
I. Introduction*

For years there has been an intriguing tendency for many aspects of today's worldwide legal profession to be subjected to an ever increasing Anglo-Saxon influence as well as a growing Americanization. This is of course particularly true of all European legal professionals and academics.¹ However, it is not just this pan-European process of "Anglification" but also the growing American dominance and the predominance of Anglo-American legal thinking and legal practice that lawyers in the International Practice of Law² are having to deal with, exposed, as they are, to the challenges of these new realities and the *Internationalization of the Practice of Law*³ in their day-to-day professional lives.

For the legal practitioners, the function of professional legal English has fundamentally changed in recent years: English has become their *lingua franca*. These new realities having not only a great impact on all legal professionals of a particular jurisdiction but also on the jurisdiction itself. Very little is known about the mechanics and the wide impact of these new realities; particularly, if one considers their enormous significance. In a changing world, there will be a need for a new awareness and new strategies in the areas of legal education, research and scholarship and the international legal profession. The ever growing importance of the English language increasingly affects our society. All this of course must also be seen in the context of many initiatives to deal with the larger issue of the function of the English language in our society, our daily lives and the education of our children.

In this essay we shall attempt to outline what we believe to be the most significant issues in this regard.⁴ We will also try to identify possible elements of a strategy

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¹ JENS DROLSHAMMER, *The Effects of Globalization on Legal Education – an Agenda from a European Perspective for the Interdisciplinary Education of a New International Commercial Lawyer*, in: NEDIM PETER VOGT/JENS DROLSHAMMER (eds.), *Transatlantica – Culture, Language and Law in a Transatlantic Context, Volume 2*, Zurich/The Hague 2002.

² NEDIM PETER VOGT (ed.), *The International Practice of Law, Liber Amicorum* for Thomas Bär and Robert Karrer, Basle/The Hague 1997.

³ JENS DROLSHAMMER/MICHAEL PFEIFER (eds.) *The Internationalization of the Practice of Law*, The Hague 2001.

⁴ JENS DROLSHAMMER started this project during a stay as Visiting Scholar and Fellow at the Harvard Law School in the spring term 1999. He would like to thank Professors Mary-Ann Glendon, Detlev Vagts, Arthur von Mehren, David Kennedy, David Wilkins, Peter Murray and Harry S. Martin III for valuable insights and suggestions to write a series of essays under the working title "The Changing International Practice of Law – Aspects of International Compati-

for action to increase the comparability, compatibility, interoperability and competitiveness⁵ of the Swiss legal system and Swiss legal professionals. We will look at the changed function of legal English in the area of government policy, education and research, legal professions, professional legal associations and associations of legal academics. We are also attempting to deal with the issue of *The New International Lawyer* in a post-national constellation, beyond the issues of English as a legal language and of language and national concepts of legal systems, legal professions and national legal educations.

In dealing with these issues we have used “lists” and “catalogues” as “outlines” to describe the continuously changing impact of English as the Language of Law.

We should like to make the following caveats: In view of the multidimensional task of coping with the new realities of legal English, the authors have favoured an issue-driven and topical approach. We would also add that we do not claim to have embarked on an academic venture in the traditional sense. Many of our statements are based on observations and experiences and not on survey and research.

This essay is intended to serve as a quarry to provide building blocks, gravel and sand for further discourse or analysis. Our approach is a practical one from the perspective of legal professionals and with a specific focus on the international practice of law, but we are well aware that not all members of the legal professions are affected in the same way by the issues dealt with in this essay.

Law follows language and language often carries the law: Now is the age of Anglo-American law and of English as the Language of Law.

bility and “Competitiveness” of Legal Systems, Legal Professions and Legal Educations”; he is particularly grateful to Peter Murray’s reviewing chapter II (The International Practice of Law) and chapter III (The Internationalization of the Practice of Law and the English Language), which are both based on an essay by PETER MURRAY/JENS DROLSHAMMER, The Education and Training of a New International Lawyer in: Jens Drolshammer/Michael Pfeifer (eds.), *The Internationalization of the Practice of Law*, The Hague 2001, p. 289-328.

⁵ See also NEDIM PETER VOGT, The Importance of Being Earnest: Englischsprachiger Zugang zum Schweizerischen Recht, in: Festschrift für Peter Forstmoser, Zürich 2003, p. 799-808.

II. The International Practice of Law

The growing importance of international law practice begs the question, “Are there any particular functions and challenges for a lawyer in international law practice that are not faced by other lawyers? What kind of education and training would best equip young lawyers and experienced practitioners to perform these functions and face these challenges?”

Without attempting to be definitive, international law practice, unlike its domestic counterpart,¹ requires the practitioner to advise, opine, draft or litigate, often with reference to more than one body of national law and with reference to laws, treaties and regulations of international bodies and organizations such as the EU which provides a body of “supranational law”.

Addressing legal issues involving more than one nation’s law is likely to require an understanding of the world’s two great legal systems, the Anglo-American common law, and the Civil Law system in force in those parts of the world not colonized by Great Britain. While these legal systems may share many similarities, their fundamental approaches to many legal problems vary to such an extent that they can be considered different legal cultures.² Practitioners in confedera-

¹ Domestic law practice is here considered to be practice of law largely in a single national jurisdiction; see DETLEV VAGTS, The Impact of Globalization on the Legal Profession, in: Special Issue European Journal of Law Reform, Vol. 2, Issue 4, 2000 and in: JENS DROLSHAMMER/MICHAEL PFEIFER (eds.), *The Internationalization of the Practice of Law*, op. cit. I/N. 3; JENS DROLSHAMMER/MICHAEL PFEIFER, Beitritt zur Europäischen Union als Herausforderung für die schweizerische ‘International Practice of Law’? – Lagebeurteilung und Thesen, in: THOMAS COTTIER/ALWIN KOPSE (eds.), *Der Beitritt zur Europäischen Union*, Zurich 1998, p. 895 et seq., attempting to quantify the value of the ‘international’ as opposed to the ‘domestic’ practice of law.

² On the issue of the similarities and dissimilarities of the two legal systems see BERNHARD ZIMMERMANN, “Common Law” and “Civil Law”, *Amerika und Europa – zu diesem Band*, p. 1-11, in: *Amerikanische Rechtskultur und europäisches Privatrecht, Impressionen aus der neuen Welt*, Tübingen 1995, with contributions of JOACHIM ZEKOLL, SHAEL HERMAN, REINHARD ZIMMERMANN and MATHIAS REIMANN; see also JOHN MERRYMAN, On the Convergence (and Divergence) of the Civil Law and the Common Law, in: *The Loneliness of the Comparative Lawyer*, p. 13-17; on the transatlantic comparative law based views on the American and European tradition see REINHARD ZIMMERMANN (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht, Impressionen aus der Neuen Welt*, Tübingen 1995; JOACHIM ZEKOLL, *Zwischen den Welten – Das Privatrecht von Louisiana als europäisch-amerikanische Mischrechtsordnung*, p. 11-44; SHAEL HERMAN, *Schicksal und Zukunft der Kodifikationsidee in: Amerika*, p. 45-86; REINHARD ZIMMERMANN, *Law Reviews – Ein Streifzug durch eine fremde Welt*, p. 87-131 and MATHIAS REIMANN, *Amerikanisches Privatrecht und europäische Rechtseinheit – Können die USA als Vorbild dienen*, p. 132-185; MATHIAS REIMANN, *Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues*, *Tulane Law Review*, Vol. 73 1999, p. 1337-1346; on the European influence on American law see MATHIAS REIMANN, *Com-*

tions such as the United States or Switzerland will have some familiarity with addressing legal problems governed by the laws of more than one subsidiary state or canton. Within a single national jurisdiction, however, there is likely to be a basic consistency of doctrine and approach which is wholly lacking between the common law, of say, Canada, and the civil law of Japan. Lawyers who seek to complete transactions, cement legal relationships, or resolve disputes involving two legal systems must have some real understanding of how each system works.

Today's international lawyer is not only required to deal with multiple legal regimes and cultures, but to relate successfully to people, be they clients, opposing counsel, or judges from socio-economic cultures other than their own. Understanding other cultures and an ability to relate comfortably to persons and institutions in terms of such cultures can be important to the success of an international endeavor.³ A successful international negotiator must have an appreciation of the

parative Law and Legal History in: the US, Report for the XVth International Congress of Comparative Law Bristol 1998, 46 American Journal of Comparative Law 1 (1998 Supplement with Alain Levasseur); same, *Rechtsgeschichte und geschichtliches Recht in Common Law*, in: G. DILCHER/P. CARONI (eds.), *Norm und Tradition* 1998; same, *Continental Imports: The Influence of European Law and Jurisprudence in the US*, 65 *Tijdschrift voor Rechtsgeschiedenis* 391, 1996; same, *The End of Comparative Law as an Autonomous Subject*, 11 *Tulane European and Civil Law Forum*, 1996, p. 49-72; on the changing function of comparative law see MATHIAS REIMANN, *The End of Comparative Law or an Autonomous Subject*, in: *Tulane European and Civil Law Forum*, Vol. 11 1996, p. 49-72; see in this context also the Symposium "New Directions in Comparative Law", which took place under the direction of Ugo Mattei and Mathias Reimann at the Law School of the University of Michigan, reported on in: *The American Journal of Comparative Law*, Vol. XLVI, Fall 1998: UGO MATTEI/MATHIAS REIMANN, Introduction, p. 597-606; I. *Comparative Law in the United States Today: Distinctiveness, Quality, and Tradition*: JAMES GORDLEY, *Is Comparative Law a Distinct Discipline?* p. 607-616, JOHN C. REITZ, *How to Do Comparative Law*, 617-636, Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, p. 637-646; II. *A New Orientation: Towards Recognition of Difference*: NORA V. DEMLEITNER, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, p. 647-656, VIVIAN GROSSWALD CURRAN, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, p. 657-668, L. AMEDE OBIORA, *Toward an Auspicious Reconciliation of International and Comparative Analyses*, 669-682; III. *New Methods and Approaches: Jurisprudence, Interdisciplinary Study, and Systems Analysis*: GEORGE P.FLETCHER, *Comparative Law as a Subversive Discipline*, p. 683-700, WILLIAM EWALD, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"*, p. 701-708, UGO MATTEI, *An Opportunity Not to Be Missed: The Future of Comparative Law in the United States*, p. 709-718, DAVID J. GERBER, *System Dynamics: Toward a Language of Comparative Law?*, p. 719 et seq.; ERNST STIEFEL/JAMES MAXEINER, *Why are U.S.-Lawyers not Learning from Comparative Law?* in: NEDIM PETER VOGT (ed.), *The International Practice of Law*, op. cit., I/N. 2, p. 213 et seq.

³ Amongst the various special competences of an "international lawyer", certainly the aspect of a specific emotional intelligence will have to be studied in more detail; see DANIEL GOLDMAN, *Emotional Intelligence*, London 1996 and *same*, *Working with Emotional Intelligence*, New York 1998, in particular chapter 1, *Beyond Expertise*, chapter 3 *People Skills* and and chapter 5 *The Emotional Intelligent Organization*; see also CRAIG LAMBERT/DANIEL GOLDMAN, *The Emo-*

deep-seated cultural and social values of all parties to the negotiation.⁴ The structuring of business entities and the creation of successful business relationships requires a sensitivity to the cultural and social values of the participants and an ability to reflect these values in the international entity or relationship.⁵

Although English may have become the international language of business and legal discourse,⁶ documents important to international transactions are frequently in various national languages. National laws and most books and research sources about national laws are in the national languages of the countries that have pro-

tional Path to Success, with pertinent citations on the relevance of the topic to lawyers of Rokoff Todd and Minow Martin, Professors at Harvard Law School, in *Harvard Magazine*, Sept./Oct. 1998, Nr. 1, p. 60 et seq.

⁴ See e.g. JULIAN GRESSER, *Piloting Through Chaos: Wise Leadership, Effective Negotiation For the 21st Century*, Sausalito 1995, for a discussion of the impact of cultural differences on international negotiation. Some of the leading practice-oriented books on negotiation in general do not specifically address the cultural issues included in international negotiations; see e.g. ROGER FISHER/WILLIAM URY, *Getting to Yes*, for 2nd edition Bruce Patton, 1981 and 1991; ROGER FISHER, *Getting Together: Building Relationships as we Negotiate* (with Scott Brown), 1988; same, *Beyond Machiavelli* (with Elizabeth Kopelman and Andrea Kipfer Scheider), 1994; WILLIAM URY, *Getting Past No: Negotiating with Difficult People*, 1991; ROGER FISHER/ALAN SHARP, *Getting it Done, how to lead when you are in charge*, 1998; DOUGLAS STONE/BRUCE PATTON/SHEILA HEEN, *Difficult Conversations*, 1999; *Barriers to Conflict Resolution* edited by KENNETH ARROW/ROBERT H. MNOOKIN; JOHN S. HAMMEND, RALPH L. KEENEY/HOWARD RAIFFA, *Smart Choices, A practical Guide to Making Better Decisions*, Boston, Mass., 1999.

⁵ At least in continental Europe there is a certain lack of conceptualization of the planning and structuring of legal transactions. The international dimension of these legal activities, which are core activities in the "international practice of law", is thus not conceptualized either. The "decision"-oriented legal education has not been adequately supplemented by an "action" or "creation"-oriented legal education. The original legal discipline of *Kautelarjurisprudenz* (discipline on the making of contracts) has not developed into a full-blown theory of legal creation. See JENS DROLSHAMMER, *Ein didaktisches Experiment an der Universität St. Gallen und ein Plädoyer für eine transaktionale Lehrmethode im modernen Wirtschaftsrecht*, in *Solothurner Festgabe zum Schweizerischen Juristentag 1998*, Solothurn 1998, p. 381-411 and JENS DROLSHAMMER, *Internationalisierung der Rechtsausbildung und Forschung – eine Agenda für die interdisziplinär ausgerichtete Ausbildung zum in Wirtschaft und Management tätigen International Lawyer*, Basel/Genf/München 2000 (Bibliothek zur Zeitschrift für schweizerisches Recht, Beih. 35), p. 243-250 and JENS DROLSHAMMER, *The Effects of Globalization on Legal Education – an Agenda for the Interdisciplinary Education of a New International Commercial Lawyer*, in: NEDIM PETER VOGT/JENS DROLSHAMMER (eds.), *Transatlantica – Culture, Language and Law in a Transatlantic Context*, Volume 2, Zurich/The Hague 2002.

⁶ The far-reaching consequences of the domination of key areas of the "international practice of law" by business and legal English are not yet fully understood and analyzed. See PETER M. TIERSMA, *Legal Language*, Chicago and London, 1999, also selected Bibliography p. 293-298, and GÉRARD-RÉNÉ DE GROD/REINER SCHULZE (ed.), *Recht und Übersetzen*, Baden-Baden 1999; see also from a broader perspective GEORGE STEINER, *After Babel, Aspects of Language and Translation*, 3rd edition, Oxford, New York, 1998; STEVEN PINKER, *Words and Rules, the Ingredients of Language*, New York 1999; ROBERT SCHOLES, *The Rise and Fall of English*, New Haven and London, 1998.

mulgated them. Even if translated, the governing version will be the version in the national language. Clients and other persons important to a transaction or dispute may be more comfortable talking in their own national language. For these reasons the ability to read, and if possible converse and write in several languages is important to an international lawyer.

Even though the globe is continuously shrinking with improvements in travel and communications, international law practice typically involves logistical challenges greater than domestic legal activity. The international lawyer must cope with different time zones, long travel times, and extended communications and supply lines to carry on legal campaigns abroad. The ability to use the Internet with its global communications and information storage, transmittal, and exchange facilities is an indispensable skill for the international practitioner.⁷

Finally, the international lawyer needs to have a sense of “globality”, to enable him to step outside the boundaries of his own jurisdiction and consider international transactions, relationships and disputes from a global rather than a national perspective. As professional agents and advocates, lawyers are expected to provide their clients with a perspective and objectivity over and above that of their clients. On an international scale, the lawyer must be able to bring a legal perspective to his client which transcends the national and cultural perspective of the client and seeks solutions based in part on a real appreciation of the national and cultural perspectives of other parties and ultimately on global values and considerations.⁸

It is always dangerous to try to list the required or recommended components of educational preparation for any specific career. Successful legal practitioners come from every kind of educational background. The line between formal legal education and “on the job” training is not clear. What should be taught “in school” and what should be learned “by doing” continues to be actively debated.

The following is a checklist of the intellectual capital that a lawyer in international practice might want to acquire early on:

⁷ See e.g. RICHARD SUSSKIND, *The Future of Law; Facing the Challenge of the Information Society* (Oxford 1996); Financial Times Survey, *Business Education*, April 13, 2000. RAINER NEUMANN/JOHANN VOLATH (eds.), *Corporate University, Strategische Unternehmensentwicklung durch massgeschneidertes Lernen*, Zurich and Hamburg, 1999, in particular *Corporate Universities im Internet*, p. 185.

⁸ E.g. an appreciation of global economics and the possibilities of comparative advantage in international transactions will assist lawyers in developing “win-win” deals on the international scene. The lawyer has to be able to understand business visions and strategies, be able to work with business consultants and investment banks, appreciate and understand new technologies such as biotechnology and information technology, sense clients’ needs to understand the entrepreneurial and economic side of lawyering in an international context.

- *Substantive law training in the national law of the lawyer’s home jurisdiction.* The international lawyer should have a thorough knowledge of his own national law.⁹ In many instances the international lawyer will be required not only to assist a client in the application of local law, but also to educate an international colleague on the ramifications of local law. One has to understand one’s own legal system in enough depth to be able to interpret and utilize local law in unusual international contexts, and to be able to compare and evaluate legal solutions available under local law with alternatives under other legal systems.
- *Training in other legal systems.* Significant basic knowledge of the civil law system and its principal institutions should be a basic component of the formal education of lawyers in common law jurisdictions, and vice versa. Lawyers involved with particular foreign jurisdictions should obtain greater in-depth knowledge of the legal structures and doctrine of those jurisdictions. An ability should be developed in employing basic comparative law techniques to the study of foreign law. Ignorance of foreign law and of comparative law techniques may lead to a parochial preference for local law to the detriment of international clients.
- *Foreign and international legal research abilities.* Legal research training should encompass methods for researching foreign and international legal sources in addition to national legal sources. The Internet has made many legal sources globally accessible to lawyers and law students. The international lawyer must understand where and how to access the relevant legal sources in any jurisdiction involved with an international transaction or dispute. This capability includes not only accessing the legal sources, but also understanding them in a cultural context.
- *An understanding of the international legal profession.* All international lawyers need to have an appreciation of the international legal profession, of the roles lawyers play in legal transactions and dispute resolution under many national and international regimes, and the principles and regulations governing the activities of lawyers in foreign and international practice.
- *Proficiency in relevant foreign languages.* For Europeans and Asians the ability to speak, read and write English is essential. For British and Americans, the ability to read a major European language (to facilitate the study of a Civil Law system) or an East Asian language and the ability to speak, read and write the language of any area with frequent or important foreign legal contacts is highly desirable. An international lawyer managing a complex multinational

⁹ In federal systems such as the United States, Canada, Australia, Germany or Switzerland, this will include both federal and state law.

transaction should have linguistic capability in the national languages of the chief participants. An excessive reliance on translation or the other participants' second language capabilities can place the lawyer at a serious disadvantage. All foreign language capabilities should include a thorough knowledge of technical and legal terminology.

- *Interdisciplinary background knowledge.* Nowadays, most lawyers have a degree of interdisciplinary knowledge in economics, business, political science, etc. Such knowledge is particularly important to the lawyer in international practice, who may be required to address problems in these areas outside the conventional structures of any single national legal system.
- *General educational background.* A sound and comprehensive general education in international history, politics, economics, social, cultural and governmental institutions helps the international lawyer to gain the global perspective essential to the successful representation of parties in international transactions and disputes.
- *Experience in global transactions.* The final component of the training and education of the international lawyer is some meaningful exposure to the unique kinds of international transactions, institutions and disputes that characterize this branch of legal activity. This exposure, in addition to a sound command of the methods and applications of substantive law is what is needed to develop the problem-solving abilities of the international practitioner. This kind of experience is often difficult to acquire. "Hands on" learning in the international as well as the domestic legal arena is generally not a part of the curriculum of institutions of higher education or professional training. Traditionally it has been absorbed during "on the job training" in the early years of practice or during certain more formal programmes of continuing professional education.

We use the reference points of "The International Practice of Law" and the "International Lawyer" as metaphors for activities which best show the changed function of the use of the English language in the legal profession outside the Anglo-Saxon world. It is fair to say that the "internationalization of legal practice" goes way beyond the "internationalization of law" and has brought about a multiplicity of functions and levels of use of the English language in a legal context. If one looks at the realities of legal English outside the Anglo-American world, one also has to look at the increased role of the media in and the ever increasing technical dimensions of the international legal process.

An interesting new perspective affecting the function of language is that legal systems, professions and education¹⁰ have become factors in assessing the "competitiveness" of nations; information and communication about those competitive factors is nowadays likely to be exclusively in English.

One has also to take into account the shift from an industrial society to a knowledge-based society where the use of legal language forms part of modern knowledge management.

¹⁰ JENS DROLHAMMER, Internationalisierung der Rechtsausbildung und Forschung – eine Agenda für die interdisziplinär ausgerichtete Ausbildung zum in Wirtschaft und Management tätigen International Lawyer, in: Bibliothek zur Zeitschrift für Schweizerisches Recht, Beiheft 35, Basel 2000 and JENS DROLHAMMER, The Effects of Globalization on Legal Education – an Agenda from a European Perspective for the Interdisciplinary Education of a New International Commercial Lawyer, in: NEDIM PETER VOGT/JENS DROLHAMMER (eds.), Transatlantica – Culture, Language and Law in a Transatlantic Context, Volume 2, Zurich/The Hague 2002.

III. The Internationalization of the Practice of Law and the English Language

The international practice of law has grown over the past 30 years from an obscure speciality to a standard concept in many of the world's developed economies. Today, there is hardly a company of any size in Europe or North America that has a thriving business without reference to international markets and international competition.¹

The internationalization of business and commerce has been fostered by revolutionary advances in all forms of communication, culminating in the Internet. Deregulation of national economies has been accompanied by international mergers of businesses in fields as diverse as banking and automobile manufacturing. The variety of forms of international business combinations boggles the imagination as different legal structures, regulatory environments and national cultures are accommodated in different mergers of economic interests.² The internationalization of business in Europe has been tremendously spurred on by the course of

¹ See e.g. *Neue Zürcher Zeitung Fokus*, May 1999 devoted entirely to "Globalisierung" in business, economic and cultural affairs; G. BOXBERGE/H. KLIMENTA, *Die 10 Globalisierungslügen*, Munich 1998, with additional references to literature on the merits of globalization/the terror of the economy/the globalization trap/the myth of the world market; HARTMUT BERG (ed.), *Globalisierung der Wirtschaft: Ursachen – Formen – Konsequenzen*, Schriften des Vereins für Sozialpolitik, vol. 263, Berlin 1999; C. CHRISTIAN VON WEIZSÄCKER, *Logik der Globalisierung*, Göttingen 1999; JÜRGEN HABERMAS, *Die postnationale Konstellation*, Frankfurt a. Main 1998, p. 65 et seq.; ULRICH BECK (ed.), *Politik der Globalisierung*, Frankfurt a. Main 1998; the same, *Was ist Globalisierung?*, Frankfurt a. Main 1997; DANIEL THÜRER, *Globalisierung der Wirtschaft: Herausforderung zur 'Konstitutionalisierung' von Macht und Globalisierung von Verantwortlichkeit Unterwegs zur 'Citizen Corporation'?*, *Zeitschrift für Schweizerisches Recht*, vol. 119 I, 2000, p. 107 et seq.; in English language see e.g. THOMAS FRIEDMAN, *The Lexus and the Olive Tree*, New York, 1999; DAVID HELD/ANTHONY MCGREW/DAVID GOLDBLATT/JONATHAN PERRATON, *Global Transformations, Politics, Economics, Culture*, Stanford, 1999; ANTHONY GIDDONS, *Runaway World, How Globalization is Reshaping our Lives*, New York, 2000; PETER L. BERGER/SAMUEL P. HUNTINGTON (eds.), *Many Globalizations, Cultural Diversity in the Contemporary World*, New York 2002; ARJUN APPADURAI (ed.), *Globalization*, Duke University Press, Durban/London 2001; ANTHONY GIDDONS, *Runaway World, How Globalization is Reshaping our Lives*, London 1999; HAROLD JAMES, *The End of Globalization, Lessons From the Great Depression*, Harvard University Press, Cambridge, Mass./London 2001; JOSEPH E. STIGLITZ, *Globalization and its Discontents*, New York/London 2002.

² E.g. in early 1999 Daimler Benz and Chrysler Corporation, major German and American automakers effected a global merger. Deutsche Bank took over Bankers Trust Company. In 1997 Price Waterhouse and Coopers & Lybrand created a global mega-firm in accounting and management consulting. A vivid account of this type of transactions is contained in BRUCE WASSERSTEIN, *Big Deal, The Battle for Control of Americas Leading Corporations*, New York 1998.

European unification from the post W.W.II "European Coal and Steel Community" to the European Union as it exists now.³ A recent trend of great importance⁴ to the international business scene is the prevalence of international business alli-

³ *Agenda 2000: For a stronger and wider Union*, Editorial Comments, *Common Market Law Review* 35 (1998), p. 317-384; Andersen Consulting, *Europe beyond the Millennium – Making Sense of Tomorrow*, London 1998; about the position of the Swiss economy in this process from an economic and political science viewpoint, see e.g. SILVIO BORNER/FELIX WEHRLE, *Die Sechste Schweiz: Überleben auf dem Weltmarkt*, Zurich and Schwäbisch Hall 1984; SILVIO BORNER/AYMO BRUNETTI/THOMAS STRAUBHAAR, Schweiz AG, vom Sonderfall zum Sanierungsfall, Zurich 1990; SILVIO BORNER/MICHAEL E. PORTER/ROLF WEDER/MICHAEL ENRIGHT, *Internationale Wettbewerbsvorteile: Ein strategisches Konzept für die Schweiz*, Frankfurt/New York, Zurich 1991; SILVIO BORNER/AYMO BRUNETTI/THOMAS STRAUBHAAR, *Die Schweiz im Alleingang*, Zurich 1994; CEDRIC DUPONT/PASCAL SCIARINI, *Globalization, Few Certitudes and many open Questions*, p. 124-128; ROLF KAPPEL, *Die Schweiz im Prozess der Globalisierung: Einige Aspekte aus der Sicht der Ökonomie*, 96-103; JEAN-CHRISTIAN LAMBELET, *L'Economie Suisse, un essai d'interprétation et de synthèse*, Paris/Genf 1993; from a Swiss political view, cp. KLAUS ARMINGEON ET AL. (eds.), *Swiss Political Science Review*, Volume 4, Issue 2, Summer 1998, the papers under discussion: *Globalization*, p. 95-128; ROLF KAPPEL/OLIVER LANDMANN, *Die Schweiz im globalen Wandel, Aussenwirtschaftliche und entwicklungspolitische Herausforderungen*, Zurich, 1997, p. 104-111; KLAUS ARMINGEON (ed.), *Der Nationalstaat am Ende des 20. Jahrhunderts: Beiträge im Rahmen der Berner Vortragsreihe 'Die Schweiz im Prozess der Globalisierung'*, Bern/Stuttgart 1996, 181-199; ALOIS BISCHOFBERGER, *The Consequences of Economic Globalization for Switzerland*, 119-124; DANIEL WÜGER, *Globalization – Challenges to Constitutions – the Case of Treaty Making*, *Schweizerische Zeitschrift für Politische Wissenschaft* Vol. 4 (1998), Issue 2, p. 111-119; from the Swiss legal viewpoint – for the time being still primarily about the effects of commercial international law on the Swiss legal system – above all THOMAS COTTIER, *The Challenge of Regionalization and Preferential Relations in World Trade Law and Policy*, *European Foreign Affairs Review* 2, 1996, p. 149-167; *The Impact of New Technologies on Multilateral Trade Regulations and Governance*, *Chicago Kent Law Review*, Volume 72, 1996, p. 415-436; *Handlungsspielräume und Zwangslagen der Schweiz in den internationalen Handelsbeziehungen und Die Globalisierung des Rechts – Herausforderungen für Praxis, Ausbildung und Forschung*, ZBJV 1997, p. 217-241; ANDRÉ MACH (ed.), *Globalization, neoliberalisme et politiques publiques dans la Suisse des années 1990*, Zurich, 1999; BEAT HOTZ/HORST CARSTEN KÜCHLER, *Wissen als Chance, Globalisierung als Herausforderung für die Schweiz*, Chur/Zürich 1999; *Globalisierung eine Standortbestimmung*, Schweizerisches Institut für Auslandsforschung, Vortragsreihe an der Universität Zürich, Chur/Zürich, 1998; THOMAS BEINAUER/DIETER RULOFF (eds.), *Globaler Wandel und Schweizerische Aussenpolitik, Informationsbeschaffung und Entscheidungsfindung der Schweizerischen Bundesverwaltung*, Chur/Zürich, 2000.

⁴ There are at the present time very few Swiss publications about the effects of globalization on the Swiss legal system in general, Swiss commercial law; or the emerging changes in Swiss legal education, see JENS DROLSHAMMER, *Internationalisierung der Rechtsausbildung und Forschung – eine Agenda für die interdisziplinär ausgerichtete Ausbildung zum in Wirtschaft und Management tätigen International Lawyer*, Basel/Genf/München 2000 (*Bibliothek zur Zeitschrift für schweizerisches Recht, Beiheft 35*), p. 94-130; and JENS DROLSHAMMER, *The Effects of Globalization on Legal Education – an Agenda for the Interdisciplinary Education of a New International Commercial Lawyer*, in: NEDIM PETER VOGT/JENS DROLSHAMMER (eds.), *Transatlantica*, Volume 2, Zurich/The Hague 2002.

ances of every description, in which business entities enter into short- or long-term partnerships, joint ventures and other joint relationships to complete a particular project or exploit a particular market.⁵

Inevitably, the growth in international business transactions and relationships has led to a growth in disputes. Manufacturers of products sold world-wide face world-wide exposure to product liability.⁶ Litigants in many countries are no longer shy about asserting claims for compensation against foreign firms under local law.⁷ Transnational litigation and international arbitration have become growth industries.

This internationalization of business activity and dispute resolution has been accompanied by the internationalization of lawyers that serve business and resolve its disputes. The burgeoning of transnational business mergers has ushered in a spate of international combinations of law firms. Major law firms based in London, Frankfurt and New York have gone far beyond the different branches and correspondent relationships that existed 20 years ago to become worldwide networked enterprises with partners and major offices in many countries.⁸ English,

⁵ For a description of the alliance phenomenon and the importance of "alliance mediation" to preserve and foster successful business alliances, see JULIAN GRESSER, *Strategic Alliance Mediation – Creating Value from Difference and Discord in Global Business*, in: JENS DROLSHAMMER/MICHAEL PFEIFER, *Special Issue European Journal of Law Reform*, Vol. 2, Issue 4, 2000 and in: JENS DROLSHAMMER/MICHAEL PFEIFER (eds.), *The Internationalization of the Practice of Law*, Kluwer Law International, 2001, p. 227-288.

⁶ Manufacturers of silicon breast implants sold worldwide are embroiled in world-wide litigation and are seeking worldwide settlements of claims of citizens of many countries. Other well known current examples include international plane crash litigation against Swissair and TWA, consumer class action cases against BMW and Roche, the Microsoft antitrust case with international implications; international patent litigation involving the Biogen patents; international fraud claims against BCCI. Overviews of the most prominent ongoing transnational litigations are found in the specialized publications of the International Legal profession cited below in N 25.

⁷ An example of this form of transnational litigation are the "holocaust claims" being asserted in American and European courts against German and international firms based on alleged misconduct arising out of the Holocaust; see DETLEV VAGTS, JENS DROLSHAMMER AND PETER MURRAY, *Mit Prozessieren den Holocaust bewältigen? Die Rolle des Zivilrechts und Zivilprozesses beim Versuch der Wiedergutmachung internationaler Katastrophen*, *Zeitschrift für Schweizerisches Recht*, NF Volume 118, 1999, p. 541-528; BURKHARD HESS, *Entschädigung für Zwangsarbeit vor US-amerikanischen und deutschen Zivilgerichten*, *Die Aktiengesellschaft* 1999, p. 145-154 and in: *Newsletter of the Deutsch-Amerikanische Juristenvereinigung*, Nr. 2 1999, p. 33-39; MICHAEL J. BAZYLER, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 *University of Richmond Law Review* 1 (2000).

⁸ See JENS DROLSHAMMER, *The Future Legal Structure of International Law Firms – Is the Experience of the Big Five in Structuring Auditing and Consulting Organizations Relevant?*, in: JENS DROLSHAMMER/MICHAEL PFEIFER, *Special Issue European Journal of Law Reform*, Vol. 2, Issue 4, 2000 and in: JENS DROLSHAMMER/MICHAEL PFEIFER (eds.), *The Internationalization of the*

and to a lesser extent, American firms have emerged as early leaders in this trend for globalization.⁹ Multinational business firms have developed their own international in-house legal staffs composed of lawyers from the various areas in which they do business. One recent development on the international scene causing concern, if not consternation, on the part of the traditional legal profession, is the growing presence of the mighty – now "Final Big Four" – international accounting and management consulting firms with huge multinational legal staffs operating in areas of professional practice formerly considered the preserve of the legal profession.¹⁰

This trend towards the internationalization of business and legal practice that has characterized the last two decades is unlikely to change in the near future. Improvements in communications, the dismantling of financial and currency barriers and the waning significance of any practical impediments to the widespread

Practice of Law, Kluwer Law International, 2001; *Special Issue Global Boom*, *The American Lawyer*, November 1998; *Lawyers Go Global*, *The Battle of the Atlantic*, *The Economist*, February 26, 2000; *Surviving in the New Europe: Strategies for European Firms*, in: *European Counsel*, March 1998, p. 31. The new "global" law firms incorporate such elements as offices in the major European jurisdictions dispensing both international and national legal services, teams of employees with dual competences (international law and national law specialists) and integrated networks of branches providing the ability to exchange teams relating to individual projects.

⁹ See JAMES L. HESKETT, *Managing in the Service Economy*, Harvard Business School Press Boston 1986; JAMES L. HESKETT/LEONARD A. SCHLESINGER, *Out in Front, Building High Capability Service Organizations*, Harvard Business School Press Boston 1997; JAMES L. HESKETT/W. EARL SASSER JR./LEONARD A. SCHLESINGER, *The Service Profit Chain*, New York 1997; DAVID H. MAISTER, *Managing the Professional Service Firm*, New York 1993; DAVID H. MAISTER, *True Professionalism, The Courage to Care About your People, your Clients and your Career*, New York 1997; STEPHEN MAYSON, *Making Sense of Law firms, Strategy, Structure and Ownership*, London 1997; MARK C. SCOTT, *The Intellect Industry, Profiting and Learning from Professional Service Firms*, New York 1998. Swiss publications in this field e.g. are rare and suffer from the fact that due to the predominance of the English language in this field, they are not taken note of in their German form; see e.g. GÜNTER MÜLLER-STEWENS/JENS DROLSHAMMER/JOCHEN KRIEGMEIER, *Professional Service Firms*, Frankfurt 1999.

¹⁰ See e.g. ARNDT RAUPACH, *Globalisierung, Full Service-Concept und Multi-Disciplinary Practices auf dem Beratungsmarkt, Anwaltssozietäten auf dem Weg zur Internationalisierung, internationale Wirtschaftsprüfungsgesellschaften auf dem Weg zum Global Legal-Service*, in: *Der Fachanwalt für Steuerrecht im Rechtswesen*, Festschrift, p. 13-49. On the legal issues concerning Multidisciplinary Practices see *Preserving the Core Values of the American Legal Profession, The Place of Multidisciplinary Practice in the Law Governing Lawyers*, Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, Albany, New York, April 2000; on the recommendations of the New York Bar Association on MDP see SIDNEY M. CONE III, *The Future Debate on Multidisciplinary Practice in the United States*, in: JENS DROLSHAMMER/MICHAEL PFEIFER, *Special Issue European Journal of Law Reform*, Vol. 2, Issue 4, 2000 and in: JENS DROLSHAMMER/MICHAEL PFEIFER (eds.), *The Internationalization of the Practice of Law*, Kluwer Law International, 2001.

adoption of English as a world of business language will only hasten the process of internationalization of business, financial and commercial activity. "International legal practice" will become an ever greater component of lawyers' professional activity in practically every part of the world, but particularly in Europe, North America and East Asia where both major business enterprises and major legal resources are currently concentrated.¹¹

The effect of this internationalization of business activity has been the "internationalization" of the practice of law.

Over the last 30 years in the United States and the last 20 years in Europe, the Bar as perceived by the public and by its own membership has evolved from an organ of the public administration or officer of justice to a market-orientated service provider. In the *good old days* the degree of specialization was low and the lack of business understanding and judgment widespread. Law firms were small units in locally structured markets. The markets were well protected and were only partly competitive. At that time, the national economies were regionally fractured, consisting of small and middle-sized markets developed around dominating centres. The economy was made up to a considerable extent of medium-sized and family owned enterprises. The importance of the financial sector was small and legal matters were generally undervalued by the business community.¹²

Consequently, the big industrialized firms had large legal departments with a high degree of specializations and retained outside counsels as experts, particularly in litigation. Medium-sized enterprises would have personal, long-term and loyal consulting relationships. The international practice of law was focused heavily on incoming investment and on trade relations. This led to a concentration of a few internationally orientated law firms who organized their cooperation nationally and internationally on a best-friends-system.

¹¹ See the following US and British publications specialized on the international practice of law, which usually appear on a monthly basis: *International Journal of the Legal Profession*; *Lawyer International*; *The Legal Business Briefing on International and Emerging Markets*; *Legal Business*; *The American Lawyer*; *European Corporate Lawyer*; *European Counsel*; *Commercial Lawyer*, London; *International Legal Practitioner*, *International Bar Association*, London; *International Business Lawyer*, *International Bar Association*, London; the *New York Times*, the *Wall Street Journal* and *The Financial Times* are at the forefront in reporting on the international practice of law on a daily basis.

¹² The text follows a line of argument reflected in a presentation of MICHAEL OPPENHOFF, then Co-Chairman of Linklaters & Alliance with the title *Outside Counsels (European perspective)* held at the occasion of special lecturers on the legal professions in the context of the Masters of European and International Business Law MBL-HSG on October 28, 1999 at St. Gallen University, Switzerland.

Since the 80's, drastic changes have taken place in the economy and the consulting scene. Industry has undergone a far-reaching process of concentration and internationalization. The complexity of economic and legal matters has grown. Increasing specialization has been accompanied by increased sensitivity to costs on the part of many clients. Liberalization of freedom of service provision and establishment have brought about more competition. Greater orientation towards finances and the growing influence of the predominantly Anglo-Saxon financial service providers have led to a concentration of the most lucrative segments of legal consulting in the financial centres of London and New York.

These developments in turn have led to more specialization, an increased capacity for major transactions, greater understanding of business and economic matters, the development of technical infrastructure and changes in work structures, and new cooperations with other service providers. The respective changes in the Bar can be characterized as follows: development marked by a forced growth, often by national and international mergers; increased focusing, specialization and team-work; reorganization of law firm management; specialized working groups and market orientation; a priority on legal-management; the inclusion of tax law; specific and specialized accounting capabilities; market internationalization; the increased importance of languages and a clear demand for entrepreneurial thinking by the Bar. The international practice of law has led to new demands such as the provision of legal advice in the major legal systems; one-stop shopping; high specialization and limitation to fields of practice specifically suitable for specialization; high availability of manpower and teams, an ability for legal-management; high standards of quality and education as well as the development of new and proprietary legal products and services.

Traditional law firms on both sides of the Atlantic have encountered problems in adapting to these changed circumstances. These resulted from limited financial and professional resources, limitation of legal knowledge outside the local legal community, traditional professional structures, cultural differences between the countries on the European continent, insufficient market orientation and a limited ability for legal management. These changes have brought about an increased market orientation of the practice of law. New regional markets have come into existence and are served by small and medium-sized law firms with a comparatively broad range of services. Niche markets have also emerged to be served by smaller law firms with a distinct focus on the range of services they offer. International business and commercial law has always been serviced by large international firms.

This process marks a revolutionary phase of development. The developments have led to a need to analyze these new roles of lawyers, legal services, legal or-

ganizations such as legal departments and law firms as well as the role of legal education.¹³

The kind of "international law" practiced by these lawyers is hardly the traditional public international law of treaties, boundaries and fishing rights at sea. Traditional public international law was practiced in a few areas by a small group of practitioners associated with governments, or the relatively few business entities and specialized law firms directly affected by public international law.¹⁴ Far more commonplace in today's burgeoning international commercial and business practice are transactions and business arrangements or disputes which involve the national law of two or more jurisdictions, or international and supranational legislation such as regulations of the European Union or organizations such as the World Trade Organization or the IMF. It is this kind of "international law" or rather International Practice of Law¹⁵ that is occupying the new international law firms¹⁶, the law departments of multinational corporations, and the "Final Big Four" accounting and management consulting firms.¹⁷

¹³ On November 9 and 10, 1998 some 105 lawyers from 25 countries gathered in Paris France for the first Paris Forum on Transnational Practice for the Legal Profession. At this historic meeting the participants considered from several points of view how the international legal profession should best be regulated. Does the legal profession possess unique attributes which make regulation by the WTO and similar organizations inapposite? How can impediments to practice in jurisdictions other than that of original licensure be reduced? What common values are shared by lawyers all over the world? Some of the papers presented at the Paris Forum are published in 18 Dickinson Journal of International Law, p. 1-173 (2000).

¹⁴ E.g., for decades the fishing industry has been intimately concerned with international law regulating maritime boundaries and resource management. Rights of navigation on international watercourses or in the air are similarly the subject matter of traditional international law.

¹⁵ The influence of globalization on the profession of these international lawyers is addressed in NEDIM PETER VOGT (ed.), *The International Practice of Law*, op. cit., I/N. 2 which includes contributions by PETER BÖCKLI, *Osmosis of Anglo-Saxon Concepts in Swiss Business Law*, p. 9, KLAUS BÖHLHOFF, *The International Practice of Law: Globalization or Regionalization*, p. 31, WILLEM J.L. CALKOEN, *Internationalisation of the Legal Profession*, p. 53, PHILIPPE NOUËL, *The International Practice of Law*, 183, ANDREW SOUNDY, *UK Aspects of International Legal Praxis*, 207, PETER D. TROOBOFF, *Maintaining Professionalism in International Legal Practice – Challenges for the Future*, p. 237, DETLEV VAGTS, *Bär and Karrer: Connecting Two Legal Systems*, p. 247.

¹⁶ See also JENS DROLSHAMMER, *The Future Legal Structure of International Law Firms*, in: JENS DROLSHAMMER/MICHAEL PFEIFER (eds.), *The Internationalization of the Practice of Law*, op. cit. I/N. 3, pp. 449 et seq.

¹⁷ For a sampling of the kinds of legal problems faced by these international lawyers see the various articles in: *The International Lawyer*; *Freundesgabe für Wulf Döser*, Baden-Baden 1999; *Wege zur Globalisierung des Rechts*, Festschrift für Rolf A. Schütze, München 1999; see also JENS DROLSHAMMER, *Internationalisierung der Rechtsausbildung und Forschung – eine Agenda für die interdisziplinär ausgerichtete Ausbildung zum in Wirtschaft und Management tätigen International Lawyer*, in: Beiheft 35 zur ZSR zum Schweizerischen Juristentag 2000 and JENS DROLSHAMMER, *The Effects of Globalization on Legal Education – an Agenda from a European*

At the beginning of the new millennium, the term "International Lawyer" applies to a large number of players on the legal scene.¹⁸ First, there are the traditional international lawyers attached to governments and international organizations who are concerned with questions of public international law such as treaties, conventions, boundaries and the like.¹⁹ With the growth in private international legal transactions and relationships, this body of law and the lawyers who practise it have also been undergoing a sustained growth cycle. The second major group of "international lawyers" comprises partners and associates of law firms that have a major stake in international law practice as described above. The number of mergers and other fusions of law firms in different countries, the number of foreign branches of major law firms domiciled in major commercial centres, and above all the transformation of the business activities of the clients of these firms attest to the rapidly growing size and importance of this branch of the traditional legal profession.²⁰ This group is augmented by lawyers employed by multinational accounting and management consulting firms who now perform many services for their clients that were traditionally performed by lawyers in private practice.²¹ Another growing group of lawyers in international practice are members of in-house legal staff of multinational corporations. Over the last 20 years the growth of this group has been compounded by the movement in America and other countries to increase in-house legal competence.

Perspective for the Interdisciplinary Education of a New International Commercial Lawyer, in: JENS DROLSHAMMER/NEDIM PETER VOGT (eds.), *Transatlantica*, Volume 2, Zurich/The Hague 2002.

¹⁸ See DETLEV VAGTS, *Are there no International Lawyers Anymore?* 75 *American Journal of International Law*, January 1981, p. 134-137; *The Impact of Globalization on the Legal Profession*, in: JENS DROLSHAMMER/MICHAEL PFEIFER, *Special Issue European Journal of Law Reform*, Vol. 2 Issue 4, 2000 and in: JENS DROLSHAMMER/MICHAEL PFEIFER (eds.), *The Internationalization of the Practice of Law*, op. cit. N. 3; *The International Legal Profession, A Need for More Governance*, 90 *American Journal of International Law* 1996, p. 645.

¹⁹ See e.g. OUTI KORHONEN, *International Law Situated: The Lawyer's Stance towards Culture, History and Community*, *Kluwer Law International*, The Hague etc. 2000; see also OUTI KORHONEN, *New International Law: Silence, Defence or Deliverance*, *European Journal of International Law*, 1996, p. 1-28; *Liberalism and International Law: A Centre Projecting a Periphery*, *Nordic Journal of International Law*, 1996, p. 481-532 and *Current Trends in European International Law Publications*, *European Journal of International Law*, 1998, p. 553-573.

²⁰ The best sources of information on the internationalization of the legal professions are the specialized publications on the legal profession cited in N. 29, which appear on a bi-weekly or monthly basis. A broad picture is also presented in *Lawyers Go Global, The Battle of the Atlantic*, *The Economist*, February 26, 2000.

²¹ See JENS DROLSHAMMER, *The Future Legal Structure of International Law Firms – is the Experience of the Big Five in Structuring Auditing and Consulting Organizations Relevant?*, in: JENS DROLSHAMMER/MICHAEL PFEIFER, *Special Issue European Journal of Law Reform*, Vol. 2 Issue 4, 2000 and in: JENS DROLSHAMMER/MICHAEL PFEIFER (eds.), *The Internationalization of the Practice of Law*, op. cit. N. 3, pp. 449 et seq.; GÜNTER MÜLLER-STEWENS/JENS DROLSHAMMER/JOCHEN KRIEGMEIER, *Professional Service Firms*, Frankfurt 1999.

On the dispute resolution side of international practice, one finds growing numbers of lawyers occupied with international legal disputes. This is especially true in international centres of dispute resolution such as New York, London, Paris and Zurich.²² There are other lawyers focusing on human rights who can be found in London, New York, and Strasbourg, or any other city where there are clients with international human rights claims.²³ Almost any lawyer in Europe, East Asia or North America can become involved in an isolated international business dispute or products liability claim. As the internationalization of economic activity proceeds, the number and proportion of legal practitioners who practise "international law" can only be expected to grow.

²² See e.g. MARC BLESSING, Introduction to Arbitration – Swiss and International Perspectives, in: NEDIM PETER VOGT (ed.), *Swiss Commercial Law Series*, vol. 10, Basle/Frankfurt a. Main, 1999; YVES DÉZALAY/ BRYANT F. GARTH, *Dealing in Virtue, International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago and London, 1996; International Court of Arbitration, *Arbitration in the Next Decade, Proceedings of the International Court of Arbitration's 75th Anniversary Conference*, Geneva, September 25 1998, Special Supplement – ICC International Court of Arbitration Bulletin; ROBERT BRINER, President of the Court of Arbitration of the ICC, in: Special Issue *European Journal of Law Reform*, Vol. 2, Issue 4, 2000 and in: JENS DROLSHAMMER/MICHAEL PFEIFER (eds.), *The Internationalization of the Practice of Law*, op. cit. N. 3; STEPHEN GOLDBERG/FRANK SANDER/NANCY ROGERS, *Dispute Resolution, Negotiation, Mediation and other Processes*, 2nd edition, Boston, Toronto, London, 1992.

²³ See International Bar Association, Human Rights Institute HRI News e.g. LORD GOLDSMITH QC/NICHOLAS R. COWDERY QC, *The Role of the Lawyer in Human Rights*, HRI News, Vol. 4 No. 2, December 1999.

IV. The Importance of English as a Legal Language

In Switzerland, the English language is recognized as the language of science, business and culture. This is nowadays seen as a necessity within the overall trend towards a general Anglo-Saxonization and globalization¹. There is, however, tension between a politically driven tendency to try to limit the spread of English on the one hand and a wish by the business community on the other to further the trade and industry driven² use of the English language with regard to education, professional activities, science and arts. The public perception of English seems to be intimately linked with motivation, challenge, dynamics, modernity, mobility and even seduction and has led to intensified scientific research into this phenomenon³. In the case of Switzerland evidence of this can be seen in recent publications by Richard J. Watts and Heather Murray, "Die fünfte Landessprache? Englisch in der Schweiz" (The fifth national language, English in Switzerland), which summarizes the results of a symposium based on a one-year pilot research

¹ RICHARD J. WATTS/HEATHER MURRAY (eds.), *Die fünfte Landessprache? Englisch in der Schweiz, Zürich 2001* (ALFRED H. GEERING, Foreword: Much ado about nothing? Viel Lärm um nichts?, p. 1 et seq.; RICHARD J. WATTS/HEATHER MURRAY, Prolog: Die fünfte Landessprache? Englisch in der Schweiz, p. 3 et seq.; ALESSANDRA FRANZEN, Wo wird Englisch in der Schweiz verwendet? Eine Dokumentation, p. 9 et seq.); Teil I: Englisch als Weltsprache, RICHARD J. WATTS, Einführung, p. 25 et seq.; PETER TRUDGILL, Weltsprache Englisch; BENT PREISLER, Englisch von Oben und von Unten: Sprachwandel und kulturelle Identität in Dänemark, p. 35 et seq.; Teil II: Englisch im öffentlichen Bildungssystem; HEATHER MURRAY, Einführung, p. 55 et seq.; MARTIN STAUFFER, Fremdsprachen an Schweizer Schulen: Dilemmata und Perspektiven eines Gesamtsprachenkonzepts, p. 59 et seq.; CHRISTIAN AEBERLI, Englisch ab der ersten Klasse: Das Zürcher Experiment, p. 69 et seq.; HEATHER MURRAY, Englisch als Wissenschaftssprache an der Universität Bern, p. 85 et seq.; Teil III: Englisch in Handel, Industrie und Finanz; RICHARD J. WATTS, Einführung, p. 201 et seq.; FRANÇOIS GRIN, Der ökonomische Wert der englischen Sprache, p. 105 et seq.; DAVID STOTZ, Sprachpolitik und Sprachpraxis in "big business": Der Status des Englischen, p. 121 et seq.; Teil IV: Englisch als Traktandum in Schweizer Politik und Medien; HEATHER MURRAY, Einführung p. 139 et seq.; CONSTANTIN PITSCH, Wieviel Mehrsprachigkeit ist zumutbar?, p. 141 et seq.; RENATA CORAY, Englisch in der Schweiz: Trojanisches Pferd oder Sprungbrett für die Zukunft?, p. 161 et seq.; RICHARD J. WATTS, Epilog: Was ist der Marktwert der englischen Sprache?, p. 183 et seq. (with documentation, p. 191 et seq. and bibliography, p. 201 et seq.).

² RENATA CORAY, Englisch in der Schweiz: Trojanisches Pferd oder Sprungbrett für die Zukunft?, p. 161 et seq. in: RICHARD J. WATTS/HEATHER MURRAY (eds.), *Die fünfte Landessprache? Englisch in der Schweiz, Zürich 2001*; in FN 2.

³ RICHARD J. WATTS/HEATHER MURRAY, Prolog: Die fünfte Landessprache? Englisch in der Schweiz, p. 3 et seq., in: RICHARD J. WATTS/HEATHER MURRAY (eds.), *Die fünfte Landessprache? Englisch in der Schweiz, Zürich 2001*.

project⁴ and the research report, *Englisch in der Schweiz* (English in Switzerland), commissioned by the Federal Office of Education and Science⁵.

Interestingly, the phenomenon of the function of legal English is not touched upon in either of the abovementioned publications. As we will demonstrate, it is a fact that neither public discourse nor scientific efforts in the past have made legal English a specific object of analysis⁶. As will be further shown, the intrinsic relationship between law and language has not been scientifically analyzed, either from legal or from linguistic perspectives. The degree of their interrelatedness⁷ is evidenced e.g. in Markus Nussbaumer's exemplary annotated bibliography, "Sprache und Recht" (Language and Law), which appeared in 1997⁸.

English texts on legal English are written in and for a primarily Anglo-Saxon environment and not in an international context or a context of *international* or *extraterritorial* use of legal English. If legal language as such is e. g. by German writers made the object of academic analysis, it focuses generally on the legal language used by the lawmakers and on the interpretation of statutes and contracts by lawyers. We are confronted with a similar situation in the Anglo-Saxon world, where the topics of law and language are dealt with mostly in a purely domestic context⁹. For instance in England and in the United States, important specialized publications such as David Crystal's, *English as Global Language*¹⁰, and Tom

⁴ RICHARD J. WATTS/HEATHER MURRAY, *op. cit.* N. 2

⁵ *Englisch in der Schweiz*, Forschungsbericht Bundesamt für Bildung und Wissenschaft, Schriftenreihe BBW 2001/1d (*English in Switzerland*, Research Report Series BBW 2001/1d).

⁶ In the light of the specific focus of this essay on legal professions, it is interesting to note that the relevance of English in law is different in an academic and in professional contexts. Again one has to note that even as regards the relevance of English in legal science, the legal academia has hardly dealt with the issue. In the book *The Dominance of English as a Language of Science, Effects on other Languages and Language Communication*, edited by ULRICH AMMON for instance, none of the 22 contributions deals with the role of English as a language of legal science. The teaching of (international) legal issues and law in English at continental European Universities is less compared to other natural, philosophical and even social sciences, see URS DÜRRMÜLLER, *The Presence of English at Swiss Universities*, in ULRICH AMMON (ed.), *The Dominance of English as a Language of Science, Effects on other Languages and Language Communities*, Berlin/New York 2001, p. 389-404. A comprehensive analyses of the relevance of the English language as language of law would have to include the specific user of English in legal research as well as legal teaching.

⁷ THEO ÖHLINGER, *Sprache und Recht* (Language and Law), eine Problemskizze, in: THEO ÖHLINGER (ed.), *Recht und Sprache* (Law and Language), Symposium in Commemoration of Fritz Schönherr 1985, Wien 1986, p. 25 et seq. and DAVID MELLINKOFF, *The Language of Law*, Boston 1993, are rare exceptions.

⁸ MARKUS NUSSBAUMER, *Sprache und Recht*, *Studentenbibliographien Sprachwissenschaft*, Heidelberg 1997 (Language and Law, Bibliography, Philology).

⁹ See i.e. FRED SCHAUER (ed.), *Law and Language*, Aldershot (UK), 1993.

¹⁰ DAVID CRYSTAL, *English as a Global Language*, Cambridge University Press, Cambridge, 1997 (with a short commented bibliography, p. 141 et seq.).

McArthur's, *The English Languages*¹¹, as well as *The English Language* (by David Chrystal)¹² and *The Oxford Companion to the English Language* (by Tom McArthur)¹³ are explicit and complete in describing the emerging dominance of English in various spheres of life around the world, however in these publications, the role of legal English, if dealt with at all, is hardly ever the focus of attention. The reluctance or disinterest in dealing with English as a legal language coincides with the state of education in legal English outside the Anglo-Saxon world. This is all the more striking, since the spectacular internationalization of the legal professions, which goes way beyond the anticipated internationalization of the practice of law¹⁴, has led to a dramatically increased use of the English language on the European Continent and in all commercial centres of the world.

In this essay we make a series of observations on the present function of legal English for the legal professions in Switzerland based upon our own experiences and observations and will we therefore first describe the growth and the present state of the international practice of law in this context:

- The International Legal Practice which has developed over the past 30 years, cannot be understood without understanding the changing and changed functions of legal English as a professional language.
- The variety of situations in which international lawyers have to operate and communicate in a professional context nowadays necessitates understanding the importance of the role that legal English plays.¹⁵

Whilst we characterize a number of elements of the present use of legal English by professionals primarily in Switzerland, we also suggest that those elements are relevant in comparable circumstances in other continental European jurisdictions.

¹¹ TOM MCARTHUR, *The English Languages*, Cambridge University Press, Cambridge, 1998.

¹² DAVID CRYSTAL, *Cambridge Encyclopedia of the English Language*, Cambridge University Press, Cambridge, 1995 and same, *Die Cambridge Enzyklopädie der Sprache*, German translation, Zürich, 1995 (*The Cambridge Encyclopedia of Language*, Cambridge University Press, Cambridge et al. 1987); with an overview on further literature (p. 447 et seq.) and an overview on all publications that are referred to in the main text p. 451 et seq.

¹³ TOM MCARTHUR (ed.), *The Oxford Companion to the English Language*, Abridged Edition, Oxford University Press, Oxford et al. 1998 (first published 1996).

¹⁴ JENS DROLSHAMMER/MICHAEL PFEIFER, *On the Way to a Globalized Practice of Law*, in: JENS DROLSHAMMER/MICHAEL PFEIFER, *The Internationalization of the Practice of Law*, *op. cit.* N. 3, p. 15; JENS DROLSHAMMER/MICHAEL PFEIFER, *The International Practice of Law: The Swiss Experience*, *Tulane European and Civil Law Forum*, Vol. 14, 1999, p. 66-100.

¹⁵ As a starting point we have drawn heavily from an essay by Peter Murray/Jens Drolshammer, *The Education and Training of a New International Lawyer*, which appeared in a 2001 *European Journal of Law Reform Special Issue on the Internationalization of Legal Practice* and in: JENS DROLSHAMMER/MICHAEL PFEIFER, *The Internationalization of the Practice of Law*, *op. cit.* N. 3, p. 289 et seq.

V. The Current Use of the English Legal Language by the Legal Professions

1. Switzerland – Facts and Figures

According to the Swiss national census 1990 – (the figures for 2000 have not yet been published) – the role of English and English speakers in Switzerland¹ shows that in 1999 60'786 spoke English as a main language (Hauptsprache), representing 0.9 % of the total population or 9.9 % of the speakers of non-national languages (Nicht-Landessprachen). From that perspective, English appears to be relatively unimportant in Switzerland. Its real importance in Switzerland is in its use in the family, schools and in particular in professional life as a colloquial language (Umgangssprache). The research report "Englisch in der Schweiz" (English in Switzerland) by the Swiss Federal Office of Culture and Science², concludes that English in Switzerland at that time was of a certain importance as a common language of communication ("Verkehrssprache").

According to the census of 1990, English as a professional language is used particularly in the German speaking part of Switzerland. 18.5 % of the German speakers residing in the German speaking part of Switzerland in 1990 stated that they use English in a professional context. The report of the Federal Office of Culture and Science shows, that in professional contexts at that time English was still slightly less used than French, but far more intensely used than any other language (with the exception of German and French). Scientific research shows that English plays an important role as a business language and in external communications. From a regional perspective, it is more often used in the German speaking part and in economically strong regions. On the highly controversial subject of the use of English as inter-lingua between German, French or Italian speakers within Switzerland, scientists were of the opinion that English as an inter-lingua amongst Swiss citizens is of minor importance³. However, English is generally considered to be the most important Second Language ("Zweitsprache"). It should be noted that the studies consulted and cited do not make any reference to the use of legal English in legal professions.

¹ GEORGES LÜDI ET AL. Die Sprachenlandschaft Schweiz. Auswertung der Eidgenössischen Volkszählung 1990 (The Language Landscape Switzerland. Analysis of the official Population Census of 1990), Bern 1997; the use of English in Switzerland is likely to have increased considerably in the past decade since the last national Census. When this essay was finalized the relevant figures of the 2000 census were not yet available.

² See FN 9.

³ See FN 9.

For the purpose of this essay, we assume that respective percentages with regard to in-house legal counsels and practising attorneys are on average higher compared to government offices and judges. It is obvious that based upon the changes in the international practice of law the use of legal English has substantially risen in the past 20 years in the areas of attorneys and in-house counsels.

2. Observations as to the Actual Use of Legal English by the Swiss Legal Profession

It is obvious that the mere reference to the use of legal English as such does not reflect the multi-dimensional and multi-functional use of written or spoken English in various professional legal activities. English may be used as a legal and business language, as an inter-lingua between regional professional populations as well as an accepted means of communication in professional, business and legal matters totally unaffected by and unrelated to the Anglo-Saxon world (for instance a German and Indonesian contract written in English on the applicability of Swiss law).

The expression of legal English in Switzerland which attempts to summarize "the use of English by lawyers in Switzerland" would have made us believe that we are talking about a professionally accepted, controlled and benchmarked use of English. Of course, this is not the case, since most Swiss legal professionals (and for this purpose most other continental European professionals) using English neither speak English as their mother tongue nor as their first professional language. Their spoken and written legal English represents a special form of "pigeonization" of the English language in multi-dimensional and multi-functional contexts (mostly outside the Anglo-Saxon language area). Only a minority of Swiss legal professionals have had an opportunity to study or to work in an English speaking country. The actual use of legal English in Switzerland in day-to-day professional activities is not formally taught, benchmarked or supervised. This is an interesting aspect of professional self-teaching, which has largely come about because of the time constraints on professionals and the lack of formal language education in the professional use of legal English. It also results in a largely unconscious and unanalyzed pigeonization of professional English. This will change when formal education improves with reference to Anglo-Saxonization in general and continuous formal training in legal English is included as part of the formal legal (university) education.

The following observations can be made:

- in professional contexts an average continental European law student generally overestimates his ability as an English speaker. The same is probably true for practising professionals.
- We assume, that the perceived need to have English language abilities as a member of the legal profession is limited, for the time being, to internationally active continental European law firms and the legal departments of larger continental European companies operating internationally. Obviously, in certain environments a good working knowledge of English is necessary for professional acceptance. Speaking English and having a certain accent is no longer a professional status symbol. It is however sometimes surprising how frequently many of the very able and prominent members of the legal professions have a below-average ability to speak or write English in legal contexts.
- It has to be noted that e.g. Switzerland – although a sophisticated market for legal services – has not yet attracted non-Swiss law firms from Anglo-Saxon countries. Also, internationally orientated Swiss law firms only occasionally employ English speaking non-Swiss lawyers in their firms. There are only a few Swiss law firms who have offices outside Switzerland, in particular in the Anglo-Saxon area.
- In most business enterprises where English is the corporate language, it is also the language of the legal department. This means that for instance Swiss lawyers have to communicate internally in English in legal matters, which is not the case within a comparable international law firm in Switzerland. Furthermore, legal departments of major Swiss multinational firms are often internationally staffed and usually have at least one Anglo-Saxon lawyer in their own ranks. It is quite possible that the head of a legal department of a multinational firm is non-Swiss and an Anglo-Saxon educated lawyer. This development in turn affects the relationships of those legal departments with outside counsels in Switzerland. In most Anglo-Saxonized areas of practice, the legal professionals dealing with those issues within law firms and within legal departments of multinational companies show a comparable ability to speak and write English.
- An interesting example for the use of legal English is the international professional service firms, which foster an across-the-board, integrated, internal and external culture, in which the English language plays a dominant and pivotal role. It would be an interesting topic for further analysis to see how certain parts of business law (in which the “Final Big Four” have traditionally been very interested and are strong service providers) have been influencing the intensity and professionalism of the use of legal English in Switzerland. This certainly holds true for tax law.

- The leading position of Switzerland in international arbitration has also to be seen in the light of the history of Anglo-Saxonization of international commercial arbitrations with a forum in Switzerland, and a choice of Swiss law. This history has yet to be written⁴.
- Amongst the legal professionals in the administration of justice, for instance in the area of international taxation, legal assistance, organizations, economic law and in some regulatory agencies, etc. legal English is widely used. There are parts of the Swiss federal administration that are fully equipped to operate in English, which includes the issuing of orders or decisions and publication of annual reports of the agencies in English.
- When looking at the general acceptance of English amongst legal professionals in Switzerland, one also has to bear in mind that a comparatively large number of Swiss attorneys have been trained in graduate schools of American law schools and/or have worked in American law firms. This has led to an above average internationalization of certain parts of the population of legal professionals.
- The Swiss liberality towards English is also shown by a systematic “parallelization” of its university education system based upon the Bologna model introducing bachelor and master degrees, by the introduction of post-graduate programmes on Swiss territory, which are entirely taught in English such as the Master of International Management at the University of St. Gallen and the Master of International Economics and Law at the World Trade Institute in Bern.
- English also dominates the Internet and the information society as a legal language and the lingua franca of professional discourse as well as of legal education also in the area of distance learning.⁵
- The inter-disciplinary provision of professional services in the context of an integrated service concept favours English, since related social sciences such as management, economics and political science are in a more advanced stage of Anglo-Saxonization, which for these purposes is mostly Americanization. The fact that these topics are dealt with in English will inevitably require the use of legal English in dealing with the legal aspects if the professionals involved are to render interdisciplinary services.

⁴ See MARC BLESSING, *Introduction to Arbitration – Swiss and International Perspectives* in: NEDIM PETER VOGT, *Swiss Commercial Law Series*, Vol. 10, Basle 1999, N. 1 ff.

⁵ WOLFGANG WIEGAND, *Die Rezeption des amerikanischen Rechts*, in “Die Schweizerische Rechtsordnung in ihren internationalen Bezügen, Festschrift zum Schweizerischen Juristentag 1988, Bern 1988, p. 299 et seq.

- The new world of medialized communication has also created new aspects of the function of legal English in Switzerland. Nowadays, legal issues regarding general business matters are primarily communicated by international economic journals of English or American origin. Those journals who have journalists specialized in legal matters, are widely read by the same professional communities which use legal English as their professional language, which means that the majority of new legal commercial and business terms are coined in (legal) English and then used by the international professional community. Since law and lawyers have a much higher visibility in the Anglo-Saxon media, information and communication about legal issues and developments is provided much faster than in other non-English media and for this reason legal English becomes of primary and controlling importance in a professional context.
- Whilst economists or scientists can function with one single language – English – the legal profession outside the USA and the UK always needs to be bilingual (e.g. German/English).
- A related phenomenon is the new Anglo-Saxon tabloid-like press for the legal professions and the international practice of law, which is widely read by Swiss legal professionals. In the absence of a similar press or media in Switzerland, all the general information on changes in the international practice of law is written in English and read by the Swiss legal professionals in English.

3. The Creeping Standardization of Law and of English as the Language of Law

- It would be wrong to argue that the dominance of English in professional matters is a mere tendency for Americanization. The need for English goes way beyond dealing with this American – or British – challenge. Internationalization has brought about the need to have English as a *lingua franca* amongst all members of the legal profession.
- As to the question of a special professional language, a more in-depth analysis would have to deal with the fact that certain markets for legal and financial services are linguistically standardised to the point that the same *lingua franca* or *speaking entre nous*⁶ namely English is being used by the participants of a specific professional sub-community in the major economic centres of the

⁶ As described by MARY JANE MORRISON, Excursions in the Nature of Legal Language, 37 Cleveland State Review 334 (1989).

world. This standardised technical English does not need translation and is used as the need arises.

- Obviously English as a technical legal language (“Rechtsprache”) and linguistic system, can be better understood in connection with a thorough understanding of the underlying legal system. The predominant use of English as a legal language blurs the conceptual and institutional differences between the various legal systems and cultures of the world. Unfortunately this is coupled with a decline in comparative law and international law as teaching subjects.

VI. The International Impact of Swiss Law

Switzerland is well positioned in the international competition amongst legal systems. In particular amongst non-Swiss parties it has traditionally been and continues to be the legal system and also the substantive law chosen by a large number of those who seek an impartial and neutral body of law.

- As regards the historic international recognition of Swiss law, a more in-depth “interest analysis” should look at the status and function certain parts of the Swiss legal system had in the past in international contexts. These in themselves are strong reasons to re-assess the issue of legal English in Switzerland.
- As far as we are aware, there is no available data showing the extent to which and in what circumstances Swiss law is chosen by non-Swiss parties. This occurs mostly in the international practice of law. In our opinion, this choice reflects international recognition of Swiss law and an appreciation of the quality of the Swiss legal system as a whole. This area is an important component in the analysis of the “competitiveness” of the national legal system as well as in a reputational analysis of the perception of the Swiss legal system by non-Swiss, including foreign states and governments.
- Statistics show that the choice of law or jurisdiction with regard to Swiss law and Switzerland is significant in areas such as matrimonial property, inheritance law/estate planning, sales contracts, service agreements, construction (turnkey) contracts, telecommunication/carrier/service agreements, agreements for the televising of sporting events, sponsoring agreements, artists’/athletes’ agreements etc., joint ventures and shareholders’ agreements.
- In this context, Marc Blessing speaking of an acknowledged legal culture rightly remarks:

“Swiss law has developed (within the context of Roman and Germanic law) into an outstanding legal system of precision, balance, liberalism and liberality. Amongst foreign contracting parties, in particular, it has therefore become a *legal system to trust*, i.e. a legal system of preference in those cases where a contract between two non-Swiss parties was to be based on a “neutral” system of substantive law. There is therefore a high percentage of choice of law clauses in favour of Swiss substantive law to be found in contracts between non-Swiss parties, e.g. on the construction of off-shore oil platforms, the construction of pipelines in oil producing countries, the construction of infrastructure projects in developing countries (e.g. telecommunications equipment, water and electricity supplies, power stations, port facilities, highways, military installations, hospitals, universities, dams, airports etc.) – in fact for the construction of all kinds of industrial plants and the supply of equipment. Choice of law clauses in favour of Swiss substantive law are found equally often in all kinds of commercial contracts, in joint-venture agreements, in

long-term power and natural gas supply contracts, in mining concessions as well as in transactions on commodity futures exchanges.”¹

- A number of large international professional service firms (originally Arthur Andersen Worldwide, Deloitte Touche, Coopers & Lybrand, KPMG) have chosen Swiss private law vehicles to structure their international organizations². The majority of international sports organizations are now incorporated in Swiss vehicles. The international deregulation of the telecommunications industry has led to a multiplicity of private telecom organizations using Swiss law vehicles. A large number of multinationals have chosen Switzerland as a jurisdiction to incorporate or as headquarters for worldwide or regional operations.
- Switzerland has the highest number of lawyers per capita who are members of the leading international lawyers’ organizations. There have been Swiss presidents of professional associations like IBA, AIJA, UIA, IFA and AIPPI.
- Swiss law has had and continues to have an impact on the legislation of various countries such as Turkey, Japan, Greece and most recently Serbia.
- Switzerland has a reputation as one of the leading jurisdictions for international arbitration and great efforts have been made, for instance by the Association Suisse pour l’Arbitrage, to foster and further this position.

In order to remain well positioned in the international competition amongst legal systems we propose the following:

- Swiss law statutes and regulations should not only be translated into English,³ but guidelines should be laid down for their effective communication. Translation and communication apart, legal English should be classified as an official language. As part of these communication efforts, agencies of the Federal Government, which work in an international context, should issue public statements and decisions in English. Accessibility to the Swiss legal system in

¹ MARC BLESSING, Introduction to Arbitration – Swiss and International Perspectives, in: NEDIM PETER VOGT (ed.), Swiss Commercial Law Series, Vol. 10, Basle 1999, N. 17.

² JENS DROLSHAMMER, The Future Legal Structure of International Law Firms – Is the Experience of the Big Five in Structuring Auditing and Consulting Organizations Relevant? in: JENS DROLSHAMMER/MICHAEL PFEIFER, Special Issue European Journal of Law Reform, Vol. 2, Issue 4, 2000 and in: JENS DROLSHAMMER/MICHAEL PFEIFER (eds.), The Internationalization of the Practice of Law, op. cit. I/N. 3, pp. 449 et seq.

³ In contrast we note that the Swiss Federal Tribunal in an administrative law based appeal against a decision of the Swiss Communication Commission (ComCom) in preliminary injunction proceedings concerning interconnection in an obiter dictum clearly stated that the totality of the decision has to be issued in an official language and reprimanded the ComCom for having issued part of the sentence in English (BGE 123 III 193).

legal English would be vastly improved by including parts of the legal system in state-of-the-art information technology.⁴

- A Bibliography on English materials and on Swiss law should be available⁵ and continuously up-dated and made accessible on the Internet.
- An intensive international marketing policy for the distribution of Swiss legal literature in English should be pursued by Swiss publishers in cooperation with publishers specializing in International and Anglo-American law.
- The Swiss National Fund and Pro Helvetia should sponsor special English language publications on behalf of the Swiss legal system and actively participate in its distribution and marketing. The far-reaching effort to refocus the image of Switzerland in the Anglo-Saxon world through the project “Presence Suisse”, should include texts in legal English on Swiss law, since the quality and worldwide recognition of the Swiss law and legal system are an important competitive factor contributing to the recognition of the country on an international level.⁶
- Swiss law schools should encourage selective teaching in English and academic publications in English at seminar, master-, Ph.D.- and habilitation thesis levels.
- The necessary change of culture in publication practice would be helped if the Swiss legal journals were to accept English texts on Swiss law or add abridged English versions to non-English texts. The same holds true for the publication of law books in general and Ph.D. theses, which should provide for English summaries.
- With regard to the use of the Internet one could envisage a public/private partnership of the Swiss members of the International Bar Association, AIJA and UIA, the Swiss Association of Lawyers, the Swiss Association of In-house Counsels and other professional and academic associations including the Swiss-American, Swiss-Australian and the Swiss-British Chambers of Commerce to orchestrate a joint effort to pool all information and publications on Swiss Law available in English, including pursuing the possibility of making

⁴ On top of the predominance of the Anglo-Saxon professions, the predominance of the mediation, partially Anglo-American controlled, which has a direct effect on this area, has to be taken into account.

⁵ A first bibliography should be available in early 2003: NEDIM PETER VOGT/JENS DROLSHAMMER et al., *Swiss Law Bibliography – English Language Materials on Swiss Law*, in: NEDIM PETER VOGT/JENS DROLSHAMMER, *Access to Swiss Law*, vol. 1, The Hague/Zurich 2003

⁶ It is counterproductive and dangerously detrimental to Switzerland and the Swiss legal system to suggest as has been done by a high-ranking bureaucrat of the Swiss Federal Administration as late as in 2001, that the translation and communication of Swiss law should be left to non-Swiss publishers and organizations.

English materials on Swiss law available in full text to English speaking professionals abroad as well as in Switzerland.

- It is clear that funding should be made available for the principal prerequisites for such a project such as a standardized thesaurus⁷ and dictionaries.
- A task force should be set up to develop a policy aimed at increasing and improving the effectiveness and efficiency of communication on Swiss law in English.⁸
- Of course one has always to be aware that the integration of English and legal English into Swiss (legal) culture is a politically sensitive issue.⁹

⁷ The Eurodicautom-database of the EU in Luxembourg provides unified terminology, see MAX BAUMANN, *Europäische Sprachenvielfalt*, Festschrift für Roger Zäch, Zurich 2001.

⁸ Without such efforts, the opportunities to increase the comparability, the compatibility and (what JENS DROLSHAMMER, *On the Way to Globalization*, op. cit. N. 3, p. 13, has coined) the “competitiveness” of the legal systems would be badly miss(ed).

⁹ It is however interesting to note that the far-reaching projects of “Avenir-Suisse” (Swiss Think Tank) and “Presence Suisse” (world-wide Swiss Image Campaign) or the smaller project “Discours Suisse” (network for an open discussion on key issues) have French names obviously in the belief that this allows sufficient distance to the Anglo-Saxon world but is already removed from the most used Swiss language. The same thinking may have led to the name “Credit Suisse” (other than that it rhymes with “don't miss”).

VII. The Relevance of Legal English for Switzerland

1. Legal English as a Reality for the Legal Profession

We suggest that facing the realities of legal English in Switzerland should be part of an issue-driven, integrated effort involving all stakeholders (government, legal professions and legal educators) in order to better face the challenges of internationalization and globalization. Whilst we do not think that “change management” and “re-engineering” as such are at issue we would like to suggest that those metaphors have an indicative value for such an enterprise as well. “Best practices” and “state-of-the-art” as understood in other social sciences should be used to indicate the desirability and necessity of benchmarking one’s efforts on emerging international “standards” such as comparability, compatibility and competitiveness; however, the apparent sensitivities of the political and professional dimensions of these issues should be taken into account.

The following issues should be dealt with

- Legal English is an essential part of the professional competence and skills of international lawyers and a precondition of professional access to and success in the international legal process.
- Legal English comprises dimensions of English as a lingua franca, an interlingua, as business English, legal language, specialized professional language, all linked together as a professional language with a multi-dimensional and multi-functional reach to be used in specific oral and written forms. These dimensions generally manifest themselves simultaneously.
- Legal English is part of a larger cultural process of globalization and internationalization of the legal professions; the importance of legal English has therefore to be determined in relation to these two larger processes.
- Legal English is mostly used in external, but also to a lesser extent in internal communication.
- Legal English is an essential element in bringing about the necessary comparability, compatibility and interoperability of legal cultures. International lawyers are the players in and between these legal cultures.
- Legal English is an essential element and instrument in coping with the effects of globalization in societies in which the international legal process is an integral part of information and communication.
- Legal English is an essential element and instrument for law and lawyers to participate in the discourse about global governance in an emerging global community beyond the professional use of legal English.
- Legal English is an essential part and instrument of the Swiss legal system and is necessary in order for the Swiss legal system to be able to compete, to be noticed, understood and respected throughout the world.
- Legal English is an important element and instrument of the Swiss legal system from the point of view of the emerging function of law as an element of the competitiveness of a nation.
- Legal English is of considerable importance in connection with the preservation and augmentation of the international recognition of Swiss law de facto.
- Legal English is an important element of academic and professional legal education and training on all levels and a precondition for access to and success in academic as well as professional legal work.
- Legal English is the key to accessing the evolving legal cyberspace affecting and transforming law.
- Legal English is a key element of modern business language communicated through the international media.
- Legal English is a key element in the better understanding of the Anglo-Saxon and international legal process.
- Legal English is a key element in improving and refocusing the understanding of one’s own law and culture in view of the necessity to interpret, translate and/or communicate one’s own law and culture internationally.
- Legal English is a key component of interdisciplinary professional activity, in which the most frequently used related social sciences such as management, economics and political science, have reached a far higher level of internationalization and Anglo-Saxonization than law.
- Legal English is the most frequently used language in professional contexts in Switzerland apart from German, French and Italian. The importance of legal English has to be benchmarked with the importance of English as a professional language in Switzerland as a whole.
- Legal English does not replace or displace legal German, French and Italian, even in the areas in which it is most frequently used by Swiss professionals; it is the most important complementary professional language.
- Legal English functions as an inter-lingua between different legal professionals.

- Legal English is an undisputable reality for the legal profession. Its progress should be followed attentively¹.

The legal system is a key component in the organization and operation of a state. Despite the ongoing internationalization of the world, the legal process, largely based on the principle of territoriality, is still determined by the state as a sovereign political entity. This holds true for the whole of the legal process, from the generation and enactment of law, to its administration and enforcement. The same applies to legal education and to the legal professions involved in the process of law.

Historically, the Swiss legal system has reacted and adapted to international developments in a flexible and responsible way. When the question of the importance of legal English to the Swiss legal system is raised today, one is confronted by a distinct time lag with respect to legal perception of the challenges of globalization as highlighted at the 2001 annual meeting of the Swiss Lawyers' Association, which chose the effects of globalization on the Swiss legal system as one of its key topics.²

¹ Legal English is an uncontestable reality for the legal profession. It is advisable not to fight but to solve the problem.

It goes without saying that the relevance and importance have to be defined from the perspective of the interested and directly concerned players.

Foreign policy and international relations have developed a so-called "Interest analysis". This method could be used here as well for our purposes and would be a key element to develop specific contents of strategies to be pursued. We will attempt below to identify certain elements of such strategies in the area of legal, professional, educational and communication policy.

The important part of this "interest analysis" would be to analyze proposed "interests" from an over-arching perspective and choose those qualified "interests" of the players concerned. It is apparent that the awareness of certain interests – for instance of the state as an important player with regard to the legal system – first has to be raised and/or refocused. The dependencies of pursuing certain interests in the network moreover have to be defined at the outset, in order for instance to realize, that from a mid-term perspective, the culture of legal English in Switzerland cannot be changed unless educational efforts are addressed and involved. Amongst the interests involved, there certainly will also be primarily private interests – the general ability of a professional community to communicate in English in legal matters – which will require a special benchmark for those interests to pass muster and to be eligible to be pursued in a joint strategy. As we will see below, certain limitations and constraints in dealing with reality of legal English in Switzerland will have to be honestly analyzed and taken into account. Needless to say that some of the constraints are attitudinal and institutional, raising questions as to the basic willingness and ability to understand and to act in a manner commensurate with the challenges of this new reality of legal English. We are well aware of the fact that the determination of "interests" and the attribution of "importance" is based upon value judgements. One would of course also have to take into account what other professional, educational and governmental communities do in addressing these issues and challenges.

² KARL HOFSTETTER, Globalisierung und Wirtschaftsrecht, in: Zeitschrift für Schweizerisches Recht, Vol. 3, 2000, p. 361-396; HEINRICH KOLLER, Globalisierung und Internationalisierung des

We believe there is an absolute necessity to put this issue on the political, professional and educational agenda.³

Over the last few years the Swiss legal system has shown itself unprepared for certain developments. We believe that certain aspects of a changing world have a profound impact on key qualities of a national legal system.

The quality of a legal system has become an important element of the "competitiveness" of a nation in international contexts. The increasing importance and presence of the media in the world has further led to a fundamental change in the role of information and communication with regard to legal systems. An analogy can be drawn from the corporate sector, where "corporate reputation" has become a pivotal object of concern and protection⁴, similarly the "legal system" has become a pivotal factor in its relevance for the respect and recognition of a nation. The way a legal system is communicated in international contexts has become an area of great concern.

It should also be noted that the Holocaust-related class actions, which pitted Switzerland against the United States and some important parts of the rest of the world, finally acted as a belated wake-up call. In international relations, the perception of a legal system by others, particularly other states, has become an important area in which Swiss actions and reactions have been – to say the least – helpless at times. It is obvious that these are recent phenomena yet to be integrated in a systematic analysis and political plan. In view of the predominance of the Anglo-Saxon world and the corresponding predominance of English and legal English in legal matters, the proposed "interest analysis" should in our view lead to a change in perception of legal English in Switzerland, corporate Switzerland and the concerned professions alike.

It must again be emphasized that if one wishes to make *English as a legal language in Switzerland* part of an issue-driven, integrated effort to refocus the attitudes of all the English speakers concerned, one has to take into consideration certain "constraints" and "potentials" of the realities of legal English in Switzerland.

Wirtschaftsrechts – Auswirkungen auf die nationale Gesetzgebung, in: Zeitschrift für Schweizerisches Recht, vol. 3, 2000, p. 313-360.

³ CHARLES-ALBERT MORAND (ed.), *Le Droit saisi par la Moralisation*, Edition de l'Université de Bruxelles and Helbing & Lichtenhahn, 2001; JENS DROLSHAMMER, *Verlangt die Globalisierung eine Neuausrichtung der Forschung? – Beispiele von Forschungsfeldern im Bereich Recht und Management aus der Sicht eines International Lawyers*, in: *Meilensteine im Management*, Band X, Management & Law, Basle 2002.

⁴ CHARLES J. FOMBRUN, *Reputation, Realizing Value from the Corporate Image*, Harvard Business School Press, Cambridge, Mass. 1996.

2. The “Potential” of the Use of English as a Legal Language in Switzerland

Situationality analysis describes an already existing practice rather than a formula to be applied to it. The starting point is that existing modes of work can be analyzed, developed and made into guidelines which increase our understanding of this complex legal world and of the future influences on our common working environment⁵. We will try to focus on issues which help to identify a strategy to deal with the reality of legal English in Switzerland:

- Switzerland is a multilingual country with knowledge and experience of dealing with and bridging the gap between the four national languages.
- Switzerland is a country of immigrants and emigrants with experience in integrating other cultures and languages.
- Switzerland has a tradition of professional multilingualism from doctors, lawyers and concierges to mountain guides.
- English has established itself as the most important secondary language in professional matters.
- There is a growing academic and political consensus with regard to the importance of the English language for all dimensions of Swiss life.
- Switzerland seems to have an above average affinity for the Anglo-Saxon and the Anglo-American world and can claim a special – “sister-republic” – relationship with the United States.
- The use of English generally and professionally presents no emotional difficulties.

⁵ Situationality analysis according to Outi Korhonen in remarks concerning the situationality of the commercial lawyer entails “the tracing of the contextual coordinates of the lawyers’ work as it is in practice and relating them back to the structure of constraints provided by the law in all its different facets, from managerial and technical, to epistemological. By doing so, a truly realistic account of the every-day advisory and consultative functions of the lawyer – in our contexts all the actors involved in the use of legal English and interested in effecting changes – can be brought under examination”; see OUTI KORHONEN, *International Lawyer: Towards Conceptualization of the Changing World and Practice*, in: JENS DROLSHAMMER/MICHAEL PFEIFER (eds.), *The Internationalization of the Practice of Law*, op. cit. I/N. 3, p. 373-384. This methodological option is in line with a “turn to the person of the lawyer” as the main and pivotal reference point and actor in the legal process. According to the philosophical foundations of Gadamer and Jaspers, the concept of situation represents a standpoint that limits the possibility of vision. Our situations and, consequently, our imaginative freedom are conditioned by the factual realities of the economic, sociological and political world, the human epistemic abilities and the variety of personal and ideological affiliations and developments.

- In the social sciences (economics, management and political science), the use of legal English is well developed.
- Swiss law continues to enjoy an above average degree of recognition outside Switzerland.
- There are still several countries making express reference to Swiss law as a model for their own national statute laws.
- Switzerland as a small nation has a tradition of giving high priority to matters of international law.
- Switzerland will be exposed to the freedom of legal services, the recognition of diplomas as well as the freedom of establishment based upon the bilateral agreements between Switzerland and the EU and the GATS-agreement with the WTO.
- Switzerland has an above average IT-infrastructure and telecommunications infrastructure.

Legal profession and professional organizations:

- Switzerland has a great number of readers of international economic media containing instant and detailed information on English language developments in modern business law.
- Switzerland has an above average internationalized population of academic and practising lawyers, who were mostly trained in Anglo-American graduate schools.
- Switzerland has an above average membership of international professional associations such as the IBA, IFA, AIPPI etc.
- Switzerland has an above average number of law firms of international standing.
- Swiss firms have an above average reputation for delivering services.
- Switzerland is home to the headquarters of a very substantial number of multinational enterprises using English as their corporate language, which includes their legal departments.
- Switzerland has large and sophisticated chambers of commerce such as the Swiss-American and Swiss-British Chambers of Commerce, which act as vehicles for the organization of English speaking professionals.

Education and research:

- The Swiss university reform is gradually increasing the importance of English and legal English in legal education and research.
- Selected Swiss universities are now being subjected to reforms along the lines of the so-called Bologna Recommendations.

- Swiss international graduate and post-graduate law programmes emphasize English or use legal English as the teaching and research language.

3. The “Constraints” of the Use of English as a Legal Language in Switzerland

With respect to the change in the use of legal English, one has to accept limitations. They might consist of attitudes, beliefs and opinions affecting the basic willingness and ability to act. Switzerland like any other country in continental Europe has to deal with these constraints and appears to be very well placed to do so.

The constraints may be seen as follows:

- Due to lack of analysis and data available, those concerned are not fully aware of what the realities are and how and why they affect them.
- It is not generally considered to be a public task or obligation to translate Swiss laws into English.
- It is not generally considered to be a need or obligation of the government to communicate on Swiss law in English.
- The issue of legal English is not perceived as an element of the competitiveness of a nation in an international context.
- There are political sensitivities which make it difficult to put the issue of legal English on the government’s agenda (four national languages).
- There is no governmental interest analysis on the relevance of legal English for the Swiss legal system.
- There is no coordinated legal, educational, foreign, commercial or cultural policy as regards the issue of legal English.
- There is no strategy to deal with these issues.
- There is no systematic analysis of the effects of globalization on the legal system, in particular of the effects of Americanization.
- There is a time lag in understanding the function of international communication on legal systems in English.
- The issue of legal English is generally viewed as exclusively linked to the phenomenon of direct and indirect influence of Anglo-American law.
- Switzerland has only limited governmental instruments and institutions to assess the direct and indirect effects of Anglo-American legal culture on the

Swiss legal system as well as the respective effects of the changing function of legal English.

- Switzerland is not participating in certain key international fora in which internationally relevant law is developed and in which legal English is used.
- And most importantly, those concerned do not consider themselves responsible for addressing or cultivating the issue and are not subject to any obligation to do so.

In the area of legal education and research, some of the “constraints” are:

- The access to Swiss law in English is relatively limited.
- The present academic discourse on the function of English as a professional language in Switzerland does not address the issue of legal English.
- It is incorrectly assumed that the proficiency in English at the end of High School is sufficient to successfully master this new professional reality.
- There is no compulsory training in legal and professional English at university level.
- We generally make no effort to understand and deal with Anglo-Saxon distance learning techniques.
- Generally, we do not provide sufficient training in international legal research and the new research tools of the Internet.
- In many cases Swiss libraries lack law books in English.
- There are no Swiss bibliographies on law, which include publications on Swiss law in English.
- The possibilities of teaching English at university level are not yet sufficiently developed.
- The possibilities of writing theses in English are not sufficiently explored.
- Anglo-Saxon and Anglo-American law are only taught selectively at Swiss law schools.
- The possibilities of publishing on Swiss law in English in Swiss law journals are still limited; the possibilities of publishing legal books on Swiss law in English in Switzerland and have them distributed outside Switzerland, are limited.
- There are only a few Swiss law professors teaching outside Switzerland in English.
- Swiss academics in general do not publish in English.
- The possibilities of appointments of Anglo-Saxon law professors to chairs at Swiss law schools are limited.

- There is relatively little active participation of Swiss legal scholars in Anglo-Saxon legal scientific communities.
- Unlike in European law, there are no special institutes for Anglo-American or American law at Swiss universities.

Lastly, in the area of professions and professional and academic associations, we have observed the following “constraints”:

- Generally speaking professional and academic associations in Switzerland do not deal often enough with their topics in English.
- Switzerland does not have an association like the Deutsch-Amerikanische Juristenvereinigung in Germany, which is a forum broadly fostering the use of professional English in legal matters.
- The Cantonal and the Federal Bar Association do not integrate the international practice of law and legal English into their organizations.
- There is very little analytical writing on this issue by Swiss legal professionals in the professional media, which leaves writing about the Swiss legal market and the Swiss legal system to non-Swiss authors writing in English for non-Swiss publishers outside Switzerland and often only selectively distributed in Switzerland.
- There appears to be some decline in the numbers of Swiss lawyers acting in executive functions in international professional associations, despite the fact that Swiss membership in these associations is way above average.
- The skills programmes of the Swiss professional associations, for example those on negotiation, are not being taught in English and do not include special courses in legal English.
- Continuing legal education within law firms does not generally include formal training in legal English.
- There may also be some time lag in Swiss law firms in introducing modern tools of information technology such as the Internet on law, which are of particular relevance for the use of legal English.

VIII. Elements of a Strategy to Deal with English as the Language of Law in General

The Federal and State governments have to be seen as interested parties in the network of those concerned about legal English. Despite the fact that English is not an official language, governments may be seen as having a duty to formulate a public policy with regard to legal English. This entails a series of key questions such as

- (i) why a re-orientation (language policy in a changing world)?
- (ii) what lies ahead of us (chances and risks)?
- (iii) what position do we want to take and how do we want to act (goals and strategy of a specific language policy)?
- (iv) how do we realize this strategy (our means of language policy)?
- (v) what decisions lie ahead of us (open questions and assessment of proposals)?

This presupposes that governments realize and accept the need for governmental analysis and action in the first place. A strategy in the area of legal policy and in particular of language policy with respect to legal English would have to address (1) the continued “competitiveness” of the legal system, (2) the continued compatibility, acceptance and recognition of a particular legal system in an international context, (3) the ability to communicate effectively on a particular legal system (in our case the Swiss legal system),

Elements of such an international strategy of legal policy include:

- (i) raising awareness of the effects of globalization on the legal system, profession and education,
- (ii) ensuring adequate compatibility and interoperability of the lawyers participating in the network through information, education and active communication of a particular (in our case the Swiss) legal system,
- (iii) participation in bilateral and multinational governmental relations and international organizations to pursue respective “governmental interests”,
- (iv) determination of official positions on law within the framework of globalization and contribution to the general “competitiveness” of a particular country (in our case Switzerland) by legal means. All this raises the issue of the allocation of resources from the perspective of:
 - (1) legal, foreign and foreign trade policy,

- (2) the IT-competence of the national economy in the area of legal English,
- (3) the policy of education and research,
- (4) language and cultural policy,
- (5) the institutions of legal policy such as the legislator,
- (6) the administration and application of law and the strategic leadership of such legal policy.

In the area of *legal policy* with regard to Switzerland we would suggest for example:

- systematically analyzing the effects of globalization on Swiss legislation with a special emphasis on Anglo-Saxon developments
- defining the issues of the cross-sectional relevance in legal policy, foreign affairs policy, foreign trade policy as well as educational and cultural policy
- refocusing Swiss legislation with the aim of increasing the competitiveness of the legal system vis-à-vis the Anglo-Saxon world
- making the management of successful strategic positions in Swiss legislation an on-going task vis-à-vis the Anglo-American world
- establishing a cross-sectional minimum standard for the use of legal English by Government
- requiring federal administrations to selectively perform certain (cross-border) functions in English
- forming a special section at the Department of Justice to compare Anglo-American law with European law, including the issues of legal English
- providing an official or government-approved English translation of key parts of Swiss legislation
- testing compatibility of new legislation with European and Anglo-American law
- including English as a special quasi-official language where it appears necessary
- refocusing the approach of the Swiss Institute of Comparative Law on Anglo-American law and on the use of legal English
- compiling a thesaurus for the use of legal English with reference to Swiss law under the auspices of e.g. the Department of Justice and the Swiss Institute of Comparative law
- forming an interdisciplinary task force to assess the relevance of legal English for Switzerland

- extending the theory based description and periodic reporting on Swiss law in English as practiced within the WTO, OECD etc. to other key areas of Swiss law
- including a bibliography on Swiss law in English in the governmental website updated by the Swiss Institute of Comparative Law
- publishing the annual report of the Swiss Federal Supreme Court in English
- publishing the (annual) reports of the Federal administration in English
- increasing the capabilities and capacity of the Federal Chancellery translation office
- establishing an Anglo-American working group studying the migration of English (legal) terminology into the Swiss legal language and ultimately the Swiss legal system.

In the area of *science, research and technology policy*, we suggest that it would be appropriate to:

- finance research centres and institutes at Swiss universities specializing in Anglo-American law, in particular in legal English, and set up specialized libraries for Anglo-American law, comparable to the Swiss Institute for Comparative Law
- encourage the National Fund for Research to finance a project on the analysis of law, language and legal English as a professional language from a linguistic and legal perspective
- extend the research project of the Federal Office of Education and Research regarding English in Switzerland to include the issue of legal English in Switzerland
- coordinate the implementation of the Bologna Recommendations to include the education and training in Anglo-American law and legal English as a compulsory subject in the curriculum of Swiss law schools
- influence the “virtual campus” project involving a number of Swiss universities to give a certain priority to dealing with Anglo-American law and legal English
- commission a supplementary report to the report on the strategy for the advancement of information technology in Switzerland with a report on the influence of the Internet and information technology on the use of legal English in legal matters
- formulate a communication policy in English for political emergency situations

IX. The Need for a Strategy in the Area of Education and Research

It is fair to say that proficiency in English at university entrance is insufficient for professional purposes after graduation. Training in legal English must therefore be integrated into the law school curriculum so that the proper foundations can be laid before practical self-teaching takes over. The high level of self-teaching in legal English amongst professionals indicates the necessity for more formal education in the future.

Legal English is not systematically taught at university level and there is not enough research into the function of legal English with respect to globalization. Opportunities for students to learn legal English at university are often lacking or not pursued.

With regard to a strategy for education and research one has to bear in mind the implementation of the Bologna Recommendations in the European university systems. As education is ongoing, more emphasis has to be placed on professional education. This also applies to legal English.

In the area of education *on the level of university governance and organization* we suggest that the following proposals are given further consideration:

- forming a sub-strategy for the law faculties of continental European universities to deal with the effects of globalization on legal systems, professions and education
- forming a strategy concerned with legal English as part of the above
- providing for a consistent strategy for the use of English, particularly legal English in the graduate, post-graduate and continuing legal education programmes of the universities
- appointing a dean for academic foreign relations with a focus on aspects of (legal) English
- providing for an information infrastructure to facilitate teaching on globalization and the use of the English language
- refocusing libraries to improve the available English language material, in particular with regard to the international legal process
- providing international cooperation to increase student mobility into the Anglo-Saxon world and selective teaching and research joint ventures in subjects in which the English language is used
- fostering a culture of teaching, writing, publishing and consulting in English

- encouraging interested parties such as the corporate sector and the legal profession to actively participate in teaching and research in cutting-edge fields in which English is used and which otherwise are unlikely to be taught in law schools
- determining areas of teaching and research to be taught in an integrated international and interdisciplinary manner across the relevant social sciences and provide for an adequate use of English, particularly in legal English
- requiring that in every subject taught, the major literature in English is referred to and the respective terminology used throughout the curricula
- facilitating summer clerkships in the Anglo-Saxon world
- providing appointments for Anglo-Saxon professors
- providing special chairs for practising international lawyers from the Anglo-Saxon world
- entertaining a programme for English speaking guest professors and guest lecturers

In the area of education *at law school governance and organization level* we suggest the following for further consideration:

- offering a general course on the effects of globalization on legal systems, professions and education
- offering courses on Anglo-American law¹
- maintaining comparative law as the pivotal subject for understanding the international legal process as well as Swiss law itself in view of the realities of the principle of territoriality
- obliging professors teaching Swiss law to teach the terminology in legal English and make it part of the examinations
- establishing minimum requirements in every subject with reference to the respective situation in Anglo-Saxon law and a specific reference to legal English
- having legal English taught by an Anglo-Saxon professional as a compulsory course throughout law school
- encouraging applicants to take TOEFL-tests before entering law school
- using distance learning methods in English
- teaching international legal research as a basic course
- standardizing the participation in international moot court competitions, which are usually in English

¹ It should be noted that e.g. at the University of Zurich more than 20% of the tenured professors of the law faculty hold an LL.M. degree.

- encouraging the organization of student-run bodies in international organizations
- establishing a philosophy of open access for students to courses taught in English in graduate and post-graduate programmes at the university
- encouraging students who want to earn money while studying, to work in institutions and firms in which legal English plays a central role
- encouraging students to work as summer clerks in clerkship programmes in Anglo-Saxon legal institutions and consulting firms.

In the areas of *research on globalization and the use of the English language* at university level, we suggest the following for further consideration:

- to conceive research programmes on the effects of globalization on legal systems, professions and education, stressing selective issues of the “international legal process”, primarily undertaken in English and legal English
- to engage in international research cooperations in order to assure access to international research, in which the English language and legal English in particular play an important role
- to determine and follow a language strategy in research with respect to sources, writing, publication and written and oral discourse across the universities
- to make legal English a specific research topic from the linguistic and the legal perspective along the lines of the concepts for research described in the report on English in Switzerland by the Federal Office of Education and Science, (2001)² and the plans described in Richard J. Watts/Heather Murray, eds. *Die Fünfte Landessprache? Englisch in der Schweiz*, of the Academic Commission of the University of Bern (2001)³
- to commission a research project in the area of law and communication, analyzing the specific impact of the communication of the international legal process in legal research, modern media and the Internet on the range and use of legal English in scientific and professional contexts
- to form a group of librarians to analyze the issue of access to Swiss law in English in all media used in the present knowledge generation, management and distribution on a continuing basis
- to convince professional and scientific associations to conduct research on the use of English and legal English, within their associations in order to clarify, enhance and improve the use of legal English in the areas concerned

² See I/N 5.

³ See I/N 3.

- to create an international standard of proficiency in legal English and develop methods to standardize the education in legal English at an international level.

X. Strategy for the Legal Profession and Professional Associations

We now turn to the legal profession and professional organizations and the role they play in the development of legal English. These professionals have a responsibility to target and actively discuss the effects of globalization on the legal world.

In view of the paradigmatic changes in the legal profession we have expanded the scope of our survey to include professional service firms.¹ This is warranted by the fact that these firms have an integrated, world wide, internal and external English based language culture using legal English. These professional service firms have become the pre-eminent organizations in education and training as part of their human resource management structures and are very sophisticated in the generation, management and distribution of knowledge in legal matters. All these activities are pursued in English, which also functions as the corporate working language for the business areas concerned in a tailor-made, standardized form. There is formal legal English training in many of these organizations and the documents used to provide legal services are largely standardized and accessible through information technology throughout the organization and partly to major clients.

Further observations can be made with respect to the challenges faced by the professional associations on a national and international level. In view of the growing lack of homogeneity of the professional population on a national level and the growing competition amongst specialized professional organizations and associations, the Bar Associations are rather reluctant to reorganize themselves in order to address these challenges. In dealing with the changes in the “international process of law” they are competing with legal chapters of organizations such as the American and British chambers of commerce and the international professional organizations, which have a particular focus on those areas of legal practice in which legal English plays a prominent role.

With respect to the education and training in legal language, we note that both national and international professional organizations are heavily involved in training and education in legal practices in various specializations and in dealing with the general effects of globalization. Some are involved in formal training in legal English.

¹ See JENS DROLSHAMMER, op. cit. I/N. 3, p. 457 et seq.

We should further analyse the use of English and legal English in professional academic associations dealing with law. These associations predominantly use legal English. As a result of this, the Swiss members of these associations are likely to use English on a national level within their respective specialized national academic associations.

In the area of *professional service firms*, we suggest that the following proposals are given further consideration:

- having formal in-house language training in legal English
- giving access to that know-how to students, trainees and colleagues
- continuing to generate academic and professional texts in legal English on Swiss law
- requiring a certain level of proficiency in legal English as a requirement for employment
- developing specific know-how as to the implication of the use of legal English in various areas of practice
- being open to participating in university courses and seminars conducted in English
- raising the issues of legal English both nationally and internationally within specialized professional associations
- developing a critical position in their international professional relationships with foreign attorneys, representatives of professional associations and academics to determine a European position with respect to the function of law and lawyers in the “international process of law”
- establishing generally accepted core values to unify the legal profession in its approach to the issues raised in this essay through its national and international associations
- increasing knowledge enabling lawyers to participate primarily in English, in interdisciplinary consulting
- critically assessing the influence of information technology on the Internet with respect to the internal use of legal English.

In the area of *professional associations*, we suggest

- including studies on the “international process of law” among the core activities of the association
- including education and training in legal English at events or programmes
- analyzing the effects of the Internet on the use of legal English
- improving links to associations of in-house counsels

- increasing links to international professional associations in order to integrate international efforts to deal with legal English within the national association
- encouraging and supporting publications in English
- encouraging joint ventures to include the use of legal English in educational matters with universities and private training organizations
- encouraging members to become members of English-speaking international professional associations
- maintaining links to professional associations based on French and German culture in order to establish language neutrality in association matters and within the profession
- encouraging education and training joint-ventures with American and British Chambers of Commerce, in particular with the legal chapters
- forming a special working group to assess modern international trends in legal services within GATS, the EU, in the Anglo-Saxon world, in particular with regard to multi-disciplinary practices and linked law firms
- having an English part of the website of the association and being open to publishing English contributions in the association bulletins
- contributing to a research project analyzing the issue of “association language” in professional and scientific associations
- actively participating in the creation of teaching methods in legal English
- favouring the creation of an independent training institution for legal English open to every professional concerned

With regard to specialized professional and academic associations we suggest:

- establishing an overview as to what associations use legal English as their internal language on a national level and to what extent
- fostering links with IFA, AIPPI etc. to establish a common standard of use of legal English in specialized professional matters in Switzerland
- fostering the preparation of national reports on national legal systems in English and marketing such publications on a worldwide basis
- forming a Swiss association comparable to the Deutsch-Amerikanische Juristenvereinigung in Germany so that interested parties can focus on the effects of globalization on the legal world as a whole, highlighting Anglo-Saxon and American law
- encouraging members to participate in training conducted in English within associations or at universities.

XI. Further Challenges in an Age of Globalization

Firstly, globalization is gradually being subjected to extensive globalization studies' programmes dealing with legal matters, generally conducted by Anglo-Saxon institutions in English.

Secondly, there has been a sharp increase in globalization issues, related information and communication in our information society which has brought about a new awareness and research integrated in cutting-edge globalization studies. This brings about a complex inter-linking between law and communication, a phenomenon which has as yet hardly been analyzed¹.

English is the language of globalization and its communication. This also holds true for legal English in the area of communication and law. This emerging body of globalized knowledge will produce yet another layer of lingua franca use of English and legal English.

If we consult the recent book by John Braithwaite and Peter Drahos, *Global Business Regulations* (2000)², we are faced with the use of the following theoretical tools. The applicable methodology is developed primarily by looking at a “contest of actors” (states, international organizations of states, businesses, individuals, epistemic communities), a “contest of principles” (contests, properties of principles), “mechanisms of globalization” (military cohesion, economic cohesion and systems of reward, modelling, reciprocal adjustment and non-reciprocal coordination, capacity building), “regulatory webs and globalization sequences” (webs of influence, dialogue, reward and cohesion) all leading to a processual theory of contests of principles and the foundation of a theory of modelling. The same can be inferred from David Held, Anthony McGrew, David Goldblatt and Jonathon Perraton, *Global Transformations, Politics, Economics and Culture* (1999)³, and from *Globalization: the Reader*, John Bynon and David Dunkerly (ed.), (2000)⁴, which contain special extracts in the areas of globalization culture and globalization media and technology. The presently leading globalization project at the Kennedy School of Government of Harvard University uses the theoretical con-

¹ JENS DROLSHAMMER, Verlangt die Globalisierung eine Neuausrichtung der Forschung? – Beispiele von Forschungsfeldern im Bereich Recht und Management aus der Sicht eines International Lawyers, in: *Meilensteine im Management*, Band X, *Management & Law*, Basel 2002, in particular point 2.10, *Die Verschränkung von Kommunikation und Recht*.

² JOHN BRAITHWAITE and PETER DRAHOS, *Global Business Regulation*, Cambridge University Press, 2000.

³ DAVID HELD/ANTHONY MCGREW/DAVID GOLDBLATT/JONATHAN PERRATON, *Global Transformations, Politics, Economics and Culture*, 1999.

⁴ JOHN BYNON/DAVID DUNKERLY (eds.), *Globalization: the Reader*, New York 2000.

cepts of Joseph S. Nye and John D. Donoghue (ed.), *Governance in a Globalizing World* (2000)⁵, which contains a systematic and pervasive programme of analysis of globalization in English.

The function of English as a language and of legal English as a professional language has not yet been made an express topic even if one consults contributions by Neal M. Rosendorf, *Social and Cultural Obligation: Concepts and America's Role*⁶, Viktor Mayer-Schönberger and Deborah Hurley, *Globalization of Communication*⁶ or Arthur Izak Applebaum, *Culture, Identity and Legitimacy*⁶. This lack of in-depth language analysis also applies to the analysis of the effects of globalization on the legal world. Research, information and communication activities to do with globalization will also bring the language issue in focus. The legal dimension of globalization and globalization analysis will be considered a part of that process and therefore legal English will also play a prominent role.

Obviously, one should add the quasi-hegemonic function of English in the New Economy and the Internet to this new potential function of English. As Kenichi Ohma, (*Vier strategische Imperative für die New Economy*), rightfully underlines, English is the de-facto-language of the Internet and the New Economy and thereby confers on the English speaking regions of the world a remarkable lead in many forms of commercial activities carried out through the Internet⁷. We therefore propose to add the issue of the relevance of the Internet for English and legal English to the above-mentioned emerging function of English and legal English in globalization.

⁵ JOSEPH S. NYE/JOHN D. DONOGHUE (eds.), *Governance in a Globalizing World*, Cambridge/Washington 2000.

⁶ In: JOSEPH S. NYE/JOHN D. DONOGHUE (eds.), op. cit. N. 5.

⁷ KENICHI OHMAE, *Der unsichtbare Kontinent. Vier Strategische Imperative für die New Economy*, Wien 2001.

XII. Issues of Law and Communication

In the area interlinking law and communication, we have not yet found any academic publications dealing with the issue, in particular with the issue of the special function of legal English. This dimension of interaction in our globalized, data-based society is of immense importance to all areas of legal activity, affecting its competitiveness, compatibility and comparability. This communication dimension on legal matters has to be accepted and integrated as an essential part of the "national and international legal process". The reality of this new international communication raises complex issues regarding access to knowledge management networks and professional information; the distribution of generated knowledge on legal matters; and the relevance of the perception of the professional roles of lawyers¹. The research and analysis of these issues including the communication of legal matters is likely to be conducted in English. This is yet another use of English as an additional type of lingua franca for a globalized legal world in the information age.

¹ See in JENS DROLSHAMMER, *Internationalisierung der Rechtsausbildung und Forschung – eine Agenda für die interdisziplinär ausgerichtete Ausbildung zum in Wirtschaft und Management tätigen International Lawyer*, op. cit. N. 51, p. 149-155 and in OUTI KORHONEN, *International Lawyer: Towards Conceptualization of the Changing World and Practice*, p. 373-384, ANDREAS L. PAULUS, *The International Lawyer between Globalization and Postmodernity*, p. 385-400, PETER MURRAY/JENS DROLSHAMMER, *The Education and Training of a New International Lawyer*, p. 289-328, all in JENS DROLSHAMMER/MICHAEL PFEIFER, *The Internationalization of the Practice of Law*, Kluwer Law International, 2001.

XIII. Defending Your Own: The Necessity of Communication in English

It will become increasingly important for non-English speakers from non-Anglo-Saxon jurisdictions to be able to communicate their own values and concepts of legal systems, professions and education in English in order to make themselves heard and understood by the English speaking legal community. This form of internationally orientated self-defence or self-assurance will be an important and very considerable challenge.

In this context, effectively and efficiently dealing with the *Anglo-Saxon concept of professional roles* is a key area of concern, because the direct and indirect harmonization of legal professions and educations has gone beyond what most people have anticipated.

There appears to be a fundamental lack of mutual knowledge of relevant legal cultures. We believe this to have been underestimated and the effect insufficiently considered with regard to developing a strategic effort to increase the ability to operate and communicate between the various members of the legal professions on the international scene. Without an increase of awareness with respect to the issue of communication and without an active change in the culture of understanding, we will all miss out on a key part of the reality of the “international legal process”.

Promoting or defending your own law and your own legal system necessitates mastering the communication of one’s law (and one’s values) in the *lingua franca* of the international legal profession and of course the same applies if one wishes to promote a particular choice of law in international transactions.

XIV. English is the Language of Law – A Call for Further Action from a Transatlantic Perspective

We would like to sum up our thoughts and considerations and put them in a broader context as follows:

English has become the *lingua franca* not only for international trade and relations in general, but also for almost all cross-border legal transactions and international legal issues in particular. The function of professional legal English has fundamentally changed in recent years for the International Lawyer¹ and English has become the *lingua franca* of the International Practice of Law. The internationalization of all business activities and also of dispute resolution has been accompanied by the internationalization of lawyers who advise on international business transactions and the resolution of related disputes². Major law firms headquartered in London, New York and Frankfurt have become worldwide networking enterprises with partners in major offices around the globe. English and to a lesser extent American law firms have emerged as early leaders in this globalization trend³. The trend of international business and legal practice which has had such an impact over the last two decades, is unlikely to change in the near future⁴. Rapid improvements in communications, the dismantling of financial and currency barriers and the waning significance of language barriers with the widespread option of English as a world language of business will do nothing but further the process of internationalization of all business, financial and commercial activities. As a consequence, the relevance of the international practice of law will continue to grow⁵.

Law follows the language, and language often carries the law⁶. With the *Anglo-Americanization* of law a new phenomenon has also arisen: *English is the Language of Law*.

¹ WILLEM J-L. CALKOEN, Internationalization of the Legal Profession, in: NEDIM PETER VOGT (ed.), *The International Practice of Law*, Liber Amicorum for Thomas Bär and Robert Karrer, Basle/The Hague etc. 1999, p. 54-56.

² KLAUS BÖHLHOFF, *The International Practice of Law: Globalization or Regionalization*, in: NEDIM PETER VOGT, *The International Practice of Law*, op. cit. N. 2, p. 34.

³ PHILIPPE NOUEL, *International Practice of Law*, in: NEDIM PETER VOGT, *The International Practice of Law*, op. cit. N. 2, p. 183 and p. 185.

⁴ DETLEV VAGTS, Bär & Karrer, *Connecting Two Legal Systems*, in NEDIM PETER VOGT, *The International Practice of Law*, op. cit., N. 85, p. 248.

⁵ PHILIPPE NOUEL, op. cit. N. 2, p. 190-205.

⁶ Or as the nursery rhyme would say: “Law piggy-backs the language”.

Addressing cross-border and/or multi-jurisdictional legal issues is very likely to require an understanding of the Anglo-American common law as well as the civil law system. While these two far reaching bodies of law share many similarities, many of the approaches to legal issues differ fundamentally⁷ and are an indication of what is commonly labeled as the difference between two legal cultures.⁸

Notions like the International Practice of Law or the International Lawyer are also a clear indication of the changed function of the use of the English language in the legal professions outside of the Anglo-American world. An interesting new perspective in this context is, that the legal system, the legal profession and the capability of the international practitioners of a country have become a relevant factor in the comparison of the political and economical relevance of a country. English has become the language of law, and in particular the language of business and commercial law – the capability of a country and its legal professionals to communicate about its legal system and its law in English is essential in the worldwide competition between the different national legal systems.

It is however obvious, that a lot of in-depth research is required to better understand the background of these developments, reflecting the different national legal systems and laws. In the wake of internationalization the issues of a special professional language for instance, have to be analyzed; such analysis would have to deal with the fact that certain markets for legal (and financial) services are technocratized and denationalized to the point that the same *lingua franca*⁹ is being used by the participants of a specific professional sub-community in the major economic centres of the world. These new special “languages” which are self-explanatory to everyone do not need translation as such and are used as and when the need arises. Legal English as a technical language and linguistic system can only be understood if the underlying legal system (or more precisely law) is also understood. The complex relationship between law and language from the viewpoint of commensurability and translatability¹⁰ requires further specialist analysis.

⁷ It appears, however, that in many areas the difference are over-emphasized and the similarities often neglect(ed). In addition, the often over-emphasized differences between Anglo-American law as being case law and civil law being codified is, if at all, a rough rule of some indicative relevance only. For years now, the observation can be made that Anglo-American law has increased codification while civil law increasingly relies on case law.

⁸ See e.g. ELSING/TOWNSEND, Bridging the Common Law – Civil Law Divide in Arbitration, Arb. Int. Vol. 18, No. 1, p. 59 et. seq. and the further references above in N. 8.

⁹ Or *speaking entre nous* as described by MARY JANE MORRISON, Excursions in the Nature of Legal Language, 37 Cleveland State Review 334 (1989).

¹⁰ H. PATRICK GLENN, Commensurability and Translatability in Law and Justice in a Multistate World, in: JAMES A.R. NAFZIGER and SYMEON C. SYMEONIDES, Essays in Honor of ARTHUR T. VON MEHREN, New York 2002, p. 675-681.

From a practitioners perspective it seems that law often follows language and language often carries the law. Furthermore, it appears that form (language) begins to govern substance (law) through translation and the terminology of the language into which legal concepts are translated as well as the terminology of the language from which legal concepts are translated take on a life of their own.

Once a legal concept such as breach of contract starts to be used – by translation or otherwise – with regard to e.g. one of the continental European legal systems, the notion of breach as perceived in the Anglo-American legal system starts to impact the approaches under the applicable substantive (continental European) law¹¹. Observations also show, that those lawyers who have a better mastery of the language of the potentially applicable law also impose the legal concepts of such law which they know best or consider favourable to their clients.

Procedure already has been privatized (through arbitration) and we are now witnessing that the law as such (the actual substance of law) is also being privatized by what is commonly called *lex mercatoria*. This again is largely a language driven development and therefore Anglo-American dominated.

Moreover, it is wrong to assume (or fear) that the internationalization of legal practice has brought about a compatible internationalization of substantive legal developments as such¹²; the predominant use of English as a legal language blurs the conceptual and institutional differences between the various legal systems and legal cultures of the world. Unfortunately, this blurring has been accompanied by a decline in comparative law and international law as teaching and professional subjects¹³. It would be wrong to argue that the dominance of English in professional matters merely expresses a tendency for Anglo-Americanization. This might hold true with respect to the influence that Anglo-Saxon international law firms are having on the practice of law in international Continental European (and Swiss) law firms as a whole. However, the need for English goes way beyond dealing with this American – or nowadays also British – challenge. Internationalization has brought with it the need to have English as a *lingua franca* amongst many different members of the legal professions.

The first reason for the *agenda-orientation* of this essay is the obvious and marked gap in academic analysis of the phenomena behind the observations

¹¹ Fascinating distortions can e.g. be observed with regard to the absorption of the Anglo-American concept of trust by civil law systems, see NEDIM PETER VOGT, Disputes Involving Trusts, Basle/Munich etc. 1999, p. 7 et seq.

¹² ARTHUR T. VON MEHREN, The Rise of Transnational Legal Practice and the Risk of Comparative Law, Tulane Law Review, Volume 75, 2001, p. 1215-1224.

¹³ ERNST STIEFEL/James MAXEINER, Why Are US-Lawyers not Learning from Comparative Law, in: NEDIM PETER VOGT, The International Practice of Law, op. cit. N. 2 p. 23 et seq.

made. This vacuum in the area of law and language can best be characterized by Patrick Glenn's article *Commensurability and Translatability*, or more precisely its subtitles "commensurability of language-dependent concepts" and "translation of language-dependent concepts"¹⁴.

The second reason is the obvious and substantial effect of Americanization, even hegemonization of the commercial world by the United States. This source of concern is best characterized in a text by Christian Mair, "The Continuing Spread of English: Anglo-American Conspiracy or Global Grassroots Movement?"¹⁵, pitting an exploitation theory against a grassroots theory accounting for the spread of English, which yet again does not specially deal with the relationship of law and language in that context¹⁶.

This essay attempts to identify the "opportunities" and "constraints" of the political actions necessary to increase the capabilities and willingness to act. We believe that all those concerned should assume their own particular responsibility. Our observations of the Swiss professional reality can only be a first step. In the future a continental European perspective should be developed as the start of a more adequate academic, action oriented response to dealing with the issues at stake namely confronting the Anglo-Americanization of the "international legal process" from a transatlantic perspective.

¹⁴ GLENN, op. cit. N. 94, p. 675.

¹⁵ CHRISTIAN MAIR, *The Continuing Spread of English: Anglo-American Conspiracy and Global Grassroots Movement?* in: *Perspectives on English as a World Language*: D.J. Allerton, Paul Dranster, Tschichold (ed.), Basel 2002, p. 159-170.

¹⁶ CHRISTIAN MAIR, op. cit N. 15, p. 168:

	exploitation model	grassroots model
Political value of English	imperialist language	post-imperial language
Chief cause for post World War II spread	organized/centralized language planning following Anglo-American master plan	Demand -driven; decentralized rational choices by individuals and groups
English is the language of ...	Anglo-American capitalist interests	Modernization and globalization
English is ...	a language that conveys an Anglo-Saxon/Western world view	an ideologically neutral lingua franca
English ...	transforms recipient societies (usually for the worse)	is transformed by recipient societies (rise of New Englishes)
Chief beneficiary of "global English"	British and American capitalist interests	usually some segment of local users
Evidence for view proposed	historical analyses pointing out open and hidden continuities; evaluation of official statements of policy; and expert opinion (EFL professionals, writers, etc.)	strictly synchronic and descriptive sociometric analysis

In dealing with English as the language of law we were often reminded of the last paragraph of the preface to the 3rd and latest edition of the seminal work by Georg Steiner: *After Babel, Aspects of Language and Translation*, which strikes yet a more subtle chord: "Both in 1975 and 1992, I sought to conjecture as to the polyglot future in the face of the global detergence by an Anglo-American *esperanto*, itself splitting into more local though cognate forms [...]. Thus one is tempted to suppose that the triumphalism of science, of technocracy, of international finance and the mass-market media will assure the long-term hegemony of Anglo-American (computer languages reflect and enforce this prepotence). Reality, however, is always subtler and more ironic than our suppositions. It may well be that the Tower of Babel will continue to cast its creative shadow."¹⁷

¹⁷ GEORG STEINER, *After Babel, Aspects of Language and Translation*, 3rd ed. (first published 1975), Oxford University Press, Oxford et. al., 1998, p. VIII (with selected bibliography p. 499 et seq.).

XV. Further Reading and References

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2. Topical Listing

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