1995

Advising the Neocapitalists

James J. White

University of Michigan Law School, jjwhite@umich.edu

Follow this and additional works at: http://repository.law.umich.edu/articles

Part of the Commercial Law Commons, Comparative and Foreign Law Commons, and the Legislation Commons

Recommended Citation

In the early 1920s, Angelica Balabanoff, Secretary of the Soviet Comintern, wrote that all of the left-wing Westerners who had come to the Soviet Union after the Revolution of 1917 fell into one of four categories: "superficial, naive, ambitious or venal." The fall of Communism has brought a new group of Westerners to Russia. Unlike the visitors of 1922, these are from the right, not the left, but they may still fall into comrade Balabanoff's four categories.

Who have gone there to advise on drafting free market law, and I am not unique. Eastern Europe, Russia, and other countries that were formerly Soviet Republics are crawling with Western Europeans and Americans with advice about western commercial, constitutional, and other law. I write to reflect on what American lawyers can and will do for these emerging free market economies. I am more skeptical than most. With the destruction of the Berlin Wall and the decline and ultimate dissolution of the Soviet Union, free enterprise has spread eastward across eastern Europe and into Asia, to Kazakhstan and beyond. China has seen a similar but more covert rise in capitalism. This rise of the free market has brought a call for free-market law. Laws on contract, sale of goods, negotiable instruments, mortgages, personal property security, and a variety of other things are needed of a kind never required in the controlled economies which formerly existed in Eastern Europe, the Soviet Union, and China.

Americans, British and Western Europeans have offered their laws as models. Organizations such as the American Bar Association, the United States Agency for International Development, and the Ford Foundation have helped out helping hands to these countries. As an American expert on commercial law I have participated in these efforts. In 1993, Deborah Prutzman, a New York lawyer, and I spent a week in Beijing with Chinese drafters of the law on negotiable instruments. In a series of meetings since 1993 held in Ithaca, New York, and Moscow, Cornell University Law Professor Bob Summers and I have worked with the drafters of the Russian Civil Code. We worked under the auspices of the Institutional Reform and the Informal Sector program (IRIS) of the University of Maryland and at the invitation of one of its directors, David Fagelson, J.D. '85.

I write not to praise the work of Americans abroad but to note some of the difficulties I see for a "helper" who comes to a distant Asian or European country armed with experience about American law. While I have considerable optimism about the quality of law that will grow up in many of these societies, my work with the Russians and Chinese makes me skeptical about the benefits that Westerners provide.

Consider the barriers that face an American who would help another country revise its laws. A first problem is well known. It is the explosion that can occur when American chauvinism and arrogance are mixed with home country pride and defensiveness. It is a serious mistake to think the Chinese or Russians are ill informed about traditional law and it is easy for an American commercial lawyer to exaggerate our law's influence on the success of our mercantile economy. (I suspect assertions about the influence of our law have it backward — in fact, our law is probably successful because of the mercantile economy and because of our stable and effective judicial system, not vice versa.)

Chauvinism is a problem, but there is a fine line between odious chauvinism and appropriate forcefulness. Faced with conservative drafters who do not fully embrace the free market, one may need to push hard to accomplish even a little. Home-grown drafters may simultaneously feel defensive about and superior to Americans — defensive because of the success of our commerce but superior
because of our ignorance of their language, laws, and history. I naively assumed that the Russians would base their new sales law on the United Nations Convention on the International Sale of Goods or on an American or Western European model. Not so; they started with the pre-Revolutionary Russian civil law! So the advisor must push — but not too hard.

A second challenge for a foreigner is to understand the experience, authority, and motivation of the local drafters. In Moscow, Bob Summers and I dealt with a committee that was composed mostly of people with professional titles. Several members of the committee were also arbitrators or judges and some might be called research scholars. There were no business people, nor anyone who was or had been a private practitioner. In China, on the other hand, the committee was composed of professional drafters who worked for the legislature, but also of bankers from the central bank and from commercial banks. In both cases, I was impressed with the doctrinal knowledge of the legally trained persons.

The Russians reminded me of nineteenth-century American law professors; they had deep understanding of legal doctrine but no association with and limited concern for commercial transactions that were to be governed by the doctrine. For example, the Russians could easily hold their own on doctrinal debate on matters such as whether the perfect tender rule or the substantial performance rule should apply in performance of a sales contract. But they were not much interested in how that rule of law might affect the behavior of business people, nor were they much concerned with lawyers' manipulation of their rules. As Americans — deeply affected by legal realism — we instinctively ask: How will a lawyer attempt to manipulate this rule? To what transactions should this be applied? To what transactions will it not be applied? And to whom? In both cases, I was naively unaware of the Russian drafters' work for the legislature, but also of bankers from the central bank and from commercial banks. In both cases, I was impressed with the doctrinal knowledge of the legally trained persons.

These, of course, are obvious examples, but there are hundreds of others where the local practice differs from the American practice and where the law should differ too. Ignoration of those business practices and a fortuitous ignoration of that is likely to develop coincidently with the free market, an American has trouble advising a Russian or a Chinese.

A fourth problem in drafting abroad is the drafter's awareness. Unlike the American drafters, who spent years researching corporate law, Russian drafters, who have been known to not pay attention to check fraud, draft very differently. In fact, they had deep understanding of legal doctrine. For example, the Russians had written a number of articles about the performance of a sales contract. But they were not much interested in how that rule of law might affect the behavior of business people, nor were they much concerned with lawyers' manipulation of their rules. As Americans — deeply affected by legal realism — we instinctively ask: How will a lawyer attempt to manipulate this rule? To what transactions should this be applied? To what transactions will it not be applied? And to whom? In both cases, I was naively unaware of the Russian drafters' work for the legislature, but also of bankers from the central bank and from commercial banks. In both cases, I was impressed with the doctrinal knowledge of the legally trained persons.

These, of course, are obvious examples, but there are hundreds of others where the local practice differs from the American practice and where the law should differ too. Ignoration of those business practices and a fortuitous ignoration of that is likely to develop coincidently with the free market, an American has trouble advising a Russian or a Chinese.

A fourth problem in drafting abroad is the drafter's awareness. Unlike the American drafters, who spent years researching corporate law, Russian drafters, who have been known to not pay attention to check fraud, draft very differently. In fact, they had deep understanding of legal doctrine. For example, the Russians had written a number of articles about the performance of a sales contract. But they were not much interested in how that rule of law might affect the behavior of business people, nor were they much concerned with lawyers' manipulation of their rules. As Americans — deeply affected by legal realism — we instinctively ask: How will a lawyer attempt to manipulate this rule? To what transactions should this be applied? To what transactions will it not be applied? And to whom? In both cases, I was naively unaware of the Russian drafters' work for the legislature, but also of bankers from the central bank and from commercial banks. In both cases, I was impressed with the doctrinal knowledge of the legally trained persons.

These, of course, are obvious examples, but there are hundreds of others where the local practice differs from the American practice and where the law should differ too. Ignorrow of those business practices and a fortuitous ignor of that is liable to develop coincidently with the free market, an American has trouble advising a Russian or a Chinese.

A fourth problem in drafting abroad is the drafter's awareness. Unlike the American drafters, who spent years researching corporate law, Russian drafters, who have been known to not pay attention to check fraud, draft very differently. In fact, they had deep understanding of legal doctrine. For example, the Russians had written a number of articles about the performance of a sales contract. But they were not much interested in how that rule of law might affect the behavior of business people, nor were they much concerned with lawyers' manipulation of their rules. As Americans — deeply affected by legal realism — we instinctively ask: How will a lawyer attempt to manipulate this rule? To what transactions should this be applied? To what transactions will it not be applied? And to whom? In both cases, I was naively unaware of the Russian drafters' work for the legislature, but also of bankers from the central bank and from commercial banks. In both cases, I was impressed with the doctrinal knowledge of the legally trained persons.

These, of course, are obvious examples, but there are hundreds of others where the local practice differs from the American practice and where the law should differ too. Ignorrow of those business practices and a fortuitous ignor of that is liable to develop coincidently with the free market, an American has trouble advising a Russian or a Chinese.