

INTEGRATING TRANSNATIONAL LEGAL PERSPECTIVES INTO THE FIRST-YEAR CONTRACTS COURSE: THE RELEVANCE OF FOREIGN LAW

BY:

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I Introduction

Philip Jessup used the term “transnational law” to describe “all law which regulates actions or events that transcend national frontiers.” He used this term in the broadest sense – encompassing international law and municipal law, substantive norms and conflicts norms, hard law and soft law – and resisted rigid definitions of the subject. Starting then with his notion of transnational law as a “storehouse of rules on which to draw” in coping with cross-border activity, what might it mean to integrate transnational legal perspectives into the first-year contracts course?

Some possibilities:

- * Preparing students for upper-level courses outside the domestic law curriculum
- * Teaching students the body of rules applicable to cross-border contracts (e.g., the CISG)
- * Introducing students to the sources of those rules (beyond domestic law) and the processes by which they are developed
- * Giving students a sense of the broader context within which contractual relationships arise and within which U.S. contract law operates

II Appreciating Diversity of Contracts Regimes

On the basis of factors including available credit hours and personal experience/inclination, each professor chooses how much time to devote to topics like the ones listed above. No matter how ambitious or how superficial the treatment of transnational law in first year contracts, though, one thing seems critical to all of these goals: that students acquire an appreciation of the diversity of national contract law regimes. (Not in-depth knowledge of foreign substantive law – just an appreciation of diversity.) In many ways, that appreciation will help students grapple with transnational law issues.

- * It helps students see that the body of rules potentially applicable to cross-border contracts is larger than U.S. law (which in turn gets them to think from the start about jurisdiction and choice-of-law problems in cross-border contracting)
- * It helps students understand why we need multilateral solutions (e.g., the CISG, the Unidroit Principles) to deal with cross-border contract activity
- * It gives students a basis for understanding where the rules reflected in these multilateral solutions come from, and for appreciating the challenges of harmonizing/unifying divergent legal standards

It also has positive side effects beyond the transnational: for instance, understanding something about diverse approaches makes students less complacent about the inevitability of U.S. rules and more willing to engage in critical analysis of those rules.

One way to convey this appreciation of the diversity of national regimes is to introduce references to foreign contracts law into the first-year course. (I'm consciously not calling this comparative law because that involves topics like comparative techniques of statutory interpretation, the relative role of judicial precedent in different systems, and so forth that go beyond this proposal.) That is, in the course of the class hour, throughout the semester, the professor can refer from time to time to specific rules of foreign contract law that differ from U.S. rules.

III Some Potential Objections to the Use of Foreign Law

- * Because it is not U.S. law, students find it of less immediate relevance; in addition, there are no direct professional responsibility arguments to be made in favor of teaching it, as there are with the CISG
- * It is difficult to test
- * It is likely to be unfamiliar to many teachers
- * It feels superficial in that students can't possibly learn much about a foreign legal system in this way

IV Suggestions for Incorporating Foreign Law Anyway

The point of this approach is not to teach students a particular body of foreign law, but to teach them about the diversity of legal rules. To that end, the constant flow of small observations is in a sense the point – it sensitizes students to the world beyond the system that they are currently studying, and thereby gives

them a basis for understanding the challenges of dealing with transnational activity and developing transnational legal mechanisms.

With a low time commitment:

- * The it-may-interest-you-to-know point. After finishing discussion about a particular doctrine, note briefly a competing approach adopted in other jurisdictions. For instance, during a discussion about remedies, point out that many other systems prefer specific performance to monetary damages as the default remedy; during a discussion about formation, that many other systems generally view any written offer as irrevocable; during a discussion about promissory estoppel and the Red Owl case, that many other systems impose an express obligation of good faith and fair dealing during contract negotiations. (These observations often lead to productive discussions about the U.S. rules themselves, but can also serve as a springboard to discussing how international instruments reconcile contrasting approaches.)
- * The foreign-party hypo. After finishing a case, ask whether the analysis might have been different if one of the parties had been from another country. The students should realize that some other law might apply (CISG? Foreign law? Would the rule in question be different from U.S. law in substance?) and can start also to see the function of standardized principles like the Unidroit Principles.
- * The reference to harmonized/uniform law. After finishing discussion about a rule, note how sources such as the Unidroit Principles have attempted to bridge the gap between divergent legal systems in order to facilitate cross-border contracts.

With a somewhat higher time commitment:

- * Invite a colleague to guest lecture
- * If you have foreign LL.M. students in the classroom, invite them to prepare short presentations on a topic of their choice

V Locating relevant materials

- * Comparative law casebooks; journal articles on particular comparative issues

* Websites of various organizations

www.unilex.info (case law and bibliography relating to the CISG and Unidroit Principles)

www.unidroit.org (International Institute for the Unification of Private Law)

www.cisg.pace.law.edu (Pace Law School CISG Database)

www.uncitral.org (United Nations Commission on International Trade Law)

www.acsl.org (American Society of Comparative Law)