

Lawyering beyond law

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It is all very well to have the legal tools of your trade down pat, but how does one effectively represent clients in jurisdictions where all of the ground rules are unreliable? ROBERT AMSTERDAM addresses some grass-roots challenges of foreign practice

One of the challenges of globalisation for an international lawyer is that a smaller, more interconnected world doesn't come complete with a rule book providing handy instructions on how to deal with the myriad problems that may be encountered in emerging markets – that is, jurisdictions where the rule of law is under threat. In such situations legal practitioners often find themselves requiring very different skills and knowledge than those their training and previous career exposure may have equipped them for.

Unfortunately, as always, there is no substitute for experience. Having personally spent many years travelling and working in Eastern Europe, Africa and the Middle East, I have found there is an invaluable 'street sense' that you develop – part of which is the ability to calculate risks in new environments and gauge quickly who can and cannot be trusted. Of course, in each location one also must utilise sensitivity and intelligence in relation to the local ethnic, gender and race issues affecting your activity there. However, in addition to these vital capabilities that can only be learned on the job, lawyers first starting out in less familiar territories may find some of the following advice useful.

At the outset, in emerging markets it is more important than in Europe for lawyers to exercise care in their choice of client. In fact, your life may depend on it. Many individuals and corporations believe that where the rule of law is under threat it is an opportunity to behave

far differently than at home – I call this practice 'constitutional dumping' and it is often on display with respect to both environmental and competition law. Also, in these less sophisticated markets you are not seen as an independent lawyer but rather as an agent of the client, which means you can be viewed as a legitimate target for pressure tactics. Additionally, given the major changes to money-laundering legislation in Europe, care must be exercised concerning the provenance of the funds provided to you.

International lawyers today tend to be all caught up in using arbitration and such arcane and expensive methods in order to obtain a reasoned result. Yet many legal systems allow for speedy access to their courts through the use of injunctive types of relief. While you should exercise caution and be aware that your retreat to accustomed terrain is well and truly in your client's best interests, there is nonetheless logic in exhausting local remedies – particularly where your client wishes to remain in the jurisdiction.

And so, if instructed to assist in sorting out a problem in West Africa or Central America, one must first consider what generic steps are worth taking. Although as lawyers we are trained to work within the parameters of a legal system to obtain a result based on an open, fair and transparent process, we cannot assume this vision is universally accepted. It is critical when communicating with local counsel to determine who in fact they actually work for. I have often had to isolate

or discharge local counsel after discovering that their actual allegiance was either to the local partner, government regulator or corrupt official.

In many countries, the client relationship does not carry the same fiduciary duties as in typical Anglo-Saxon systems – which comes as a great surprise to even the most astute lawyers who formed relationships at some international conference attended by local counsel. (Note to file: politically-connected local firms in these countries do not send their heavy-hitters to these events – more often than not you will see representatives of the *comprador* class who are extremely elegant and out of power).

In every country my first step is to find a local criminal lawyer. They are poorly paid encyclopedias of indigenous lore and information, and retaining this local seer will save you and your client a lot of valuable time and money. My own inclination is to use a strong local practice and not the office of a law firm based in London: after all, when problem-solving we want to reduce the level of institutional bias by identifying what you bring to the table and ensuring that you do not replicate it. All too frequently, lawyers try to find people in various far-flung territories who look and sound just like them, but in litigation matters a high level of institutional bias and adherence to the status quo results in a narrow amplitude of advice. I am not suggesting going to Peru and recruiting from the Shining Path (a Maoist guerilla group), but hiring individuals who have a real understanding of the local political and legal networks in place.

Speaking of politics, in emerging markets the traditional separation of powers can often appear a foreign concept – and here I not only speak of corruption but of political influence and state capture. It is

therefore essential to get local advice on how best to resolve the dispute, but do not make the fatal assumption that the local lawyers, your client or the opposing counsel will necessarily resort to the law.

A few years back in Venezuela I was involved with representing a foreign-owned hotel which faced the possibility of being taken over by armed thugs who were attempting to change the status quo on the ground prior to international litigation ensuing. Our reaction was to bring in our own security so as to mount a show of force with strict instructions that violence was to be avoided. In addition we invited an important foreign ambassador to the hotel for a festive meal so as to diffuse the threat and raise the profile of the case to the point where any serious violence would have become an international incident and have a negative impact on the host government. This high-risk decision was taken following consultation at every level within the company and involved placing myself and my colleagues on the firing line interacting with security and the local police. Unfortunately certain risks are non-delegable.

The manager of the hotel discovered that our opponents were engaged in a plot to wire tap and intercept computer communications intended for us and our client. Given that the client's communications were intercepted while in the US we were able to utilise a statute granting extra-territorial application, allowing us to bring the Venezuela defendant into the US courts.

This case also involved frequent use by the defendant of local police to intimidate expatriates and subject them to interrogation. It took a tremendous amount of handholding to assist our client through this ordeal and once again our investment in local criminal counsel paid off handsomely.

In emerging economies and developing countries the judicial and regulatory corruption is endemic. I do not advise clients to engage in judicial corruption because aside from being wrong, as well as illegal, it is highly dangerous, and more likely than not a foreigner will end up on the losing end. Another compelling reason is that if one is engaged in bribery you have handed local counsel a lifetime opportunity to extort from you and your client. The other disadvantage to illicit behaviour is that it sets a precedent for your client.

To survive in emerging markets, clients must ensure that their reputation is unimpeachable and their reputation bankable. Therefore I will often involve the relevant embassy to engage on the client's behalf and interface with local government, requesting the bureau makes a political case against the harassment by either private or public interests, that it is contrary to the host country's long-term interest. Interestingly, this intervention does not require the client to have mastered the dispute. However, it is your job to demonstrate to the host government the importance and negative ramification of the behaviour being manifested.

At times it is possible to use human rights law as a sword, rather than a shield. Systemic lack of due process can in severe circumstances constitute a breach of international obligations including human rights conventions, bilateral and multilateral trade agreements and/or partnership agreements. In this way, lawyers may therefore gain access to what one might call international legal nodes.

Proper attention to these nodes can yield disproportionate results due to their infrequent use. The power of 'soft law', or quasi-legal instruments, is that governments in these markets are sensitive to their

reputational risks and their effect on foreign direct investment and/or regime stability. And so, non-binding resolutions or third-party investigations by human rights organisations or NGOs can therefore have a serious widespread impact beyond simply the litigation at hand.

In many of these markets business remains separate from the human rights advocacy available through international NGOs such as Transparency International. However, I believe this is a serious error, as they are natural allies. We are in a truly global marketplace where local elites are constantly competing with each other and those in other markets to demonstrate compliance with a more universalist approach to human rights and due process. The ascension of certain of these countries into either the EU or various regional arrangements, makes their activities in the area of rule of law and justice more easily accessible to international review and pressure. Study of all these nodes before embarking on either local or international litigation is advantageous. After all, at the end of the day, alliance building is one of the key tools for business advocacy. Don't stop at the embassy, but meet with local groups that may share your client's concerns or issues.

Finally, it is critical to understand that because of repressive legal and political structures, contests – whether before the courts or through lobbying or other means – may involve far different aims than European litigation. They can encompass sophisticated political messaging, pre-empt regulatory attack or attempt to destroy a cartel or conspiracy that in a more transparent market would never be tolerated. The nature of these goals and the difficulty in attaining them need to be well understood by both lawyer and client. ■