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International Parochialism

Sydney M. Cone III.

International

by Sydney M. Cone, III, Professor of Law

The legal profession the world over is frag-mented into segments that protect themselves from one another. If you have the opportunity to look through *International Trade in Legal Services,* (Little, Brown 1996) you will probably be struck by the parochial and often petty rules that govern the cross-border practice of law; rules that seek to exclude, or minimize the role of, nonindigenous lawyers.

International legal practitioners may bask in the image of gigantic, even glamorous, transactions, but their professional lives are hedged in by regulations that, in the name of protecting consumers of legal services (usually referred to with feigned altruism as "the public"), in fact offer protection of the type represented by high tariff barriers or low import quotas. These regulations are less likely to be inspired by concern for the public at large than by an entrenched "guild-ridden" mentality.

Among the forces that work against the easing of restrictions on cross-border legal practice are bar associations and bar regulators who think of the practice of law as a privileged activity properly parceled out amongst local fiefdoms. Often, they find it unduly risky to seek the alleged benefits of developing a profession aligned with the needs of transnational clients, or they are driven by fears or dislike of foreign-trained lawyers, or they consider it unprofessional to view lawyering as susceptible of regulation under rules developed for trade in services generally. Facing (and frequently overwhelmed by) these forces are, first, those lawyers and law firms that stand to benefit from freer trade in legal services and, second, governmental and supragovernmental agencies charged with liberalizing the terms of trade in professional services.

Progress in achieving more liberal regulation requires that principled proselytism be backed by gritty determination. Typically, the high ground to be captured is guarded, in each jurisdiction, by local legislators and administrators accustomed to responding (if at all) only to recognizable constituencies. Outside of London and New York City, it is unusual to find a body of international legal practitioners who have the potential to develop muscle where it counts, and even in those two cities they must first learn to deal in the crass coin of local politics.

In addition, it is not easy for the cross-border legal profession to obtain help from trade negotiators, because legal services (unlike hormone-enhanced beef or air transport) do not represent a big ticket item in any country's balance of trade. Even so, it is occasionally possible for the clamoring of foreign lawyers to be heard in the arena of trade negotiations, particularly in those opportunistic moments when an embattled government is looking for a relatively painless way to give up something in an effort to conclude a difficult negotiation on weightier trade issues. Thus, in the 1980s, the Japanese Government, under American pressure on many trade measures, dropped its protectionist barriers a bit to let in foreign lawyers (and thereby, in the eyes of Japanese

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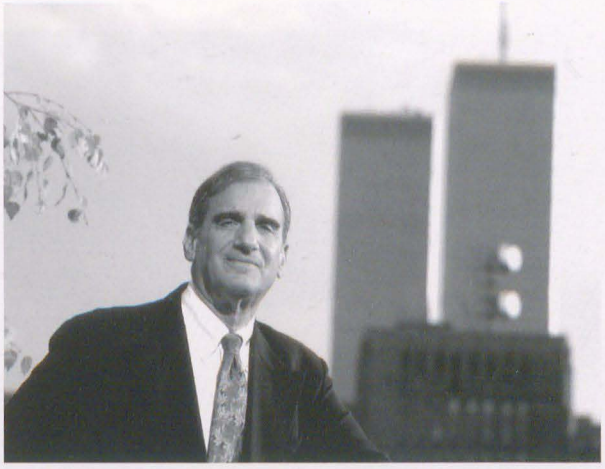
lawyers, betrayed the local profession to appease the United States). A few years later, the Japanese profession, through its government, succeeded in limiting the damage in the closing hours of the Uruguay Round in December 1993, when U.S. negotiators acceded in part to the Japanese position on legal services (and thereby, in the eyes of U.S. lawyers, sold them out in order to secure a deal on semiconductors).

For the foreseeable future, the regulation of international legal practice will remain a parochial patchwork which will have to be evaluated jurisdiction by jurisdiction. Not unexpectedly, two of the principal areas to keep in mind are China and the European Union.

China, having admitted over 70 foreign law firms under legal practice rules that in key respects are fraught with ambiguity, seems to be moving toward increasing protectionism in regulating cross-border practice. Within China, a crucial test could arise later this year after Hong Kong becomes a Special Administrative Region, and China finds itself free to continue or modify the liberal legal practice rules currently in effect in Hong Kong and under which it now exists as a major international legal center.

The European Union, after two decades of intense infighting, seems to be on the verge of adopting a Directive on the intra-EU establishment of lawyers. Should it do so, the next tests will involve implementation of the Directive by the EU member states, and whether it leads to less-restrictive rules for non-EU (notably U.S.) lawyers and firms seeking to become established in those member states. Within the EU, France presents the severest test case, because it imposes on non-European lawyers (e.g., on U.S. lawyers) a protectionist bar examination for which it is extremely difficult to prepare and which is administered in ways that permit the arbitrary flunking of candidates. ■



Sydney M. Cone, III is the C.V. Starr Professor of the Law of International Trade and Finance at New York Law School and Director of the School's Center for International Law. One of the nation's top experts in the field of international law, Professor Cone joined the Law School's faculty after 37 years with Cleary, Gottlieb, Steen & Hamilton, where he was instrumental in the development of the firm's global practice. He is the author of International Trade in Legal Services *(Little, Brown 1996).*