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The reflection of cross-border law practice in the organisation and regulation of the legal profession.

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1. Introduction

Tipp O'Neil, who was the Speaker of the U.S. House of Representatives during the 1980s, used to emphasise that 'all politics is local'. There was a time when the same could have been said about law. However, especially since the end of the 20th Century, law has been de-territorializing rapidly.

Courts increasingly rely on foreign sources when deciding national cases. Non-governmental organization export their expertise in dealing with public interest litigation to other jurisdictions, including the People's Republic of China. Law students no longer spent their entire law school career in one jurisdiction, but increasingly benefit form the internationalization of higher education by spending a semester abroad or by taking an LLM in another country.

Since the economy is globalizing, companies and individuals increasingly need global legal advice. These potential clients want to employ counsel efficiently and economically and they expect one lawyer to be able to come up with answers to questions that may concern several jurisdictions. Law firms have been following suit. They increasingly engage in cross-border legal practice to offer their clients adequate representation. Some are involved in outsourcing legal work to other countries, in particular to India. Some firms use multinational teams to tackle national law questions, because they believe that it will enhance the quality of their services. In ADR proceedings it is common for lawyers to render services outside the particular states in which they are licensed.

The organisation and regulation of the legal profession were developed at a time when legal matters used to be confined to a single jurisdiction and the familiarity of the attorney with that jurisdiction was considered of exclusive importance. Most lawyers were involved in litigation on the basis local rules. The question raised in this paper is to what extent the de-territorilisation of law practice that has taken place since the end of the 20th Century is actually being reflected into the organisation and the regulation of the profession. In other words, to what extent does the law allow lawyers to engage in cross-border law practice?

The paper contains a brief analysis of the state of the law in the U.S., within the EU and at the global level. The words 'home state' refer to the jurisdiction where the lawyer entered the legal profession for the first time. The words 'host state' refer to the jurisdiction where the lawyer subsequently decided to engage in law practice. A lawyer who moves from one jurisdiction to another is called a migrant lawyer.

2. The opportunities for cross-border law practice in the U.S.

2.1 A restrictive regime

Every lawyer in the U.S. who would like to practice law has to be admitted to the bar of one of the fifty states or the District of Columbia. It is almost impossible for a lawyer to practice law outside the state where he has been 'barred'. This is the result of the so-called 'unauthorized practice of law' or UPL provisions that apply in every state. These provisions, most of which were adopted during the early twentieth century, prohibit lawyers from engaging in the practice of law outside the state in which they are licensed. The only effective way for a lawyer to be admitted to the bar in another state is to pass that state's bar exam. However, there are two exceptions to the rule that out-of-state lawyers are not allowed to get involved in practicing law, *i.e.* the *pro hac vice* admission and the activities of foreign legal consultants.

2.2 Engaging in cross-border law practice on a temporary basis

A lawyer who has not been admitted to practice in a particular state may nevertheless be allowed to participate ad hoc in a particular case that has been brought in that jurisdiction. This is called '*pro hac vice* admission'.[1] The out-of-state attorney needs permission from the court that handles the case to be able to appear as an attorney in the case. Such permission is usually sought from the court by an attorney who is licensed in that particular jurisdiction. Although often this is not stated expressly, foreign lawyers too may be admitted on a *pro hac vice* basis.

In order to be admitted *pro hac vice*, migrant lawyers are usually required to work in conjunction with a local lawyer. The extent to which this local lawyer should be actively involved in the case varies from jurisdiction to jurisdiction. Some states require that local counsel appear in every proceeding arising from the case, while others leave it to the discretion of the judge. The rationale of the active involvement of local counsel is that they are more familiar with state rules and the judges that try the cases. The need to extensively involve local lawyers leads to higher costs and can be quite cumbersome, which may have a chilling effect on *pro hac vice* appearances. Many jurisdictions impose a limit on the number of times an attorney may appear *pro hac vice*.

2.3 Engaging in cross-border law practice on a permanent basis under the home state professional title

At the moment 26 jurisdictions within the U.S have adopted 'foreign legal consultant' provisions, under which a member of the legal professions of a foreign jurisdiction may practice law under his home state professional title.[2] The concept of foreign legal consultant was first introduced in New York in 1974. Persons over 26 years of age, who have practised

[1] Clint Eubanks, Can I Conduct this Case in Another State? A Survey of State Pro Hac Vice Amission, (2003-2004) 28 J. Legal Prof. 145.

[2] See generally Carol A. Needham, The Licensing of Foreign Legal Consultants in the United States, (1998) 21 Fordham Int'l L. J. 1126; Carol A. Needham, Practicing Non-U.S. Law in the United States: Multijurisdictional Practice, Foreign Legal Consultants and Other Aspects of Cross-border legal Practice, (2007) 15 Mich. St. J. Int'l L. 605.

law in their home state for at least three years, will be admitted as legal consultants after submitting a certificate issued by the professional body in their home state.[3]

Although interestingly the concept of foreign legal consultant places foreign practitioners in a better positions than out-of-state lawyers from the U.S., some important restrictions apply. First, they may not represent nor defend a client in a court of law, other than upon admission *pro hac vice*. Second, foreign legal consultants are usually not allowed to deal with real estate transactions, nor with the preparation of wills, or the preparation of instruments related to marital rights or the custody of a child of a resident of the United States. Third, foreign legal consultants are not allowed to provide advice to their clients on the law of the host state nor U.S. federal law, "except on the basis of advice from a person duly qualified and entitled to render professional legal advice in the state on such law". This 'on the basis of' formula is the result of a compromise reached in New York in 1973-1974 between those who felt that the foreign legal consultants should be allowed to advise on host state law and those who rejected the idea.

At first sight the formula allows the foreign legal consultant to pass along to his client advice regarding host state law which originates from a layer who is barred in that state. However, in the State of New York the interpretation is much more permissive. There it is left to the legal consultant himself to judge whether giving advice to a client on hosts state law would have a sufficient basis.[4]

3. The opportunities for cross-border law practice within the EU

3.1 Engaging in cross-border law practice on a temporary basis

Migrant lawyers have been expressly allowed to provide legal services in the host state since the adoption of the so-called Services Directive in 1977.[5] This Directive allows lawyers practising in one Member State to provide legal services of in another Member State on a temporary basis. Under the Directive the Members States are allowed to exclude migrant lawyers from preparing and administering wills and conducting real estate transactions. While rendering services in the host state the lawyer will use the professional title he has acquired in his home State.[6] A lawyer pursuing such activities is bound by the rules of professional conduct of the host State, without prejudice to his obligations in his home State.[7] Under this Directive the migrant lawyer may advise his clients on the law of the host State and he may represent them in legal proceedings.[8]

However, the Directive does allow the Member States to subject migrant lawyers who represent a client in legal proceedings to rather cumbersome administrative obligations, like the duty to introduce themselves to the presiding judge and the president of the relevant bar association, and the duty to work in conjunction with a lawyer who practices before the

[3] This description is based mainly on the situation in New York, see Rules of the Court of Appeals of New York, part 521.
[4] Sydney M. Crone III, Legal Services and the Doha Round Dilemma, (2007) 41 Journal of World Trade, 254 at 255.
[5] Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services: O.J. [1977] L.78/17.
[6] Ibid. Article 3.
[7] Ibid. Article 4(2).
[8] Ibid. Article 5.

judicial authority in question.[9] These duties may, of course, have a chilling effect on rendering such services.[10]

However, in *Commission v. Germany* the European Court of Justice has made it abundantly clear that these duties should not be used to make life difficult for the migrant lawyer.[11] The case concerned an action brought by the Commission against Germany for failure to fulfil its obligations under the Services Directive. In the national law to implement the Directive Germany had laid down the requirement that visiting practitioners engaged in legal proceedings always had to operate in conjunction with a German practitioner, who had to be present around the clock throughout the entire proceedings. The German legislature had introduced this requirement because it was afraid that unlimited access by foreign lawyers would undermine the proper administration of justice. It assumed that these lawyers were bound to make mistakes because of their insufficient knowledge of German law.

The Court clearly disapproved of this 'chaperone-arrangement'. It pointed out that the scope of the duty to work in conjunction with a local lawyer, which the Member States were allowed to introduce under Article 5 of the Directive, should be interpreted in the light of the purpose of the Directive, which is 'to facilitate the effective exercise by lawyers of freedom to provide services'. According to the Court, while the Direction allows national legislation to require a migrant lawyer to work in conjunction with a local lawyer, he should also be allowed to look after the interests of his client and to have due regard to the proper administration of justice. Seen from that perspective, the obligation to act in conjunction with a local lawyer is intended to provide the migrant lawyer with the necessary support to operate in an unfamiliar judicial system and to ensure the judicial authority that as a result of that support he will act in accordance with the applicable procedural and ethical rules.

According to the Court, the migrant lawyer and the local lawyer, who are both subject to the ethical rules of the host State, are perfectly capable of agreeing upon a form of cooperation appropriate to their client's instructions. The requirements introduced by the German legislature went beyond what was necessary and useful for the provision of the support required by the migrant lawyer. The Court was unimpressed by the German concerns about the possibility of inadequate knowledge of German law. According to the Court that is an issue between the lawyer and his client, who, after all, is free to entrust his interests to a lawyer of his choice.

3.2 Engaging in cross-border law practice on a permanent basis under the home state professional title

Since the adoption in 1998 of the so-called Establishment Directive,[12] any lawyer may practice law in any other Member State under his home state professional title. The only requirement that has to be met is the presentation to the competent authority in the host state of a certificate attesting to his registration with the competent authority in his home state. As soon as that requirement has been met, the visiting lawyer may carry on the same professional activities as lawyers belonging to the host state profession. This includes giving advice on the

[9] Ibid. Article 5.
[10] James Quinn, The Right to Practice Law in the European Union: An American Perspective, 2004 Macquarie Business Law Journal 6, p. 8.
[11] Case C-427/85 [1988] E.C.R. 1123.
[12] Directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained: O.J. [1998] L. 77/36.

law of the host state and the representation or defence of a client in legal proceedings. In the latter case the host state may require the migrant lawyer to work in conjunction with a local lawyer. Under the Directive the Members States are allowed to exclude migrant lawyers from preparing and administering wills and conducting real estate transactions.

In *Luxembourg v. Parliament and Council*, [13] Luxemburg sought an annulment of this part of the Establishment Directive. It took the position that the fact that migrant lawyers were allowed to practice law in the host country without having had any prior training in the law of that state was likely to prejudice the public interest in consumer protection and the proper administration of justice.

The Court was not very impressed by this argument. It pointed out that the Directive contained several safeguards intended to protect consumers and to ensure the proper administration of justice. First, migrant lawyers act under the home state professional title, which signals to the consumers that the persons to whom they entrust their interests have not obtained their initial qualification in the host member state. Second, such migrant lawyers are not only subject to the rules of professional conduct applicable in their home state, but also to those applicable in the host state. Third, the host state may require a migrant lawyer to take out professional indemnity insurance or to become a member of a professional guarantee fund. Fourth, where a lawyer falls short of the obligations in the host member state, the rules of procedure, penalties and remedies provided for in that state apply. Finally, migrant lawyers also bound the rules of professional conduct applicable to lawyers generally, like the Code of Professional Conduct adopted by the Council of the Bars and Law Societies of the European Union, under which professionals are not allowed to handle matters which they know or ought to know they are not competent to handle.

In so doing, the legislature has not abolished the requirement that the lawyer concerned should know the applicable law in the cases he handles, but has simply released him from the obligation to prove that knowledge in advance. It has thus allowed, in some circumstances, gradual assimilation of knowledge through practice, that assimilation being made easier by experience of other laws gained in the home state.

After the Court had dismissed the action for annulment, Luxemburg implemented the Establishment Directive while adding two conditions. The registration of migrant lawyers was made subject to a language test, while migrant workers were not allowed to accept service on behalf of companies in Luxemburg.

These restrictions were the subject of an action for failure to fulfil obligations brought by the Commission. In *Commission v. Grand Duchy of Luxemburg*,[14] the Court of Justice first tackled the language test. The Court made it clear that the Community legislature had undertaken a complete harmonisation of the preliminary conditions for registration in the host state by requiring the submission of a certificate attesting to registration with the competent authority of the home state. According to the Court, it was apparent that submission of such a certificate is the only condition to which registration may be subject.

According to the Court, the deliberate exclusion by the Community legislature of a system of prior testing of the knowledge of the migrant lawyer is accompanied by a set of rules intended

[13] Case C-168/98 [2000] E.C.R. I-9131.
[14] Case C-193/05 [2006] E.C.R. I-8673; see also Case C-506/04 *Wilson v. Conseil de l'Ordre des Avocats du Barreau de Luxembourg* [2007] E.C.R. I-8613.

to ensure the protection of consumers and the proper administration of justice. Thus, the purpose of the obligation of migrant lawyers to practice under their home state professional title is to make clear to the potential clients that the lawyer has not obtained his qualification in the host state, and does not necessarily have the knowledge, in particular of languages, which is adequate to deal with the case. Furthermore, under the Directive, Member States are permitted to require migrant lawyers to work in conjunction with local lawyers, and Luxemburg has indeed laid down such a requirement. The involvement of a local lawyer will compensate for any lack of proficiency on the part of the migrant lawyer.

The Court also reiterated that under the Directive the migrant lawyer must comply with the rules of professional conduct applicable in his home state and those applicable in the host state, failing which he will incur disciplinary sanctions and exposure to professional liability. One of the rules of professional conduct applicable to lawyers is the obligation not to handle matters which they know or ought to know they are not competent to handle, for instance owing to lack of linguistic knowledge. The Court also pointed out that clients are most likely to seek the advice of migrant lawyers in transnational cases, which are unlikely to require a degree of knowledge of the language of the host state.

The Court finally looked into the decision to reserve the acceptance of service on behalf of Luxemburg companies to professionals familiar with national law and practice in that field. Luxemburg had justified this decision by referring to the need to clamp down on the use of fictitious company addresses. The Court noted that although the Directive does allow the Member States to provide for exceptions to the principle that migrant lawyers are entitled to pursue the same professional activities as local lawyers, this is not one of them. In addition, the kind of abuse referred to by Luxemburg can be redressed by the rules of professional conduct to be observed by the migrant lawyer, the compulsory professional liability insurance or the membership of a professional guarantee fund, and the applicable disciplinary systems.

3.3 Engaging in cross-border law practice on a permanent basis as part of the profession in the host state

Since the adoption of the so-called Diploma Directive in 1988, a migrant lawyer may be admitted to the profession in the host State on the basis of the recognition of the qualifications he had already acquired in the home State.[15] The migrant lawyer will then practice law using the professional title of the host state, with all the rights and privileges attached to it. This means that the migrant lawyer is allowed to advise on host state law and to represent and defend clients in court proceedings, without any restriction. Under the Directive the Members States are allowed to exclude migrant lawyers from preparing and administering wills and conducting real estate transactions.

Although the Directive suggests that automatic recognition of qualifications is the rule, in practice it became the exception. That was the result of a loophole created by Article 4 (1) (b) of the Directive. According to this provision, if the matters covered by the education and training in the home state differ substantially from those covered by the diploma required in the host state, the host state may require the professional to complete an adaptation period or to take an aptitude test. It is true that the Directive insists that the aptitude test must take account of the fact that the applicant is a qualified professional in his home state and should

[15] Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration: O.J. [1989] L. 19/16.

only cover knowledge which is essential for the exercise of the profession in the host state.[16] However, some Member States have almost routinely imposed on the applicants an aptitude test similar to the final examination for the qualification of a lawyer in their country, without regard to the fact that the applicants were already qualified lawyers. Since it is self-evident that the more senior members of the Bar are not willing to submit themselves to these tests later on in their career, these aptitude tests have had an important chilling effect. In fact, in the hands of some of the Member States the Directive became a means to stop foreign practitioners from entering the country rather tan a tool to facilitate them to do so.[17]

In so doing, those Member States failed to take the approach on board proposed by the European Court of Justice. It has time and again pressed the Member States to look beyond the façade and to weigh the true credentials of the applicant who would like to enter the profession in the host State. Thus, in *Vlassopoulou*, Mrs. Vlassopoulou, a Greek national, had applied for admission as a *Rechtsanwalt* in Germany.[18] The German Ministry of Justice had refused the application, because it felt that the applicant did not have the necessary qualifications. The Ministry suggested that she should take the normal route, which would involve taking a law degree at a German university, passing two State exams and completing a preparatory training period. However, the Ministry had clearly not taken account of the fact hat besides her Greek diplomas Mrs. Vlassopoulou had a doctorate in law of a German university and had been working at a German law firm for a number of years.

The Court emphasised that the review of an application for admission to the profession should start with a comparative examination of the diplomas. If this comparison reveals that the knowledge and qualifications certified by the diploma acquired in the home state and those required by the national laws of the host state correspond only partially, that should not be the end of the matter. On the contrary, the applicant should be offered the opportunity to show that he has acquired the missing knowledge and qualifications in another way. This involves the assessment of knowledge and professional experience acquired either in the home state or the host state.

Since the Diploma Directive was under the threat of losing its significance in the area of law, the EU legislator decided to restore the damage in the Establishment Directive. It effectively closed the loophole offered by Article 4 (1) (b) of the Diploma Directive. Under this provision the host state could force the migrant lawyer to complete an adaptation period or to take an aptitude test if it felt that the matters covered by the education and training in the home state differ substantially from those covered by the diploma required in the host state. According to Article 10 of the Establishment Directive, a migrant lawyer is exempted from Article 4 (1) (b) of the Diploma Directive if he has effectively and regularly pursued activities in the host state involving the law of that state for at least three years. Consequently, the discretion of the host state to find that there are substantial differences and to order either an aptitude test or an adaptation period, has been replaced by an across the board assumption that if there are any such differences, they will have lost their relevance after having been exposed in daily practice to the system of the host state continuously for three years. In this way the demanding and discouraging aptitude tests have effectively become a thing of the past, at least for those migrant lawyers who have practiced host state law for three years.

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[16] Ibid. Article 1(g).

[17] Katarzyna Gromek-Broc, The Legal Profession in the European Union – A Comparative Analysis of Four Member States, (2002) 24 Liverpool Law Review, 109 at 110-111.

[18] Case C-340/89 [1991] E.C.R. I-2357; see also Case C-313/01 *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*.

Interestingly, even a lawyer who has not yet effectively and regularly pursued activities in the host state involving the law of that state for at least three years may be exempted from Article 4 (1) (b) of the Diploma Directive as long as he has effectively and regularly pursued a professional activity in the host state for al least three years. Although the host state enjoys some discretion, under the Directive it should take into account the effective and regular and professional activity pursued and any knowledge and professional experience of the law of the host state, and any attendance at lectures or seminars on the law of the host state (Article 10 (3) (a).

4. Global opportunities for cross-border law practice

Legal services are covered by the General Agreement on Trade in Services, or GATS, which was negotiated within the WTO, and which came into force in 1995. The GATS contains multilateral rules on the international trade in services. The GATS requires each WTO member to list those services for which it wishes to guarantee access to foreign suppliers. Several of those so-called commitments have already been made with regard to legal services. However, not much progress can be expected in this area during the current round of trade negotiations called the Doha Round.[19]

Although the Services Directive, the Diploma Directive and the Establishment Directive extend important benefits to EU nationals, they do not apply to lawyers from outside the EU, as was made clear in a judgment of the Superior Administrative Court of Nordrhein-Westfalen of 30 September 2004.[20]

A lawyer had obtained a JD from Virginia Law School, had been admitted to the California bar and he had practised law there. He then took a degree in international law at the University of Geneva and was admitted to the French bar. He practised law in France for a number of years as an in-company counsel. He subsequently was admitted to the profession in Germany as a foreign legal consultant in the areas of U.S. and French law. After having acted as a foreign legal consultant in Germany for a number of years he then applied to be allowed to take part in the exam for the entry of the German profession. The responsible German authority denied the request, because the applicant did not have the nationality of a Member State of the EU, as required in the German legislation to implement the Establishment Directive.

The claimant challenged this denial before the Court. He argued that under the Directive Germany was not obliged to reserve access to the profession to citizens of EU Member States only. He also invoked Article VII, clause 4 of the Treaty of Friendship, Commerce an Navigation between the U.S. and Germany under which nationals of either Party and the enterprises they control shall be accorded within the territories of the other Party treatment no less favourable than that accorded similar enterprises controlled by nationals of the other Party.

The Court felt that the fact that the claimant did not have the nationality of an EU Member State was the end of the matter. Understandably, the Court refused to be drawn into a discussion on whether the claimant had actually met the foreign experience requirement laid down in the Directive as translated into the German legislation. If it had come to the

[19] Crone, supra note 4 at 246-247.
[20] OVG Nordrhein-Westfalen, Urteil v. 30.9.2004 – 14 A 1937/99, BRAK-Mitt. 1/2005, 44-48.

conclusion that he did, the denial solely on the ground of nationally would have been particularly questionable. It expressed the view that the treatment accorded to nationals of the other Party should not be less favourable than that accorded to nationals of other third States. Under no circumstance could the national of a third State invoke the clause in the Treaty to support an entitlement which was created in cooperation with other States, within the framework of a supranational Community, the Members of which had relinquished some of their regulatory authority.

5. Conclusion

The growing de-territorialization of law practice has been reflected to a certain extent in the organisation and the regulation of the profession.

In the U.S. foreign lawyers may make an *pro hac vice* appearance, which allows them to be involved on an ad hoc basis in court cases. When doing so they are required to operate in conjunction with a local law firm. Furthermore, in 26 jurisdictions within the U.S. foreign lawyers can act on a permanent basis as foreign legal consultants. They are not allowed to represent or defend clients in court proceedings, and, with the exception of the state of New York, they should refrain from advising on the law of the host state and the U.S.

Within the EU, migrant lawyers may render services on an ad hoc basis, practice law on a permanent basis under the home state professional title and may even become a full member of the profession of the host state if he has effectively and regularly pursued activities in the host state involving the law of that state for at least three years. This very welcoming regime created by the EU legislature is being reinforced with vigour by the European Court of Justice.

Although legal services are covered by the GATS, not much progress has been made in this area during the current Doah Round.

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