The Building of Bridges - A Hungarian Lawyer's View

Peter Sebestyen

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol50/iss4/10

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
THE BUILDING OF BRIDGES—
A HUNGARIAN LAWYER’S VIEW

Dr. Peter Sebestyén*

It is common experience of all of us that the same words, the same ideas mean different things according to who utters them. My background is the pre-war middle class of a country which is said to be situated in Eastern Europe which we preferred and still prefer in our hearts to call Central Europe. In that country I was what you would call in this country a “corporation lawyer.” Does it not seem at first to be a paradox for a lawyer to speak about building bridges, to speak about tightening ties, a good lawyer’s task being to fight, and to fight well for his client’s interest? Not at all. Law does not create conflicts. Nothing can serve better the cause of peace than to fight out conflicts by principles and by arguments, observing the rules set by that age old game, “the law”— instead of fighting with arms.

There is another paradox. Most of the great conflicts governing the course of history seem to have been wrapped in the garb of a legal conflict. We may choose our examples at random.

Think of the first major conflict determining the fate of what we call our Western world: the conflict about the Delian League in ancient Greece. The issue there was the right to secede, which had not been foreseen by the Act of the league. This was the first known clash between two legal maxims which were formulated only later. The allies wanted to follow the rule *cessante ratione cessat contractus ipsa lex*. The Athenians adhered to *quod non est in contractu non est in mundo*. In other words it is the conflict between “literal” and “liberal” interpretation which exists up to the present day.

The Peloponnesian war which led to the decline of the Greek world was a clash between two fundamentally different legal systems, a sort of clash which is not quite unknown to people living in the third quarter of the 20th century.

The Punic wars of Rome began on the controversy of whether Rome had jurisdiction as to the award given in the dispute which arose between two factions in Saguntum. It is an established fact that the various legal reforms of Diocletianus who was by no means

*Dr. Sebestyén was educated at the Piarist Fathers’ in Budapest, Hungary and studied law at Budapest, Berlin and Dijon Universities. He was formerly Juridical Secretary to the Arbitration Court of the Budapest Stock and Products Exchange and is presently legal adviser to “Licencia” Hungarian Company for the Commercial Exploitation of Inventions, and to “Presto” Foreign Trading Publicity Co. Ltd. Dr. Sebestyén is also a member of the Examination Board of the Budapest Bar on the subject of Civil Law, and is the author of numerous articles.*
a half-wit, but something worse, a half-genius, were both the cause and the means of those strifes between the different parts of the then known world which led or to say at the least, contributed to the "Decline and Fall of the Roman Empire." The great struggle between the Papacy and the imperial power of the Holy Roman Empire which is the main feature of the history of the Middle Ages was the dispute over what was called the "investiture," i.e., the very real legal issue was whether the spiritual or the temporal authorities should be endowed with the power to create the feudal lien between suzerain and vassal as to ecclesiastics.

The life and death struggle between Catholicism and Protestantism revived the case of Papal jurisdiction versus jurisdiction of the temporal power represented by the monarchs. Doctrine donned the guise of litigation on a tremendous scale against legal powers and privileges enjoyed by the priesthood or if you prefer, you may say that from the struggle against these powers and privileges the new doctrine of Protestantism was born.

The cry of the American War of Independence "no taxation without representation" speaks for itself and so does the Emancipation Proclamation.

All these are on their face valid legal issues fought out with arms instead of legal means. These are just some examples chosen at random. Any other would serve to prove the thesis.

It is the sad accomplishment of the last 30 years or so that people seem to be able to do without this legal guise and we can only hope that the moral level of humanity will again reach the level which has been abandoned so wantonly. But even in the recent conflicts it is only the guise of Law which is wanting for the gist of these conflicts consists of the clash of two diametrically different legal systems.

In each case it could and should be investigated in what measure the legal issue was a simple reflection of an economic, national or other conflict and how far the legal aspects reacted on the intensity, form and outcome of the clash.

It is well-known that modern schools of history used to emphasize the general trend of certain forces, of a group of data: economic, psychological or any other, according to the basis of their theory in contrast to the older method of studying the role of outstanding personalities.

We are told, for instance, by some that Nazism and World War II were brought about by repressed psychoanalytic abreaction, anxiety and self-assertion of the Germans, by others the whole train of those horrible events is attributed to the unrealizable terms of the Treaty of Versailles, to the economic situation of Germany,
to war-monger instincts, to certain inter-action of group behaviour and so on. Nobody seems to realize that any of those statements and any similar thesis is an abstraction of individual characters, of individual states of mind, of individual fates. As such they are as lifeless and as unnatural an abstraction as in music a tone without overtones. The mental process which leads up to the pretended prevalence of such theories is very similar to that which modern science uses when solving problems with the help of a computer. The computer may work impeccably, the mind proffering the theories may be brilliant, but yet something is lacking.

We have shown that conflicts of groups as soon as they emerge out of the recesses of the human mind and become manifest generally take the form of a legal issue. Hence their handling needs some of the tools which lawyers use.

We may note how the handling of a problem, of any problem of a practising lawyer, is fundamentally different from the approach of any modern research worker, including those working in the domain of social sciences.

The model of up-to-date scientific work can be drafted as follows: with the exception of descriptive sciences the establishing of data is not considered to be the task of science proper, it is deemed to be a marginal, preparatory function. Even within the domains where the establishing of data seems to be at first sight drawn into the orbit of the discipline, thorough examination shows that it is rather the method of probabilistic sampling by a procedure based on the system of quotas with which the theory is concerned.

A flow-chart is prepared. This is a functional diagram of the process to be carried out. Then a "Code" is set up which means that the phenomena already isolated and torn apart from their natural connections, are further denuded until nothing more is left than the quanta which can be used in the subsequent process which pre-determines the degree of denudation. This done, the pack of data can be fed into the mental machine either directly or by the intermediary of the program of a computer. Each of these steps both serves the purpose and necessitates the stripping of each simple item of the facts from any quality which determines their uniqueness. This not only simplifies the mental process to be accomplished but is a preliminary condition of transforming unique phenomena into units which again is a preliminary condition of applying to them either the formulas of mathematics or the laws of logic. You can see that in the course of this process one of the most important steps is to set free the basic statements from the adhering unnecessary and redundant information. Unnecessary in-
formation has no functional relationship to the further steps to be carried out; redundant information is what other information already includes.

In comparison to this method the work of a practising lawyer seems to be antiquated and more or less the opposite of the principles expounded.

The bulk of a practising lawyer's work consists of fact finding. In this he proceeds by a method which may justly be said to be the contrary of what I described before. The practising lawyer will seek to establish as much of those individual traits of the case which may qualify it as an unique and non-recurrent one, as he can. He does so even if he is seeking to classify the case as one of the rarest kind one ever meets, one which fits exactly into a certain rule of the law. Also he is compelled to consider as facts some uncertainties when he has collected the facts for he is yet at the threshold of a problem of the second degree: which of the facts can be proven and by what means, and the required means available and is their cost—measured in money or by work—in any relation with the effect which can be expected? If within the limits of possibility the facts are known and the decision has been taken as to the evidence which can and may be produced, there arises a problem of yet another degree. This is the assessment of the personal qualities of people to be convinced: the judge or the legal advisor of the other contracting party. On that will depend how much of the facts which have been established by so much effort and how much of the evidence on which money and work have been spent will have any effect. Such an assessment is not only to include the intellectual qualities of people whom the practising lawyer sets out to convince but also such trivialities as the probable extent of their patience to listen to the evidence. With those factors and many others of similar kind, the practising lawyer has to work as though they were facts, although actually they are nothing but products of his sound or perhaps mistaken judgment.

When this stage has been attained a problem presents itself which one practically never encounters in other disciplines. This is to work out a program which I may describe as a program of qualification, a program on the second power. By this I mean a program which when correctly applied will result in establishing the probability of the possible programs to be applied, i.e., which rules of law will be applied to the facts in question.

This sounds rather complicated. But it all comes to this: statesmen and all their experts will probably consider a given conflict as being a conflict of systems, political or economic, which may engender conflicts between nations belonging to one of the systems,
which in turn may engender conflicts between groups, and from that may derive—if ever they should be interested in such trifles—conflicts between individuals.

A practising lawyer, because of the very method of his work, is bound to do this the other way round. He may investigate whether there is any conflict between individuals, he may establish whether the nature of those conflicts is such as to create group antagonism, whether the latter forms a national problem and if it does, whether this means an inevitable clash of interest between systems.

This may be a primitive method and a pedantic one. It may imply a tremendous amount of minutia. But believe me, it is more effective than to invest a collective body with personality and dealing with it as though it were an entity governed by particular laws. This method—I admit—may be as dull-minded as that of the simple soldier at a combat post who asks his officer to show him his enemy because he wants to go up to him and make peace. But at the same time this is the only method that gets results.

One of your great judges, Mr. Justice Holmes, has condensed all that in the marvelous phrase that lawyers' work is "to prophesy what the Courts will do."

The domain where the practising lawyer's work reaches across the frontiers is not so much the vast fields of International Law, but rather in the field of Civil Law and Mercantile Law.

The first thesis we may establish from what I have set forth is that a lawyer, if he does not want to add to those individual conflicts out of which may result conflicts on a broader scale, or if he wants to settle a conflict which came into being without his own doing, ought to stick scrupulously to the ways of his own art. Instead of using abstractions in his thought and in forming his opinion, he better locate as many individualizing facts of the matter in hand as he can. Although legal concepts, ways of life and motives of people also differ within one's own country, their neglect will never lead so frequently to mistakes as neglect of differences in international matters.

As far as one is able to judge from distance the Anglo-American lawyer is apt to proceed by the inductive manner in contrast to the sweeping general premises the continental lawyer uses to start from.

The theme of this article is the "building of bridges." It is no good to try to build a bridge by working from one of the shores only. I suggest that this kind of work which I am speaking about bears more similarity to constructing a tunnel: both sides are advancing in the dark in opposite directions and, if the co-ordinates
of the directions have been properly adapted, both working parties will meet.

We may approach the problem from another side, with the concepts of another discipline. I shall be able to show that the practical consequences are partly overlapping.

A very important difficulty to overcome is, surprisingly enough, one of semantics. Even the best equipped lawyers on both sides often have an unscientific attitude toward language. Perhaps a phrase of office talk may throw a light on what I mean: I sometimes say to juniors that "in legal matters dictionaries are very dangerous weapons, they should only be used by people who know the language in question well." In the domain of Law not only are the symbols arbitrary but there rarely exist in different systems of law terms which correspond exactly to a term of another system. I would not go as far as to build my reasoning on one of the premises of modern linguistics, namely that "no word ever has exactly the same meaning twice." I restrict myself to the well-known phenomenon that every symbol varies in meaning according to its context, its place in space, time, etc. This is all the more true of notions of Law as these only have intensional meanings and never extensional ones. These are very appropriate terms which I first saw in a paper of S. J. Hayakawa. The notions of Law are abstractions, immensely useful shorthand expressions. Jerome Frank uses the expression in one of his brilliant papers that they "thingify" quite a number of elements or phases. The classic illustration is Ingraham's who says something like this: We do not often have occasion to speak, as of an indivisible whole, of the group of phenomena involved in or connected with the transit of a Negro over a rail fence with a water-melon under his arm while the moon is just passing under a cloud. But if this collection of phenomena were of frequent occurrence we should have a name to denote it. That is exactly what the language of Law does. There is no use of looking up in a dictionary the word corresponding to one of the shorthand expressions of Law, for one or more or nearly all of the elements of the notions covered by the expressions are different.

Let us take an example of everyday practice, at least of my everyday practice. It happens more frequently than you may suppose that a lawyer of a so-called Western country is told to negotiate a contract with a Hungarian State enterprise. I made a sort of psychological test of my own, asking several of my counterparts (when we became better acquainted) what their first idea was when they learned that they would have to negotiate with a State enterprise of a Socialistic Country. It showed that there were some in whose mental picture there appeared the three commissars
right out of the film "Ninotschka"—grandest role of Greto Garbo—sitting in fur-caps in an over-heated room in conference with an agent of the political police making plans on how to overthrow capitalism by the means of the very business in question. There were others who perceived a department of the omni-present and omniscient State which has at its disposal all the data obtained by a tremendous organization where shrewd people do exactly what is necessary, in perfect harmony with a great number of other departments of the whole system of several other countries. There were even some who thought of a State enterprise as of any other corporation of their own country. None of the three versions came near the truth. The truth is—or at least the truth I can discern—is that a Hungarian State enterprise consists of a group of people who mean to make business and do the best they can for this purpose. Behind them there is, very much as behind the executives of your corporations, the interest of the owners. In your case this is the stockholder, in our case it is the State. In both cases the executives try to be successful in the interest of the controlling hand—and in their own as their position depends on their success. Both try to overcome their difficulties, but the difference lies in the fundamentally different circumstances with which they are confronted.

The differences are not the consequences of the fact that one corporation is State-owned and the other owned by stockholders, but come from the fact that both are working in economic systems of the Laws, the advantages and the difficulties of which are fundamentally different. This leads rather far into the domain of economics and statistics. It would pay to know more about each other in this respect too, but I only wanted to demonstrate by this example that it is not the legal form which determines the differences but the facts of economic environment. And those for the lawyer are exactly like phenomena of nature in the domain of sciences, in that he cannot change them.

I do not pretend at all that false concepts only exist on this side of the gulf. When in 1960 I was first sent across our frontiers to negotiate a contract, my director said to me: "Beware, do not forget that those capitalists are only out after profit!"—"And what do you send me for?" was my answer.

Once or twice I came pretty near to conflict. We were negotiating with a big American corporation about buying a license concerning a product of which a couple of brands are on the market over here but which was not manufactured in our country until recently. The idea which led our negotiations was to obtain the know-how of the manufacturer. Your people, whom it did not strike in the slightest that such a rather well-known technique could be
something to get value for, thought that what they had to sell was
the use of their well-known trade mark, the quality guarantee in-
cluded in the good-will connected with it.

They presented a draft, nine-tenths of which was concerned
with the use of the trademark and the guarantees claimed as to its
proper use. The other party presented a draft which did not even
so much as mention the trademark but was concerned only with
the guarantees which they thought necessary to ensure the success
of manufacture.

In the course of the rather formal meetings none of the parties
succeeded in making the other party understand their real motives.
After considerable haggling on details instead of clearing up the back-
ground, both parties grew suspicious, came to the conclusion that the
other party was not sincere, and both wanted to withdraw from the
whole affair.

Another example is that of advertisements. Let us say some-
body wants to sell a new type of fruit juice in Hungary and wants
to start a publicity campaign. He will be rather astonished when
putting the orders with respective advertising firms for that cam-
paign that they will perhaps not be accepted. The complaint about
arbitrary discrimination will be raised. What is the background to
such a situation?

Hungary, like so many other countries, has foreign currency re-
strictions. This means that not everything may be imported, but
only what can be paid for. Now it would not be fair to allow the
creation of a potential market for something which the customer
will not be able to obtain. This would be clearly misleading. But at
the same time it serves the interest of those who would otherwise
spend considerable money on a publicity campaign which cannot
have proper results. Between the more liberal attitude of countries
with foreign currency restrictions which do allow this kind of pub-
licity and the ways just described, the only difference is that the
former do not prohibit that money to be spent without any effect.
You may call that an unnecessary restriction or honesty according
to the point of view you choose to consider it from.

The man who allows his acts to be governed by a false image
will either run into trouble or will waste his efforts. What is the
remedy? Again I have to quote Mr. Justice Holmes who condensed
this in an aphorism as early as 1899 much better than I can do:
“We must think things not words” and then he added “or at least
we must constantly translate our words into the things for which
they stand.” But alas, before being able to do so, one has to know
the “things” our words stand for. And here comes the real diffi-
culty. We frequently assume that the things behind our words are
those which we learned when we formed our own dictionary. We form our dictionary very much by the method any printed dictionary is prepared. We make a mental note of the context in which we hear or read a certain word and form an idea of the thing behind it, the outlines of which will be the widest contours of the connotations heard or read. Later when we happen to use the word ourselves or read or hear it, the reverse of this process comes. We automatically have before us a mental picture of the thing we wanted to use the word for or if used by others, the thing we would use it for. It never occurs to us that the thing other people see behind the word we use is different from what we want to suggest, or that we may see a different thing behind the word used by others than they wanted to express. If we did, our own connotation would be different. We cannot fill in empty spaces with something whose existence is unknown.

Think of the examples I mentioned. The possibility of conflict in each of them lay in the difference the parties saw behind the words: "state enterprise," "profit," "license."

Dictionaries, printed ones as well as personal ones, give definitions on a high level of abstraction, that is, with particular references left out for the sake of conciseness. This is the reason why it is a great mistake to regard one's own definition as "telling all" about a word.

As soon as a concept is used in the connection of law, that is to say in agreements, awards, etc., it always becomes a so-called "directive utterance," in that it is meant to control future events. Those terrifying verbal jungles called "laws" or "contracts" are the systematization of such directives. There is probably no kind of utterance that affects our lives more deeply, and that we quarrel about more bitterly, than those simple concepts which become in the realm of law "directive utterances."

You can see easily that all this is but another angle of considering the same problem which has been investigated first in terms of the antithesis between the method of modern science and the law. Here, on the one hand, the stripping of the facts of the case from the incidental details determining their uniqueness, there, on the other hand, the establishing of as much identifying data as possible. Here, on the one hand, to use and understand symbols only according to one's own dictionary and there, on the other hand, always to take into account the value it may have to the other party. These antitheseses may be considered as the elementary particles of which most mutual misunderstandings are comprised.

The two lines of thought are partly overlapping insofar as both require the exact establishing of the right symbol corresponding to
the thing meant and of the exact thing the symbol wants to express. But the first is wider insofar as the requirements are extended to include meticulous care in establishing the individual details of each case. The second goes beyond the first by including the study, at least to a certain degree, of the institutions, ways of life, and customs of the other party’s environment.

There is a third precept, a purely practical one. Perhaps it is not very proper for a lawyer to mention it. There have been quite a number of disputes in respect of which people of common sense (whose judgment is not spoiled by an inveterate legalistic attitude) can say in advance that nothing can and nothing will come out of it except annoyance and irritation on both sides and still they are fought out until the bitter end. This reminds me of how we ignorant people without any reliable information stuck our heads together during World War II and wondered how some of the leading people having all the grasp of the situation they were supposed to have, and having certainly much more information than we had, could be as astonished about the turn of events as they seemed to be.

One instance is the nationalization of enterprises. These nationalizations gave rise to two categories of legal dispute. If such nationalized enterprises were foreign-owned the owners were naturally tempted to pretend that nationalization was illegal and relied on the doctrine of beneficial ownership which by the way is unknown in Civil Law Systems. The State under whose control the nationalized enterprise was brought would assert that property of the nationalized enterprise situated in the country of the original foreign owners was to be considered as having been transferred to the new legal entity. None of such cases succeeded. The only favorable outcome of these sort of cases were the fees received by counsel.

It is not always the last word of wisdom to speak with Shylock: “I’ll have my bond; speak not against my bond, I will not hear thee speak.” It is sound experience that even the Law cannot be pushed beyond a certain limit successfully. It is definitely not true what Antonio says in the “Merchant of Venice:” “The duke cannot deny the course of law.”

There is another principle which should be ever observed by a practising lawyer if he wants to avoid conflict or if he wants to find an equitable solution for an existing one. We may call it the impact of moral norms or ethics or of public opinion on the law and its interpretation. The practising lawyer has to evaluate unwritten principles behind the law.

In the same way as the foundations of mathematics lie in the axioms of mathematical logic there always are some axiomatic norms behind the law. The difference is that mathematical logic
developed into an independent discipline, while the axiomatic norms governing the law and its interpretation are widely dispersed. There was a period when natural law was supposed to become the receptacle of these norms.

But natural law could for various reasons not fulfill that task. From Grotius, who is said to be the founder of this school, through Hobbes, Locke, until Hegel and Kant, all who may be said to belong to that school applied the deductive method. Not being in agreement as to what is the basis of their deductions, those few who went beyond the statement that "concrete rules of natural law are bound to exist" proved by their diametrically different conclusions that anything can be stated to be a norm of natural law.

The other reason why natural law was not able to become the basic discipline of law was the supposition that its norms must be the same and invariable in place, in time and for every society. By modern standards this proved to be absolutely false.

So it came to be that the axiomatic norms governing the different systems of law have been partly incorporated by the law itself and partly have to be sought after in sociology and there is a not unimportant part of them which simply exists as facts and ought to be deciphered from these. These principles of social behavior are sometimes formulated in a more or less adequate statement in works the topic of which does not seem to indicate in the slightest that they may contain this kind of information. Examples of such social norms incorporated into the law itself are the twelve maxims of equity or the principle that the abusive exercise of rights is unlawful as established in §2 of the Swiss Civil Code.

But there are norms of this kind which can only be derived from social behavior which is a reflection of the norms accepted by a certain society. Not to know the difference which exists between communities in this respect may lead to conflicts too.

It seems to me for instance that in Britain a certain fundamental norm differs from its equivalent on the Continent. I don't know what the situation in this country is in that respect. What I mean is that a turn of mind, a conviction, a rule of behavior has infiltrated into the minds of executives and corporation lawyers, perhaps from the "caveat emptor" principle or from the maxim vigilantibus, non dormientibus aequitas subvenit.

I noticed that for us it is much harder to come to terms with people whose legal fundamentals lie in the Common Law than with those brought up on Civil Law. I further noticed that in countries of the Common Law one nearly always can reckon with the terms to be performed scrupulously. One may even take it for granted.
that the terms will be construed comprehensively. The chief means one can rely on to that purpose are the obligations which are deemed to be implied and the relation of confidence within my particular field.

But allowing for terms to be construed comprehensively, we learned from our experience that if something has been forgotten (when drawing up the agreement or left out because it was wrongly supposed to be evident), there is no inhibition with the other side to make use of that omission.

I do not mean to criticize. One attitude is as good as the other. Probably it may be called a sounder position when people feel that their moral obligations always exactly correspond with the legal situation than when one is felt to be more extensive than the other. But anyhow there is a difference in attitude.

Let me illustrate what I mean by the following. We sold a patent license to a British company for the territory of the United Kingdom. Of course everybody working in this field knows that at the time one has to decide in which countries a patent should be applied for, one cannot foresee whether the invention will prove marketable. A poor country cannot take the risk of spending on applications in every country or in a great many because in this case licensing would prove on the whole an unprofitable business.

It is easy to misjudge the situation because it generally takes several years until the market value of an invention begins to show. Now it happened that the particular invention had been patented in the United Kingdom but the Australian patent had not been applied for. The invention was a great success and the United Kingdom firm, as is almost invariably the case, was able to add some new developments to the production and organization of marketing which increased the value of the invention. We got inquiries from Australia and decided to sell the invention there on a know-how basis as it had not been patented. We named our English licensee both as reference to convince the Australians that the thing really worked well and because we wanted our Australian customer to be able to use the process with the improvements the English brought to it. Of course we would not have had any objection against the United Kingdom firm asking value for their improvements even if this should have reduced what we were able to get from the Australians. What came out of it? The English firm said to the Australians: we know the process because we are the licensees for the United Kingdom. But we know more, because we made improvements. The Hungarians have no patent protection in Australia. Why pay anything to the Hungarians? You can get from us the basic process patented in the United Kingdom and our improvements. You pay us a lump sum for both. We will leave out the Hungar-
rians. So they did. Our people were infuriated. We remonstrated with the English firm. They took the position: "Our agreement contains nothing which would prevent us from selling the process to territories in which Letters Patent have not been issued. You did not even ask us to undertake an obligation to that effect. If you had, we should or should not have entered into the contract with this clause. As things are we are not bound by something which we did not take upon ourselves. It is only too natural that we availed ourselves of the opportunity to cover part of our costs incurred by paying you a considerable sum for the license. And it was they who seemed to get angry with us because of our insinuation.

No doubt, legally the United Kingdom people were quite right. We inquired and were to our astonishment told by our English friends that in a similar situation they would have done the same.

We felt that we had learned something. Accordingly next time when negotiating with an important continental firm we included in our draft a clause covering this contingency. The reaction was again unforeseen. "We do not care to do business," they said, "with a partner who takes us to be scoundrels and thinks it necessary to protect itself against such practices which of course we would never use."

In both cases just by not knowing the prevailing relation of legal situation and social opinion within a certain circle or, if you prefer, business morals, the lawyer instead of resolving a conflict situation added an item to the substantially unfounded public opinion which holds that it is very difficult for the two worlds to find common standards.

The lengthy and involved drafting of contracts which we received from this country seem to allow the inference that public opinion in the business world moves on the broad lines we experienced in the United Kingdom case just reported. Of course I may be mistaken and this method of drafting may have other reasons or may have its roots in tradition. But I could not find any sufficient other explanation why, for instance, it is thought necessary to formulate the same terms of the agreement first in the form of the generality, then giving a rather exhaustive range of alternatives covered by the generality and then, in order to avoid misunderstandings, state that the circumstance that the alternatives have been given does not exclude the application of the said generality. Or what else can lead the draftsman of a contract to include clauses of the kind one frequently finds and of which one quoted by the Belgian professor van Hecke in a speech to American lawyers is by no means an extreme example: "Except where otherwise indicated by the context, singular terminology shall include the plural, and neuter terminology shall include the masculine and feminine." Van Hecke added that for an European reader it had a truly Pickwickian flavor.
The moral is that unwritten principles behind the law are to be included within the scope of the practising lawyer's work if he wants to contribute to building bridges between individuals, Nations and Systems.

There is one last point I should like to mention. I only dare to approach it cautiously. I do not want to commit the mistake I am preaching against and create misunderstanding instead of removing it.

You perhaps heard about the *Jordan Investment Ltd.* case concerning which the award of the Moscow Arbitration Court has been so widely criticized. The essence of the case was that Sojusnefte sold to Jordan Investment Ltd. goods to be delivered over a certain range of years. The whole lot had not yet been delivered when the Soviet Government withdrew the export license. Jordan Investment Ltd. sued. They contended that the foreign trade organization of a Socialist country irrespective of its legal form is to be considered an organ of the State. Consequently withdrawing the export license is to be deemed an act of the contracting party which is to be held responsible for that act which is a clear breach of contract. Sojusnefte argued supervening illegality or in terms of French Law: *fait du prince*. The Court held that the withdrawal of the export license falls under the doctrine of frustration of contract.

The foundations of this dispute lie rather deeply. They go back to the fact that the idea of both parties about the working of their own System is not based on the consideration on how it works in fact but on how it ought to work. On the other hand the idea about how the other System works is either derived from political publicity or, even when studied with more care, is based on information which necessarily shows a considerable time-lag. Very interesting hints to the problems arising from that antithesis can be found in Karl Loewenstein's "Political Power and the Governmental Process." According to doctrine in Western Democracies, acts of public authorities or organs of the State are acts of the State as if no inner connection between such acts and the legal relation of the parties could exist. At the same time acts and omissions of a socialist state are identified with the acts and omissions of the contracting party. In fact, in this respect, there is rather a difference of degree. W. Friedmann's excellent book "Law in a Changing Society" deals with the juristic aspects of the problem of group power within the State. Organized industry and organized labor have, in modern democratic society, become giant and powerful social forces. He even feels justified to ask whether the balance of pressures and counter-pressures between groups did not leave the power of the State as a mere shell.

On the other hand in the socialist countries the regulating function of the State in respect to the single facts of the economic and legal
process has a diminishing tendency. This seems to be a historical process similar to the other in Western Democracies. The two sides started from opposite poles. The course of progress pursues opposite directions. This brings the two extremes nearer to each other. I am not qualified to say whether the two antithetic developments within the two Systems have reached a point where the law may consider the positions to be similar. I only know that for all practical purposes the theory that in Western Democracies the acts of the State are absolutely independent from group influence and that in Socialist countries the Acts of the State are to be identified with the acts of the contracting parties, i.e., of the economic entities, is likewise unwarrantable.

There may have been times when both were true, or at least nearer to the truth than in our days. But it seems to me that in pretending that the position is the same as forty years ago, one neglects a development which, although not having left any mark on the text of legal rules, is nevertheless equivalent to a structural change in the actual interrelation of the acts of the State and the position of the parties.

This again supports the thesis that a practising lawyer's possibilities, or rather a practicing lawyer's duty when evaluating a situation, goes far beyond the scope of law proper.

Perhaps it is possible to sum up these rather theoretical reflections into some rules of thumb:

1. To gather as much detailed information as possible about the facts of the case, i.e., foreign background, foreign legal institutions, the real meaning of foreign legal terms one has to deal with.

2. To make known to "opposite numbers" abroad the real meaning of situations, legal institutions, and legal terms they are dealing with.

3. Not to try to impose one's own interpretations on "opposite numbers" abroad.

4. Not to take for granted the meaning of terms or of situations, legal institutions, or background as we perceive them.

This is the intellectual side of it. I should contradict myself if I should deny its importance. But after all, this is not enough. There is something more which may sound a bit old-fashioned but is nevertheless true. When I was a young man I had a principal who said it is not always the shrewd lawyer who is the best, but the conscientious and the honest one. And this brings us back to an old truth: it is personality which counts. To be able to show firmness without rigidity, to be able to proceed "fortiter in re, suaviter in modo" (a wise principle said by the superior general of the Jesuits in the sixteenth century), and show firmness not only towards the opposite party but towards one's
own people is by no means negligible. And so is honesty not only toward one's own people but toward the opposite party too. These are no hollow words from a selection of moral precepts. It yields better results both for the cause itself and for the cause of international understanding, if one can convince people that the role of the opposite lawyer is not that of an outpost of the foe bent to entrap the enemy, but that of an expert whose ambition is to smooth the way of real cooperation between the parties. And the only means to make this believed is to come up frankly to that standard.

Recently some of the official impediments of trade have been lifted by our respective governments. This relates even to a rather delicate field, to one in which I am personally active, the trade in licenses.

It is up to lawyers now, their importance in this particular domain even greater than in other trades, to fill in the possibilities which are now open. In this, perhaps some of the thoughts I have just expounded may prove helpful. And if they do succeed in that just by making people realize that those on the other side are just businessmen like themselves, driven by similar motives, then perhaps the vicious circle, up to now formed by personal antagonism which created enmity on the governmental level which again increased personal antagonism, may turn into a favorable circle creating friendship and confidence through a phenomenon similar to that of resonance in physics.

There was a time when novels and plays ended with the hero and the heroine happily married. Today novels and plays try to show what happens after the curtains were closed down and novels begin where older ones used to end. What if we would catch a glimpse of things behind the curtain together.

It is well-known that the American Courts have a tendency to protect individual inventors who may have been induced to disclose their ideas to the industry even if they could not rely on patent protection. This led in a great number of cases to claims by inventors raised in more or less good faith. This proved to be a burden on the industry even if one has only to consider costs and waste of time of litigation.

In self-defense, which, of course, is justified, corporations are prepared to consider disclosures only if the discloser beforehand signs a document the gist of which is usually that all rights and remedies arising out of the disclosure shall be only those given under patent laws. You know better than I that there are for the applicant a great number of factors of uncertainty as to the outcome of an American patent application. Letters Patent may be granted or not, the claims may cover the essence of the invention, but it may also happen that the basic idea is not patentable, because it is too comprehensive or it may be found, alas perhaps too late, that the actual claims left over when granted represent only one of several possible alternatives of
carrying the basic idea into effect. In addition, very able technicians may find a way to circumvent the claims, although their work may be based on the idea of the invention. If we are negotiating to sell an invention to one of your corporations they demand the signing of an agreement to the effect I mentioned. If we did sign, that would mean that all our disclosures which may not be covered by Letters Patent issued later belong to the other party, without the slightest possibility of getting any countervalue. The situation after signing is even more prejudicial to us than if we should make disclosures without having made any previous agreement. If we do not sign we are practically precluded from direct business with the American market. We do not know top people of the companies sufficiently well to deliver ourselves in their hands by signing. They do not know us sufficiently to expose themselves to unnecessary litigation. Suppose that after our disclosure has been made it should turn out that their research department is working on the same lines. Even with the best of intentions it may be difficult to decide whether there is any progress in what has been disclosed.

With some of our English, French and other foreign partners this stage is long past. We know they never would use legal devices at their disposal to circumvent us, and they know we have confidence in them and would never suspect them of pretending that something we disclosed was already known to them. This is an existing bond of real confidence, not in the legal sense of the word. But which side is to begin to spin the cable on which this bridge of confidence can be suspended? Neither they, nor we, seem ready to take the first risk. Can I in good faith persuade my people to take a risk which depends on the decision of people unknown to me, and whose resources seem to be unlimited in comparison with those which may be at my disposal, if my confidence would turn out to have been excessive? Quite apart from the unequivocal legal situation which would be created if I acceded to the signing of the agreement, my company would find itself faced with insuperable difficulties: impossibility of gathering the necessary evidence, and the very high costs and great length of American litigation. By the way, I do not think that our task as lawyers consists of ensuring an advantageous starting point for a lawsuit but in avoiding one. I am very proud that in the last eight years when these problems have lain in my hands neither we, nor our partners, found it necessary to bring any matter before any court or even have recourse to arbitration. Hopefully, patient work by all lawyers will result in the continued building of warm international understanding through law.