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The Emerging Legal Perspective on Transnational Business Law: Development Law Theory and Practice

Keywords

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AN EMERGING LEGAL PERSPECTIVE ON TRANSNATIONAL BUSINESS LAW·
DEVELOPMENT LAW THEORY AND PRACTICE

Reviewed by Heather K. Beattie

RUMU SARKAR, *TRANSNATIONAL BUSINESS LAW· A DEVELOPMENT LAW PERSPECTIVE*, Kluwer Law International, The Hague, The Netherlands (2003); ISBN: 90-411-9921 7· 419 pp. (hardcover).

RUMU SARKAR, *DEVELOPMENT LAW AND INTERNATIONAL FINANCE*, Kluwer Law International, The Hague, The Netherlands (1999); ISBN: 90-411-9743-5; 275 pp. (paperback).

The field known as international business transactions (IBT) continues to play a critical role in relations between developing and developed countries. For this reason, Professor Rumu Sarkar's work in this area is unique and important. She deserves praise for her ability to take the enormous amount of information in the IBT field and apply it in a development context. In Ms. Sarkar's first book she outlines the basic legal and theoretical principles of development law and international finance. Her second work contains a more practical application of development law to the everyday international business environment. Both books outline the importance of international business and investment for the economies and societies of both developed and developing countries.

Ms. Sarkar's most recent work, *Transnational Business Law: A Development Perspective* is a text book intended to give concrete illustrations and guidance to beginning international practitioners and law students. She takes a development law approach because many cross-border (transnational) transactions take place in the developing world. Accordingly practicing attorneys ought to be familiar with the concerns of their host country counterparts regarding critical economic and political decisions. The fundamental starting point for any transaction should be a basic understanding of what each party hopes to gain in both a narrow and broad sense from the particular transaction so that both parties can benefit and advance.

The book is divided into three parts. Part I explains the conceptual framework. These first two chapters explain the essential elements of a contract for the sale of goods or services. An international contract of this sort will

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generally be governed by the United Nations Convention on the International Sale of Goods and Services (CISG) unless another source of law is stipulated or one of parties to the transaction is not a signatory to the convention.¹ Moreover, a contract usually includes which taxes will be paid, when and where delivery will be made, what warranties apply, and who bears risk of loss among other things. The International Chamber of Commerce (ICC) publishes "International Commercial Terms" referred to as INCOTERMS that define common terms used in the international context such as FOB vessel NYC² means the seller pays all charges until the goods are actually boarded on the transportation vessel. Then seller receives a clean bill of lading and title of the goods passes to the buyer, who assumes the risks of damage, loss, cost of insurance and transport to NYC. These standardized terms help prevent miscommunications between buyer and seller, but they must be specifically referenced in the contract.

The second half of Chapter 1 addresses letters of credit. There are many different types of letters of credit and they are common in IBT Ms. Sarkar includes annotated forms at the end of almost every chapter so that one can look at the form and refer to the text to explain the significance of each provision of the form. For example, at the end of Chapter 1 there is a sample international sale of goods contract and a sample irrevocable letter of credit. This functional approach is useful for any practitioner, especially those new to the field.

The second half of Part I discusses technology transfer and intellectual property rights. In the international sale of services the transfer of technology is a critical issue. Within the technology transfer area there are a number of sub-issues including whether the agreement is for a license, joint venture, sales agent, or distributor. These agreements are one of the most important for developing countries because of the potential they carry for increasing production of goods as well as increasing the ability of locals to work with advanced technology. Increasing productivity generally gives rise to increasing economic development.³

The remaining two parts of *Transnational Business Law* explain how to structure a cross-border business transaction. Part II includes managing issues of commercial risks such as: credit enhancement, loan guarantees, and debt issues. Ms. Sarkar explains how to negotiate the terms of a loan agreement as well as what principles of negotiating to use. The international financial framework is incorporated throughout the book. This framework incorporates the responsibilities of the International Monetary Fund (IMF), which is in charge of stabilizing currencies world-wide, and the International Bank for Reconstruction and Development (IBRD) also known as the World Bank, which is in charge of financing development projects world-wide. There are many regional development banks that nation-states will borrow from to finance their domestic projects. Ms. Sarkar includes examples of development projects and how they are

1. RUMU SARKAR, *INTERNATIONAL BUSINESS LAW: A DEVELOPMENT LAW PERSPECTIVE* 4-5 (2003).

2. *Id.* at 11.

3. Development in its narrowest sense means increasing per capita Gross National Product (GNP) for a country.

funded are at the end of the chapter.

Part III manages issues of non-commercial risks such as: political risks, investment risks, and risks of litigation. This part of the book is perhaps the most recognizably pertinent to a development analysis because of the need in developing countries for additional credit enhancement. For private investors the most important issue is whether the pertinent countries have a bilateral investment treaty (BITS). There are now hundreds of these treaties covering private investment overseas.⁴ The second way private investors may be protected is by obtaining political risk insurance from such companies as the Overseas Private Investment Corporation (OPIC) or the Multilateral Investment Guarantee Agency (MIGA). These companies will provide insurance against the classic credit risks such as coups, war and political violence, nationalization and expropriation, and currency inconvertibility⁵ Ms. Sarkar has a wonderfully useful comparison of the equity cover provided by OPIC and MIGA at the end of Chapter 6.

The second half of Part III covers information regarding the resolution of disputes. Ms. Sarkar addresses three possibilities for when “things fall apart.”⁶ First, mediation may be appropriate under the circumstances, particularly if the problem is an intellectual property issue. Second, arbitration is similar to litigation except the contracting parties may agree to the arbitrators, who are non-judicial and non-governmental. The parties also agree to the law that will be applied in their case. Most important is that arbitration awards under the New York Convention will be recognized almost anywhere⁷ whereas judgments from a country’s domestic courts will not generally be recognized in another country. International litigation can be costly and confusing so the key is to negotiate for alternative dispute resolution prior to signing the final agreement. One common forum is the International Centre for the Settlement of Investment Disputes (ICSID), which is part of the World Bank Group. ICSID is governed by its own rules and procedures.⁸

In sum, Rumu Sarkar’s text book takes a clinical teaching approach to a field that is generally taught by using either case book method or a form-based/protocol supplement method. It is a refreshing methodology to actively incorporate a development law perspective into an international corporate cultural that generally leaves such issues beneath the surface.

Ms. Sarkar’s first book, *Development Law and International Finance* lays the theoretical groundwork for understanding cross-border transactions. The book is full of interesting historical and legal underpinnings of economic development. The book’s functioning premise is that most frameworks for cross-border transactions fundamentally do not have compatible legal infrastructures, cultural beliefs on which both parties may rely, or similar economic principles. Economic

4. RUMU SARKAR, *INTERNATIONAL BUSINESS LAW* 237 (2003).

5. *Id.* at 235-36.

6. *Id.* at 349.

7. As long as the countries are both signatories to the NYC.

8. *Id.* at 361.

development in its narrowest sense is defined as raising per capita standards of living. However, development occurs socially, legally as well as in the economic sphere.

Part I explores the Rule of Law programs addressing theoretical principles and development law principles. Rule of Law programs aim to systematize legal changes in a country including constitutional principles, substantive principles, and institutional frameworks. Ms. Sarkar uses a definition of development law that emphasizes interdisciplinary international corporate principles overlaid with economic, political, sociological, and historical issues. The reason practitioners should be aware of this perspective is because out of 180 countries in the world more than 120 are considered developing.⁹

Part II, entitled Structural Legal Reform, focuses heavily on nation-state macroeconomic reform. It begins with an overview of international borrowing including the role of the state in financing its development by borrowing from private commercial entities and public multilateral banks (IMF or IBRD). This borrowing has given rise to serious debt crisis and the restructuring of debt loans to include structural adjustment policies. These policies have come under severe criticism in recent years because of the focus on cutting state spending at all levels to improve the government's fiscal deficit and because the policies encourage privatization of former state owned enterprises (SOEs). These policies have been generally successful in keeping inflation low and providing economic stabilization. However, the "human cost" has been born by the sections of society least able to afford it, namely women, children, and the disabled. The policies have increased unemployment rates, lowered wages, and severely reduced social services.¹⁰

Part III discusses a human right to development. Ms. Sarkar cites the Universal Declaration of Human Rights for this proposition and further explores the individual's relation to the state.¹¹ Correctly, Ms. Sarkar observes the increasing gap between developed and developing countries. She analyzes what a right to development means and how it has worked in various countries and finds that the right to development exists, but countries must actively shape this right to give it real force in international law.¹² The book suggests a rule of law program that will integrate local needs and cultures to an international principle of development.

Ms. Sarkar's unique perspective is a welcome one in the international business transactions field. The theory and practice outlined in her two books are a meld of human development and economic reality applied to transnational business law.

9. Rumu Sarkar, *Development Law and International Finance 1* (1999).

10. *Id.* at 104-5.

11. *Id.* at 213.

12. *Id.* at 249.