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THE PRIVATIZATION OF EASTERN EUROPE

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THE PRIVATIZATION OF EASTERN EUROPE

INTRODUCTORY REMARKS

ERNST C. STIEFEL

I have a few words of caution and restraint on American law and to American lawyers on the subject of privatization in Eastern Europe. Do not crusade. Below the crust of communism, there is a 200 year old layer of civil law in the eastern countries that was introduced under the Czars and the Hapsburg Monarchy, which is alive today in all satellite countries. Beneath the command of the dictatorships, the terminology and technique, there is western civilization and codification. Once the command structure is broken down, it is safe to say that over one-half billion people will live there under legal systems basically rooted in the civil law.

Thus, from East Germany to Siberia, after the political and economic systems have been scrapped, the law of the East will be civil law, not common law, and certainly not American law. When we help to "reinvent the wheel" of privatization in countries such as Albania, Bulgaria, Czechoslovakia, Poland, and all new countries this side of the Ural, we must remain mindful that the axle will turn around civil law. We Americans may grease it with American inventions, "Coca-Colonize" it with specific American inventions, like licensing, franchising, and joint ventures. But once the new political and economic underpinnings have been moored, there is little room for American law and American practices in the East. Forget about American "Rambo" creations in the area of merger and acquisitions, such as poison pills, shark repellents, golden parachutes, and white knights. There is nothing to learn from American tax or real estate law, especially when compared to the time-tested older European systems. It is senseless to translate our Uniform Commercial Code into the Czech, Croatian, or Bulgarian languages. They have, and will revive and reform, their old Napoleonic Code de Commerce.

It is ludicrous to send ten-thousand copies of our Constitution to the new countries. Exporting paragraphs is like exporting cars with steering wheels on the wrong side. In particular, we must understand that beyond the United States, people do not respect, and will reject, our adversary process. It has been said that our litigation is "a machine which you enter

as a pig and come out as a sausage." Aleksandr Solzhenitsyn spoke at Harvard about our delirium with due process. The jury system, contingent fees, cost distribution, and punitive damages are not understood and will not be accepted in the East. In the minds of civilians, discovery and cross-examination is not, as Wigmore said, "the greatest legal engine ever invented," but a steamroller designed to disintegrate and demolish the facts and make many attorneys rich.

It is essential that our lawyers possess something more than the technical tools that they employ in domestic practice. Only the lawyer who speaks, thinks, and feels the foreign mind will be able to penetrate the subtleties of a foreign culture.

With these restraints, we will now agree to agree to some degree on "privacee."