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Comparative Law for Market Societies

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Introduction

The major message of my presentation can be stated in one sentence: In a changing world that is characterized by greater interdependence of economies around the world, the future of advanced legal education lies in the successful integration of comparative and international law into mainstream legal education.

The notion that comparative and international law should be better integrated into legal education refutes the idea that law will become global in the sense that a single product comparable to an artificial language, such as Esperanto, will replace the multitude of domestic laws defined by, and often confined to, the jurisdiction of a nation state. The statement also rejects the notion that traditional legal education, which is very much focused on domestic law, and frequently on the doctrinal analysis of domestic law, will remain the unchallenged focus of legal education. Schools that wish to train the future legal elite will have to move beyond domestic legal analysis.

In short, law schools face important challenges. Meeting these challenges requires both a re-conceptualization of comparative law teaching and substantial reforms to the standard law school curriculum. In my talk I will focus on the first aspect, but will also make some remarks about the second. To understand why we need to re-conceptualize the teaching of comparative law, allow me to say a few

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words about our comparative law tradition. Two features of this tradition in my mind are particularly noteworthy:

First, comparative law is too often the study of "foreign" law, not comparative. That is, in the trade off between understanding another legal system in great detail, and comparing a larger number of legal systems, the former often trumps the latter. From a practical point of view, this kind of specialization is useful, if, for example, the country whose legal system we study is the dominant trading partner of our home jurisdiction. The more diversified the trading and investment portfolio, however, and the more likely that future lawyers will deal with multiple legal systems, the more we should question whether this kind of specialization is still justified, and what might replace it. From a conceptual point of view the specialization of only few jurisdictions is even less satisfying as it ignorance the variance of law and legal systems around the globe. Appreciating this variance – which may be less apparent from the law on the books alone, but is the result of the complex interplay between law, economic, politics, is not only of scholarly interest. It is also critical for practitioners wishing not to be deceived by looks alone. In an interesting article entitled "Looks can be deceiving", Beller and Terai analyze the rules and procedures for initial public offerings in the US and Japan. They show that notwithstanding the fact that Japan has borrowed extensively from the US especially in the area of securities regulation, the actual operation of the system is remarkably different.[1] Similar examples can be quoted from around the world. The Russian corporate law for example, was drafted by two American law professors and looks familiar to

[1] (Beller, Terai, and Levine 1992)

anyone trained in American corporate law.[2] However, there is little doubt that in practice the law operates quite differently. Not only do far fewer disputes ever make it to the courts, but judges trained in the civil law tradition and with little understanding of commercial practice and enjoying for less independence than their counter parts in the West perceive the meaning of the law quite differently.[3]

Second, the scope of the study of foreign or comparative law has traditionally focused on the core of the civil law, i.e. contract, property, torts, and (though to a lesser extent) family and inheritance law. This does not mean that other areas of the law (antitrust, corporations, environmental regulation, etc.) have not been included in comparative analysis. Still, even today they play only a minor role in comparative law classes. To some extent this is compensated by specialized courses in comparative corporate law and corporate governance, or comparative anti-trust. The proliferation of comparative courses in specialized areas may indeed by the future of comparative law. Still, it may be worth reflecting on why the traditional scope of comparative law has remained rather narrow. A possible explanation is that the emergence of comparative law scholarship has been inextricably linked to the rise of the nation states. In the civil law tradition, the most prized achievement of the nation state was the codification of private relations among citizens in the *Code Civil* in France or the *Buergerliche Gesestzbuch* (*BGB*) in Germany. Private contracts among *individuals*, the scope of their property rights, and their responsibility vis-à-vis third parties in non-contractual situations (i.e. in tort) as well as family and inheritance relations defined the legal status of the *citoyen, Buerger*, or citizen. Previously, relations among individuals were defined primarily by status. In other words, the rights and

[2] (Black and Kraakman 1996)
[3] (Black, Kraakman, and Tarassova 2000; Pistor and Xu 2003)

responsibilities of parties in a legal relation differed depending on where in the feudal hierarchy they were situated. Only the birth of the nation state conferred equal legal rights to its citizens. Two hundred years ago, this transition from “status to contract” as Sir Henry Sumner Main has put it so succinctly (Maine 1917) was a social revolution. This helps explain the fascination of legal scholars with the civil law, i.e. contracts, torts, property, but also family and inheritance law. Commercial law was codified around the same time as the civil codes, but with less fanfare. Codification of commercial law did not change the law as such, but simply organized and systematized existing commercial practices. The relevance of commercial law for scholarly legal analysis and law school teaching increased only with the growth of the “regulatory state” giving rise to the emergence of new fields of law, antitrust, capital markets regulation, etc.

Comparative Law Teaching Today

At the beginning of the 21st century we face new and quite different challenges. The notion that all citizens enjoy the same civil rights, that they may freely contract, acquire property, sue and be sued in a court of law, but will also be held responsible should they harm other peoples’ life, liberty or property, is taken for granted. In fact, most of these rights have been extended in most countries to non-citizens as well. While it is interesting and important to know that there are different ways in which property may be recorded and transferred and claims by owners are enforced, the real lie elsewhere, namely in

- the increase in the number of cross-boarder activities (trade and investment), and of countries that actively participating in these activities both as exporters and importers, host and home countries;
- the decentralization and multiplication of actors engaged in the development of contractual governance structures for cross-border activities;
- the challenge economic integration poses for national legal systems, or more specifically policy makers engaged in approving deals, governance structures, and using domestic regulatory tools to shape them.

I will address each of these challenges in turn.

Increase in Cross-Border Activities

Simply examining aggregate data on international investment as a share of GDP over time does the reveal the scope of changes currently under way. These data suggest that while the overall volume of international investment activities has increased, when controlling for GDP the world is now only reaching again levels that had already been attained in the late 19th century.[4] However, they conceal the fact that the pattern of capital and trade flows has shifted considerably. While in the late 19th century, for example, the United Kingdom as the most developed economy was the major exporter of capital, the United States today both exports and imports capital, with much of the country's budget deficit being financed by foreign central banks,

[4] See, for example, (Calomiris 2005) depicting data compiled by Obstfeld and Taylor (2003).

particularly those in Asia. Similarly, the US runs a trade deficit with China, even though it is a net exporter in relation to other countries.

The implications for law and legal governance are important in that it can no longer simply be assumed that a specific law or legal system trumps. Given its dominant role in the late 19th century, there was little doubt that English law would govern contracts. Major financial market crises, such as the Baring crisis in Argentina in the 1890s were resolved in the City of London behind closed doors and with an eye on protecting the most important financial market place in the world.[5] While the Mexican financial crisis of 1994 suggests interesting parallels to the Barings crisis,[6] the East Asian crisis and its spill over effect to other emerging markets revealed that the world had indeed changed. Many more countries were involved on both sides – the countries that found themselves in the midst of a financial crisis unable to defend their currencies and pay back foreign debt, and the number of countries that were homes to financial institutions engaged in the pre-crisis lending spree and the post-crisis debt resolutions. In addition, a number of international agencies were actively involved in the crisis management, foremost among them the International Monetary Fund (IMF).

The reaction of the IMF to the crisis indicated that the instinctive response was to recreate a legal safe haven by developing what the IMF called an international financial architecture. A common set of rules and governance principles was designed to re-establish confidence and security in financial markets. Indeed, the IMF has made considerably effort in promoting legal reforms along those lines in countries around the globe. There are, however, reasons to believe that these efforts have not produced the intended results, and are inherently flawed. Legal governance structures cannot be

[5] For details on the management of the Baring crisis, see (Eichengreen 1999).
[6] See Eichengreen, supra note 5.

simply reduced to set of rules easily transplanted from country to country and implemented by agents that received some ad hoc training in these new rules. Not only do these rules and regulations not fit into pre-existing legal systems,[7] but legal cultures differ and so does the political economy. These elements are crucial for the operation of legal systems and must be taken into account when assessing the relevance and quality of legal governance structures today. By implication, law students today should not only study how to write debt contracts, including debt covenants. They need to be able to understand specific countries' and transaction risks in order to structure such instruments appropriately.

A similar argument can be made for the governance of trade relations. English law has long served as the legal order of choice for international transactions and has shared this role with the law of the state of New York. Thus, lawyers trained in English or New York law might live under the impression that all they need to know in foreign trade transactions is the law of their home jurisdiction. This, however, would be misleading. Negotiating the choice of law is part of a complex bargaining process. Whether it is indeed worth insisting on one's own jurisdiction depends on the relevance of a particular set of rules for the transaction at hand and the impact the application of a different set of rules might have on it. Such an assessment requires, of course, at least some knowledge of foreign law, its strengths and potential pitfalls. In addition, parties and their legal counsel should be familiar with international treaties that might apply to their transaction. It is still not uncommon for parties to be unaware of the fact that the 1980 Vienna Convention on the International Sales of Goods is directly applicable to transactions, if parties belong to member states and that they

[7] (Pistor 2001).

must actively opt out of the Convention, if they want to avoid its applicability (Stephan 1999). Few contract law courses in the US make specific reference to the Convention, note its existence, much less explain that by virtue of being a self-executing Convention, this is American law.[8] A brief survey of the literature on the Vienna Convention reveals that most commentators are from other countries – predominantly from Europe – and most decisions are by courts outside the United States, even though case law has increased in recent years.[9] This may, however, change over time. China has modeled its 1999 contract law on the Vienna Convention.[10] As a major trading power, exporters from China may well insist on applying the Vienna Convention to contracts with trading partners instead of opting out and instead electing say US or UK law. An interesting lesson from this development is that international legal harmonization may be less important for countries with well developed legal systems and a long tradition of trade. For emerging economies, by contrast, opting into a regime that has international legitimacy might boost their chances of influencing the choice of law, and perhaps might even trigger a shift in the dominant regime. American lawyers should wake up to this challenge.[11]

Moreover, just as with international capital flows, international trade flows are determined not so much by rule on the books, but by the quality of legal institutions.[12]

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[8] This is based on conversation with colleagues as well as a small poll of students in our new course "Lawyering in Multiple Legal Orders", which revealed that none of the 60 students in our class had been taught the Vienna Convention in the first year contract law class.

[9] For details compare http://www.cisg.law.pace.edu/. Note that there are so far no reported cases from Japan. See http://www.law.kyushu-u.ac.jp/~sono/cisg/english.htm.

[10] See Friedrich Blase, China and CISG: In inter-continental exchange. Available at http://www.cisg.law.pace.edu/cisg/biblio/blase2.html

[11] Commercial practice has already taken note. See http://www.cisg.law.pace.edu/cisg/biblio/yang.html

[12] Measuring the quality of legal institutions is a difficult task. Current data compile survey data that measure the perception of institutional quality, including judicial efficiency, rule of law, and the

This appears to be particularly relevant for international traded in complex goods. Trade economists define complex goods as those that are neither traded on a commodity exchange nor have an international reference price (Rauch 1999).[13] That is, simple goods are for the most part staple goods and natural resources, whereas all manufactured goods (from T-shirts to cars) are complex goods. The reason why complex goods are more affected by the quality of legal institutions seems to be that their complexity makes them more vulnerable to dispute. In a recent study my co-authors and I have analyzed the impact of domestic institutions on international trade flows for 62 countries around the world (Berkowitz, Moenius, and Pistor 2005). Controlling for other indicators that trade economists typically account for, such as adjacency, distance, language, and GDP per capita, we find that *exporters of complex goods* suffer from weak domestic institutions in their home countries. That is, a country – call it Country A - with weak legal institutions participates less in international trade flows of complex goods than Country B, which resembles Country A in all other respects, only that its legal institutions are superior. We explain these findings by suggesting that the buyer of complex goods – the importer - cannot fully opt out of the exporter's domestic institutions and thus has to factor in the risk associated with their quality. The reason is that even if parties choose a different law and agree to have their disputes adjudicated elsewhere – say at an international arbitration tribunal – in the event the exporter fails to comply with the ruling, it must be enforced or executed against him. Since companies tend to have most of their assets in their home jurisdiction, enforcement in the exporter's home country is therefore a high probability.

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likelihood of governmental expropriation or contract repudiation. See (Knack and Keefer 1994) (Kaufmann, Kraay, and Mastruzzi 2005).

[13] In this classification, copper, steel or staple goods, such as grain, are simple goods, whereas any manufactured products even as simple as t-shirts are complex goods.

International treaties have sought to mitigate the risk of domestic institutions. In particular, the 1958 New York Convention on the Enforcement of Foreign and International Arbitral Award requires countries to limit any review of verdicts issued by such a body to a procedural one. In a study published over 20 years ago, van den Berg (1981) suggests that compliance with the New York Convention has been remarkably high. At the time, a little over 80 countries had ratified the Convention. Meanwhile the number has increased to 134, and – perhaps not surprisingly – there is some evidence that compliance has weakened (Isaacson 2002). One strategy to soften the effect of the Convention is to use the "public interest" reservation for refusing enforcement, or at least subjecting it to substantive review. Other countries have erected constitutional constraints against outsourcing judicial review in such a fashion. Thus, in Brazil, for example, domestic parties have been able to invoke their constitutional right to a fair trial to argue that they must be granted a full hearing in a domestic court of law (Samtleben 1994), which has delayed Brazil's ratification of the convention and triggered a constitutional review of the law that finally did ratify it (Kleinheisterkamp 2004). Thus, even when dealing with a party from a country that is party to the New York Convention may not be a guarantee that awards granted by a foreign or international arbitration tribunal will, in fact, be enforced.

What lessons can we draw for legal training? First, students should be aware of major differences in the law and be familiar with basic principles of international treaties that might apply. Second, they should also note that the law on the books is but a stepping stone in the analysis of (legal) country risk. At least, if not more important, is a basic understanding of the quality of local institutions. This is

important especially in circumstances where one party cannot fully contract around, or insure for, weak legal institutions in the other party's jurisdiction. As noted above, for importers that risk of bad exporter institutions might be higher than exporter's risk that the institutions in the importer's countries are weak. The need to go beyond black letter law increases with the growing participation of countries in international trade with weak institutions – among them the largest emerging markets China, India, Russia and Brazil.[14]

To summarize, globalization of business implies not only, and maybe not primarily, that students should study many more legal systems or that they should also familiarize themselves with a series of important international treaties – even though this is part of what they will need to do. In addition, they need to learn about the variety of host country institutions that may affect the transactions they are advising on; about the relative importance of legal governance mechanisms to different types of transactions and different parties to a deal. Furthermore, they should be aware that non-legal alternatives might be available in some countries, which may be less costly and more effective than reliance on the formal legal system. Most importantly, they need to be able to identify the particular risk, but also the opportunities their client might face in a given environment and make provisions accordingly.

Multiple, Decentral Lawmakers

[14] In the 2004 Corruption Perception Index (CPI) published by Transparency International, the four countries score on a scale from 1 to 10 where lower scores indicate higher levels of corruption, as follows: Brazil (3.9); China (3.4); India (2.8) and Russia (2.8). http://www.transparency.org/cpi/2004/dnld/media_pack_en.pdf.

The importance for lawyers to understand the context in which they clients will operate is even more relevant in light of the fact that they are the ones who are developing contracts for transactions as well as complex governance structures for longer term relations. They do this even within well developed legal systems in an attempt to specify in the contracts the intention and interests of their clients and provide for future dispute resolution. Their role as "transaction engineers" (Gilson 1985) is even more apparent in the international context. New York and UK based law firms control the market for sovereign debt issues have written complex covenants for sovereign debt issues by numerous countries.[15] They are also a growing force in developing standard contracts and investment deals for their clients. While we may not want to call these templates "law" in a technical sense, they do serve similar functions as law by offering "rules off the shelf" and standardizing the allocation of rights and responsibilities in commercial transactions. At least initially, the standardization effect might be limited to the clients of a particular firm. However, templates used in negotiated deals will inevitably have spill over effects to the other party and its legal counsel.

Private lawmaking is, of course, not a new phenomenon. However, the scale and scope of private lawmaking has increased considerably with the proliferation of multi-national law firms. Much of the existing literature analyzes private lawmaking within relatively close-knit groups, such as cattle farmers in a particular country in California (Ellickson 1986); the diamond exchange in New York, which continues to be controlled by Jewish brokers who benefit from monitoring and reputation mechanisms within their community (Bernstein 1992); or ethnically homogenous

[15] According to (Choi and Gulati 2004), Cleary Gottlieb alone controls 44% of the advisory market.

middleman in Mediterranean long distance trade (Greif 1989) as well as Chinese trading networks in South East Asia (Casella and Rauch 1998). In each of these cases, contracting parties were able to do without much formal contracting, because they had alternative mechanisms at their disposal. They therefore either "opted out" of a given legal framework, or developed their own governance structures when faced with a legal void.

The role of multi-national firms differs in important respects from these networks. Law firms offer legal solution to their clients and anchor them in a particular legal order or enforcement infrastructure, such as international arbitration. In other words, these firms do not facilitate a legal opt out, but create legal solutions that work in the context of multiple and competing legal orders. Moreover, these multi-national firms are economically powerful both in their own right and advisors to major clients around the world. In the latter role they often have considerable influence on host countries' policy and lawmakers and are likely to advocate solutions that are consistent with their clients and their own needs.

Their focus on law and legal governance structures makes lawyers in the top law firms around the world the most forceful advocates of what some would call the "global rule of law". Some of them even serve in multilateral institutions to promote this agenda more explicitly. The former General Counsel of the Asian Development Bank, Barry Metzger, for example, is a senior partner with Coudert Brothers and practiced with the firm for many years in Asia before accepting the position of General Counsel. After returning to Coudert, he served as one of the lead attorneys in advising the Russian Commission for Securities (KZB) on a code for corporate

governance.[16] Similarly, the previous General Counsel of the World Bank, Ko-Yung Tun, was a leading partner in the global practice group of O'Melveny and Myers before and after working for the Bank, and has recently joined another major international firm, Morrison and Foerster.[17]

The American Bar Association has been at the forefront of offering technical legal assistance – largely funded by the US government – in Central and Eastern Europe with its CEELI program.[18] The program has been so successful that additional chapters have now opened in Latin America & the Caribbean, Africa, and Asia. Like it or not, individual lawyers and lawyer organizations, predominantly from the US, have become important players in shaping governance structures not only for their clients, but also influencing the directions of domestic legal reforms in many countries.

Legal practice has taught most of these lawyers that what they need to know and advise on are not only technical details of black letter law, but the business environment their clients face in various countries around the world. The network for internationally operating law firms, lex mundi, now offers guidelines on how to do business in various countries on their web page. These guidelines are typically produced by a major law firm located in that country. The guideline for Japan was prepared, for example, by Asahi Koma Law Offices in Tokyo. They contain much of what one would expect from such a general introduction, including rules governing exports from Japan, direct investment, purchase of Japanese businesses by foreign investors, establishing a branch office, and the like. In addition, they give not only an overview of the country's geography, political system and general economic

[16] http://www.coudert.com/lawyers/default.asp?action=partnerdetails&id=2136 (last visited 8 August 2005).
[17] http://www.mofo.com/news/media/files/pr02018.html (last visited 8 August 2005).
[18] http://www.abanet.org/ceeli/

conditions, but also highlight "sensitive areas", which include administrative guidance, exclusory business practices, and Japanese attitudes toward contracts, among others.[19] Obviously, law firms do not give away too much in these guidelines, as they offer their services typically for a fee. Nevertheless, these guidelines offer give a glimpse of the richness of the work of lawyers in cross-boarder deals. They also suggest that in addition to engineering transactions and inventing new legal solutions, they are cultural intermediaries as they constantly "translate" law and legal actions taken by regulators, administrators, or private parties and their meaning not only into the language of their client or counter-part, but also into the legal culture in which they operate.

What challenges do we as law school teachers face in light of this account? Can we, should we prepare our students to their future role not only as lawyers, but also as transaction engineers, legal innovators and translators of law and legal culture? Or should we leave the task of teaching these skills, which undoubtedly need to be learnt and understood by lawyers in our global world today, to the firms that hire them as young associates?

I suggest that there is an important role for law schools to be played, but that we need to realize that the demands on the young lawyers we graduate are changing and modify our curriculum accordingly. Obviously, there are certain things law firms can better do than law schools. Most importantly, they, not law professors are at the forefront to inventing new solutions for complex transactions, and creating new legal solutions. Take only the so called "poison pill", a widely used device of publicly

[19] http://www.lexmundi.com/images/lexmundi/PDF/guide_japan.PDF (last visited 8 August 2005).

traded corporations to defend themselves against corporate takeovers. This device was invented by law firms within constraints set and subsequently modified by courts. We can pass this knowledge on to our students. However, typically by the time we have fully integrated these new legal devices, legal practice has already moved forward. However, along other dimensions the comparative advantage is arguably on our side. In particular, I would suggest that law schools are better placed than law firms to train future attorneys in the art of translating not only black letter law, but the culture of different legal systems, and in helping them assess systemic country risks their clients might face. Integrating comparative politics, economics and sociology into the standard law school curriculum would be an essential part of such an agenda. This is not always easy, and may require more inter-disciplinary teaching and research than we currently are doing. I know that this is precisely what CDAMS is doing here in Kobe, and I admire and support the institute's leadership on these issues.

National Legal Systems in the Context of Globalization

So far, I have focused my discussion on areas of the law that have long been on the agenda of comparative and transnational law scholars: contracting, deal brokering, foreign direct investment. The areas of law associated with these activities include, of course, contract law, corporate or business organization law, secured transactions, some real estate and property law, as well as tax law. Increasingly, however, areas of the law that were treated primarily as "domestic" law areas are becoming internationalized. An increasing number of takeovers occur across, not within borders. Take corporate law as an example. While structuring joint ventures

and wholly owned subsidiaries in different countries belongs to the common core of transnational legal practice, cross-border mergers and even hostile takeovers are a more recent phenomenon. As Professor Black has documented, the late 1990s witnessed the first multinational merger wave (Black 2000). According to his findings, in 1999 only 40 percent of the value of all merger activities, and 30 percent of total numbers, resulted from domestic mergers on the US market. The remainder could be attributed to world wide merger activities, many of them cross-border. A cross-border merger does not always change the rules of game. Thus, when a US company is the target of a takeover, the defensive mechanisms management takes are still subject to the law of the state where that company is incorporated. However, the domestic law of the acquirer might require greater legal scrutiny, which the legal advisors of the target company need to know about. Moreover, hostile takeovers by foreign parties tend to be more politicized than similar transactions at home – even in a country as seasoned in takeovers as the United States. Recall the recent incidence in the United States, where a friendly merger between Chevron and UNOCAL was challenged by a competing bid by the Chinese state owned company China National Offshore Company (CNOC). The case triggered substantial political anxiety and prompted CNOC to withdraw its offer. Cross-border mergers frequently give rise to national defensive instincts. Witness only the attempt by the Italian central bank to prevent the takeover of an Italian bank by a Dutch counter part, or the recent attempt by France to protect national champions from takeovers – all this, of course taking place in the context of the European Union.[20] It is therefore not surprising that takeovers by

[20] "French Anti-takeover Decree Draws Interest", The Washington Post, 11 September 2005, available at http://www.corpwatch.org/article.php?id=12630.

companies from outside the EU, such as India's Mittal corporation for Arcelor has triggered similar reactions.[21]

Mergers and takeovers are not only important because of the ownership change they produce, but also because they often import new governance structures and business practices, which may clash not only with domestic practices, but also with domestic law. For foreign companies and their legal advisors assessing the prospects of a merger, it is therefore important to gain an understanding of what the major domestic constraints might be. Take the example of the Vodafone-Mannesmann takeover. In early 2000, Germany experienced the first almost hostile takeover, but ultimately friendly merger, of a German flagship company (Mannesmann) by a foreign company, the British telecom company Vodafone. The defensive measures Mannesmann took proved ultimately unsuccessful. However, they forced Vodafone pay a total of €67bln over and above the price it had originally offered in order to win over shareholders. As part of the final merger deal a special "appreciation award" of €15 Mln was paid to Mannesmann's Chief Executive Officer, Klaus Esser – in addition to payments to his team members and a former chief executive. This extra compensation was approved by Mannesmann's compensation committee after consulting with the management of Vodafone, the acquirer of Mannesmann.

From the perspective of US law, the arrangement raises few legal concerns. The relevant body in charge (the presidium, a sub-committee of Mannesmann's supervisory board, which also operated as the company's compensation committee) took decision. With the exception of Funke, the former CEO, none of the members of this committee benefited from the payment. In fact, the committee fully disclosed the

[21] See "Powerless Patriots", The Economist, 6 February 2006. Available at http://www.economist.com/business/displayStory.cfm?story_id=5476736.

deal in documents filed with the relevant regulators. Leaving aside the payment to Funke (which was subsequently approved again without him being present) there was no indication that the members of the committee were conflicted. As a result, Delaware law would not grant them the presumption of the business judgment rule rather than subjecting the payment decision to an entire fairness test, as would be required under duty of loyalty considerations. By implication, a lawsuit would have hardly survived a motion to dismiss unless the plaintiffs were to argue that the presidium acted in bad faith or waste. However, existing case law has established a rather high threshold, making it unlikely that plaintiffs would have prevailed in a Delaware court.[22]

In Germany, salaries for top management have been traditionally much lower than in the US (Cheffins 2001). Moreover, in the absence of a vibrant takeover markets, there has been little legal scrutiny of practices that evolved elsewhere, including the legality of "golden parachutes", or as in this case, "golden handshakes" under German law.

The disclosure of the appreciation award was met a public outcry, and eventually by a criminal investigation. A criminal law suit was brought against Esser, as well as against the members of the supervisory board's compensation committee, which included the CEO of Deutsche Bank, Josef Ackermann, Klaus Zwickel, a representative of the labor union, Mannesmann's former CEO Joachim Alexander Funk, and Juergen Lademann, an employee representative. They were accused of breaching the trust vis-à-vis Mannesmann corporation, whose interests they were obliged to protect and thereby causing the company harm. The court of first instance acknowledged that the defendants had breached Germany's corporate law. It acquitted

[22] On the interpretation of "bad faith", see the most recent Disney decision by the Delaware Chancery Court, In Re Walt Disney Corporation Derivative Shareholder Litigation, 9 August 2005 C.A. Nr. 15452 available at www.courts.delaware.gov/opinions

nevertheless, mostly because the breach was not sufficiently severe to trigger criminal punishment in light of the fact that the relevant decisions had been made by the right corporate body and had been properly disclosed. The Supreme Court, however, reversed. It argued that trustees are strictly bound to further the interest of the beneficiary – here the corporation. Since Mannesmann corporation did not receive anything in return for the ex post payment to Esser and his management team, there was a breach of trust. The fact that Vodafone had approved of the payment made no difference, because the action could haven been approved only by a unanimous shareholder vote. Even though Vodafone eventually became Mannesmann's sole shareholder as anticipated by the merger agreement, at the time the compensation award was agreed upon and payments were made, Vodafone held only 9.8 percent and 98.6 percent of the shares respectively.[23]

The contrast to the Delaware approach could not have been more stark. Whereas in Delaware not even a civil action would have been successful, in Germany the relevant parties may face criminal conviction.[24]

It is difficult to understand this case and its impact on similar transactions without a basic grasp of the German notion of a "social market economy". It denounces unfettered economic competition in favor of a model that combines a basic commitment to the principles of capitalism with social justice. The most explicit feature of this model is co-determination. In fact, Mannesman's supervisory board was co-determined and workers' as well as union representatives sat on the relevant committee and participated in the decision. They found themselves in a difficult position and in the end abstained from voting, but did not boycott the meeting at

[23] See BGH, Decision of 21 December 2005, 3 StR 470/04.
[24] A court of first instance will now have to decide whether Mannesmann may have received any benefits whatsoever in return for the payment. If not, conviction is likely under the terms of the Supreme Court decision.

which the compensation decision was made. Had they done so, the quorum would not have been met.

The impact of trans-border merger transactions on domestic law goes far beyond executive compensation. Merger agreements and relevant legal documentation, including due diligence studies, are boiler plate contracts that US law firms in particular have refined over the years. They are often used in European transactions as firms benefit from using existing contract templates for transactions around the globe. English language has become the dominant language in this realm. Not many of these agreements have been tested in courts. Still, there is substantial evidence that extensive adaptations of boiler plate contracts must be met in order to make them compatible with domestic law. A good example is the Daimler-Chrysler merger. A simple reverse triangular merger structure was precluded by German law, which prevents a subsidiary from holding shares in the parent company. This makes it technically impossible to transfer shares of the parent company that are used as a consideration for the merger transaction to the subsidiary. A legal solution was eventually found.[25] The general lesson is that legal technology, such as merger agreements and merger structuring is not easily transferred to different settings. Lawyers at both ends of the transaction must understand the relevant constraints domestic law governing the transaction imposes on them. Given the importance of trans-border transactions today, legal training should alert students at least to the most relevant issues.

Re-inventing Comparative Law Teaching

[25] (Baums 1999).

Those of us who believe in the need to re-invent comparative law scholarship and teaching today are all in the process of experimenting with curriculum reform and course design. The 2006 meeting of the Association of American Law Schools devoted several panels to the topic. Rather than summarizing the various approaches currently tried by different law schools in this country, in the remaining space I will summarize some lessons from my own experimentation at Columbia Law School.

Lawyering in Multiple Legal Orders

More and more law schools in the United States are considering offering a basic course in either international or comparative law in the first year of a three year law school curriculum. The first law school to implement his reform has been Michigan Law School with a course in transnational law.[26] For those of you not familiar with the US system, (only) the first year typically has mandatory courses and most of them introduce students to the key areas of the common law (contracts, property, torts, civil procedure), and the government system (constitutional and administrative law).

Columbia law school now offers students in their first year an elective, one of which is "Lawyering in Multiple Legal Orders".[27] The basic idea of the course is to confront students with the notion that in today's world they can't afford to specialize only in a single legal order, but that they are operating in multiple legal orders both in the horizontal and the vertical dimension.

[26] For details see http://cgi2.www.law.umich.edu/_ClassSchedule/aboutClass.asp?term=1570&classnbr=10097.
[27] The course is currently co-taught by Professor George Bermann and myself.

On the horizontal axis they find “other” legal orders, in particular foreign law. Even if they will never advise on foreign law, they will have to be sufficiently knowledgeable to understand their counter parts from a different jurisdiction. US lawyers face a serious comparative disadvantage in this regards. US law schools have trained thousands of foreign law students in their LLM programs. They are not conversant in US law in addition to mastering their own domestic legal systems. By contrast, by far the majority of US graduates do not have even basic knowledge in foreign legal systems and the number of students who take advantage of dual degree or foreign LLM programs has remained small.

On the vertical axis students are introduced to international treaties and conventions, to regional governance structures, including the North American Free Trade Agreement (NAFTA) and international dispute resolution mechanisms within the World Trade Organizations (WTO) as well as the International Centre for Settlement of Investment Disputes (ICSID). The basic notion of “multiple legal orders” is familiar to any lawyer working in federal systems where substantial lawmaking powers are vested with the states rather than the center. The international context, however, adds complexity.

The goal of the course is not to introduce students to as many foreign legal intricacies as possible. Instead, they should learn that the premises on which legal orders rests differ around the world and that this can be traced all the way into specific legal rules, and in particular into adjudication. Traditional comparative law issues, such as the role of a “consideration” in Anglo-American contract law and its absence in most civil law jurisdiction as well as the Vienna Convention will be discussed. Of even greater importance, however, is how courts in different countries interpret “good faith” principles when applied to contracts. How much deference do they give to the

parties, at which point will they intervene, and if they do, will they cancel the contract impose their own adaptation?

The classic example, of course, is Germany, where the German Supreme Court of the time (the Reichsgericht) relaxed the principle of *pacta sunt servanda* and instead reverted to pre-codification principles that gave the courts to power to intervene in and adapt contracts.[28] The critical issue here is not that the American Uniform Commercial Code (UCC) also includes reference to good faith. More important is how these principles have been used and how courts perceive their role in adjudicating contracts. This is a critical example to demonstrate that courts in civil law countries are not nearly as passive as the conventional caricature of the different legal system might imply. Given that the Vienna Convention also refers to the possible of adapting contracts when facing unforeseeable circumstances, students of international and comparative contract law need to develop a sense of how such broad clauses may be adjudicated in different jurisdictions.

Another question we address is how different legal systems respond to the problem of unforeseeable risks and what remedies do they offer to victims once the risk has materialized? The example we use in our course materials is how the US, Japan and France have managed and responded to the health crisis triggered by HIV/AIDS, and in particular what remedies hemophiliac patients had who contracted aids from blood products before the transmission channels were known.[29]

The comparison can be used to discuss the class action in the US, the French *action civil*, and more generally the organization of France's court system, the scope

[28] A detailed analysis of this adjudication on the basis can be found in (Dawson 1983).
[29] For a detailed analysis of these differences see Feldman, E. A. (2000). "Blood Justice: Courts, Conflict and Compensation in Japan, France, and the United States." Law & Society Review 34(3): 651-701.

of strict liability in the three systems, and gives an opportunity to discuss more broadly legal responses to product liability issues, including the European directive on product liability and how Japan has used it as a source when designing its own legal response (Rothenberger 2000). However, it also offers an opportunity to discuss systemic differences across countries. Such differences include the prominence of individual civil litigation in the United States, which often trumps insurance schemes or compensation funds found elsewhere. Other systemic differences include the prominence of public apologies in Japan, which are virtually unknown in the US. Finally the French example illustrates that the organization of production – here the "blood market" can be critical for how a crisis pans out in a given jurisdiction. The French market was state controlled and critical facilities for producing blood products were state owned. This in conjunction with an import ban on foreign blood aggravated the crisis. Moreover it turned out to be a major reason for the crisis erupting into a full blown political scandal with criminal, not only civil and administrative action brought.[30]

In the section on property rights, we allude to technical issues, such as the existence of public registers for land and its significance for verifying ownership. However, the core of the materials focuses on how to effectively govern a critical resource – oil – either through property rights, contracts, or governance structures, including governance structures for oil revenue. Given the increasing demand for oil the relevance of governing oil resources is beyond doubt.

In sum, the goal of the course is to compare legal solutions to relevant social problems across a range of legal systems. While Western legal systems as well as Japan still feature prominently, course materials include cases from China, Russia,

[30] See Feldman supra at note 29.

Mexico, and South Africa. The message is clear: We do live in a world of multiple legal orders far beyond the Western or Northern Hemisphere.

Law and Capitalism

Another experiment in teaching comparative law is a seminar entitled "Law and Capitalism".[31] The goal of the seminar is to investigate the many roles of law in different capitalist systems around the world. We first introduce students to basic readings in comparative institutional analysis, comparative law, comparative financial systems, etc... In a second step we divide the class into teams with each team working on a particular case study. We selected several cases, some of which may be duped "corporate scandals", other are perhaps less scandalous, but nevertheless reveal interesting tensions or problems in the prevailing governance system. Example include Enron in the US, Parmalat in Italy, SK Group in Korea, Yukos in Russia, and the Mannesmann trial (I described above) in Germany. Materials consist primarily of newspaper clippings about the scandal, some legal background materials (i.e. a company law) and, if available, scholarly analyses of the case. Students are asked to conduct what we call an "institutional autopsy" on the basis of this material. Just as a pathologist who conducts an autopsy to identify the causes of the patient's death, students are asked to use the scandal or break down of an existing governance system to explain its immediate as well as its more remote causes. In many cases the immediate causes of the problem are easy to identify, such as the forging of financial statements, falsifying tax statements, or the like. In medical parlance, however, these

[31] The seminar is co-taught with my colleague Curtis Milhaupt.

are only the symptoms. We are more interested in the disease, i.e. a governance system that comes under stress as a result of foreign competition.

Recall the Mannesmann case discussed above.[32] The first question this case raises for a group of students from different countries is what is the scandal. US students are inclined to view as scandalous the fact that a criminal prosecution was instigated for an action that appears to be consistent with standard corporate practice. For German and many other continental European students, that scandal lies in the fact that the compensation committee "wasted" €15 Mln on Klaus Esser who had done what would have been expected of every CEO in his position and who was about to leave the company anyhow and thus could not add much value anymore. Pushing the analysis further, the case allows us to analyze the role of employee representatives on corporate boards and their ambiguity vis-à-vis decisions that clearly benefit shareholders and management, but not necessarily employees, their main constituency.

Concluding Remarks

The goal of this contribution has been to discuss the need to re-conceptualize the teaching of comparative law at the beginning of the twenty-first century. The major point is that lawyers in today's world need to be familiar not only with their own legal system. They must also know the basic principles of foreign and international law. For law schools and teachers at law schools this poses the question

[32] See text accompanying note 23 supra.

as to what exactly students should learn and how to present materials to them. The two courses discussed above were designed for American law school students. Not surprisingly, they focus on case studies and case analysis. However, this does not imply that similar approaches would not work elsewhere. The major goal of these and other courses we are designing at Columbia Law School can perhaps be best summarized by using a metaphor. Each legal system might be compared with a language. It is impossible to be fully fluent in many different languages. Translations help, but do not always work. If students, however, understand that languages have grammatical structures and learn basic features of these structures, they can access foreign languages more easily and are more likely to appreciate the beauty of different languages even if they do not achieve fluency in them.

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