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A Tale of Three Cities: Reflections on the Practice of the Law (and the Laws of Practice) by Foreign (Particularly Non-European) Lawyers and Firms in London, Paris and Madrid

By Clifford J. Hendel

I. Introduction

The inclusion of legal services on the agenda of the Doha Round of trade talks has been referred to by a lawyer at one of the leading U.S.-based global firms as "not a new fight—it's the same fight we fought in Western Europe a generation ago. We simply want to offer high-quality legal services in whatever markets our clients serve."[1]

My practicing, and having become—not without some trials and tribulations—admitted to practice locally in a number of European jurisdictions, gives me a certain perspective on the ability of foreign (particularly non-EU) firms to offer high-quality legal service in Europe.[2]

My own evaluation of the situation is that (i) while there are indeed elements of protectionism and/or "fortress-Europism" in certain European jurisdictions, where the legal profession acts somewhat like a medieval guild, in large part the differences in the prevailing rules and practices among the various jurisdictions relate more to the respective visions of the profession prevailing in each country and to the varying respective paths to local qualification for local lawyers applicable in each country; and (ii) non-EU, particularly U.S. firms, have not been materially hindered by the sometimes highly disparate local rules and practices in their efforts to offer high-quality legal services to their clients wherever their clients are active, and thereby "exploit the value of their brands" worldwide.[3]

Given the increasingly harmonious and permissive treatment of the admission to local practice by EU national lawyers duly qualified in their "home-state" under Directive 98/5/EC of 16 February 1998 as implemented (more or less) in the various EU jurisdictions and as discussed separately in this session, this piece will focus on these issues as they affect non-EU (e.g., U.S.) nationals and firms.[4] Indeed, subject to the likely forthcoming liberalizations in favor of inter-state legal practice in the U.S. as a consequence of the ongoing debate over what we refer to in the U.S. as multi-jurisdictional practice (MJP), today at least the ability of a U.S. lawyer to engage in MJP in other U.S. states is quite limited when compared with that of an EU (national) lawyer engaging in MJP in other EU member states. As noted by one observer:

> Multistate legal practice is now a reality within the European Union. Lawyers and law firms from any EU state are able to represent clients on a continuous basis throughout the European Union, practice in almost all commercial law fields in any EU country, and form multinational law firms with offices as desired in any EU commercial center. In short, lawyers are able to carry on freely modern international legal practice throughout most of Europe. This picture is in sharp contrast with the much more limited legal rules governing interstate law practice within the United States. The rules of admission to the bar and rights of practice, including any tolerance of interstate practice, are set by the states. These states rules have traditionally been founded upon a dual concern for effective representation of clients, a type of consumer protection interest, and for the efficient administration of court litigation, a civil and criminal justice interest. Arguably, however, rules ostensibly set and enforced with these concerns in some instances mask a desire to protect the local legal profession against interstate competition. Although the United States Supreme Court has to some degree limited state rules in order to protect lawyers' rights under the Privileges and Immunities Clause of the Constitution, the Court has in large measure accorded great discretion to the states in setting professional qualification standard and delineating the right of legal practice.[5]

II. Spain

A. Rules for Admission of Local Lawyers in Spain

The key distinguishing feature of the Spanish rules for admission to legal practice is that, as in the case of most professional qualifications, Spain tends to treat the academic degree (in our case, the law degree) as tantamount to full professional qualification. A Spanish *licencia* has a surface similarity to an American "degree" or a French *maitrise*, but in fact each represents "very diver-

gent substantive realities; whereas the [non-Spanish] degrees mentioned are generally strictly of academic nature, the Spanish *título* of *licenciado* generally carries with it, in addition to academic consequences, immediate professional qualifications as well."[6] The Spanish *licenciado*—under current rules at least—has no need to pass a qualifying exam, undertake a period of practical training or pursue any kind of practical study after having obtained his "*título*"; he simply pays his dues and becomes a fully-qualified *abogado*.

B. Rules for Admission of Foreign (non-EU) Lawyers and Firms in Spain

Since the only way for a Spanish lawyer to become admitted is to obtain a Spanish law degree, without the need to cross any additional hurdles such as a bar exam or period of practical training, it is easy to understand that the only available routes for a non-EU lawyer to became admitted in Spain are either to (i) obtain a Spanish law degree (i.e., pursue a full-time four- or five-year university curriculum, which is hardly a realistic option); or (ii) seek a determination from the Spanish Ministry of Education "homologating" or "convalidating" the lawyer's foreign academic credentials as substantially equivalent to those of a Spanish law graduate, which determination—if the "curricular deficiencies" identified in this process are not excessive—generally will require the applicant to be tested by a law school of his choosing in the areas in question.

The "homologation" process has rightly been characterized as "Kafkaesque,"[7] because: (i) it can take as long as or longer from beginning to end than the four- or five-year Spanish university legal course of study; (ii) it has yielded wildly differing results in very similar cases—after all, in order to be ABA-accredited, all U.S. courses of legal study are very similar, but while some U.S. lawyers have been "homologated" without exam, others have been required to sit for exams (with no apparent rhyme or reason as to the areas designated) and still others—perhaps the majority—have had their applications rejected out-of-hand; and (iii) it is quite opaque: just as there appears to be little coherence in the administrative "homologation" process, so too are the exams administered by the various Spanish law schools wildly divergent and lacking in transparency. The result is that only a relative handful—the luckiest, or most persistent, or both—of U.S. lawyers are locally admitted in Spain, since obtaining a Spanish law degree or surmounting the Kafkaesque homologation process tend to be hurdles too steep for busy professionals to overcome.

C. Spanish Market and Market Practice for Foreign (non-EU) Lawyers and Firms

The "Big Mac" test has become a well-established benchmark for comparative cost-of-living studies. I have long advocated a "softball" test as a shorthand measure for the degree of market penetration by foreign (in particular, U.S.) law firms. The utility of this measuring rod occurred to me some ten years ago, while I was working with a U.S. firm in Paris and captaining its team in the lawyers-only summer softball league held in the Bois de Bologne. While some of the fifteen- to twenty-member teams were composed entirely of French lawyers (these tended to be the weakest teams), ours and several others were roughly one-half American—and there were some twenty teams in the league in all. In short, a quite sizeable number of U.S. lawyers, and a solid score on the softball "index."

But in Madrid (and indeed in Spain generally), things are rather different: not only is a lawyers' summer softball league an utter impossibility in Spain, but even fielding a single team of fifteen to twenty U.S. lawyers taken from all over the country would be difficult, if not impossible. Only four U.S. firms are established in Spain, one of which is without local law capacity or aspirations, and the remaining three—while well-established and quite serious and able competitors—significantly do not represent any "money center" practices from New York, Chicago, Los Angeles or Washington.

The question, then, is whether there is a cause-and-effect relationship between the relatively inhospitable and antiquated Spanish rules for local admission of foreign (non-EU) lawyers and the relative absence of the bevy of globalizing U.S. firms as, for example, have opened offices in Italy over the past several years. My own view on this issue is that there is no such cause-and-effect relation. Rather, the relative neglect of Spain by U.S. firms is due to a perception (with which I do not entirely agree, of course!) of relative insignificance on the one hand, and competitive difficulties on the other, of the Spanish market. Those U.S. firms and lawyers that have opted to establish themselves in Spain have not been materially impeded by the local rules, and to my knowledge none of them has had any problems with the local bar association or anyone else even if their practices included one or more U.S. lawyers not admitted locally.

III. France

A. Rules for Admission of Local Lawyers in France

The French rules for admission to practice for local lawyers are among the most stringent in the EU. Unlike the Spanish rules summarized above, where essentially nothing more that a law degree is required, after four years of university study culminating with a *maitrise*, the French law graduate must complete a one-year course of study of both theory and practice (including drafting of documents and pleadings, professional ethics, etc.), undertake a period of training with a

lawyer, company legal department or government agency, pass a rigorous oral and written bar exam called "CAPA" (certificate of aptitude for the professional of *avocat*), and then undertake a period of practical training (*stage*) of two years. Only after all these requisites are satisfied, at least three years after graduation, is the French law graduate entitled to become an *avocat*.

B. Rules of Admission for Foreign (non-EU) Lawyers and Firms in France

A short historical digression will help put in context the current French position regarding admission of non-EU lawyers. Prior to 1992, the French legal profession was "split" between *avocats* ("true" lawyers, with ability to represent parties in civil and criminal proceedings) and *conseils juridiques* (office lawyers). The path to admission as a *conseils juridiques* for a foreign lawyer was simple: no exams, no *stage*, just a period of continuous physical presence. Since the vast majority of foreign lawyers were, and wanted to remain, "office lawyers," the *conseils juridiques* route was perfect: large numbers of foreign lawyers, including some with scant knowledge of French and French law, were admitted as *conseils juridiques*. And large numbers of foreign firms became serious competitors to local firms. So effective 1 January 1992 the two French legal professions were "merged" and this "loophole" was closed: all *conseils juridiques* became "grandfathered" as *avocats*, and from that point onward, only the *avocat* (and the rigorous path to admission outlined above) remains.

For some years after the new law took effect, it appeared that no more foreign (non-EU) lawyers might ever be admitted in France. But more recently, the position has been clarified: a highly rigorous mini-bar exam (actually, "mini" is a euphemism; the written part is a comprehensive across-the-board exam and the oral exam can be an unpredictable and tricky challenge) under Article 100 of the Decree No. 91-1197 of 27 November 1991 has been introduced, and a handful of non-EU lawyers (including several U.S. lawyers) have managed to pass it. Indeed, a preparatory course has recently been made available for applicants.[8] Curiously (or not so curiously), the Article 100 route to admission has been used more frequently by U.S. qualified *French* nationals than for U.S.-qualified *U.S.* nationals: in 2001, according to the French National Bar Council, the number of U.S.-qualified French nationals sitting the Article 100 exam more than doubled the number of U.S.-qualified U.S. nationals sitting the exam.[9]

C. French Market and Market Practice for Foreign (Non-EU) Lawyers and Firms

The role of Paris as the leading international legal center on the Continent, together with the ability of "office lawyers" to ply their trade as *conseils jurisdiques* on an essentially automatic basis for many years, has resulted in Paris being home to a large number of foreign (non-EU) firms and lawyers, not to mention a booming summer softball league.

The "floodgates" of admission to practice via the *conseil juridique* route have now been closed for more than a decade, but foreign (including U.S.) firms continue to set up operations in Paris, or grow existing operations, without apparent concern for the rather remote chances of their foreign lawyers being able to survive the Article 100 exam and become locally qualified.

IV. England

A. Rules of Admission for Local Lawyers in England

Two basic avenues are available for admission of English nationals as a solicitor: the law degree route, with generally three or four years of legal study followed by one year of professional training (the "legal practice course") plus a two-year period of practical training with a firm or approved organization (formerly referred to, in quaint Dickensian terms, as "articled clerkships"); or the non-degree route (essentially, for those not having studied law at university and thus involving a one-year course of legal study and, again, followed by the legal practice course and two years of articles).

B. Rules of Admission for Foreign (Non-EU) Lawyers and Firms in England

It is in the area of practice rights for foreign lawyers and firms that England demonstrates an almost diametrically opposite philosophy from many of its Continental counterparts, including the two discussed above. If the French and Spanish approaches inevitably smack of anti-competitive protectionism (albeit often cloaked in philosophical/ethical language), the English approach is commercial and transparent. France and Spain essentially grant a monopoly on the provision of legal advice to *avocats* and *abogados*, respectively; the English approach is much more in the nature of *"caveat emptor."* Neither France nor Spain recognizes the concept of foreign legal consultant (FLC), as is in place in a number of leading U.S. jurisdictions. But England recognizes, and indeed actively welcomes, registered foreign lawyers. The extreme difficulty of the French Article 100 exam for admission by non-EU nationals has been noted above, as has the arbitrary and "Kafkaesque" Spanish "homologation" process. England, on the other hand, has long had a conversion test—the "Qualified Lawyers Transfer Test: or QLTT—which permits foreign lawyers to sit for a mini-bar exam (one which any U.S. lawyer should find quite familiar and entirely manageable) and become qualified as a solicitor. What is notable about the QLTT is its extreme transparency: it is an open-book exam (the rules of which permit test-tak-

ers to bring as many materials as they like so long as they do not "obstruct the gangways"!) for which a variety of review courses are available, focusing on past exam questions.

C. English Market and Market Practice for Foreign (Non-EU) Lawyers and Firms

It is commonplace, and altogether accurate, to describe London as the beachhead of U.S. firms in Europe. In perhaps no other jurisdiction in the world are foreign (non-EU) lawyers accorded similar freedoms to practice: there is no requirement to qualify locally; there is transparent and relatively easy access to local qualification for those interested in "converting," and a generally commercial, non-protectionist attitude and approach to the role and economic importance of English law and lawyers in a globalizing world. Both the Law Society (the solicitors' governing body) and English society at large seem to view the internationalization of English law and the globalization of English law firms as commercially, economically and socially desirable. To a real extent, the global "battle" for international legal pre-eminence is being waged between the large U.S. and the large English firms, with English law and firms having perhaps a certain advantage in Asia (and, of course, Western Europe) and U.S. firms in the fore in Latin America and Eastern Europe.

V. Conclusion

Despite the wide variety of approaches taken in different European jurisdictions to the practice by non-EU firms and lawyers, my own impression to date is that U.S. firms have been able to ply their trade and exploit their brands with real success in Europe as, when and to the extent they have opted to do so: in Madrid, despite only a handful of U.S. firms and dual-qualified lawyers; in Paris, with many dozens of U.S. firms and dual-qualified lawyers; and in London, with dozens of U.S. firms and several hundred dual-qualified lawyers. While it may well be true that the English rules of practice for non-EU nationals are much more liberal and transparent than the French rules, which in turn are more liberal and transparent than the Spanish rules, I do not necessarily see a cause-and-effect relation between the relative liberality of the rules of practice and the on-the-ground presence of non-EU firms and lawyers. Instead, I think commercial and strategic perceptions explain why my "softball index" yields such varying results across the EU.

One of the paradoxes of the inclusion of legal services in the Doha Round is that the ensuing rules might render more difficult—rather than less so—the continued ability of U.S. firms to operate globally. In this regard, the International Bar Association—due to the perception that clients today need daily advice from cross-border commercial practitioners on the laws of jurisdictions in which they are not admitted—has set up a task force charged with issuing non-binding best practice recommendations by the end of this year for cross-border commercial practice.[10]

Endnotes

1. Goldhaber, *Globalists' Mighty Wedge*, American Lawyer, April 2003, at 15, *quoting* G. Spak of White & Case.
2. For additional information about my trials and tribulations, see Hendel, *From New York to Madrid via Paris: Smaller Pond, Bigger Fish*, in M. Janis and S. Swartz, eds., Careers in International Law (ABA Section of International Law and Practice 2d ed. 2001).
3. Goldhaber, note 1 *supra*, at 17, *quoting* A. Kawamura of Anderson Mori in Tokyo.
4. For the full text of the Directive, and practical information and a useful series of links to other sites detailing qualification requirements across the EU, *see* the European Lawyers Information Exchange and Internet Resources (Elixir) at http://elixir.bham.ac.uk.
5. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 Int'l Law. 307 (2000).
6. García-Velasco García and González Cueto, *Títulos Expaòoles y Extranjeros, Especialidades y Ejercicio Professional de la Abogacía en Espaòa*, in *Abogaíca Espaòola* at 47 (2003).
7. Nahmias, *Two Lawyers for the Price of One - Transnational Licencing in the EU for U.S. Practitioners*, ACCA Docket at 104 (June 2003).
8. *See also* Keeleghan, *Passing the French Bar Exam: How a California Lawyer Becomes a French Lawyer*, International Law Section Newsletter of the California Bar (Summer 1998), available at www.calbar.org/ils/newletter/v11n1/franc.htm.
9. *Conseil National des Barreaux, Admission des Avocats Etrangers, Bilan des Travaux de la Commission d'Admission des Avocats Etrangers Pour la Mandature 2000-2002* at 3.
10. *See* Peláez-Dier, *Planning a Revolution*, Legal Week Global (August 2003). For some fairly recent quantitative data and analysis on the international activities of U.S. firms, see Silver, *Globalization and the U.S. Market in Legal Services-Shifting Identities*, 31 Law & Policy in Int'l Bus. at 1108 (2000); Silver, *Lawyers on Foreign Ground*, in M. Janis and S. Swartz, eds., Careers in International Law (ABA Section of International Law and Practice 2d ed. 2001). See also the July 2003 issue of *The American Lawyer*, noting that "Between 1992 and 2002, the number of Am Law 100 lawyers rose in 13 of the country's 15 largest legal markets. . . But the biggest growth occurred outside the United States: In 2002 there were more than *three times* as many Am Law 100 lawyers working outside the U.S. as in 1992." (Emphasis supplied.)

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