Review of “Choosing the Language of Transnational Deal: Practicalities, Policy, and Law Reform” by Patrick Del Duca

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As many of you know, I am in the business of insuring, among other things, the priority status of security interests in personal property collateral under Article 9 of the Uniform Commercial Code through the UCC Division of First American Title Insurance Company. Our policies, being keys to Article 9, specifically excludes the effect of any foreign law. I have the great benefit of a substantially uniform statute within all fifty States, in harmony as to where to file a financing statement against collateral types under the UCC, and, except for minor issues involving individual debtor names, no real issue as to language. The national form of the financing statement in Section 9-521 requires so little information that the form is language irrelevant except in the collateral description.

However, we are often asked to insure liens against foreign debtors and remedies available against foreign located collateral. If we are dealing with a foreign debtor with U.S. located collateral and the debtor located in a jurisdiction that does not provide a public registry for the priority ranking of liens in the personal property that comprises reliance

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collateral in a specific transaction, we can insure the priority of security interests through the District of Columbia filing office notwithstanding the administrative problems with that office. However, when we encounter a debtor in a jurisdiction that may have such a registry, we generally punt, saying that our policy does not cover foreign registries and maybe the lender should get foreign counsel.

The greater problem is foreign located collateral — whether the debtor is domestic or foreign. Here we come to a complete stop and advise our customers that our policy does not go to remedies regardless of the sufficiency of a security interest filed in a United States jurisdiction. Whether a foreign forum will respect the U.S. filed security interest as against third parties in that jurisdiction is problematic at best. If the lender wants to be sure of prevailing on its lien against collateral located in a foreign jurisdiction and before a foreign court, the lender should “perfect” its lien as provided by the foreign law.

Up until now I had little if any written materials to offer to a customer concerned about perfecting and then enforcing its lien in foreign located collateral. Now I do. Choosing the Language of Transnational Deals: Practicalities, Policy and Law Reform by Patrick Del Duca. I have known Patrick for many years and that is why I agreed to write this review. I thought that the book would be a “how to” primer on complying with the lien priority regulatory requirements of all significant commercial foreign jurisdictions. That’s not what this book is about, and one look at Patrick’s curriculum vitae on page ii of the book will tell you why. Patrick is one of those rare lawyers who are expertly trained in both common and civil law, with the language skills to make the knowledge useful. This book, thankfully, is much broader in scope and provides the international lawyer, as well as the members of and advisers to governmental and transnational and supranational organizations, an intellectual framework for the realities in which they work.

Parties to transnational commercial and financial transactions seek to negotiate structure, document and render enforceable their transactional understanding at minimal cost and interference, in the hope of accomplishing what they have agreed to accomplish. To do this, the lawyer and client need to be conscious of the legal and political context in which they are operating. They need to know the constraints
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on choice of language and how such constraints might be encountered in contacts with governmental authorities for purposes of first structuring and eventually enforcing their transactions. Patrick’s book provides the needed frame of reference for transnational deals and deal makers but its utility is not limited to the transnational deal makes and his or her counsel.

This book should also be in the library of, and read by, every finance minister who may want to foster an environment in his or her own country conducive to transnational commerce for not to do so will seriously constrain the capital formation opportunities for that country. Governmental authorities need to be aware that if they impose unacceptable restraints on transnational commercial and financial deals parties to transnational transactions will do what they can to avoid their jurisdiction.

If governmental constraints are inartfully pursued, such constraints may just stimulate the creativity of lawyers and their clients to construct transactions in ways that remove as much as practicable the essence of such transactions and their enforcement from the imposing legal system’s jurisdiction. Patrick suggests that transactional parties, governmental authorities and other stake holders should not focus on constraints of elusive application but rather on language and communication to develop legal frameworks that serve the constituent parties.

In this book, Patrick discusses not only the benefits of a considered approach to the legal framework for transactional language choices considering not only issues related to the difficulties to the parties of communicating through an official national language; but also the unintended consequence of speaking past each other even if we think we all know the selected transactional language. From a vantage point of thorough knowledge of many legal systems, Patrick considers the issues of terms not always meaning the same thing to all partiers. Patrick then considers the interface between party autonomy and governmental interface. However, no matter how lawyers structure transactions to avoid interaction with “unfriendly” jurisdiction, unfortunately at a minimum the parties will usually have to comply with local law to prefect a non-possession lien in collateral located in that jurisdiction and to put third parties on notice of the lien.
Patrick then moves into a consideration of various permutations of the legal framework for transnational language choices. This analysis examines the tension between (i) party preference as to the choice of language in which to conduct business and (ii) governmental strictures to use an “official” language when one or more of the parties undertakes an interaction with a governmental authority.

Patrick's analysis offers a thoughtful consideration of the various strategies that stakeholders in a transnational financial transaction might adopt to invest constructively in the improvement of legal frameworks for transnational commercial and financial deals. One of the side bars that flows through this book is Patrick's concern that if governments are recalcitrant in maintaining regressive and expensive legal systems, the parties to a transaction will remove all the aspects of the transaction that they can to avoid that legal system. This effort will lead to compliance with only minimally necessary perfection of lien system for collateral located in the jurisdiction. All other aspects of the transaction will be moved to more friendly locales. Patrick sees this result as restrictive not only to the parties but detrimental to the advancement of user friendly legal systems and much needed law reform. Pressure can often result in positive change. If the pressure is removed, the legal system continues to atrophy. If such systems are not developed, the jurisdiction involved will also directly suffer as a result of restricted capital formation. With this in mind, Patrick outlines strategies for collaborative and effective investment in the improvement of legal frameworks reaching across boarders, with specific focus on the issue of language so as to achieve additional returns from the perspective of all stakeholders.

For Patrick, and really for any lawyer practicing in the international environment, considerations of language offer the potential to promote transnational deals by reducing the burden of the parties working around inadequate and uncoordinated legal systems; to advance the rule of law goals by strengthening the role of legal institutions; and to promote the language in which such systems operate. Given this framework, Patrick considers in detail what constrains the ability of well-advised transnational parties to circumvent legal systems and their policies. Isolating such constraints, Patrick then considers whether these constraints are sufficient to serve as an effective foundation to a
governmental policy contrary to what parties to significant
transnational commercial and financial deals might agree
among themselves. Finally, Patrick addresses the issue of
how interested stakeholders (governments, parties to
transnational deals, and more broadly those concerned with
the rule of law) can lessen the burden of transnational deals,
while advancing sound policies.

Clearly, the perfection of liens in collateral located in a ju-
risdiction requires parties to deal with that specific jurisdic-
tion even if they can remove all other aspects of the transac-
tion to international arbitration or a more user friendly
jurisdiction. Understanding this minimal required contact,
Patrick then, for the bulk of the text, moves us through vari-
ous national and transnational and international
relationships. The United States of America with the
Uniform Commercial Code universally adopted by the sev-
eral States with minimal differences is the epitome of a
minimally invasive national system (or a supranational
system depending how you view the States at which level
the UCC is adopted), a system that fosters rather than
impedes transnational deals. With a point-counterpoint anal-
ysis, Patrick moves through a significant number of legal
frameworks, from the laissez-faire of the United States, to
European states and the European Union, to French
(Organisation pour l’Harmonisation en Afrique du Droit des
Affaires (“OHADA”)) Portuguese (Comunidade dos Países de
Língua Portuguesa) speaking supranational organizations,
and Spanish, Italian state systems, to the United Nations
and other multinational frameworks.

Following his thorough analysis of the various national,
transnational and international legal frameworks, Patrick
then considers party work-arounds to governmental imposi-
tions of linguistic burdens with emphasis on the ability of
the parties to bifurcate transactions, utilizing chooser of law
and forum selection for dispute resolution, arbitration and
linguistic neutral forums. Within this analysis, Patrick
considers the role of language in current models for develop-
ment of legal frameworks to support transnational com-
mercial and financial deals. In additional to the language
groupings mentioned above, Patrick considers the Vienna
Principles of Contract Law, the EU Common Frame of Ref-
ERENCE OF CONTRACT LAW, the Draft Legislative Guide on
Secured Transactions of the United Nations Commission on
International Trade Law, the Model Law on Secured Lending of the Organization of American States, and the soft law approaches of such instruments as INCOTERMS and the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce.

After describing in detail the risks and rewards of the various national, transnational and supranational systems mentioned above, Patrick argues that if governments are not receptive to facilitating commerce, transactional parties will attempt to “game the private international law rules” through forum shopping among jurisdictions in order to achieve the bargain they wish to make. Transnational deal parties are not that different from parties to intra-national transactions. They want certainty of outcome at the least possible cost. Patrick argues that if faced with deemed excessive governmental burdens, the parties will bifurcate their transaction so as to pair down to an absolute minimum that portion of their deal subject to government leverage. In so doing, the parties expand the domain of party autonomy in a transnational financial transaction, notwithstanding the force of the government’s leverage to constrain the domain of such autonomy as to the collateral perfection and other issues of the transaction. A correlative result of all of this is that the legal system involved is adversely constrained in its own development toward commercially acceptable law reform.

Patrick points out that if the cost to the parties of using the techniques such as arbitration outlined in this book to work around troublesome governmental requirements is low, the governmental strictures will have little impact on the transaction. The parties will just do as they choose. If the contrary is true, then there is, in Patrick’s words, “fertile ground” to establish frameworks, as discussed in the book, of international coordination of national norms. In this hypothesis, the transaction parties and involved governments share strong incentives to collaborate in the development of frameworks that give both the transaction parties and the governments what each seeks. Parties desire low-cost, reliable ways to make and enforce their transactions. Governments desire not only to stimulate transactions to facilitate capital formation and other goals, but also to achieve policy goals relative to the use of language such as adequately placing third parties within their jurisdiction of, for example, non-possessory liens in collateral located within
their jurisdiction. An example used by Patrick for the implementation of a harmonized framework because of the substantial incentives involved is the Cape Town Convention on International Interests in Mobile Equipment. All parties involved saw the obvious utility of an effective and efficient international system for dealing with aircraft.

Patrick, however, does not stop with a discussion of what is currently in place for frameworks for international financial transactions, for there remains many jurisdictions that are not receptive yet to the rule of law and legal frameworks to support transnational commercial and financial deals. Law reform is of great interest to Patrick and his book moves to a thoughtful consideration of how parties can operate to achieve continued and augmented benefits of linguistic diversity. For Patrick, the goals are to facilitate inclusion of potential parties no matter what language they might speak and to diminish the marginalization of legal systems that arises from the linguistic burdens imposed by governmental authorities working with outdated and uncoordinated norms. A further goal for Patrick is to provide international frameworks for the unification and harmonization of law relevant to transnational commerce and finance that are, as practicable as possible, open to multiple languages.

Patrick then reviews three well-established models of internationally-coordinated frameworks for efforts to harmonize and unify law relevant to transnational commercial and financial deals with emphasis on how language and the promotion of language functions in each. The first is the international conference model that leads to the preparation of texts for proposed treaties and model laws. Examples discussed by Patrick include the Hague Conference on Private International Law, the Inter-American Specialized Conferences on Private International Law, and the Vienna Convention on the International Sale of Goods.

The next model discussed falls under the rubric of “restatement/expert association/ model law.” This model focuses on the process of the preparation and update of a reform as a continuing process. The ongoing revision of the Uniform Commercial Code in the United States by the American Law Institute and the Uniform Law Commission is the leading example of this model. Others would include UNIDROIT Principles of International Commercial Con-

The third model is supranational legislation as exemplified by the European Union and OHADA referenced above. As the lead example of supranational legislation, the European Union harmonization of norms relevant to cross-border commerce and finance touches on the substantive choice of governing law for contracts, the choice of forum for litigation to enforce contracts, and efforts at a uniform substantive law. The effort is moving toward a unified, or at least a harmonized, European substantive contract law.

Patrick then considers a very nuanced and defensible governmental approach of making a language a more attractive choice for the parties. In this regard Patrick looks at the minimum governmental requirements relative to language that are required for those governmental actions with one or more of the parties that cannot be avoided such as the perfection of liens on collateral located in a given jurisdiction. One example in this area is the widespread allowance of agreements to arbitrate. Although all countries impose burdens of translation into an official national language as a condition of making recourse to national courts to enforce agreements locally; most countries Patrick points out allow parties to avail themselves of the New York Convention on the Enforcement and Recognition of Arbitral Awards and similar conventions.

Patrick clearly argues toward a realization of the benefits of the rule of law with governments facilitating, rather than mandating, use of language, and for multinational initiatives that establish coordinated frameworks within which respect for party language is encouraged. Patrick promotes the conduct of cross-border transactions within, rather than outside, the norms and institutions of legal systems. Patrick goal is to promote and reinforce the integrity and vitality of such legal systems, as well as the use of associated official languages. This book does just that!

Language, if viewed narrowly, is just the choice of the transactional parties. Viewed more broadly, language is for Patrick, and should be for all of us, an opportunity. Patrick eloquently offers approaches to reduce the linguistic burdens and to pursue multilateral law reform initiatives. The ap-
approaches offer the prospect of tangible improvements in the legal frameworks through which transnational commerce and finance occur. Patrick lifts up the Wilsonian dream of coordinated world governance. Even if this were to occur, such a system would likely leave in place the domain between party autonomy and governmental mandate. It is in this domain that astute transactional structuring and definition of choice of law and mechanisms and fora for dispute resolution will be needed. To this end, Patrick concludes that creativity and communication are keys not only to constructing the individual deals that cumulatively comprise transnational commerce and finance, but also to improving the legal frameworks that serve them.

This book won’t tell you where to file a lien notice in Slovakia. For that answer, hire an excellent international lawyer like Patrick who has contacts in Slovakia. This is not a “how to” book. Rather, this book sets the international stage for the reader who wants to understand the complexities of the legal realities of transnational commerce and finance. Only someone with the common and civil law experience, legal clerking and extensive international practice that Patrick brings to the subject, could in less than 300 pages provide a coherent understanding of this complex subject. For the lawyer stepping slowly into the area of international law, this book provides an extraordinary overview of the topic and offers avenues for further inquiry. I can think of no better place to start.

But this book offers something more and, to me, of greater importance. This book offers governmental authorities a structured rationale for formulating legal systems that not only honor their local language needs but also foster international commerce for the betterment of their peoples. Capital formation is necessary for community growth. Unnecessary barriers limit commerce to the betterment of no one. Patrick acknowledges legitimate concerns and offers suggestions for honoring those concerns while at the same time providing a friendly environment to the transactional parties. It is in this regard that this book is truly unique and ought to be required reading of every new employee at finance ministries.

Having practiced my career in California and within the world of asset based lending, the inability to effectively secure equipment and inventory in Mexico, to say nothing of
receivables, even within the boarder maquiladoras, severely constrains financing on Mexico located collateral. The cost and uncertainty of field warehousing and similar security methods, putting aside the language barrier and dealing with notorio publicos, consistently forced lenders to exclude Mexican located collateral from the borrowing base. The result was less borrowing capacity and reduced capital formation. Now we all have a book that lays out in full and clear detail why that’s the result and what should be done to change the legal system to foster much needed commerce and finance.

It’s been my honor to read and review this book for Patrick. The book is an important contribution to the understanding of international law. I just wish Patrick had told us the names of his favorite gelato shops in Rome.