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## The New Global Community

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SILLS CUMMIS in the News

A new international system —globalization— marks the transition from the twentieth to the twenty-first centuries. Globalization is the embodiment of speed — speed of commerce, communication, and innovation — brought about by new technologies such as computers, satellites, fiber optics and the Internet. It has given rise to a new set of economic rules involving opening, deregulating and privatizing economic systems. Globalization has spread free-market capitalism to almost every country in the world, bringing with it the integration of markets, countries and technologies in ways that have never before been seen. Just as the end of the Soviet Union and communism has redrawn the map of world politics and eliminated ideology as a dominating factor in international affairs, so have the growth of capital markets and the lowering of trade and investment barriers tied markets together. The symbol of the Cold War system was a divisive wall that separated Eastern and Western Europe for over forty years. The symbol of globalization is the Internet.

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Globalization means that lawyers, whether in government or private practice, will increasingly be called upon to advise clients in situations requiring knowledge of and confidence in dealing with different cultures and foreign legal systems. As laws multiply and the speed of communication accelerates, the ability to reference and integrate diverse foreign laws will become increasingly important in the contemporary practice of law. One can't pick up a newspaper or turn on the television without hearing about governments selling off companies they had previously nationalized, and countries seeking to entice back multinational corporations that they had expelled just years earlier. The lawyer must adjust his or her perspective to take into account such issues as how a particular law would apply in a venue with no mechanism to interpret or adjudicate it, or whether model laws promulgated by various multinational organizations can be enlisted for support. As the world's laws and borders continue to change, disappear, and reappear, lawyers everywhere must learn how to keep pace.

I first began to learn about the speed of globalization and the revolution in communications when I accepted an invitation to volunteer my time and legal skills to assist the government of Lithuania in its transition from a communist, centrally-planned economy to a democratic, market economy. That decision led me on a nine-year odyssey during which I worked with the governments of sixteen countries in Central and Eastern Europe to change financial institutions and reconstruct legal systems in the hope that democracy would follow.

My first serious interaction with a computer and the Internet occurred only a week before I left on my kickoff trip to Eastern Europe in 1991. To my surprise and delight, I learned that communicating with my office in New Jersey, whether from Lithuania, Poland, or Albania, was a relatively simple matter. Not only was I able to stay in daily contact with my U.S. clients, review their documents, and handle their legal problems, but I was also able to communicate directly with development experts throughout the world with one click of a mouse. No matter where I traveled, the Internet served as a powerful and portable development tool because it made laws and legal materials of all types readily available for reference, adaptation, and dissemination.

My experience with the Internet was, and to this day continues to be, strikingly parallel to my observation of global developments: for each, progress requires careful orchestration of myriad factors, and without that guidance, chaos and confusion can, and often do, ensue.

### **Issues Facing Globally-Connected Capital Markets**

It is important for lawyers to understand that current laws, whether local, national or international, are inadequate to meet the demands of modern globally-connected capital markets. Even when lawyers understand these issues, however, the legal tools at their disposal are insufficient for them to resolve cross-border problems. How did this state of affairs come to pass?

Because of technology, capital now moves across countries at breakneck speed; manufacturing and the generation of services move more easily across borders; and markets are supplied from a continually changing set of sources. New ideas and techniques also move among countries with increasing ease. Information and communications technology has provided the framework for globally-connected capital markets. Investors around the world are using the same approaches and criteria to make their decisions, and often are looking at the same pool of companies. The integration of financial markets is significant because it causes the distinctions among national markets to diminish.

Even though these changes are opening up new prospects and new opportunities throughout the world, the shift is also creating new anxieties and insecurities for many caught up in the process. Editors of newspapers in Ukraine, Malaysia and Ecuador write about their fear that their governments will no longer be there to protect their citizens as their countries become increasingly intertwined in a global economy that seeks to ignore national borders. Demonstrations and riots around the world have ensued as people express unease about the price that the market demands of its participants. Dislocations and turmoil in

international capital markets, such as those that occurred in Latin America in 1995 and in Asia in 1997, turn that disquiet into fundamental questions about the dangers and even the legitimacy of globalization.

As counsel to the liquidators of the pyramid schemes in Albania, I witnessed the aftermath of demonstrations and riots that resulted from collapsed Albanian investment funds. Albanians placed their life savings in these risky (and sometimes fraudulent) investment schemes in the anticipation of reaping high returns. When these funds collapsed, their anger brought down a government, resulted in the looting of the Albanian national armories, the arming of its ordinary citizens, and the further impoverishment of its people. When markets are freed up without the necessary checks and balances in place, large sums of money can be moved in short order and many innocent people can get hurt. Moreover, the global expertise required to trace these looted assets was in itself emblematic of the new age. Among the group of experts recruited to handle this daunting task of tracing and liquidating assets originally amassed in Albania, were a team of American, British, French, German, Italian, South African, Australian and Hungarian nationals.

Governments that are required to modernize, streamline and privatize in order to succeed in the global marketplace must, at the same time, find a way of dealing with historic disputes over who owns a particular piece of land and who did what to whom many centuries ago. Nowhere was this anomaly more apparent to me than in my work in the Balkans where globalization, the transition to market economies, and armed warfare originating in ancient hatreds proceeded side-by-side. The need to find a healthy balance between preserving a sense of identity, home and community, and providing the legal infrastructure required for survival in the global economy, is an imposing task for any government and its people.

When I assisted the government of Bulgaria in designing a program for the isolation and recovery of its then 70 largest loss-making enterprises that employed over 200,000 workers, I couldn't help but be aware of the heavy price Bulgarians were being asked to pay to meet the market's demand. I was encouraged, however, when a porter at the Sofia Airport, after learning that I was an American, refused to accept payment from me for helping me with my bags. He told me that he wanted to do his part to help Bulgaria take its place in the global community. He hoped that by encouraging Americans to visit and work in his country that Bulgaria's global dreams would become reality. Likewise, the business, legal and financial communities worldwide can no longer postpone their decision to bring commercial laws into the mainstream of these ongoing global economic and political trends.

## **Global Markets, But Only Domestic Laws And Regulations**

Out of the increasing globalization of markets there has developed a concomitant growth in the number of commercial transactions and disputes that extend beyond national borders. Lawyers involved in such transactions and disputes must address – and, if possible, plan for – legal issues different from those faced by parties involved in wholly domestic transactions.

The heart of the current problem is that there is no agreed-upon international legal system. We have global markets, but only domestic laws and regulations. Worldwide cultural, legal, economic, and historic differences in standards, rules, regulations and laws result in modern global markets with very sophisticated structures that provide for the trading of property rights via outdated legal and regulatory frameworks, uneven accounting standards, and a mix of slow paper-based and high tech, high speed computer systems and processes. To make things worse for lawyers engaged to advise on cross-border transactions and disputes, these legal and regulatory structures are neither consistent within markets, nor among markets.

Historically, there was a clear distinction between common law, which developed in England and spread to the English colonies, such as the United States, and civil law, which originated on the continent of Europe. Courts made common law as they decided individual cases; kings or legislatures made civil law by issuing decrees or passing bills. As time has passed, however, legislatures and government agencies in the U.S. have made more and more laws and regulations. The courts, in turn, have interpreted these laws and regulations as parties have argued about what they mean. That is the sort of procedure one finds in Europe, but vast differences in practice have developed that have less to do with the traditional common/civil law dichotomy than with historical government-citizen relationships and attitudes.

Advising clients on global issues such as the impact of pollution, disputes over water, and other rights that transcend national borders, is complex. Even in areas where one would have thought that the lawyer's search for applicable standards would be simple, such as accounting standards, huge worldwide differences in interpretation, adjudication and enforcement exist. Moreover, the process of globalization has had negative effects in that the ease of modern communications has assisted criminals, particularly in allowing more extensive and more complex cross-border crime to take place, including cyberspace crime. International mobility also makes it correspondingly much more difficult for lawyers to trace assets and to overcome corruption.

On the other hand, globalization has provided new job opportunities to many former enemies. Much of the security work done in emerging markets is being performed by teams of former KGB and CIA operatives. Whether securing a pipeline or undertaking due diligence prior to making an overseas investment, global companies and their lawyers are hiring these former spies because they are often those most familiar with the local setting.

Globalization also raises many other practical issues and concerns for lawyers. In addition to implying a different nature of economic transactions and a diverse set of players, globalization of markets forces today's lawyers to operate within a more complex political, legal-regulatory, and cultural framework on a daily basis.

## **Globalization And The "Rule of Law"**

Two or more countries may use the same name for a legal principle, but this does not mean that the present-day understanding or implementation of a particular legal principle is the same in all countries. Thus, opportunities exist for serious misconceptions and misunderstandings among lawyers involved in cross-border transactions or disputes.

In a market economy, courts are the final arbiters of conflict among private actors in the economy, and they also ensure that government officials obey the law and stay within the bounds of discretion accorded them by legislation. The proper functioning of markets and the private sector necessitates the existence of clear rules that will be respected by government as well as private actors. As a consequence, effective and efficient markets contemplate the existence of a "rule of law." By the "rule of law," we mean a system in which the laws are public knowledge, are clear in meaning, apply equally to everyone, and uphold the political and civil liberties often referred to as human rights. The courts are essential to this system.

As any lawyer who has practiced outside the United States knows, the rule of law can be impacted adversely by corrupt governments and by such simple problems as the absence of available funds to print and distribute newly enacted laws. In my earliest days in Eastern Europe, the inaccessibility to actual printed copies of ever-changing legislation by judges, lawyers and the general public created as great a stumbling block to democracy and economic growth as had the prior central planning system! Today's use of computers (now that assistance dollars have been used to purchase computers for courts and others involved in the administration of justice) has gone a long way toward solving this problem, but seemingly small dislocations in legal infrastructure can still cause significant problems in establishing the rule of law in a particular country.

For courts to play the role required by a global economy, many countries have undertaken judicial reform programs to strengthen the independence of the judiciary. The specific goals of many judicial reform efforts have included increased efficiency in handling cases, removing the appointment and promotion of judges from the political process, the reduction of corruption among judicial personnel, and judicial training programs which focus on the sophisticated commercial transactions of a global economy. Similarly, private attorneys have had to assume new and expanded roles to serve the new players in the private sector. They too have needed to develop new skills to plan, negotiate and structure transactions on behalf of their clients.

Many countries in Asia, the former Soviet Union, Eastern Europe, Latin America, sub-Saharan Africa and the Middle East are engaged currently in a wide range of rule of law reform initiatives. Rewriting constitutions, laws and regulations is the easy part. Far-reaching institutional reform, also necessary, is difficult and slow.

While political instability or demonstrated institutional bias or corruption and the absence of a "rule of law" may not keep clients from doing business in particular countries, the lawyer advising such clients needs to be aware of these political and social circumstances and the various strategies he or she may need to employ to protect clients if an international dispute should arise. Moreover, a lawyer advising a client who is considering entering into a cross-border transaction needs to understand the legal framework in place to protect such client against the risk of loss, in the event that the cross-border transaction fails or a dispute arises. How the lawyer responds to the client's questions on these issues may influence the client's decision on whether or not to enter into the transaction; the terms on which the client is prepared to do a deal; and, whether or not the client will pursue its remedies against defaulting cross-border parties.

### **Globalization And Legal Innovation**

The impact of globalization has motivated developed countries to think about regional trade blocs and harmonization of laws. It has also motivated developing countries to think of adopting new laws based on major western models. Important questions face each country and its lawyers as to which models of law and regulations are best suited to it in this era of globalization.

Illustrations of expanding regional trade blocs include the European Union (EU), Mercosur and NAFTA. Many such groups are involved in legal harmonization as well as in removing trade barriers within their region, with the EU being the most compelling example of the harmonization

and integration of national legal systems undertaken on a voluntary basis. Moreover, numerous international organizations have developed minimum principles and standards for individual nations to implement in order to improve confidence in and viability of domestic and international financial systems.

For example, the International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS) have served as forums for the development of international cooperation and information sharing among securities and insurance regulators. The Organization for Economic Cooperation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is another example of a multinational approach to a global problem. The United Nations Commission on International Trade Law (UNCITRAL) has also developed prototypes for national laws, such as those affecting cross-border insolvencies.

Cross-border transactions continue, however, to a large extent, to be subject to national laws, which not only vary considerably in content, but also may not be suited to the special needs of international trade. In an attempt to remedy these problems, the UNIDROIT Principles of International Commercial Contracts were developed by the International Institute for the Unification of Private Law. These Principles are a sort of restatement of the law of international commercial contracts. Other forms of international solutions to cross-border transactions include the use of INCOTERMS and the Uniform Customs and Practices for Documentary Credits prepared by the International Chamber of Commerce and the principles established in the United Nations Convention on Contracts for the International Sales of Goods.

Although such guidelines leave wide latitude in their implementation and effectiveness in individual countries, this limitation does not diminish the legal significance for lawyers of these initiatives for the twenty-first century. While no international consensus has evolved as to the "best" underlying legal infrastructure for a country in the current globalization era, the concentration of bilateral and multilateral legal assistance to developing countries seems to have focused on an identifiable number of core areas to be improved, including the development of clear and defined laws governing: property rights; contracts; companies and corporate governance; secured transactions; rules governing foreign investment; bankruptcy; and taxes.

International lawyers need, above all, to find a practical approach for resolving cross-border disputes. An example of one such approach, over the past 20 years, is that international commercial arbitration has been transformed and

institutionalized as the leading contractual method for the resolution of multinational commercial disputes. In its various guises, international commercial arbitration is basically a private justice system. It is effective, however, only if the award and written agreement to arbitrate are enforceable. Arbitration awards rendered in a foreign country generally are enforced via a system of bilateral and multilateral treaties. The most important of which is the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. This Convention requires each signatory country to recognize and enforce written arbitration agreements and awards of all other signatory countries.

All of these legal initiatives require future work and integration within national economic, political and legal systems worldwide. Today's lawyers need to educate themselves about these projects and, to the extent possible, should participate in the reform process.

### **The Paradoxes Of Globalization**

The euphoria that I shared with the rest of the world as the Iron Curtain rose was sadly short-lived. The end of the Cold War removed the fear of imminent nuclear destruction and added the hope of a peace dividend, money that could be spent on social progress instead of weapons. While the world was still thrilled by such positive ideas, the Persian Gulf and Balkan wars made it clear that there would be no peace yet, and certainly no peace dividend.

At the same time, Eastern Europe and the emerging economies of Asia and Latin America have become painfully aware that the road to a successful market economy is going to be a long and difficult one. For many, the luxuries of the West are still unavailable. These emerging economies and fledgling democracies are getting much less help than they had expected, needed and wanted from the West, and worldwide ethnic, nationalist, and linguistic conflicts have been worsening.

Meanwhile, the international financial revolution has brought its own challenges. The borderless world implies a certain surrender of a country's control over its own currency, fiscal policies and laws. Although very different in form, various trends such as increased air and water pollution and 24-hour stock trading are multinational by nature, crossing borders all over the globe, affecting distant societies, and reminding us that the world is a single unit. These trends are largely out of the control of local lawmakers, both in the direct sense that countries cannot prevent incoming pollution, such as the arsenic spill in Romania which affected not only the locality in which it occurred, but also all of the countries on the Danube, and in

the indirect sense that if a country banned such activities as genetically-engineered foods and foreign exchange dealing, such ban would not stop these activities from operating elsewhere and still affecting its citizens.

Another challenge to today's lawyers and lawmakers comes from the Internet itself. Perhaps the most distinguishing feature of the Internet is that it is not susceptible to the same physical and regulatory controls that had been applied to prior technology, such as the telegraph, telephone, radio and television, because the Internet combines global reach with very low barriers to entry. As the Chinese government, among others, has discovered, few communities are now shut off from the rest of the world because computers and the Internet allow individuals access to data, opinions and ideas, regardless of location.

Perhaps the most important challenge to lawyers in the new global economy, however, will be to determine who will set global legal standards, who will implement, interpret, and enforce these laws, and who will adjudicate the disputes. How the law will evolve to define and protect property rights in our very flexible, volatile, and changing global environment is the real legal challenge in the twenty-first century—a challenge that we, and future generations of lawyers, will need to address.