The Top 10 Reasons Why International, Comparative and Foreign Law Are Vital to a Kansas City Attorney

By Professor Colin B. Picker, Associate Professor – UMKC School of Law
(Professor Picker teaches a wide variety of international and comparative law courses at the law school)

Kansas City is almost as far from foreign lands as is possible within the United States. Nonetheless, our dreams to visit far off countries and to enjoy other cultures should not be cast aside. Ambitions formed during law school to fly to cities in impossibly named countries, to assist foreign princes and to negotiate deals with exotic accented adversaries are as valid for Kansas City attorneys as for those in New York, Washington, D.C., and San Francisco. Indeed, far from abandoning those dreams, now is a superb time to embrace them and make them our own. Globalization demands it. Just as at the beginning of the last century our legal ancestors had to become familiar with the expanding and dynamic interstate commerce of the United States, so too Kansas City lawyers of this new century must be familiar with the modern international commerce—regulated and informed as it is by international, comparative and foreign (“ICF”) law.

What is this ICF law? International Law is the law regulating states and international organizations (and occasionally individuals through such areas as human rights). Comparative Law is a way of considering the law from one or more jurisdictions—it involves looking at the law from above, noting characteristics, similarities and trends across systems. It is a very powerful tool when seeking to understand and solve legal problems. Foreign Law is simply the domestic law in another country—and hence rather important in transnational legal work!

More specifically and more down to Earth as we in the Midwest might prefer, I have assembled ten good and tangible reasons that show why a local attorney should know or consider ICF law as part of his or her practice and legal mind-set. Of course, there are many other reasons to know ICF law, and I welcome suggestions and comments, but space considerations here dictate the limitation to the good reasons for knowing and understanding ICF law.

Therefore, and in reverse order, a local attorney should study, know, use and consider ICF law because:

9. International, Comparative and Foreign Law Assists in Better Understanding Our Own Law

Only through examination of other systems can one know and appreciate the subtleties of our own system. It is like seeing with a new lens—an objective one. The American legal system is a member of a legal tradition—the common law tradition. That tradition is itself, part of the larger Western legal tradition. Examining how other members of these traditions have responded to stresses and developments teaches us lessons that may be applicable within our own legal system. Studying other systems and traditions also shows that the choices our system made in responding to crises and developments were not preordained or the only correct choices.

For example, the response of the English, our legal ancestors, to the Pope's removal of priests from factual determinations in disputes lead the Europeans to adopt the ecclesiastical inquisitorial system to resolve factual questions. In contrast, the English adopted a modified form of the jury to determine facts. Thus today for fact determination we may employ the jury while the non-common law world typically employs a panel of judges. Clearly, both systems work. Similarly, our understanding of the options for the future of the jury can also be informed by the relatively more recent English abandonment of juries in most civil cases by the end of the 1960s. That change does not appear to have harmed their system of civil justice. Consideration of these issues allows us to more clearly consider the present and future operation of the jury in the United States.

8. ICF Law Stories are Entertaining, Different and Illuminating

ICF concerns everything from the law of sunken treasure, high seas piracy, corruption of foreign governments, the Cuban embargo, wigs (on the heads of barristers and judges); and even foreign prisons and their "slipping out" sanctions rules.

Beyond their sheer entertainment value, these examples of foreign and international law are also very useful in domestic law. For example: the regulation of international corruption may inform the U.S. anti-kickback statute; the U.S. Supreme Court case, United States v. Smith, concerning piracy, was an important case regarding the level of specificity needed when defining a crime. The use of wigs raises questions about the roles and positions of lawyers and judges within the court room itself, while the European Court's consideration of "slipping out" by Scottish prisoners helps us to better understand the issues surrounding our own standard of "cruel and unusual punishment."

7. Lawyers Are Expected to Understand the News and World Around Them

Colleagues, family and friends will frequently turn to the lawyer among them for explanations about such current affairs issues as: the legality of the trial of Saddam Hussein; the legality of the invasion of...
international law

Iraq, and how Austria could send someone to jail for simply denying the Holocaust. These are all ICF law issues.

Also, today it is increasingly common for Americans to work or take vacations overseas. As lawyers, we tend to view the world through legal lens and should be curious about the legal environment of those foreign lands. Additionally, our travel companions will expect their lawyer companion to be knowledgeable about all law – including the law of that foreign land. ICF law helps us understand the general characters and operations of such foreign environments, even if we may not know the specific details of the country at issue. That general character may include the role of the police, the operation and structures of the courts and judges, public attitudes to law suits, the federal structure, and many issues present in the foreign legal system.

6. Law Firms Are Increasingly International

Martindale Hubbell lists about 40 firms in Missouri that claim to do international law work. More local firms probably do ICF work, but are simply not listed as such. According to Martindale Hubbell, some of those firms also herald their international law practices even have foreign offices: Armstrong Teasdale – Shanghai; Blackwell Sands – London; Versfeld & Hugo – Sydney, Australia and Shook Hardy Bacon – London/Geneva.

Additionally, if these firms are making money from ICF work, that suggests many more firms could and will enter the field. Furthermore, when law firms and attorneys with domestic law practices interact with these international law firms, it will serve to bring those otherwise domestic lawyers into contact with ICF law.

Indeed, knowledge of ICF law is a sign of being a modern law firm. Firms and lawyers without some basic familiarity of ICF may be viewed as out of touch, and not contemporary. Ignoring globalization may be akin to being a Luddite (those nineteenth century anti-globalization rioters).

5. International and Foreign Law Is Ever More Pervasive

Increasingly our law is impacted by international legal obligations. These commitments are not just in the international trade law context. Today there are specific international regulations that may impact everything from consumer goods labeling, IP protections, and technical certifications, to liabilities in contracts, mergers and acquisitions and product liability claims. The sources of these laws are often international treaties such as the NAFTA, the Warsaw Convention, or the UN’s Convention or Contracts for the International Sale of Goods (the “CISG”).

Sometimes it is the domestic law of foreign countries that affects our legal problems, such as when a merger must also seek a foreign competition law bureau’s approval prior to the merger – even though the merger is between two U.S. companies. Even in litigation before a local court, local lawyers may increasingly encounter controversies involving contracts that include a choice of law and/or forum clause that chooses a foreign jurisdiction or source of law. In such a case the local attorney will need to work with that law, through a foreign expert or otherwise, but regardless will need to understand the nuances of the foreign legal system and how it differs from the US and other systems.

ICF law may even help clients “cope” with foreign competition. For example, at lunch, a client may complain of foreign competition in its market. Knowledge of ICF may suggest some strategies that might be pursued, such as investigating whether the foreign company is engaged in illegal dumping, or receives prohibited governmental assistance back in its home country. Alternatively, if the foreign competition is a result of import surges resulting from new trade agreements, then trade law safeguards might be an option worth investigating. These and other international law devices might result in saving the client’s business. Thus, Kansas City lawyers need to be familiar and comfortable with these international and foreign laws – our Kansas City clients should demand it from us.

4. Foreign Clients Are Increasingly Common, and They Have ICF Law Needs

In today’s globalized world it is highly likely that an attorney will have non-U.S. clients. And this applies to all branches of the law – from family law to in-house corporate work in corporations with foreign branch offices. Kansas City is increasingly a destination for immigrants and relocated foreign workers, while many of our businesses are going global with offices and activities overseas in order to stay competitive in a global market.

Understanding the legal culture of clients from overseas can be vital when trying to explain our legal culture and its obligations. It will be easier to explain American property law to a foreign business person if one understands that the foreigner is used to different rules and then to explain in what way the local rules differ from the American rules. Similarly, when helping a foreign client incorporate in Kansas, it will be helpful to understand that the client’s expectation that a notary should be involved at the highest levels stems from the very different character and role of the civilian notary – one of the highest legal positions in the continental legal tradition.

3. To Avoid Malpractice, and Even Civil and Criminal Personal Liability

As an initial matter, lack of knowledge of ICF may itself be malpractice. Perhaps even the failure to inquire about these regulations may be considered malpractice. For example, the failure to consider that the CISG may apply instead of the UCC to a transaction may be malpractice.

Nor is it just at home that these dangers lurk. The legal environment abroad can be very different from that typically encountered by an American lawyer. For example, simply trying to serve process in a foreign country can result in the unknowing American attorney being subject to criminal sanctions in some countries, where service of process is exclusively a governmental activity. Similarly, representing a foreign national in criminal proceedings, and not taking the immigration consequences in consideration, may subject your client to deportation. How do you explain that to the U.S. spouse or the U.S. employer who is directly impacted by thereby?

Furthermore, even our own law can be surprising in how it operates when matters of foreign, transnational and international law are involved. One example is the use of “nationality” based jurisdiction for some of our laws, such as for the Foreign Corrupt Practices Act (“FCPA”), which may apply to Americans regardless of where they are when they engage in the activities at issue. Another example is that it is all too easy to inadvertently violate our export control simply continued on page 12
by transferring controlled information or violating our sanctions laws
when giving legal advice on how a transaction can be structured in an
embargoed country.

2. U.S. Judges and Legislators Are Increasing Employing ICF
Materials
American law, whether federal or state, is constantly developing
and responding to new issues, and thus may be influenced by ICF
law. For example, in the recent Atkins v. Virginia6 and Roper v. Sim-
mons7 cases on capital punishment, some members of the Supreme
Court employed ICF in their opinion. Nor are those cases unique.
Accordingly, the diligent advocate will consider the utility of reaching
out to foreign materials in support of a legal argument.

Also, ICF law may be useful when drafting legislation. It is not
unlikely that at some point in her career, a lawyer will be involved in
a municipal or state effort to craft legislation. This may happen either
as a result of the lawyer's personal role as a legislator or, more likely
and frequently, as a result of trying to further a client's specific inter-
est (the legal side of lobbying). At that point, a lawyer should turn to
other systems' attempts to resolve the issues through legislation. Nor
should such examinations be confined to other American states.
Indeed, if it is a new issue, it is not unlikely that a foreign jurisdic-
tion has examined the issue, and while politically one may not
want to follow or be seen to follow their direction, it is immensely
helpful to consider their solution to the problem.

1. $14 Billion Plus in International Trade for the Kansas City
Metropolitan Area
$14 Billion may appear to be a surprisingly large number. But
the explanation of how that figure was derived helps to stress the
point — the very significant volume of trade, and corresponding
legal services, in and out of the Kansas City metropolitan area.
This large figure was extrapolated in part from the most recent,
although dated, published trade figures for the Kansas City metropoli-
tan area — from 1998. At that time the U.S. government reported
3.8 million dollars in export trade in goods to the world from the
Kansas City area.8 But typically the United States imports more
goods than it exports. Thus, at least the same amount was likely
imported into the Kansas City area.9 Furthermore, the United
States typically exports services at about one quarter of the level of
our exports in goods.10 So, using this as a calculation, we can con-
servatively estimate that international trade in goods and services
contributed over 9.5 billion in 1998 to the KC Metro
region. Even conservatively extrapolating the data since 1998, based
on the 50% increase in trade for Missouri and Kansas in those
years,11 this results in a figure of at least 14 billion dollars. I suspect
this number underestimates the true number by a few billion dollars.

Now, the important point about this 14 billion dollars is that it
all requires lawyering. Everything from the contract writing and
negotiating, customs clearances, hiring of foreign nationals/spe-
cialized workers, and even the eventual litigation from when the
transactions go bad, as too many inevitably will, requires lawyer-
ing. Much of that lawyering does happen here — and more could if
only our KC lawyers knew about it!

1 E-mailed ideas and suggestions welcome (pickerc@umkc.edu).
2 175 U.S. 677, 700 (1900).
3 The Fourth Lateran Council of 1215.
4 18 U.S. 153 (1820).
7 743 U.S. 521 (2005).
8 On file with author.
9 One estimate had imports in 1999 at $5.6 billion. See William Testa,
Thomas Klier, and Alexei Zelene, Estimating U.S. metropolitan area export
and import competition (Federal Reserve Bank of Chicago) at 16 (available
10 See Reputational Failures In International Law: A Comparative Review
of United States and Canadian Trade Actions, 30 BROOKLYN J. INT'L L.
11 See generally TradeStats Express™, a service offered by the Department
of Commerce.