or should disputes in transnational business ventures be adjudicated exclusively within national processes and according to domestic strictures? Does the character of these transactions portend the creation of a new genre of lawyering? Are current academic curricula adapted to the molding of this new breed of lawyers? Is a functional international bar possible? Do we need a substantive law of wide jurisdictional dimensions that fits the contours of transnational commercial conduct? How would such a law emerge? What would be its source of legitimacy? How can it be enforced?

The Colloquium emphasized the presence of these new realities in the legal community, confronted the ambiguities of resolution, and proposed possible pathways of adaptation and change. Divided into three panel sessions, the proceedings ini-

* Visiting Professor of Law, University of California, Davis; Professor of Law and Acting Director, Eason-Weinmann Center for Comparative Law, Tulane University; A.B. 1972, Bowdoin College; J.D. 1978, University of Virginia; M.A. 1979, Oxford University; LL.M. 1979, J.S.D. 1984, Columbia University.

tially grappled with the concept of international lawyering, looking both to aligning and segregating it from its domestic counterpart. The panelists assessed the particularities of transnational practice—for example, problems arising from negotiations with multicultural parties, the transposition of legal and commercial concepts from one legal system to another, and the special concerns generated by the instability and variability of the international context, such as issues of enforcement, jurisdiction, currency fluctuation, and *force majeure*. The participants made an effort to distill basic rules of international practice from the present activities of the international legal profession. However international lawyering and practice might be defined, the panelists agreed upon the importance of temperament and disposition, namely, the willingness to recognize and reconcile cultural, jural, and linguistic differences. A detailed consideration of national regulations pertaining to the certification of foreign lawyers provided the analytical insight necessary to entertain the prospect of creating a “supranational” bar—one whose professional training and skills are tailored to the needs of transnational legal problems. The final discussion among the participants emphasized that international lawyering was now an entrenched and growing phenomenon. Despite the reluctance born of tradition, national legal processes must adapt to emerging contingencies; both regulatory bodies and academic institutions should hasten their adaptation in light of current realities.

Having explored the background, function, and possible future status of the international lawyer, the proceedings turned to the more specific consideration of the activity of international lawyering by addressing the salient features and issues of transnational litigation. The second panel gave special attention to the central problems of discovery and forum shopping in the context of litigating international cases. If acceptable transnational standards are to be elaborated, there needs to be a basic uniformity of approach among national jurisdictions. According to one presentation, the quest to formulate a truly international regime for evidence gathering, however, appears to have been imperilled by a recent decision of the United States Supreme Court. The Court’s uncharacteristically restrictive reading of the applicable international instrument, the Hague Evidence Convention in this instance, undercuts the instrument’s universal scope and its attempt to reconcile common-law and civil-law procedural methodologies. As a result, the Court’s pronounce-

ments on matters of transnational litigation appear confused or are at least confusing. On the other side of the equation, notwithstanding the desire for uniformity in national litigation practices, the international lawyer must remain at the service of the client's interest. As long as disparities in substantive and procedural rules persist, professional duty mandates the pursuit of available advantages that favor the client's position, including shopping for the most favorable forum and law. The panelists then contrasted these notes of dissonance to the relative harmony and stability that had been achieved in international adjudication through the recourse to arbitration. International merchants need an expert and neutral forum in which to resolve their transactional disputes. Arbitration provides merchants and government parties involved in multinational commercial activity with a form of adjudication that responds to the special character of transnational commercial dispute resolution. A central issue current in arbitration law is whether formalizing of the process over time will rob it of its now well-recognized utility.

With the benefit of the foregoing discussion, the third panel confronted the more theoretical ramifications for law of the transformation of the international marketplace. Drawing on references to public and private international law, the panelists questioned the feasibility of an "a-national" law and process. While the unilateral formulation of international rules through extraterritorial application of domestic law has generally waned, the creation of a *lex mercatoria* through the adjudicatory activity of international arbitrators raises serious questions about proper sources and legitimacy. The movement toward adapting national law to international commercial developments may not be sound; it might engender an overly exuberant form of commercial self-regulation and extinguish the importance of national legal concerns. Unfettered recourse to arbitration or unbridled arbitral discretion could quash the integrity of the process. In establishing a framework for the development of arbitration, the 1958 New York Arbitration Convention did not countenance a complete eradication of national public policy interests, but rather instituted a balance between international adjudicatory needs and national juridical priorities. The general sentiment among the panelists was that the vision of an autonomous transnational framework needed to be qualified by common sense factors and necessary systemic restraints.

The Colloquium proceedings, therefore, address some of

the most difficult and pressing issues facing the international legal community. They also reveal that the juridical pluralism fostered by the comparative law approach is an essential part of fashioning an understanding of the problems generated by transnational commercial developments, and is indispensable to the intelligent adaptation of national legal systems to these phenomena. Beyond its academic vocation, comparative law has a vital mission to play in elaborating a legal regime for global business activities and in preparing future members of the bar for their roles in tomorrow's legal profession.

On the occasion of its Colloquium, the Eason-Weinmann Center for Comparative Law was honored to receive, on behalf of the law school and the university, a group of truly distinguished lawyers and outstanding teachers as its guests. The contributions that follow, which summarize part of the proceedings, are destined to be seminal. They are authored by lawyers of exceptional reputation, with a wide breadth and depth of experience, who occupy leading positions in the academic and practicing communities. The officers of the Center are also grateful to the many registrants and students who faithfully attended the panel sessions and contributed to the discussion with their questions and comments.

We gathered at the Colloquium to discuss comparative and transnational law in the memory of a dear friend and mentor to us all. Professor Henry P. deVries was a lawyer and a teacher of exemplary merit. His teaching and writings literally laid the foundation for the transnational practice of law and for the development of comparative legal studies. His scholarly and pedagogical importance will live on. This gathering in his memory, however, was not accomplished solely or primarily because of Henry's professional achievements—no matter how noteworthy they might be. We gathered together to recall Henry's unique personal qualities because he touched each of our lives in a warm and humane way. Henry's acquaintance with so many different languages and cultures gave him a vibrant and rich intellect, and allowed him to understand and communicate with his colleagues and students in a unique and special way. The Eason-Weinmann Center is privileged to dedicate the proceedings of its Colloquium to a scholar who was not only steeped in the comparative and transnational law tradition, but who helped forge it.