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Working on Legal Culture Changes in Kyrgyzstan: Drafting Practical Commentaries on The Civil Code

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INTRODUCTION

From the time that Alfred Lord Maine spoke of the need to modernize the *legal* and political culture of India from one of “status” to one of “contract,” Western lawyers and legal scholars (now called “consultants”) have been teaching jurists from non-capitalist economies to think in legal categories presumed by such consultants to be vital to market and capitalist relationships. Much simplified, these lessons of the Western lawyers devolve on two basic legal principles, property and contract, or more particularly, (i) the right to own and accumulate private property for one’s own account, and (ii) the right to trade and exchange such property freely, according to fixed, predictable, and enforceable rules of negotiated agreement.

Some critical thinkers have predictably condemned this proselytizing by Western legal consultants as imperialistic. Other critics, taking a different tack, have bewailed the simple managerial futility of trying to plant western trees (*i.e.*, legal principles) on the native soil of the non-capitalist world. Whichever the critical approach, however, a basic issue of each critical argument involves questions of a society’s embedded culture. This is because law and the way it addresses economic and social relationships is a cultural construct, steeped in the meaning of right and wrong, truth and falsehood. Thus, if what is meaningful in the collective imagination of a society is long-term kinship or personal relationships, then the time-bounded.

hard-bargained. specified performance characteristics which underlie western concepts of contract will probably lack popular acceptance as being “right.” Therefore, say the anti-imperialist critics, western and capitalist legal principles such as contract must be, have been, and are being imposed by force, either physical or economic. Alternatively, say the managerial critics, such capitalistic legal principles in societies transforming to capitalism inevitably suffer a difficult and perverse incarnation, skewed by purposeful and non-purposeful misapplication, corruption, societal stratification, and ultimately societal disenchantment.

Against these criticisms are posed other theories of both history and jurisprudence. One familiar line of thinking is that there has always been a “law merchant” of contract, which is somehow abstracted from the common cultural disposition of a particular setting, and which acts according to more universal norms as a neutral moderator of efficient trade relations. Historically, a law merchant governing trade relations between nations was developed long ago. In relations between the west and non-west, non-western nations (notably China then--and now) did adopt laws of conduct related to foreign trade only, and today UNCITRAL (the UN’s Commission on International Trade Law) urges nations to adopt commercial laws to govern international private transactions.

This congenial view of an international law merchant, free of cultural baggage and proceeding by the higher command of economic and trade rationality, seems recently to have been adapted to national boundaries, also. As economic restructuring and privatization programs proceed in many countries under the urging of the world’s creditors, look-alike laws governing banking, investment, lending, business and insolvency accompany them. These laws are called the legal infrastructure of the free and privatized market economy, and are, at

least in their ideal “model” form. graced with a universality largely unrelated to the specific *location in which* they happen to find themselves. In *this sense. then. these laws are a new* “law merchant”, writ not for the governance of international trade, but for the governance of economic relations within national borders. The acceptability of all of this is a faith in the inevitable success of free market efficiency and rationality. Thus, these laws need not be yoked to cultural predisposition. They will prove themselves because they are a part of an “institutional” setting for successful future development. And that development operates by free market rules of sense and meaning completely separate from the sense and meaning that local culture ascribes to economic and social relationships

For those of us who work in the non-capitalist world on commercial legal reform all of the above thinking no doubt rings true in greater or lesser proportion. according to personal histories, attitudes, perspectives and tasks. If one works on drafting commercial and economic laws, then his or her belief in them must be strong. This is because the expatriate’s task will be to convince working groups of skeptical local lawyers and officials of the laws’s necessity, and then to do battle over each article whose purpose local counterparts may not fully understand, and then to convince Parliament to accept and not to tamper too much with any of the delicately drafted provisions. All of this activity amounts to a continuing process of getting key local people to take “ownership” of a law whose purpose they did not really comprehend initially, and whose value they were therefore not exactly “sold on.” In these circumstances, the expatriate advocate cannot afford to hesitate or ask too many Doubting Thomas questions about the locals’s point of view, about the underlying cultural correctness of his own mission, or even about the impact his law will really achieve.

On the other hand, for legal reformers who work “downstream” a bit, for instance training lawyers or judges or businessmen who have to implement these new free market laws, issues of local disposition, understanding, historical inheritance, mind set, openness and perception of things and the way they work (i.e., culture), are inescapable. Free market legal transactions do not happen simply because laws are in place; there must be a cultivated spirit to make use of them. For this kind of downstream legal work, then, the cultural obstacles to implementing free market legal rules must be identified and urged away, and all cultural proclivities which can be positively used must be fostered. In addition, new legal norms and rules must be reduced to practical, as opposed to abstract, understanding, which is an exercise that demands intimate knowledge of the way things are and the way people think in the culture in which one is operating. **And** finally, new methods of legal presentation that have not ever been done in-country before may have to be tried in order to break out of mindsets and to stimulate creativity and learning among recipients.

For this kind of “downstream” work, the donor must be willing to take risks and allow time for projects to develop; but this is the only rational solution, for laws have never worked and will never work where the people who must use them are reluctant or incapable of doing so. As for self-doubt, the expatriate legal reformers who work “downstream” must be steeped in it, because they are always confronting other ways of looking at matters, and they must act with a humility so as not to offend. Their job is to convince people at a deeper level than mere “ownership” of a draft law: they must ask people to believe in the rightness of a legal norm, and that requires the patient cultivation of long-term and cross-cultural trust.

The following article discusses a downstream law implementation project now

proceeding in Kyrgyzstan. one of the former Central Asian Republics of the former Soviet Union. The project. drafting practical commentaries and forms for the Kyrgyz Civil Code. was designed to address a perceived need to strengthen good contract practices in this transforming economy. In this way, it touches, one century later, Maine's "status to contract" observations about modernization and development. This is the case because, without belaboring the point too dearly, the former Soviet Union was very much run on a status basis, and current economic relationships and opportunities in this country yield unduly to considerations of who one is and whom one knows, rather than to the enforceability of precisely and skillfully negotiated terms of agreement. As the inheritor of the Maine equation. the author of this article has had to answer for himself the criticism of the anti-imperialists and the skepticism of the management Jeremias. He has done so as follows. Any attempts to promote good contract principles as tools of positive development are not detrimentally imperialistic; legal principles such as contract, which can empower and protect those citizens who are willing to take a risk for the good of a society, cannot be bad in any context. Further, legal cultures are not inevitably static. Rather, they change if people really wish them to. and what is called for is projects that will not stop at merely writing new laws, but are also designed to do some sustained and deep value-laden (i.e., cultural) implementation, including long-term strategic battle against their perverse application.

Background--Kyrgyzstan

Early in its commercial law development project in Kyrgyzstan. IRIS ran one focus group and designed two polls of local businessmen to survey local business attitudes to the development and administration of commercial law in Kyrgyzstan. The poll surveys were

conducted by Overseas Strategic Consulting, Ltd., an AID public relations consulting firm working on privatization matters in Kyrgyzstan.¹ The results described in these surveys were dramatic and forthright. For instance, in response to a *defining question regarding the bias of governing authorities responsible for administration and regulation of commercial law*, 65 % of the respondents stated that the authorities are somewhat biased or biased.² A summary of the respondents's comments is telling:

..Many respondents think that administration and regulation of commercial law are so unfair as to make the entire structure useless. While a law may be written with an intent to protect business, there is a considerable gap between the idealization of a law and its execution. In actuality, factors of social status, connections, clan, and financial resources sometimes play a larger role in determining the outcome of business disputes than does the wording and intent of existing laws.

Of the factors contributing to a biased judicial system, Marxist attitudes of judges towards businesspeople were cited most often. Judges, some businesspeople believe, perceive entrepreneurs, especially successful ones, as exploitative capitalists and probable criminals. This facilitates rationalization by judges that they are entitled to relieve businessmen of excessive wealth, resulting in rulings against private commercial interests.

Italics added.

Other responses repeated the same theme, to wit, that ascriptive biases and dispositions

¹ See, "Attitudes of Commercial Sector Participants to Development and Administration of Commercial Law in the Kyrgyz Republic: General Contract Practices, Access to Information, State Regulation of Private Business," published July 1996. Hereinafter, "Survey".

² To the question "Governing authorities responsible for administration and regulation of commercial law are objective, somewhat objective, somewhat biased, biased, unable to answer," 2% of respondents answered objective, 18% of respondents answered somewhat objective, 32% answered somewhat biased, 33% answered biased, and 15% were unable to answer. See, "Survey," n.1 supra, at 13.

stand in the way of objective business law practice. Thus, 58% of the respondents deemed the court appeal process mostly unfair or completely unfair.³ According to the following summary, the respondents explained:

Business people feel that they have almost no chance of winning disagreements involving government bodies or influential officials. Well publicized disputes such as the privatization scandals of the “Zenit” and “Azia” stores, in which directors and their relatives assumed ownership under questionable circumstances, have sent a message to entrepreneurs that the personal interests of those in government are above the law and immune to private protest. In the case of the two stores mentioned, the courts ignored established legal procedures (and protests of workers’ collectives) in favor of families of influential political figures. Here, the only checking factor may be the media, which has shown a keen ability to inflict political damage. *There is little precedent to give businesspeople the impression that courts will rule with fairness and according to established legal guidelines. Again, personal connections and social status are sometimes above the law.*

Italics added.

Interestingly, this ascriptive bias appears to the businessmen/respondents to be an obstacle that is even more significant than lack of knowledge and understanding by judges and lawyers of commercial law principles. Thus, though a surprising 66% of the respondents were confident that local lawyers had the ability to “help with business contract development and arbitration,” the report states as follows:

A high percentage (66%) of respondents are confident in the value of lawyers to promote business negotiations. These same respondents, however,

³ “In instances of disagreement, the appeal process completely fair, mostly fair, mostly unfair, completely unfair, unable to answer“. 1% of respondents answered fair, 15% of respondents answered mostly fair, 46% of respondents answered mostly unfair, 12% of respondents answered completely unfair, and 25% were unable to answer. See, “Survey” n. 1 supra, at 15.

⁴ See, “Survey” n. 1 supra, at 6.

do not seem confident in the knowledge and advanced technical abilities of local lawyers as they relate to commercial law. *nor do they see a compelling need for specialized commercial law knowledge. Businesspeople use lawyers for their consulting experience and ability to handle legal paperwork, not their knowledge of commercial law.*

From the perspective of some in private business, an inchoate commercial Law framework, incapable of consistently communicating, administering and enforcing new business laws, obviates the usefulness of specialized commercial law skills. (Italics added).

It is, in other words, simply law practice as usual that works in Kyrgyzstan; familiarity with the new concepts and opportunities offered by new commercial laws does not appear to be relevant. With respect to judges, 58% of the respondents stated that commercial judges are not very knowledgeable (49%) or not at all knowledgeable (9%) about relevant issues in commercial cases.⁵ Here again, however, the surveyors cautioned that other matters were perceived to be more relevant than knowledge:

Not understanding rudiments of commercial law themselves, it was difficult for respondents to comment on the qualifications of judges. From the perspective of business people involved in arbitration, however, a judge's knowledge of commercial law is largely irrelevant. In their opinion, factors biasing judges against private business play a larger role in determining the outcome of disputes.

In light of the above survey results, it is impossible to escape the conclusion that obstacles to commercial legal reform in this country run much deeper than mere lack of good commercial legislation or simple lack of commercial legal knowledge. Certainly these factors are important, but neither legislative drafting nor specialized commercial law training alone

⁵ To the question "Judges arbitrating business matters are very knowledgeable, somewhat knowledgeable, not very knowledgeable, not at all knowledgeable or unable to answer of relevant issues," the respondents answered as follows: very knowledgeable (3%), somewhat knowledgeable (23%), not very knowledgeable (49%), not at all knowledgeable (9%), unable to answer (16%). "Survey", n. 1 supra, at 3.

will turn the necessary trick. Rather, it is attitudes or mindsets or world views, or, if one will, legal culture, that must be changed. And such a mission is admittedly a much more risky and ambitious commercial law reform endeavor, in no small part because results are difficult to measure, and are certainly not guaranteed. Nevertheless, the hard reality of business in Kyrgyzstan is that it does not proceed by a recognizable and rational rule of law. Even the large investors have trouble, as was illustrated by the CFO of a substantial agriculture foreign investor here, when asked at a USAID contractors' meeting about the percentage of his signed contracts that are honored by local signatories. His answer: one in ten. Among local businessmen, apparently, there is little appreciation of the sanctity of contract.

Naturally, an entire legal culture cannot be changed from one of status to one of contract overnight or within the compass of one donor project. No one could request such a feat, or reasonably attempt to accomplish it. Rather, specific and discrete areas of necessary learning (as opposed to mere training) need to be identified and attacked. And such learning must be self-replicating and must make sense to the recipients whose cultural perspective needs to be broadened. At IRIS--Bishkek, we believe that we have identified such a discrete and specific area of necessary legal culture learning. For lack of a better way to describe it, we've labeled this area "contract orientation", by which we mean those basic orientations to the law which we believe lawyers involved in contract work must possess. We chose that area based on the author's prior year-long work with local lawyers to establish an independent bar association. From that work, it became clear that there exists a number of characteristics and orientations common to the local legal community, which, without change, would make it next to impossible for local lawyers to practice effective contract law. These orientations were

described in an early work plan, and summarize what we see as the current status of commercial legal culture in Kyrgyzstan:

To realize an environment of good contractual practices, the members of Kyrgyzstan's business and legal communities must undo a number of presumptions fostered by the Soviet legal system under which they were educated, and must learn a raft of new commercial, free market concepts with which they have no prior experience. This necessary reeducation amounts *to* a massive legal cultural change. Among first principles that must be re-learned by both lawyers and judges are:

(I) that if the law does *not* explicitly prohibit something, it is allowed.

This is fundamental to contract negotiation and business strategy. Contracts differ one from the other and reflect particular business needs at particular points in time. Lawyers and businessmen must use their imaginations to construct contracts and agreements that will do what is necessary. Laws delimit what is not legal, but cannot, in a commercial context, hope to anticipate and define everything that is legal. This is contrary to the Soviet system of civil law, which, at least according to local perceptions, assumed that what was not explicitly permitted was forbidden. Local lawyers and perhaps judges are still burdened by that image of law as an exclusive how-to legal guide, and are unaccustomed to envisaging tactics not spelled out in the law. Such a predisposition is stifling to original and imaginative commercial lawyering, and needs to be removed from the legal culture here;

(ii) that commercial laws are rational tools and orderly procedures for responding to practical business needs. In the Soviet civil law system, there seemed to be a prevailing notion that law comes *ex cathedra* (often as a function of theoretical, Soviet Natural Law'), and is somehow removed from everyday necessities. Such a notion lingers here, making it difficult for local lawyers to understand the relationship between commercial law and the commercial realities and strategies to which it must respond. More problematically, this notion makes it difficult for the local legal community to understand that commercial laws must be shaped, molded and applied to actual needs and realities, rather than vice versa; and

(iii) that a lawyer's job in contractual matters demands understanding and evaluating the client's needs, anticipating risks, and ensuring against those risks by professional due diligence, creative identification of options, careful negotiating and precise drafting. In the Kyrgyzstan of today, neither businessmen nor lawyers are accustomed to thinking in terms of transactional contingency or risk, and so businessmen rarely ask about, and lawyers rarely offer caution about, what could go wrong in a

deal, or how it could be structured better. This often leads to pro forma or ill-informed negotiating and to boilerplate drafting, the combination of which sorrowfully fails to optimize business opportunities, and in some cases, results in completely unhappy transactions

[In a sense, these above points are first principles of contract law and they]. ..are not difficult for those of us in the West to understand. Given Kyrgyzstan's lack of experience with free market transaction and interaction, however, they constitute matters that must constantly be discussed, illustrated and ramified by and for the legal and business communities here. Such discussions of contract law and culture must be in terms of concrete laws or draft laws, concrete hypotheticals or examples of transactions relevant to Kyrgyzstan's reality, and concrete tactics for handling new and unfamiliar legal tools and principles.⁶

Description of Project

General Observations: It was the final paragraph quoted above that set the managerial parameters of the type of "cultural reorientation" legal project we ultimately decided to do. We knew that we needed a vehicle filled with constant discussion and illustration of free market legal principles. We also wished to center such discussions around concrete laws, and to use concrete hypotheticals or fact patterns for illustrative purposes. And we wished to encourage the formation of strategies and tactics for using such laws and responding to such hypotheticals. Other basic management decisions were naturally required. For instance, who would participate in the discussions, and what would be the end result of the discussions'?

Of equal importance to the above managerial issues, however, was a more ephemeral and gnawing issue of what we should be trying to accomplish by way of cultural reorientation. The long quotation from our work plan, immediately above, sets forth some problems in the Soviet legal system that we believe are fundamental roadblocks to what we perceive as good

⁶ "Work plan of the Commercial Law Manager", IRIS--Bishkek, Dec. 1995, at ____.
Hereinafter, "Work plan."

commercial lawyering. We accordingly determined that we needed to work toward changing them. Thus, we determined that we absolutely needed to show the business and law communities here that commercial laws, in particular, are simply practical tools to make business transactions more informed, more rational, more predictable and more smooth. They are not, in other words, immutable gems of natural law.

To catalyze that kind of understanding, however, meant that we needed to provide the legal community with a new way of “explaining” law to themselves. The Soviet fascination for classifying laws and legal concepts according to an internally satisfying theoretical taxonomy is an interesting academic approach: however, it does not say a word about how laws work or how they should be applied and used. In other words, to say that there are “substantive” rights of property and to list them dutifully, doesn’t tell one how they articulate with, or how they can be made use of in, real life. Not surprisingly, the Soviet legal education system is still at play in Kyrgyzstan, and equally unsurprising is that it is based solely on taxonomic theory. Thus, for most of the lawyers here, taxonomic theory is what they use to “explain” the law to themselves.

This approach contrasts radically with the way lawyers in the United States “explain” legal principles. In law school and after, we immediately explain the meaning of a legal principle by reference to life-like hypotheticals: e.g., “A sells his interest in Blackacre, through which C has been driving his car without objection from A for the last twenty years, to B. What are the rights to Blackacre as between B and C?” If run out further, with alternatives and options, this illustrative hypothetical fact pattern would explain the ins and outs of the legal principle of “adverse possession.” It is typical of the general way we

American lawyers “take in” legal principles. Such a basic approach, explanation by fact pattern variations, allows us to perceive law, from law school days forward, as an issue-spotting exercise. In this way, it is particularly well-suited, to this author’s way of thinking, to serving the real-life needs of clients. For instance, if a client comes to most American lawyers with a business scheme, our immediate orientation is to locate legal questions and problems embedded in his “fact pattern”, in order to identify legal potholes and discover ways around them. This is second-nature, this is what legal practice in America is, because we are taught from the outset to parse legal principles from given facts.’

What would happen, however, if, as a matter of our ordering of legal things and legal knowledge, we had never been called upon to explain legal principles through the fact patterns that bring them to life? Would we be able to anticipate that a given law may have certain shortcomings as it is unable to address the issues of real life? And would we be able confidently to mine the negative implications of a client’s fact pattern, and correct them? Allowing for all possibilities, the answer to these questions should be “perhaps”, but it would be much more difficult to do so. In our commentary drafting project at IRIS--Bishkek, therefore, we determined that a reorientation of Kyrgyz legal culture away from theoretical taxonomic thinking and toward practical fact patterns as ways of explaining laws would be beneficial to overall commercial and contract law development. Indeed, as the project we are about to describe developed, the rich use of illustrative hypotheticals to explain commercial

⁷ The author is sure that Western European lawyers, despite their civil code orientation, also operate by foraging and spotting for issues in fact patterns. At the risk of cultural hubris, it simply does not seem to this writer that contract and business lawyering for a client can reasonably be performed any other way.

law principles became the innovative, and for Kyrgyzstan, unfamiliar, cornerstone of the effort.

Furthermore, but without belaboring the point about fact patterns and hypotheticals and their use in explaining law, a modest cultural observation might be made. Where law is explained in terms of a variety of hypotheticals concerning a variety of anonymous actors (A and B, for example, or the unknown plaintiffs and defendants who appear in our casebooks), there is an unmentioned but steady repetition of the principle of “blind justice.” Legal principles are learned, explained, repeated and absorbed completely without reference to the individual status of the parties. The narrative of our legal norms, then proceeding as it does by use of objective hypothetical and fact pattern, serves in and of itself to defy the introduction of ascriptive right concepts into any of our notions of justice. It is as if we are all telling the same non-status based story of justice, so status is excluded outright and ab initio from the justice equation.” In contrast, where law’s narrative device is an abstract mental gymnastic, glued by theory, but not anchored by fact or enriched by the repetitive process of anonymous and universal hypothetical, is the outright exclusion of ascriptive rights likely to be as natural to the very core story of justice itself? I would venture not; one system of legal narrative (i.e., the one rich in anonymous hypotheticals from real life) simply does a more relentless, more thorough and more natural job of inculcating dispositions against status as a legal norm. And this is of course even more true and more likely concerning a legal culture such as

⁸This is not to suggest that status plays absolutely no part in the actualities of our American legal system. It may. But if it does, we would all readily admit that that is repugnant to the way we conceive of ourselves and of our legal system.

Kyrgyzstan's, where the not-too-distant popular narrative of "justice" was worker overcoming owner, party member overcoming recalcitrant. government overcoming nonconformist behavior, etc., regardless of the facts. In that culture, the narrative of justice was in fact a narrative of status.

The Project: As mentioned above, the IRIS project is to write commentaries and appropriate legal forms for the Civil Code of Kyrgyzstan. the first part of which was adopted by Parliament in May, 1996. and Part II of which will be considered this fall (1996).⁹ The Civil Code has been labeled by President Askar Akaev as the "constitution of the economy." and is filled with provisions of commercial and contractual import. In order to draft these commentaries. we have formed two drafting groups. The drafting groups are not government-formed or officially sanctioned. which constitutes a calculated risk that the commentaries. when completed, may not be universally accepted. In the former Soviet Union, commentaries were official. drafted either by chosen law professors from chosen law centers, or by members of the high courts. No commentary was ever written in the Kyrgyz Republic. The above notwithstanding, however, for this project we decided that in lieu of government-appointed drafters with lukewarm enthusiasm and other distracting priorities. we would recruit qualified private volunteers or unofficial government workers, who will have a personal stake in the excellence of the finished product. and in the possibility of obtaining royalties when the

⁹ A significant task of the IRIS Commercial Law Manager in Bishkek involved supervision of the drafting of the bulk of Part II of the Civil Code. For this work, the Kazakh Code, the Russian Code and the Model Code were consulted and culled. and revisions appropriate to Kyrgyzstan and commercial law practice were made. The commentary drafting project in this way neatly ties legislative implementation to the legislative drafting that IRIS accomplished with respect to this substantial piece of legislation.

commentaries are published and sold. In part, that decision was made because we anticipated what has come to emerge: the drafters have had to attempt something completely new, never before done in the former USSR, and therefore their enthusiasm is vital to overcome what is for them different and difficult work. If they are successful, then we anticipate that the commentaries and forms will be accepted on their merit, and will not need the countenance of official organs.

The nature of the work, and the reason we deem it new and arduous within the former Soviet Union, is to draft commentaries that discuss each article of a law by use of short, illustrative hypotheticals. For American readers, the best way to describe this work is that it resembles the Restatements of the Law, prepared by the American Law Institute. Of course, the order of preparing the commentaries will be different from the procedure in the United States. There, Restatements are essentially restatements of common law court decisions, where the commentators collected past decisions, analyzed them and organized them according to basic legal principles. In order to illustrate those legal principles, the commentators then offered simple and precise hypotheticals and examples. In Kyrgyzstan, there are naturally no court decisions to analyze,¹⁰ but in any event, the law itself sets forth the applicable legal principles. The problem that the drafting groups have had to confront is how to come up with illustrative hypotheticals to explain how the law will or can relate to the affairs of citizens and businessmen. Although commentaries on the Russian Civil Code have been written in Russia,

¹⁰ For the Civil Code, the lack of court decisions can be expected; it is too new. But more troublesome is the fact that the courts do not publish their decisions in any event, so no routine analysis of what issues are being decided, or how they are being decided, would be possible at the current time.

these are classic abstract commentaries, which do not rigorously contain illustrative hypotheticals. Such commentaries are meant only for lawyers or legal professionals, and have a distinctly academic flavor, without pretense to associate the law with real-life experience or possibilities. In contrast, the members of our working group have over time decided to write commentaries (or more precisely, a practical manual) that will be understood by businessmen as well as lawyers and judges. Thus, the compulsion to create meaningful hypothetical examples of real-life moment is even greater. As can easily be imagined, however, the task of creating hypotheticals to explain the Code is new and difficult labor for the working groups. This is because examples in the absence of commercial or free market experience are hard to conjure. And in addition, the Soviet orientation of our commentary drafters never compelled them to think in terms of creating hypothetical fact patterns to explain legal principles.

Organizationally, there are two working groups, each having between seven and nine members.” One group is tasked to approach the Civil Code from the perspective of forming deals or transactions: the emphasis of the commentaries these members are writing is to show how articles of the Civil Code allow options to businessmen, demand defensive conduct where

¹¹ The constitution and membership of the drafting groups has changed over the last several months, as we have added new members to enhance creativity. We anticipate that we will be revamping the groups again in the fall, which will involve dropping less energetic members whose contributions have been adequate, but not shining. At the present time, the group members are composed as follows: three judges of the Bishkek City Court, which is a court of appeals and a court of first instance; two lawyers in the private banking industry; the chief lawyer of the National Bank of Kyrgyzstan; the head of the law reform section in the White House’s Legal Council Office and one of his staff members; two university professors; an advocat (trial lawyer) in civil matters; chief lawyer for a legal reform NGO here; chief lawyer for Kyrgyz State Petroleum Company; chief lawyer for a private joint venture oil refining company; a private local attorney employed by Mayer, Brown, Platt on mining matters here; and a lawyer working for the City administration.

necessary, and favor certain positions and strategies to effectuate certain business purposes, The second group is charged with examining the same Code articles from the point of view of the breakdown of transactions: the emphasis of this group's commentaries is on the remedies that the law allows, the consequences of not following the law, and on tactics for negotiating compromise. Naturally, a goal of both groups is to identify ambiguities in the law and to make suggestions about how those ambiguities should be resolved

Procedurally, each of the groups meets once a week in a two-and-one-half hour session. At each meeting, there is a full discussion of the meaning of the Code section under consideration, and there is an exchange of ideas about appropriate hypotheticals and the ways they might be applied. Minutes are made of each session and distributed at the next week's session. After discussion of a chapter is finished, a single drafter is designated to draft the commentary on that chapter of the Code.¹² The end-product of the project will be a finished Practical Manual of the Civil Codes, Parts I and II. The group members will be acknowledged as the authors and will receive royalty rights. As another task of the IRIS project, we are currently working with local publishers to create a viable, private legal publication industry. It is hoped that one of these publishers will agree to publish the commentaries.

Major Issues and Observations Regarding the Project To Date

¹² We also pay an honorarium of \$150.00 per month to each participant. Because some of our group members are government employees, they are receiving an honorarium from us, while simultaneously receiving salary from the Kyrgyz government. Under Kyrgyz law, there is no problem with this: government officials are permitted extracurricular compensation for educational services they perform. In addition, because these are commentaries we are drafting, no one is receiving payment for work that he or she would otherwise be required to do by the Kyrgyz government.

A. How do we do this project?

A major hurdle for all members of the working groups was coming to grips with the working nature of the project. At the current time, most members do *come to the meetings* adequately prepared to discuss individual articles in light of fact patterns and hypotheticals; however, it was a long-time coming. By way of guidance, we distributed suggestion sheets and sample commentaries drafted by the Commercial Law Manager. These were obviously read and absorbed by most of the participants.”

¹² The suggestions handed out at the first meetings of the working groups offered the following advice.

1. Analyzing Code Chapters for Discussion: As a first step for discussing a code chapter, the group would presumably wish to analyze the material. As preparation for such a discussion, each group member, in advance of the meeting, might ask himself:

- a. What is the general purpose of this code chapter, in terms of:
 1. the function it serves; and
 2. the disputes and problems it tries to address?
- b. What aspects of the code chapter are most interesting to me?
- c. What use can businessmen make of this code chapter, and what issues does the chapter:
 1. raise for businessmen; and/or
 2. challenge them to do; and/or
 3. give them options to do?
- d. Given all of the above, what aspects of this code chapter absolutely must be addressed by the commentaries?
- e. What forms might usefully be prepared for this code chapter? What must such forms include, and what would be useful for such forms to include?

2. Formulating Hypotheticals: At the meetings, the participants should also discuss different hypotheticals, trying to arrive at hypotheticals which best illustrate the analysis of the code chapter which the group wishes to emphasize. Each participant should therefore think up hypotheticals in advance of each meeting, which hypotheticals he believes might serve as a basis for illustration and fruitful discussion at the meeting. In order to do, each participant might proceed as follows in attempting to think up hypotheticals:

- a. Start with a hypothetical client, who wants to accomplish something that the specific code chapter addresses, **and**, pretending you are his hypothetical lawyer, identify:

At the current time, the issue is not so much that the members are not comfortable thinking in terms of hypotheticals for explanation, but rather that they find it hard to create hypotheticals of business transactions with which they have little familiarity. The Commercial Law Manager accordingly is placed in the position of sometimes leading the discussions in an effort to transfer relevant business fact patterns. As an aid in this, we have translated apposite sections from the Restatements and from various Gilbert's review books. These have been very useful.

Predictably, the members can and do contribute fact patterns from their own experience. The mix of group members often makes this interesting. Banking and debtor-creditor examples are plentiful, for instance, and the private lawyers often give business examples which involve their own struggles with negotiating or disputing contractual terms. From the perspective of this author, the groups often seem riveted to these and enjoy working out their possible denouements. The judge members are always quick with examples from

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1. his circumstances that are relevant to the legal issues in the relevant chapter;
 2. his interests that are relevant to the legal issues in the relevant chapter;
 3. the interests, both adverse and cooperative, of the person or people he must do business with to accomplish his purposes.

As a first step, pick the easiest and most obvious hypothetical first. This may be the one that most directly describes the basic meaning of the code chapter.

- b. After completing a first, basic hypothetical, formulate other ones by changing the circumstances or interests identified above in a way that will illustrate other applications of the code chapter.
- c. As a general principle, try to work through three or four hypotheticals in an attempt to show the depth and variability of the code chapter.
- d. Consider whether the forms you've identified in your analysis should change according to the circumstances of each hypothetical, and if so, how?

their experience. but because none of the judges sits on the commercial court (all judges whom we invited from that court declined), their fact patterns usually involve housing matters or privatization disputes where at least one party is an individual.¹⁴ Among the remainder of the participants, generalizations are difficult to make. The academics are perhaps the weakest at conjuring up examples from real (or hypothetically real) life. In addition, the lawyers who work in policy areas seem, not surprisingly, to have little ability to grasp the micro-decisions that businessmen, citizens and lawyers will have to make regarding legal principles that affect them. This mixed-bag of contributions will necessitate a reformulation of the working groups within the next month.

B. How do we handle ambiguities in the law?

A common complaint of western lawyers about Soviet law is that it is so often vague. lacking clear definition sections. and precise instructions. Without taking up the truth or falseness of that general line of thinking, this author has been impressed by the overall clarity of most of Kyrgyzstan's civil code. Originally, the author thought that much of our commentary was going to consist of identifying and working out conundrums posed by ambiguous legal norms. That type of legal gray area is, after all, the traditional playground of litigators and commentators in America, and the prospect of a slew of alternative hypotheticals illustrating the Kyrgyz law's indecisiveness was bewitching. But surprisingly the occasions to criticize the law's clarity have been fewer than expected. Nevertheless in those instances

¹⁴ The High Arbitration Court, or commercial court, hears only cases where both sides are legal entities (*i.e.*, entities having a corporate form). In contrast, the courts within the Supreme Court system, of which our group members are a part, hear any civil dispute where at least one of the sides is an individual.

where (the author believes) we have found ambiguities. the reactions or‘ the group have been interesting and are worth noting in part.

In general. the judges in our groups are much less willing to admit that sections are poorly or ambiguously drafted than are the other participants. Whereas many of the other participants enjoy taking the sides of plaintiffs and defendants and arguing that a section could mean this, or could mean that. the judges clearly wish to perceive the law as something precise. In our groups, this predilection has marked benefits. for the judges are dogged about making sense of things, and their “final word” interpretations are valuable. For instance. one of our judges took a week to tackle the following “unfortunately” drafted article (which had stumped both groups and drawn derision from all but herj. coming up with a plausible interpretation:

Article 253: Processing

1. Unless otherwise stipulated by any agreement. the right of ownership on any new movable object produced by a person’s processing material that does not belong to such person belongs to the owner of the material.

However, in cases when the cost of the processing substantially exceeds the cost of the materials, the right of ownership of the new object will be retained by the person who has in good faith undertaken the processing for himself.¹⁵

The interpretation that our judge came up with for the article is that it is talking about the use of scraps in the industrial process. For instance, if I sent material to a factor;; to make dresses. and the manufacturer made my dresses to specification, but then made something with the worthless cuttings, that creation would be his. Of course, the issue of “good faith” would

¹⁵ Regrettably, the Russian original sounds no better and is no clearer than the English translation furnished above.

always be there--should the manufacturer have notified me about what he was doing with the cuttings'--but the judge's interpretation does make sense. and does make an unclear law sound like a legal policy which rewards initiative and originality while encouraging full use of resources. It also clears up some other issues, such as the fact that the manufacturer gains rights to the cuttings only when he converts them into something valuable: he would accordingly not be free merely to sweep them up and sell them for junk. That income would belong to the person *originally* supplying the materials and *requesting the processing* work in the first place. A small and revealing flourish to this resolution is that when complimented for her "interpretation", the judge emphasized that it was not her interpretation: instead, it was what the law provided, pure and simple.

A less happy example of judicial tenacity arose in connection with another article of the Code. In this case, the instigator was the author, and though I was not criticizing statutory clarity, I was expressing skepticism of statutory wisdom. The relevant sections of the article follow:

Article 361. Responsibility and Performance of Obligation in Kind

1. Payment of penalty and compensation for damages in case of improper performance of an obligation shall not excuse the obligor from the performance of the obligation if not otherwise provided by the law or contract.

2. Compensation for damages in case of the failure to perform an obligation, and payment of penalty for non-performance, shall excuse the obligor from the performance of an obligation in kind, if not otherwise provided by law or contract.

In this case, I was simply fishing for some reflection on *the fairness of this article*, which envisions that if a person tried to perform, and did so partially but not fully, he would have to pay damages and penalty, and he would still not be excused from full performance: however.

if a person did not even try to perform. he would be obligated only to pay damages and penalty. which would excuse him from performance. My simple question was whether this formulation seems to treat parties who try but fail more harshly than the treatment of parties who do not even try?¹⁶

Interestingly, the other participants agreed that this seemed strange, but the judges said it was no problem. Their reasoning for this was that the obligor who failed to perform at all would have to pay more damages than the partially performing obligor. so there was no unfairness. I was simply struck by their reluctance to examine the issue further than this nice result-oriented answer, though I fully realize that if a case on this article came before them in real life, they would hardly be able to re-invent the statute. For purposes of commentaries. however, some judicious criticism might be in order.

One other interesting reaction of the judges in the working groups to thorny issues of statutory interpretation or application is their willingness to suggest that the parties must make things clear in their contracts. For instance, in our discussions of both of the articles referenced above, the judges noted that there would be no problem if the parties spelled things out contractually. Naturally good and precise contract drafting is a major purpose behind this commentary exercise anyway. There are over one hundred articles in Part I of the Civil Code,

¹⁶ In actuality, this is probably an unartful way of anticipating provisions on purchase and sale, which will be in Part II of the Code. In that part of the Code. as in our UCC, partial performance gives the obligee a number of options about what he may demand from the partial performer (such as cure. replacement, price reduction, which all involve going ahead with the contract), whereas no performance allows the obligee to rescind the contract completely.

which say that things will be such and such way. “unless otherwise provided by contract.”¹⁷ The emphasis our judges show toward contractual completeness as a way to clarify the law will be strongly communicated at every opportunity in the commentaries. If Kyrgyzstan’s lawyers would affirmatively begin to use precisely and carefully drafted contracts to navigate and pin down the presumptions, allowances and ambiguities of the law, we will have made some true advances in the direction of a contractually-based exchange economy.

C. How do we handle new and flexible commercial concepts?

The Civil Code is a modern commercial code and is accordingly full of terms that were largely unfamiliar (or at least rarely applied) in the Kyrgyzstan of Soviet times. These terms are the very ones that we western lawyers recognize as pregnant with potential dispute and various interpretation. but they also lie at the very heart of a commercial system that must defer to circumstance and good sense. A list of such terms which our working groups have so far confronted is as follows: “knew or should have known,” “standard of care”, “essence of the contract”, “good faith,” “good faith purchaser and bad faith purchaser,” “reasonable time.” and “business practice” or “customs of industry.”¹⁷ Absolutely none of these terms, though used in the Code, is defined or embellished. One of the projects of the commentaries is to do so by use of hypotheticals.

¹⁷ An excellent way to teach this Code would be to focus on all articles which permit contractual flexibility, and to give lawyer--participants examples of how and when to make use of that flexibility. In part, the commentaries themselves will do this; however, the give-and-take of contractual innovation and flexibility would be more vivid in a seminar or classroom. At the current time, IRIS is thinking about how to put together such a course, or how to find another medium for pushing the potential offered by a Civil Code which so freely allows contractually-invented alternatives to the given law.

One of the common features of the above terms is that their meaning varies with the circumstances specifically obtaining in a given situation. Applying the sections to which these terms are fundamental will accordingly demand a great deal of unaccustomed interpretation and understanding of factual context by the courts. All of the working group members understand this, and have now grown used to “issue spotting” the occasions in a section when such circumstance-specific terms pop up to make the section’s meaning relative and contingent. Indeed one of the accomplishments of the working group has been to draw the attention of the participants to the “nonabsoluteness” or fluidity of many commercial law principles, the real essence of which lies in the facts of a specific transaction

It is hard to generalize about the appearance of the above-noted terms in the Civil Code. Sometimes they appear almost by surprise, and they are often present in the most general of the articles. For instance, imagine how judges here will react to this provision:

Article 299. Ways of Enforcing Obligations

Obligations should be enforced in a proper manner and within the established period in accordance with the terms of the contract and requirements of legislation, and in the event such terms and requirements are absent, *in accordance with business norms and other usually provided requirements.*

Italics added. In our working groups, it was pointed out that there is no history of business norms about which lawyers or judges are particularly knowledgeable. We therefore had to hypothesize about western businesses and pick out certain industries, such as stock brokerage, which is likely to have its own standards of reasonable conduct.]” Predictably and usefully,

¹⁸ Another article where business practices come into play is Article 30.5, point 2, covering “Term of Performance of an Obligation”. That section states: “In cases when an obligation does not specify a time period for its performance and does not contain conditions which could make it possible to identify that time period, it *shall be performed within a*

however, all of the working group members thought that lawyers in Kyrgyzstan would do well to spell out in their contracts the precise “business norms” of conduct to which they would wish the other side to adhere.” That way, the court could look only to the language of the contract, and not have to worry about taking evidence on ambiguous “business norms.”

Perhaps the most significant circumstance-specific article does not even use one of the terms listed above, but nevertheless (in the view of the author) establishes the obligation of “good faith” so fundamental to commercial exchange. That section states as follows:

Article 304. Performance of Obligations in the Most Efficient Manner.

Assistance on Performance

Each of the parties to the obligation shall perform its obligations in the most efficient manner and provide assistance to the other part in the performance of its obligations.

For this section also, the working groups were somewhat stumped for examples and hypotheticals, and the Commercial Law Manager had to conjure examples of what he thought the section might demand. The use of hypotheticals which were close and could go either way predictably interested the judges and other group members quite a lot. It is an open question how in a system where judicial precedent is not recognized, and where judicial creativity is

reasonable time period after the obligation has arisen. ” Italics added. What is a reasonable time period? In the stock brokerage business, we concluded that it is unreasonable for a broker to delay execution for more than several minutes after receiving a buy or sell order from a client.

¹⁹ A provision dealing with “essence of the contract”, another unfamiliar term for the working groups, similarly assumes circumstantial reasoning by the court:

Article 301. Partial Performance of Obligations

The obligee shall have the right not to accept partial performance of an obligation if not otherwise provided by the legislation, by the terms of the liability itself, or by force of business norms or the essence of the obligation.

formally expected to defer to rigorous (if sometimes wooden) application of the law, the courts will be able confidently to make tough decisions on fact-specific sections such as this.

Another section of the Code which stands out as challenging lawyers and judges with situations of great fluidity is the section setting forth the general grounds for responsibility for breach of obligation:

Article 356, point 1:

A person who failed to perform an obligation or performed it improperly shall be responsible on the grounds of fault (intentional or negligent), except in *cases* when other grounds for responsibility are provided by law or by contract. A person shall be found not liable if he took all necessary measures for proper performance *with the degree of care required by the nature of the obligation and by the conditions of the transaction.*

italics added. The entire concept of shifting standards of care is well-known to western lawyers, and is a subject much in play in American litigation. Here, however, it is a new idea, and the working groups needed to engage themselves with finding hypotheticals which at the current time do not readily obtain in Kyrgyzstan.²⁰

D. How do we handle completely new legal concepts and ideas?

Naturally, Part I of the Civil Code also contains provisions of legal principles which

²⁰ Another section where standard of care differentiation crops up, though less explicitly, concerns laws of agency. Article 202 of the Code establishes something called “commercial representation”, which is a person who is in the business of being a professional agent, and therefore may have a number of different principals. The article states in point 2, “Simultaneous commercial representation of different parties to a transaction is allowed with the consent of the parties or in other cases provided by law. In such cases the commercial representative must perform the tasks entrusted to him *with the care of an ordinary businessperson.*” Italics added. Does this mean that such a generalist agent will not be held to the standard of care which, for instance, a specialist in a certain field will be? That is the working groups’ interpretation.

are completely new to Kyrgyzstan. Entire sections on private property ownership. for instance. are basically without precedent. One of the liveliest conversations in both groups involved positive prescription, or what we know as “adverse possession” (Article 265).²¹ It was difficult for some group members to believe that simple passage of time might create a right of ownership when there was not one before. And the whole policy concept of rewarding people who used property in contrast to people who failed to make use of their property was fully alien. Finally, the idea of “tacking” by allowing someone who did not own the property to sell or transfer it to yet a third party who might gain ownership after a total of fifteen years of adverse possession had passed. was also bizarre to some of the working group members.

The only way to handle a section like this in working groups was to start at the beginning and to explain the nature and purpose of adverse possession, and then to offer hypotheticals from American and western European law. Of course! these hypotheticals, for

²¹ Article 265. Positive Prescription

1. An individual or legal entity who is not the owner of the property but who has in good faith, openly and continuously possessed certain immovable property as his/its own for 15 years and any other property for 5 years, will acquire rights of ownership on the property (positive prescription).

A right of ownership on real estate and other property which a person has acquired as a result of positive prescription and which is subject to state registration, belongs to the person as of the moment of such registration.

2. Prior to the time that a person who has been possessing property as his own has acquired a right of ownership on the property by virtue of positive prescription, he has a right to protect his possessions against third parties who are not the owners of the property, as well as against those who are not entitled to own property owing to other grounds provided by law or by agreement.

3. A person who refers to prescription of possession may add to the time of his possession the entire time during which the property was in the possession of the person of whom the current possessor is the legal successor.

purposes of application in Kyrgyzstan. may or may not be correct. We can really only know that after the courts in Kyrgyzstan begin to consider issues of adverse possession. Nevertheless, ill+ group participants agreed to put their hypotheticals into the commentaries, in the hope that courts in the future will be convinced by the reasoning and explanation offered. They agree that it would be a major achievement if these commentaries served as a guide for interpreting new and untested legal principles here.

Conclusion:

The ultimate conclusion to this article will be the commentaries themselves. For the time being, however, the fact that the working groups are now convinced of the usefulness of hypotheticals to illustrate the meaning of the Code should be counted as an accomplishment. The groups are now accustomed to looking at a given section, deciding what its practical purpose might be, and then coming up with circumstances which demonstrate how that section can be used by businessmen and lawyers. That is a far cry from viewing the sections of the law as simple classifications of theoretical concepts.

A great deal of work lies ahead. The editing process, which will most likely be guided by the author and the IRIS staff, will be particularly difficult in that very different styles of writing must be reconciled. In addition, it is anticipated that there will be a need to add new hypotheticals, to edit hypotheticals given by the drafters, and to coax the drafters themselves into editing their own work. Finally, draft contract clauses must be a part of these commentaries, but the drafters themselves have very little experience with writing their own language into contracts. This will no doubt also be a task that the author will perform.

At the end of the day, however, the working group members, which is a true core

group of lawyers, will be pleased with what they have produced. They have already begun to discuss ways to use the hypotheticals in seminars and teaching milieus, and some have mentioned adopting the technique to illustrate other laws. Their ideas about sustaining this new way of explaining laws in Myrgyzstan will, if brought to fruition, mark a positive step in the reorientation of the legal culture here.