

English as Common Legal Language: Its Expansion and the Effects on Civil Law and Common Law Lawyers

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There are two disadvantages in global language arrangements: one of them is not knowing English, and the other one of them is knowing only English¹

Abstract: English has become the common language in a globalized legal world. However, the far-reaching consequences of the domination of key areas of the international practice of law by legal English are not yet fully understood and analysed. This article is concerned with an analysis of the expansion of legal English in global legal practice. This area has also been described as the ‘Law Market’, i.e. the area of activities of global lawyers in coping with the regulatory and legal frameworks in which international businesses function.² Much of the existing research into legal English as a common language is concerned with the development of legal English as a vehicle language for non-native English speakers in the sense of a lingua franca.³ The discussion is divided into either promoting the use of legal English as global language⁴ or pointing to its limitations ‘in that its legal terminology is premised on the tools of the (minority) common law system’⁵. This article aims to assess the interface and dynamics between lawyers using legal English as a common language as well as foreign languages in their legal work. This includes lawyers trained in the common law and/or civil law. Its aim is to gain a better understanding of global lawyering and communication in law

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1 J.L. BIANCO, *Born Global, Summary of Interim Findings* (London: The British Academy 2014), p 3.

2 J. FLOOD, ‘Megalawyering in the Global Order: The Cultural, Socio and Economic Transformation of Global Legal Practice’, *Intl. J. Leg. Prof. (International Journal of the Legal Profession)* 1996, p (169) at 190.

3 For instance, K.L. BHATIA, *Textbook on Legal Language and Legal Writing* (New Delhi: Universal Law Publishing Co 2010); M. GOTTI & C. WILLIAMS, *Legal Discourse Across Languages and Cultures* (Berlin: Peter Lang 2010); H.E.S. MATTILA, *Comparative Legal Linguistics* (Farnham: Ashgate 2013); C.A. KERN, ‘English as Court Language in Continental Courts’, 5. *Erasmus L. Rev. (Erasmus Law Review)* 2012 (3), http://www.erasmuslawreview.nl/tijdschrift/ELR/2012/3/ELR_2210-2671_2012_005_003_00 (accessed 30 Oct. 2015).

4 J. DROLSHAMMER & J. VOCT, *English as the Language of Law? – An Essay on the Legal Lingua Franca of a Shrinking World* (Zürich: Schulthess, 2002/2003); A.L. PAULUS, ‘The International Lawyer Between Globalization and Postmodernity’, in J. Drolshammer & J.M. Pfeifer (eds), *The Internationalisation of the Practice of Law* (The Hague, London, Boston: Kluwer Law International 2001), p 385–400.

5 B.J. BEVERIDGE, ‘Legal English-How It Developed and Why It Is Not Appropriate for International Commercial Contracts’, in H.E.S. Mattila (ed.), *The Development of Legal Language: Papers from an International Symposium held at the University of Lapland*, 13–15 Sept. 2000 (Helsinki: Kauppakaari 2002); P. GILKER, 17. *ERPL* 2009, p 285; K. IMHOF, ‘Same Words, Different Meanings: English Legalese in Non-English Contracts’, *Intl. Bus. Law. (International Business Lawyer)* 1998, p 385.

and business relationships and to develop strategies for the internationalization of legal education and training in the UK.

Dans un monde juridique de plus en plus globalisé, l'anglais est devenu la lingua franca. Cependant, les conséquences profondes de la domination de la pratique internationale du droit par l'anglais juridique dans des domaines clés ne sont pas encore entièrement comprises ou analysées. Cet article examine l'expansion de l'anglais juridique dans la pratique du droit au niveau mondial. Une grande partie de la recherche, qui étudie l'anglais juridique en tant que langue commune dans le sens d'une lingua franca, examine le développement de l'anglais juridique en tant que langue de véhicule pour les juristes dont la langue maternelle n'est pas l'anglais. La discussion est divisée en deux camps: la promotion de l'utilisation de l'anglais en tant que langue juridique globale ou démontrer ses limites parce que sa terminologie juridique repose sur les outils du système de la common law (qui est minoritaire). Dans cet article, l'auteur évalue la mesure dans laquelle les avocats travaillant dans la langue anglaise ont besoin de compétences multilingues.

Cet article vise à évaluer les relations et la dynamique entre les avocats utilisant l'anglais juridique comme un langage commun, ainsi que les langues étrangères dans leur travail juridique, y compris des avocats formés à la common law et /ou du droit civil. Son objectif est d'acquérir une meilleure compréhension de la pratique du droit au niveau mondial et de la communication dans les relations juridiques et commerciales dans le but de développer des stratégies pour l'internationalisation de l'éducation et de la formation juridique au Royaume-Uni.

Englisch ist die gemeinsame Sprache in der globalen Welt des Rechts geworden. Die Konsequenzen dieser englischsprachigen Vorreiterstellung in den wichtigsten Gebieten der internationalen Rechtspraxis sind jedoch noch nicht komplett erforscht. Dieser Aufsatz befaßt sich mit der Analyse der Ausweitung der englischen Rechtssprache in der globalen Rechtspraxis. Der heutige Stand der Forschung in die Rechtssprache Englisch befasst sich hauptsächlich mit der Entwicklung der englischen Rechtssprache als Vehikel für Benutzer der englischen Sprache als gemeinsam anwendbaren Fremdsprache im Sinne einer Lingua Franca. Die Meinungen hierzu sind unterteilt in Autoren, die die englische Rechtssprache als globale Sprache anpreisen und solche, die die Limitierungen dieser Entwicklung aufzeigen und darauf hinweisen, dass die Terminologie zu eng mit dem Common Law Rechtssystem zusammenhängt. Die vorliegende Untersuchung befasst sich insbesondere mit der Frage inwieweit die englische Sprache als gemeinsame Sprache verstärkt durchsetzbar ist und in welchem Maße in Anbetracht dieser Tendenz Fremdsprachenkenntnisse für englische Juristen von Nutzen sind. Dieser Aufsatz geht daher der Frage nach in welchen Bereichen und in welchen Situationen die englische Rechtssprache und die Rechtssprache anderer Rechtssysteme sich in der Rechtspraxis von Common law Juristen und kontinental europäischen Juristen überschneiden. Ziel dieser Untersuchung ist es, die globale Rechtspraxis zu verstehen und die Kommunikation in rechtlichen und geschäftlichen Verhandlungen näher zu betrachten um Schlussfolgerungen für die moderne Juristenausbildung im Vereinigten Königreich zu ziehen.

1. Introduction

English has become the common legal language in a globalized world. Globalization is most often associated with international trade but it now spans

across other fields of human interaction such as politics, education and law. It is characterised by an interdependence of organizations, institutions and people with diverse national backgrounds. To mediate the affairs between these actors in an international context and create shared spaces, ‘globalisation relies on two symbolic communicative resources: law and language’.⁶ Legal English as common language has been a unifying factor to facilitate international trade and legal transactions. However, the far-reaching consequences of the domination of key areas of the international practice of law by legal English are not yet fully understood and analysed. English as a ‘lingua franca’ has been discussed by linguists in great depth.⁷ Much of the existing research into legal English as a common language is concerned with the development of legal English as a vehicle language for non-native English speakers in the sense of a lingua franca.⁸ The discussion is divided into either promoting the use of legal English as global language⁹ or pointing to its limitations ‘in that its legal terminology is premised on the tools of the (minority) common law system’.¹⁰ This concern is of particular importance in supranational governance and the academic debate on a harmonisation of European Private Law which seeks to formulate common legal principles.¹¹ This article, however, is concerned with the expansion and the limitations of legal English in current cross-border economic exchange. The author aims to assess the interface and dynamics between lawyers using legal English as a common language as well as foreign languages in their legal work. Its aim is to gain a better understanding of global lawyering and to develop strategies for the internationalization of legal education and training in the UK.

To achieve this, this article will firstly assess the spread of legal English as a common language. It will identify some of the limitations and obstacles in this process and focus in particular on a legal system where English is widely spoken, Germany. The article will also identify the effect this has on lawyers trained in the

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- 6 D.S. GIANNONI & C. FRADE, *Researching Language and Law* (Berlin: Peter Lang 2010), p 7.
- 7 *Lingua franca, Chimera or reality*, European Commission, Directorate General for Translation, 2010 with an excellent overview into the literature on this topic.
- 8 For instance, K.L. BHATIA, *Textbook on Legal Language and Legal Writing*; M. GOTTI & C. WILLIAMS, *Legal Discourse Across Languages and Cultures*; H.E.S. MATTILA, *Comparative Legal Linguistics*; C.A. KERN, 5. *Erasmus L. Rev.* 2012 (3).
- 9 J. DROLSHAMMER & J. VOGT, *English as the Language of Law? – An Essay on the Legal Lingua Franca of a Shrinking World*; A.L. PAULUS, in *The Internationalisation of the Practice of Law*, (Zürich: Schulthess, 2002/03), p 385.
- 10 B.J. BEVERIDGE, in *The Development of Legal Language: Papers from an International Symposium held at the University of Lapland*; P. GILIKER, 17. *ERPL* 2009, p 285; K. IMHOF, *Intl. Bus. Law.*, p 385.
- 11 B. POZZO, ‘English as a Legal Lingua Franca in the EU Multilingual Context’, in C.J.W. Baaij (ed.), *The Role of Legal Translation in Legal Harmonisation* (Alphen aan den Rijn: Wolters Kluwer 2012), p 183; B. POZZO, ‘Multilingualism and the Harmonisation of European Private Law: Problems and Perspectives’, *ERPL* 2012, p 1185.

common law. It draws from literature in the field of legal language, linguistics, practitioner law journals as well as data sourced in the UK data archive¹² and through semi-structured interviews in a global law firm in London.¹³

2. The Expansion of Legal English into a Civil Law Jurisdiction

Traditionally the specialized language of lawyers who share the traditions of the common law, legal English has become the vehicle language of international business even in countries belonging to the civil law family. Seven out of ten of the world's most powerful economies are non-common law jurisdictions, with Germany being ranked fourth by economic strength.¹⁴ There is a remarkable discrepancy between the economic strength of some of the top world economies (China, Japan, Germany, France, Brazil, Italy, Russia) and the type of 'lawyering' that dominates international transactions where US and UK legal firms dominate the market.¹⁵ Germany is a country where the English language is generally widely spoken and understood amongst the population.¹⁶ Therefore, it is particularly interesting to assess whether there are any limitations to the use of English as common legal language in a country with a very different legal culture.

The spread of the English language in German legal practice has been referred to in the wider context as 'Americanization' of German law¹⁷ or its 'Anglo-Americanization'.¹⁸ In Germany, there is hardly an area of business,

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- 12 The methodology applied for the research of this article involved an analysis of data held by the UK Data Archive. Professional Education, Global Professional Service Firms and the Cultures of Professional Work in Europe, ESRC Award, Res-000-22-2957 this included 90 face-to face/telephone semi-structured interviews for lawyers of 'Top Ten firms' in Europe. See J.R. FAULKONBRIDGE & D. MUZIO, ESRC (Economic and Social Research Council) grant funded project 'Professional Education, Global Professional Service Firms and the cultures of professional work in Europe', (RES-000-22-2957), 2010. Accessed via the UK Data Archive <http://www.data-archive.ac.uk/>; (accessed 7 Aug. 2016).
 - 13 The author also carried out two separate semi-structured interviews with a senior partner and a solicitor in a global Law Firm based in London. They were conducted between February and April 2016. The interviewees wish to remain anonymous and all errors are the author's.
 - 14 Report into the global competitiveness of the England and Wales Solicitor qualifications, The Law Society, July 2015, page 15 with reference to the Global World Economic League Table for 2014.
 - 15 Report into the global competitiveness of the England and Wales Solicitor qualifications, The Law Society, July 2015, page 15 with further references.
 - 16 According to the *Gesellschaft für deutsche Sprache* in 2008 67% of all German interviewees stated that they had good verbal and oral knowledge of English.
 - 17 W. WIEGAND, 'Americanization of Law - Reception or Convergence', in L.M. Friedmann & H.N. Scheiber (eds), *Legal Culture and the Legal Profession* (Boulder, CO: Oxford 1996), <http://wolfgangwiegand.ch/index.php/en/publications> (accessed 8 Apr. 2016).
 - 18 S.M. MASSUMI, 'Quo Vadis Unternehmenskaufverträge? - Unternehmenskaufverträge nach der Deutschen Schuldrechtsreform', *Münchner Juristische Beiträge* (München: Utz Verlag 2008), p 77.

company and finance law that has not felt the influence of the Anglo-American thinking, negotiation, and drafting style.¹⁹ This includes a reception of US substantive law in the field company law.²⁰ The success of the English language in Germany can be explained as filling a gap in the German legal system, as a vehicle to facilitate business negotiations and an aid to share a common space where language would be an obstacle. Surprisingly, the phenomenon of ‘Americanization’ has received only little academic attention in Germany.²¹

There are several factors which contribute to this phenomenon. The European and German economies are closely connected to the US economy and the competition for common markets has led to many collisions of the legal cultures. The US legal drafting style is dominating these collisions and has taken on a leading role. Secondly, the increasing interest of German lawyers in the Anglo-American legal culture and education in the last 30 years has led to more and more German lawyers achieving overseas qualifications in addition to their German degrees. These lawyers have imported some of the legal techniques or even introduced standard contracts in Germany. LLMs in Anglo-American jurisdictions have become an essential pre-requisite for legal jobs in larger German law firms. This differs from the attitudes of English law firms. One respondent in a recent survey commented: ‘Because here I think, if you do an LLM, the law firm will say, why did you do an extra year, what did you spend that extra year doing. Almost if you have gone and learnt a language for a year that might be given as much credence as doing an extra, an LLM.’²²

The number of Anglo-American buyers of German companies is particularly high and buyers have the right to produce the first draft of the contract. Finally, there is a lack of legal culture in Germany when it comes to merger and acquisition contracts.²³ This vacuum has been filled by American style legal solutions. German law in this area has been described as underdeveloped and insufficient.²⁴ International lawyering does not refer to the academic subjects of International Law or Private International Law alone but to all activities of (UK) lawyers

19 H. FLEISCHER & T. KORBER, ‘Due Diligence und Gewährleistung beim Unternehmenskauf’, *Betriebsberater*, Heft 17, 2001, p 841; for areas of law in the largest German Commercial Law Firms see <http://www.juve.de/handbuch/en/2015/rechtsgebiete>.

20 J. HEIN, *Die Rezeption US-amerikanischem Gesellschaftsrechts in Deutschland* (Tübingen: Mohr Siebeck 2008).

21 H. FLEISCHER & T. KORBER, *Betriebsberater*, Heft 17, 2001, p 841; A. JANSSEN & R. SCHULZE, ‘Legal Cultures and Legal Transplants in Germany’, 19. *ERPL (European Review of Private Law)* 2011 (2), pp 225-256 with further references E. ARIANO & M. DE MORPURGO, ‘The 15th Anniversary of the “Common Core of European Private Law”’, *ERPL (European Review of Private Law)* 2010 (2), p 407.

22 J.R. FAULKONBRIDGE & D. MUZIO, ESRC Award, Res-000-22-2957, interview no. 20, p 13.

23 S.M. MASSUMI, *Münchener Juristische Beiträge*, p 77.

24 V. TRIEBEL, ‘Anglo-amerikanischer Einfluß auf Unternehmenskaufverträge in Deutschland - eine Gefahr für die Rechtsklarheit?’, *RIW (Recht in der Wirtschaft)* 1998, p 1.

interpreting foreign lawyer's advice and placing this advice in the context of the (UK) client's multijurisdictional objectives.²⁵

The work of lawyers in international law firms includes doing business, which requires technical legal expertise, the provision of services and the establishment of good client relationships. The areas of law include corporate finance, banking including restructuring and insolvency and international capital markets. It involves negotiating deals, drafting and reviewing letters and agreements, carrying out due diligence, choosing applicable laws and maintaining good client contact.²⁶

2.1. *Mergers and Acquisitions*

In particular, in the field of Mergers and Acquisitions it has become standard practice to use UK/US style contracts in continental countries.²⁷ As a result, German legal practice has adopted many English legal terms such as 'Business to business' contracts (b2b contracts), 'Earn-out-Klausel', or 'Break up fee' or Trigger-Event as found in recent publications written in the German language.²⁸ This vacuum has been filled by American style legal solutions and the English language term.²⁹

A good example is provided by the introduction of the process of 'due diligence' in the acquisition of a company, a process previously unknown of in German law and practice. German contracts are increasingly requiring this practice as a legal duty of the buyer. However, the effects of due diligence insufficiently carried out have led to uncertainty in German contract disputes. Generally speaking, German law is more generous in the protection of the buyer's legal position than US law and this illustrates the potential issues a contract drafted in the English language governed under German law might raise. Whilst the contract is drafted in English including familiar English legal processes, the contract may be governed by German law. By combining choice of law and contract language, 'so that the language is not the natural language of the selected law, we are creating a so-called 'cross system' contract'.³⁰ This trend was started in the late 1980s after liberalization of the German legal service market and subsequently with the fusion of English and German law firms. A recent study confirms that in Germany cross-border transactions are still primarily ruled by rules of international private law and

25 J. FLOOD, *Intl. J. Leg. Prof.* 1996, p (169) at 201.

26 Interview carried out with International lawyer in Global Law Firm in Feb. 2016.

27 S.G. BUGG, *Contracts in English, an Introductory Guide to Understanding, Using and Developing 'Anglo-American' Style Contract* (München: C.H. Beck 2013, 2nd ed.).

28 M.C. HILDEGARD, 'Earn-Out-Klausel beim Unternehmenskauf', *Betriebsberater* 2010, p 2912.

29 V. TRIEBEL, *RIW*, p 1.

30 S.G. BUGG, *Contracts in English, an Introductory Guide to Understanding, Using and Developing 'Anglo-American' Style Contract*, p 59.

substantive national law. Further, the study shows a preference for the English language and the Anglo-Saxon drafting standards.³¹

Knowledge of the legal effects in German law is therefore crucial even if the contract has incorporated the Anglo-American legal transplant.³² It has been argued that these creations in legal practice should be incorporated into the system of the German Civil Code (BGB, Bürgerliches Gesetzbuch) to avoid a further drifting apart of legal practice from the system of German codified law.³³ This denationalization of contracts is therefore a trend that has been fuelled by the use of English as the common language applying new Anglo-American concepts and processes in legal practice. A constructive approach by the legislator is therefore the best way forward to embrace this legal practice and avoid a further fragmentation of legal practice and German dogma.³⁴ Due diligence in Germany also requires extensive searches into German documentation which may not be available in the English language.³⁵ This includes the requirement of formal notarization of documents such as the capital increase by a German limited liability company.³⁶ US firms have recognized this as well and research into US global law firms shows that ‘foreign language skills may be important in developing client relationships in some countries’.³⁷ ‘Global law firms appreciate the multilingual skills of their attorneys. The very nature of cross-border transactions makes attorneys with multilingual skills especially appealing. Executives of foreign issuers may have a strong preference for conducting negotiations and discussions in their own language, and there may not be English translations of key due diligence documents. The ability to communicate with foreign clients in their mother tongue may be key to acquiring and developing client relationships.’³⁸

2.2. Drafting Styles

It has been well illustrated that the Anglo-American style of contract drafting differs from the traditional German approach in that it is more detailed and therefore avoids references to the Civil Code.³⁹ The influence of national law has

31 P.C. FISCHER, ‘Globalisierung und Recht, Auswirkungen der Globalisierung auf die Praxis grenzüberschreitender Transaktionen aus deutscher Perspektive’, *Forschungsberichte des Fachbereichs Wirtschaft der Fachhochschule Düsseldorf*, 27 Ausgabe 2014, <http://fhdd.opus.hbz-nrw.de/vollexte/2014/852> (accessed 29 Jan. 2016).

32 H. FLEISCHER & T. KORBER, *Betriebsberater*, Heft 17, 2001, p 849.

33 S.M. MASSUMI, *Münchener Juristische Beiträge*, p 78.

34 *Ibid.*, p 77.

35 D. CAMPBELL, *Mergers and Acquisitions in Europe* (Alphen aan den Rijn: Kluwer 2011).

36 *Ibid.*, p 147.

37 See D.R. CRAWSHAW, ‘Globalisation and the Practice of Law - One Lawyer’s Perspective’, 46. *Can. Bus. L. J. (Canadian Business Law Journal)* 2008, p 162, at 168.

38 *Ibid.*, p 162 at 170.

39 T. LUNDMARK, ‘Verbose Contracts’, 49. *Am. J. Comp. L. (The American Journal of Comparative Law)* 2001, p 121.

therefore been reduced and this makes these types of contracts more likely to be used if a different choice of law is exercised. This denationalization of contracts is further strengthened by the inclusion of arbitration clauses, which are commonly used by international investors. However, this estrangement from national (German) law requires culturally sensitive handling. The exact meaning of English legal terms and their legal effects in cross-system contracts is closely related to the national legal order of choice. Amongst the terms that can cause confusion are ‘guarantees and warranties’⁴⁰ This trend to structure cross-system contracts like common law contracts can lead to ambiguities when signatories are not sure whether a term used is to be interpreted under English law because the term does have different meanings in English and continental law or the law that governs the contract, such as ‘board of directors’ which has different meaning under German law, for instance.⁴¹ Further examples are ‘act of God’, as well as ‘rescission’, ‘force majeure’, ‘default’, ‘breach of contract’ and ‘consideration’.⁴² It has been argued that these challenges will increase with growing globalization involving emerging markets entering legal negotiations and terms. Foreign investors are increasingly coming from the Middle East, Asia and Russia. Religious standards may require changes to the structures of the contracts, for instance to enable financial deals to conform with sharia law.⁴³

In the construction industry, for instance it has become standard practice to use standard construction contracts based on versions of the conditions published by the International Federation of Consulting Engineers (FIDIC – acronym for its French name *Fédération Internationale Des Ingénieurs-Conseils*) which are based on common law standard forms using common law language. ‘Not surprisingly, considerable challenges face common law-trained construction lawyers working with English-language contracts governed by a civil law-based system of laws written in Arabic. There are numerous perils awaiting common lawyers, particularly construction lawyers, who come to work in the United Arab Emirates and elsewhere in the Gulf region. Terms such as “indemnity”, “negligence”, “consideration”, “injunction”, “waiver” and “specific performance” are liberally scattered throughout the

40 S.G. BUGG, *Contracts in English, an Introductory Guide to Understanding, Using and Developing ‘Anglo-American’ Style Contract*, p 105.

41 P.C. FISCHER, *Forschungsberichte des Fachbereichs Wirtschaft der Fachhochschule Düsseldorf*; G. CORDERO-MOSS, ‘Interpretation of Contracts in International Commercial Arbitration: Diversity on More than One Level’, 22. *ERPL (European Review of Private Law)* 2014, p 13 ff.

42 S.G. BUGG, *Contracts in English, an Introductory Guide to Understanding, Using and Developing ‘Anglo-American’ Style Contract*, p 60.

43 C. SCHEDE, ‘Justitia spricht Englisch, Die Internationalisierung hat zur Anglo-Amerikanisierung der Vertragswerke geführt’, Juni 2014, the Property Post, <http://www.the-property-post.de/gastbeitraege/fachaufsaetze/justitia-spricht-englisch> (accessed 1 Dec. 2015). G. VORNHOLZ, *Internationale Immobilienökonomie, Globalisierung der Immobilienmärkte* (München: De Gruyter Oldenbourg 2015), p 6.

English-language construction contracts (based on the FIDIC's conditions) which are widely in use in the United Arab Emirates.⁴⁴ To conclude common law lawyers need an understanding of civil law or foreign law contract drafting to be able to detect pitfalls created by cross-system contracts.

2.3. Bilingual Drafting

'The language of deal documentation can become a bone of contention. As a general rule the language chosen in international transactions will be English but the laws of each jurisdiction involved may require that some that certain documents must be drafted in the local language. When a large number of jurisdictions are involved, the main or "umbrella" agreement will often be in English and the documents implementing the transaction in each jurisdiction will be bilingual or in the local language.' A combination of agreements drafted in the English language but governed by different legal systems is also possible. This depends on the nature of the deal. In some areas of law, the schedules to an agreement which is, for instance governed by German law, are to be governed by English law.⁴⁵ An awareness of the differences in drafting styles, in particular the differences between the common law drafting styles and the civil law have been described as crucial in this process.⁴⁶ It has been noted that 'to practise purely one's own law is to lose markets and that sometimes the necessity of practising foreign law was forced on lawyers'⁴⁷ in consequence close co-operation between lawyers from different jurisdictional backgrounds is required.

2.4. Dispute Resolution

The English language has not only spread into the day-to-day work of German commercial lawyers but since 2008 has made its way into German courtrooms.⁴⁸ This is an astonishing development given that since the late seventeenth century the language of the German courts gradually evolved from Latin to German.⁴⁹ According to section 184 GVG (Court Procedure Act) the court language in Germany is German.⁵⁰ The German language was perceived to enlighten German

44 D. COURTNEY-HATCHER, 'Construction Boom Poses Challenges for Common Law Trained Lawyers', <http://www.internationallawoffice.com/Newsletters/Construction/United-Arab-Emirates/Dentons/Construction-Boom-Poses-Challenges-for-Common-Law-Lawyers> (accessed 25 Mar. 2016).

45 D. CAMPBELL, *Mergers and Acquisitions in Europe*, pp 42, 43.

46 *Ibid.*

47 J. FLOOD, *Intl. J. Leg. Prof.* 1996, p (169) at 191.

48 K. WRIGHT, 'Open for Business, the German Commercial Court, in English', *The Lawyer*, 20 June 2010; C. BISPING, 'Conquering the Legal World: The Use of English in Foreign Courts', 22. *ERPL (European Review of Private Law)* 2012, p 541.

49 H.E.S. MATTILA, *Comparative Legal Linguistics*, p 210.

50 This statute was first enacted in 1877.

citizens and the German codes contributed to that. German civil procedural law was first codified in 1879 and today it contains eleven books. The English language has also found its way into Dutch Commercial Courts from 2017⁵¹ and since 2011 French Commercial Courts.⁵²

It is hoped that the introduction of English as court language in German will enhance the competition for a legal market position and has led to what has been described as the ‘battle of the brochures’, referring to a brochure that promotes English law, published by the Law Society of England and Wales in 2007.⁵³ Whilst only two cases⁵⁴ have been reported so far, this spread of the English language into a civil law jurisdiction might open up the market for an increase in litigation with a cross-border element. Both the German legislator and the Professional Bodies would like to see more cases being heard in German courts in the English language and to encourage the choice of the German substantive law. To illustrate this point further, in Germany around three quarters of businesses involved in trans-border transactions would like to see the use of German contract law, in the words of a recently published pamphlet more ‘Law made in Germany’. 74% of German companies involved in cross-border trade would like to opt into German law when deciding on a choice of law. 85% of the interviewees prefer the more comprehensive and simpler structure of contracts, lower legal costs (33%) and no risk of class actions (19%).⁵⁵

The legislative proposal which includes a change to section 184 Court Procedure Act (*Gerichtsverfahrensgesetz*) (GVG) was re-introduced on 30 April 2014 and seeks to establish special divisions for international matters which will be permitted to proceed in the English language.⁵⁶ The proposal was re-introduced by the Federal Council (*Bundesrat*) which argues that German law and the German judiciary are regarded highly internationally but that in trans-border commercial law cases the German language as the only permissible court language is a disadvantage for Germany as a legal forum.⁵⁷

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- 51 See a new initiative by the Dutch courts, to launch a Dutch Commercial Court as of 1 Jan. 2017 where the language will be English too: <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Rechtspraak-speciale-voorziening-voor-grote-handelsconflicten-NCC.aspx>.
- 52 <http://conflictoflaws.net/2011/paris-commercial-court-creates-international-division/>.
- 53 S. VOGENAUER, in H. Eidenmüller, *Regulatory Competition in Contract Law and Dispute Resolution* (München: C.H. Beck, Nomos, Hart 2013), p 239.
- 54 http://www.lg-bonn.nrw.de/behoerde/lgbonn_english/10_About_us/130_Court_hearings_in_English/ (accessed 19 Nov. 2015).
- 55 V. EIKE, Germany Trade & Invest New York, D. Marenkov, Germany Trade & Invest Bonn Markets International, 4 Ausgabe 2014, <http://www.gtai.de/GTAI/Content/DE/Meta/Presse/Markets/Markets-international/2014/Ausgabe-2014-04/download-markets-international-2014-04.pdf?v=2>.
- 56 According to s. 184 GVG the court language in Germany is German.
- 57 Deutscher Bundestag, 18. Wahlperiode, Drucksache, 18/1287, 30 Apr. 2014; V. EIKE & D. MARENKOV, ‘Vertragsrecht’, Schwerpunkt: Law Made in Germany, Markets International 4/2014, www.gtai.de/markets, p 11; See G.-P. CALLIES & H.B. HOFFMANN, 59. *Anwaltsblatt* 2009,

Critics of the proposal are concerned about the constitutional guarantees set out in Article 103 of the German Basic Law which entitles every person to a hearing in accordance with law.⁵⁸ A court hearing in the English language could lead to misunderstandings and uncertainty which would violate this constitutional guarantee. It has been argued that the changes to the law will introduce a choice on behalf of the parties to opt in or out of the English language as well as to ask for an interpreter should the English language cause issues.⁵⁹ Further, some critics have argued that the introduction of the English language is a breach of the principle of the publicity of the hearing as a cornerstone of the German rule of Law (*Rechtsstaatsprinzip*). Others are concerned about the constitutional guarantee of a lawful judge enshrined in Article 101 section 1 of the German Constitution.⁶⁰ Also, the proposal might constitute a violation of Article 14 of the European Convention of Human Rights if one of the parties did not agree with the choice of language made.

However, the amended proposal now envisages that the parties have to agree with the choice of court of language and that the court can request at any stage of the proceedings request that the case is to be heard in German or that an interpreter has to be called for.⁶¹ It remains to be seen whether German court hearings in the English language will become a more common feature of litigating in Europe. Common law trained lawyers might see themselves more regularly being involved in court hearings in a German court applying German procedural law and possibly even German substantive law.

The introduction of English is a move to improve the competitiveness of German law and as a place for dispute resolution. This has been noted in a recent report by the British Ministry of Justice in London in 2015 which lists the German courts as potential continental competitors to English courts.⁶² Factors that were mentioned were the lower costs in continental Europe, the use of the inquisitorial system, better cost control and quicker results.⁶³ Some respondents raised doubts as to whether these jurisdictions currently were serious competitors to England for

p 52; Graf von Westphalen, 59. *Anwaltsblatt* 2009, p 214; H. PRÜTTING, 'In Englisch vor deutschen Gerichten verhandeln?', 60. *Anwaltsblatt* 2010, p 113.

58 H. PRÜTTING, 60. *Anwaltsblatt* 2010, p (113) at 114; B. HIRTZ, 'Englisch sollte nicht zu einer deutschen Rechtssprache werden!', 61. *Anwaltsblatt* 2011, p 41.

59 H. PRÜTTING, 60. *Anwaltsblatt* 2010, p (113) at 114.

60 (1) Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.

61 See Art. 184 b) (2).

62 E. LEIN, R. MCCORQUODALE, L. MCNAMARA & J. DEL RIO KUPELYANTS, *Factors Influencing International Litigants' Decision to Bring Commercial Claims to the London Based Courts* (Ministry of Justice: London 2015), p 25.

63 *Ibid.*, p 58; H. KÖTZ, 'The Jurisdiction of Choice, England and Wales or Germany?', *ERPL (European Review of Private Law)* 2010, p (1243) at 1256.

contracts not involving any parties from continental Europe. However, if court fees rose in England as proposed, they expressed a concern that this picture could change in favour of other EU Member States.⁶⁴

It has been argued that the choice of English as the language of negotiation and contract language often leads to the choice of English law and the choice of London as forum or place of arbitration.⁶⁵ Triebel argues that language and law is often not separated and that the German model might be confusing with arbitration courts in various cities across Germany rather than just in one place such as London. The capital's pre-eminence in the global disputes market can in part trace its roots to the ubiquitous nature of English common law.⁶⁶

Research into the choice of law in the area of contract law has shown that the most important factor is the perception the parties have of a particular jurisdiction. The frequency of a choice of English law has been analysed in a variety of studies by academics and practitioners.⁶⁷ One author claims that 'businesses choose jurisdictions not because of substantive law but because of 'sociological' or historical reasons.'⁶⁸ Vogenauer's conclusion illustrates that the preferences for a particular jurisdiction depend largely on perception: 'The reputation of a given legal regime as being sophisticated, balanced, accurate, and user-friendly is, of course, linked to its substantive merits because it will normally be based on past experience and other evidence. Yet ultimately, it remains a question of subjective belief: the overall perception of a legal system does not necessarily correspond to its real performance.'⁶⁹ Equally a report by the Ministry of Justice concludes: 'In a

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- 64 E. LEIN, R. MCCORQUODALE, L. MCNAMARA & J. DEL RIO KUPELYANTS, *Factors Influencing International Litigants' Decision to Bring Commercial Claims to the London Based Courts*, p 26.
- 65 V. TRIEBEL & M. BURGSTALLER, 'Legal Service Powerhouse'; Im Blickpunkt: Schiedsgerichtsort London <http://www.disputeresolution-magazin.de/legal-service-powerhouse>.
- 66 T. KINDER, 'The Lawyer Global Litigation Top 50 Review 2015 - Executive Preview', *The Lawyer*, 7 Dec. 2015.
- 67 S. VOGENAUER, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law. A Business Survey - Final Results*, (University of Oxford 2008; S. VOGENAUER & S. WEATHERILL *The Harmonisation of European Contract Law* (Oxford 2006), p 123; According to the White & Case '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process', <http://arbitration.practices.whitecase.com/news/newsdetail.aspx?news=3786>, 25% of parties prefer English law; The Clifford Chance Survey of 2005 'Does Business Want an EU Contract Law?', <http://www.mondaq.com/x/32445/Inward+Foreign+Investment/Does+Business+Wan+an+EU+contract+law+The+Clifford+Chance+Survey>, concluded that English law is chosen in 26% of cases; G. CUNIBERTI, 'The International Market for Contracts: The Most Attractive Contract Laws', University of Luxembourg Law Working Paper Series 2014-02, 15-16, who states that between 2007 and 2012, an average 11% of contracts contained a choice of law agreement in favour of English law; the highest yearly average of 15.43% was reached in 2012.
- 68 P. LEGRAND, 'On the Unbearable Localness of Law: Academic Fallacies and Unreasonable Observations', *ERPL (European Review of Private Law)* 2002 (1), p 61.
- 69 S. VOGENAUER, 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence', *ERPL (European Review of Private Law)* 2013, p 13.

highly competitive legal market place, perception is very important, so a prudential approach of the Ministry of Justice would be much better.⁷⁰

The spread of English as a language of the courts in Germany will therefore depend on the perception clients will develop. An important element in building on the perception of the German legal court system would be to ensure the efficiency of the legal personnel to make the experience a user-friendly one. This requires legal and linguistic sensitivity by the German judiciary as evidenced by highly professional and costly drafting and translation processes in the institutions of the EU. Whilst the German initiative promotes the choice of German law in the English language, the difficulties of communicating on substantive issues of law in a foreign language are underestimated.⁷¹ The German legislative proposal suggests that candidates with a LLM qualification will be well qualified for conducting hearing in the English legal language.⁷² It is questionable whether an LLM qualification can equip a judge with the language and translation abilities of a trained lawyer linguist or legal interpreter. However, taking the example of lawyer-linguists in the European Union (EU) it is important to point out that the competition for a sought after position in the institutions' legal Translation service is fierce and that it requires a candidate to possess an excellent command of the languages, translation practice and legal knowledge of various legal systems⁷³ The Patent courts in Munich have always worked well using English with the support of many interpreters.⁷⁴ The German proposal envisages some language training for judges and administrative staff and the increase in costs will be offset by the expected increase in litigation.⁷⁵

The German proposal assumes that the introduction of English as court language will lead to an unproblematic co-operation between non-native speakers

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- 70 E. LEIN, R. MCCORQUODALE, L. MCNAMARA & J. DEL RIO KUPELYANTS, *Factors Influencing International Litigants' Decision to Bring Commercial Claims to the London Based Courts*, p 25.
- 71 C. BISPING, *ERPL*, p 541; in the case of arbitration N.C. ULMER, 'Language, Truth, and Arbitral Accuracy', 28. *J. Intl. Arb. (Journal of International Arbitration)* 2011, pp 295-311.
- 72 Deutscher Bundestag, 18. Wahlperiode, Drucksache, 18/1287, 30 Apr. 2014.
- 73 S. HARCITT, 'What Could Be Gained in Translation: Legal Language and Lawyer-Linguists in a Globalized World', 20. *Ind. J. Global Leg. Stud. (Indiana Journal of Global legal Studies)* 2013 Art. 14, <http://www.repository.law.indiana.edu/ijgls/vol/iss1/14>; K. MCAULIFFE, 'Language and the Institutional Dynamics of the Court of Justice of the European Communities: Lawyer-Linguists and the Production of a Multilingual Jurisprudence', in M. Gueldry (ed.), *How Globalizing Professions Deal with National Languages: Studies in Cultural Conflict and Cooperation* (Lewiston, Queenstown, Lampeter: The Edwin Mellen Press 2010), pp 239-263, SSRN: <http://ssrn.com/abstract=2208744>; M. KÜNNECKE, 'Translation in the EU: Language and Law in the EU's Judicial Labyrinth', *Maastricht Journal of European and Comparative Law* 2013 (2), p 243.
- 74 K. MATTUSEK, 'Law Made by the Market', *Englisch als Gerichtssprache - in der Praxis geht mehr als viele wissen*, *Anwaltsblatt* 2014, p (67) at 68.
- 75 Drucksache 18/1287, Gesetzentwurf des Bundesrates, Entwurf eines Gesetzes zur Einführung von Kammern für international Handelssachen (KfiHG), p 2.

of English or native and non-native speakers of English. Literature into English as the Lingua Franca reveals that there are differences between the use English in an informal context where it is regarded as an ‘in-group marker’ which signals common ground. However, in more formal setting deficiencies in the English proficiency can lead to differences between more and less fluent speakers and lead to a ‘more unco-operative’ style of communication.⁷⁶ Other studies have found that ‘language in many areas of the business world, consciously or unconsciously, is used as an instrument of power: language policy and language planning are power related and may be invoked to ensure social control’.⁷⁷ Further, communication problems can occur such as impaired information flow, feeling of uncertainty on the part of the staff forced to use a foreign language, loss of information not available in the corporate language (English as Lingua franca). Another study observed employees of a German company who had adopted English as their corporate language. The study identifies a rise in stress levels and frustration when interacting with native English speakers. Equally, native speakers felt frustrated when information in the German language was exchanged which they could not understand.

Once again, imposing English resulted in frustration, withdrawal, disruption of joint work and poorer collaboration for all staff. They managed to partly end this negative cycle only by taking voluntary steps to change their perspective and understand the experiences and constraints faced by their colleagues.⁷⁸

The most problematic limitation of a lingua franca is that it is used ‘to create a shared space’ but speakers of English as lingua franca do not belong to the same community.’ If you take the example of litigation in the English language between English and a German company, this shared space is created by the use of the English language. However, in a very formal setting of a court applying German civil procedure and German civil law, it is questionable whether this is a viable alternative to litigating in English courts, applying English law. In other words, in a formal setting of a national court of law the English legal language cannot be perceived as a ‘lingua franca’, but rather as a translation of German law into English with all its pitfalls and technical difficulties.

This is particularly true when as the German proposal envisages a promotion of German law is sought. The national interest is clearly expressed in the brochure ‘Law Made in Germany’. Whilst the Americanization of parts of the corporate legal

76 *Studies on Translation and Multilingualism, Lingua Franca, Chimera or Reality*, European Commission, Directorate General for Translation, 2011, p 34.

77 *Ibid.*, p 96.

78 *Ibid.*, p 34.

practice is taking place in an almost denationalised sphere driven by Anglo-German lawyers, German civil procedural law is firmly rooted within the national sovereignty caveat to EU and International Law. Using English as a lingua franca currently stops short of the German courts which are institutions of the German legal order. It has been said that ‘states and professionals are captured within essentially archaic systems of organisation and legitimisation’.⁷⁹ The tension between state capture, i.e. the local peculiarities of German civil procedure, the judicial culture and the international sphere of lawyering ultimately slows down the internationalization of the German court procedure.

The perception of the German legal system will have to improve in order to compete in the international legal market. The English language applied in German courts applying mainly German law is probably not yet perceived as a viable alternative to the English language applied in English courts applying English law. Law and Language are closely connected and ‘legal arguments depend very much on notions, definitions and other lingual subtleties, which are very likely to go beyond the lingual capacities of non-native speakers.’⁸⁰ When comparing the ‘Americanization’ of parts of German legal practice with this initiative the difference lies in the fact that there are no ‘gaps’ as such in the law. In fact, the intention of the legislator is to strengthen German law and promote the choice of German law applying German procedural law in the English language. It could be argued that these are features of international business which maintains a very local character. This does not sit easily with the attempt of the German initiative to compete with English courts applying English law.

This is a limitation to the use of English as a vehicle language. There are no incentives and no real effort to make this an alternative but it may be an option to be further developed in the future. Investing into a more sophisticated body of lawyer-linguist and bilingual court administrators to assist German judges as exists in the Court of Justice of the EU would be a first step combined with a lowering of court fees could promote Germany as a forum for international litigation. Research into London as the preferred choice in international litigation shows that competition is gaining influence in Singapore and Dubai. Reforms in these jurisdictions take notice of the advantages of arbitration procedures and have combined features of arbitration and commercial court proceedings.⁸¹ The German initiative appears to be working against the English courts and foreign law rather than the trend

79 J. FLOOD, *Intl. J. Leg. Prof.* 1996, p (169) at 201.

80 M. COESTER, Comment on Vogenauer, in H. Eidenmüller, *Regulatory Competition in Contract Law and Dispute Resolution*, p 286.

81 KING & WOOD MALLESON, ‘Best of Both Worlds?’ 8 July 2015, in Dispute Resolution http://www.chinalawinsight.com/2015/07/articles/dispute-resolution/best-of-both-worlds/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original (accessed 31 Mar. 2016).

towards arbitration in Germany and abroad.⁸² It fails to address the competition created by arbitration courts. In this context it has been suggested that ‘abandoning an appeal to allow faster dispute settlement at one stage’. This would make German commercial courts more attractive.⁸³ For the German project to compete in the international legal market the legislator needs to review the training and staffing needs of the courts, reform the court procedures to be able to compete with an increasingly attractive arbitration process and keep the court fees very low.

To conclude, using the example of dispute resolution in the English language in Germany has shown that the more localised the applicable laws are the less easily available are interactions in English as vehicle language. In contrast, the use of English works in a shared space where it used to fill a gap in substantive law, when English law is applicable or where there are standard forms of drafting which may be used to express local law.

3. The Interface Between Legal English and Local Legal Languages

So far it has become evident that the spread of legal English as a common language is not always equivalent to a full reception of the common law. Whilst there is a common practice for the US/UK style of drafting contracts in areas such as mergers and acquisitions, choice of law clauses, cross-system contracts can involve different drafting styles and when incorporating concepts such as ‘due diligence’ may lead to different legal effects. Even if a merger contract is governed under English law, due diligence carried out in Germany will require a large amount of work to be carried out into German language documentation. Should more litigation in the English language reach German courts, knowledge of German procedural law will require the support of German law trained lawyers. Surely this does not mean that common lawyers need to be equipped with the technical knowledge of German legal language. Local associates of large UK firms will seamlessly carry out any work involving local legal knowledge. However, sensitivity for local cultural issues is an asset to UK lawyers working with non UK clients. The language of the client is important for building relationships, sustaining business, building trust and staying competitive. It is not an essential prerequisite for a UK lawyers operating abroad ‘but it is helpful’.⁸⁴

82 R. MICHAELS, ‘Rollen und Rollenverständnisse im transnationalen Privatrecht’ [Roles and Role Perceptions in Transnational Private Law], 45. *Berichte der Deutschen Vereinigung für internationales Recht* (2011), p 15.

83 G.P. CALLIES, ‘Explaining the Transnationalization of Commercial Law’, in H. Rothgang & S. Schneider (eds), *Transformation in OECD Countries* (London: Palgrave 2015), p 142.

84 The author also carried out one separate semi-structured interview with a senior international lawyer in a global Law Firm based in London. It was conducted in Feb. 2016. The interviewee wishes to remain anonymous and all errors are the author’s.

While English is clearly chosen as the ‘umbrella’ language, interviews with lawyers in global law firms illustrate the need for co-operation between UK lawyers and lawyers trained elsewhere well: ‘at the same time for UK lawyers, ensuring they realise there is another world out there which is a civil law jurisdiction, how civil codes work and how you amalgamate those. To an extent it is the larger international firms are willing to get to grips with that and try to have some, at least some training strategy for that. It’s been easier I think at the skills level, and some of the large firms for a number of years have had global programmes for that in terms of lawyer’s skills, interpersonal skills, client facing skills and so on’.⁸⁵

UK law firms have set up extensive network where English is used for international connections and communication. International law firms work closely with their overseas associate network. This enables them to handle clients either through local lawyers or directly. So teamwork is a crucial part of success.⁸⁶ ‘We work closely with colleagues in London or in other offices, uh it is mostly then either they draft the contract according to what you tell them of the transaction or you do the drafting and they review it and sometimes it is even the other way round, particularly the New York Office does certain types of German law contracts for their clients in New York and they send the document over and say please have a look. That all works out or if you have a problem with this or that so then you get this final draft of the contract and have a look at it or, say well it probably does work.’⁸⁷ Networking involves UK lawyers with skills that enable them to work at the interface between legal systems and the local language. So it is reviewing of documents, identifying points of foreign law, interpret advice given by foreign lawyers, and negotiate choice of law clauses. Whilst the English language dominates the drafting of technical legal agreements it is also ‘equally important that the parties consider the “soft” issues in cross border deals, the national, cultural and economic context’.⁸⁸ This requires a global mindset for all lawyers involved in the transaction. This ability to adapt to different cultural codes, protocols and formalities of legal practice is important when dealing with both clients and foreign lawyers as some of the example taken from interviews will illustrate.

Interviews reveal that an understanding of what foreign clients are used to: ‘we are international lawyers so we have to be flexible and to understand what our clients are interested in and so. Anglo-Saxon clients are interested in

85 J.R. FAULKONBRIDGE & D. MUZIO, ‘Professional Education, Global Professional Service Firms and the Cultures of Professional Work in Europe’, ESRC Award, Res-000-22-2957, interview no. 20, p 11.

86 *Ibid.*, interview no. 63, p 3.

87 *Ibid.*, p 3.

88 D. CAMPBELL, *Mergers and Acquisitions in Europe*, p 63.

being only advised on their problem. Italian clients are accustomed to traditional advice from Italian lawyers, very long [] theoretical descriptions and in the end two or three words on the conclusions [].^{89,90}

There are cultural differences which have been described as follows:

‘I think culturally Europe is very different in terms of how lawyers behave culturally.’⁹¹ The interviewee, a partner from a large law firm in London, mentions that continental legal practice is less service oriented and more inclined to show to the clients how intellectually qualified they are. Evidence for this is the importance given to titles such as ‘Dr’ in Germany whereas ‘the UK is a much more service orientated culture and I think lawyers have long since either demolished the walls between them and the client’.⁹²

Research conducted in the United States found that globalization is already driving the need for legal counsel who understand the potential impact of local laws, cultural factors and events on clients’ business operations in other countries.⁹³ For an English common lawyer to be able to read the local newspaper can be a huge advantage giving him/her an ‘insight into what is happening in markets abroad and helps him be alert to changes and challenges’.⁹⁴

Having the right team - with cultural and language skills and local connections - on the ground is a must, they say. And local Chinese nationals should be part of that team. ‘You might be okay having a Chinese expatriate run your office in China, but when you’re talking about getting down to the entrepreneur’s level and are communicating on a one-to-one basis and trying to build trust, you need to have a local representative,’ he adds.⁹⁵

3.1. *The Common Lawyer with a Global Mindset*

The need for foreign language skills for UK lawyers building these teams can be illustrated well by recent calls by the industry for law graduates and trained lawyers with a global mindset.⁹⁶ There is some disagreement whether that necessarily

89 J.R. FAULKONBRIDGE & D. MUZIO, ESRC Award, Res-000-22-2957, interview no. 43, p 5.

90 *Ibid.*

91 *Ibid.*, interview no. 30, p 9.

92 *Ibid.*; see also, ‘Legal Language, Services Specialising in Language and Culture Are in Demand’, *The Economist*, New York, 10 Nov. 2012.

93 R. HALF, ‘Globalization Compels Partners to Rethink Law Firm Management Strategies, Future Law Office Project’, 8 Apr. 2014. <https://www.roberthalf.com/legal/blog/globalization-compels-partners-to-rethink-law-firm-management-strategies> (accessed 8 Apr. 2016).

94 F. NELSON, ‘Bilingual Lawyers Have Competitive Edge’, *Lawyers Weekly*, 10 July 2015, <http://www.lawyersweekly.com.au/news/16804-bilingual-lawyers-have-competitive-edgeLast> (accessed 26 Nov. 2015).

95 J. HARRISON, ‘Easing Chinese Wariness of Private Equity Investment, Mergers and Acquisitions’, 2006, 22.

96 *The Lawyer*, 18 Oct. 2013; *The Times*, 23 May 2013.

includes the knowledge of foreign languages.⁹⁷ However, whilst a global mindset is not synonymous with having foreign language skills, language can act as a vehicle to understand how other nation's minds work:

In view of globalisation, the most important skill that young people can acquire is a command of foreign languages. Is English not the true and only lingua franca of the present time? It is so widespread across the globe that communication does not appear to depend on anything more than a good mastery of English. But language is more than a means of communication of the conferral of functional information of an economic or legal content. Language is also the vessel of culture and group identity that is reflected by the myriad of customs and habits, or preferences and typical reactions prevailing in any given community. Knowledge of a foreign language means access to those specificities of the community where the language is spoken.⁹⁸

'For students hoping to enter the legal profession - which is increasingly global in outlook - being able to speak a foreign language is useful, and ever more desirable to employers'.⁹⁹

Recent research into language capacity in the UK diplomatic service and specific industries including law has identified a 'vicious cycle of monolingualism':¹⁰⁰

A recent study has identified that there is a growing demand for foreign language skills for practising UK lawyers in in-house legal teams.¹⁰¹ Recent research into language capacity in the diplomatic service and specific industries has identified a 'vicious cycle of monolingualism'.¹⁰² Around 1 in 4 UK solicitors work as in-house lawyers.¹⁰³ Recent research has shown that language skills amongst in house

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- 97 Kings' College London Law Employability Research, in partnership with *The Times*, 23 May.
- 98 J. BASEDOW, 'Breeding Lawyers for the Global Village: The Internationalisation of Law and Legal Education', in W. Caenegem & M. Hiscock (eds), *The Internationalisation of Legal Education, The Future Practice of Law* (Elgar 2014), p 11.
- 99 Kings' College London Law Employability Research, in partnership with *The Times*, 23 May; Y. AHMED, *The Guardian*, 7 July 2015, The case for foreign languages as an aspiring lawyer. http://www.theguardian.com/law/2015/jul/07/the-case-for-foreign-languages-as-an-aspiring-lawyer?CMP=share_btn_fb (accessed 26 Nov. 2015).
- 100 T. TINSLEY, *Languages: The State of the Nation, Demand and Supply of Language Skills in the UK* (British Academy 2013), http://www.britac.ac.uk/policy/state_of_the_nation_2013.cfm (accessed 07 Apr. 2016).
- 101 (Linguistic Diversity in FTSE 250 Legal Teams Obelisk Legal Support Solutions Ltd., 2013). <http://blogs.lexisnexis.co.uk/futureoflaw/2013/09/are-you-speaking-the-right-language-2/>.
- 102 T. TINSLEY, *Languages, the State of the Nation, Demand and Supply of Language Skills in the UK*, p 66.

lawyers in FTSE 250 companies in the UK make up for 65 different languages spoken with French being the most often cited language. However, languages stemming from the emerging markets are less well represented. The survey shows a deficiency of Asian languages, in particular, Cantonese, Mandarin and Japanese. The best performing industry sector in terms of language capacity are the Banks.¹⁰⁴

It is also interesting to see a similar development in the US market, albeit with different demographic needs. A recent survey in the United States has illustrated an increase in demand for foreign language skills with Spanish (88%) and Chinese, particularly Mandarin topping the list of languages that are increasingly important in legal transactions. Other Asian languages such as Japanese and Korean have also become increasingly important in the legal market. In-house counsel positions and paralegal work was mentioned as the positions that are available for bilingual lawyers. The work involved is concerned with document review.¹⁰⁵ Hence it becomes evident that despite the widespread use of legal English and the choice of US/English law, clients might still be more comfortable to switch into their native language. Legal Recruitment companies confirm this trend as can be seen in their advertisements for positions in China: 'If you're looking for a move to the Middle East, China/HK and Japan language skills are vitally important. The majority of roles on offer in HK and China are only open to lawyers with language skills.'¹⁰⁶ Higher Education can contribute to sharpen the focus of UK graduates for these opportunities ahead.

3.2. Legal Education

Throughout this article it has been shown that foreign language skills in the common lawyer's toolkit are a competitive advantage in a global legal market.¹⁰⁷ Whilst global law firms in the UK run in-house training programmes and have overseas placement strategies for global lawyers¹⁰⁸ the role of Law Schools in producing graduates with requires more attention. An important part in the development of these global skills is played by legal education, especially in a situation where 'the demise of language learning in schools [] is widely known'.¹⁰⁹

104 (Linguistic Diversity in FTSE 250 Legal Teams Obelisk Legal Support Solutions Ltd., 2013). <http://blogs.lexisnexis.co.uk/futureoflaw/2013/09/are-you-speaking-the-right-language-2/>

105 Foreign Language Skills *See* High Demand in Legal Market Posted by C.A. VOLKERT on Wednesday, 6 Nov. 2013, <https://www.roberthalf.com/legal/blog/foreign-language-skills-see-high-demand-in-legal-market> (accessed 13 Jan. 2016).

106 <http://www.totallylegal.com/article/global-legal-recruitment-trends/>, published 29 Oct. 2015.

107 *See also* 'Report into the Global Competitiveness of the England and Wales Solicitor Qualifications', The Law Society, July 2015, page 15 with reference to the Global World Economic League Table for 2014.

108 *See* J.R. FAULKONBRIDGE & D. MUZIO, ESRC Award, Res-000-22-2957.

109 J.L. BIANCO, *Born Global, Summary of Interim Findings*, p 3.

Universities can play an even more active role to enable students with language skills by introducing compulsory language modules in the legal curriculum. ‘Legal education across the world must adapt to be more reflective of the issue and prepare future lawyers in the global world by not only teaching them how to think like lawyers in their own language, but in other languages as well.’¹¹⁰

The latest Legal Services Education and Training Review Report currently pays no attention to foreign language skills.¹¹¹ Welsh had been considered. Therefore, legal education providers are not required to introduce language skills into the curriculum, nor are there any indication given in the contents of the LETR that this is likely to change. This might be because smaller and middle sized firms as opposed to the City firms do not see the need for foreign language skills. However, as shown above language skills are a vital skill which show cultural awareness. In an age where only around 50% of all law graduates enter the legal profession and the remaining graduates are looking for other employment opportunities, language and cultural awareness skills are an easily to be added skill.¹¹² As a consequence of the inaction of the professional education and training bodies, it appears as if the legal education sector is not responding adequately to the market need and therefore not supplying multilingual lawyers. In comparing common law systems and their approach to obtaining global legal skills two strategies can be identified in how to approach the training of global lawyers.

3.2.1. Home Students

A continuous swing of the pendulum between supremacy of English and multilingualism observed by one author¹¹³ is the best metaphor for our current situation. On the one hand, English is set to spread further in the next few years; on the other hand, there are hints that multilingualism and awareness of the importance of learning more languages are on the rise too. Whilst it may not be a necessary requirement for UK qualified lawyers to possess language skills, language skills enhance graduates’ employability skills, whether in the practice of law or elsewhere. The article has shown that foreign language skills are helpful at the interface between technical legal advice and client relationships and can contribute to

110 S. HARGITT, 20, 1. *Ind. J. Global Leg. Stud.*, Art. 14, <http://www.repository.law.indiana.edu/ijgls/vol/iss1/14>.

111 Setting Standards, The Future of Legal Services Education and Training Regulation in England and Wales, June 2013, <http://www.lettr.org.uk/the-report/> (accessed 07 Apr. 2016).

112 M. HARDEE, ‘Career Expectations of Students on Qualifying Law Degrees in England and Wales’, 2014, https://www.heacademy.ac.uk/sites/default/files/resources/hardee_interimreport_2014final.pdf (accessed 07 Apr. 2016).

113 D. GRADDOL, *Lingua franca, Chimera or reality*, European Commission, Directorate General for Translation, 2010, p 12.

the success of a business transaction. One of the most influential academics writing on legal education in the UK recently wrote that

‘regulation of professional formation is rightly concerned with basic day one competence rather than excellence, and with perceived necessary requirements of competence for all, rather than desirable characteristics of many practitioners such as numeracy, fact skills, command of languages and so on. That is natural for regulation, but narrow for the total process of professional formation and development.’¹¹⁴

The desirability of foreign language skills for UK law graduates should not be underestimated and Higher Education Providers are in the best position to foster these skills during the precious time when students are engaging with the written and spoken word of the law.¹¹⁵ Any changes in the way legal education is delivered need to take account of globalization and the role that professions play in society. Denying their effects could cause serious damage to the reputation of the UK legal profession.¹¹⁶

3.2.2. *International Students*

Another approach to educating global lawyers in the UK and to stay abreast with the competition in the international law market is to attract more students from overseas economies such as China and Russia to complete law degrees and legal qualifications. The United States seems to be ahead of the UK in this respect as a recent study by the Law Society for England and Wales shows.¹¹⁷ Accordingly, there are factors which might attract clients to the United States and therefore strengthen the US economy and legal profession, such as ‘encouraging students from emerging economies to study and qualify in the US, with this having knock-on effect on perceptions and bias when these individuals become clients and decision-makers themselves’. The report identifies that the UK with its requirement of a training contract is at a disadvantage in comparison to the New York Bar exam qualification which involves several years at an academic stage, but not requiring any practical work.¹¹⁸

114 W. TWINING, ‘LETR: The Role of Academics in Legal Education and Training: Ten Theses’, 48. *The Law Teacher* 2014, p 94.

115 W. MANSELL, *Born Global, Implications for Higher Education*, British Academy, p 14, http://www.britac.ac.uk/policy/implications_for_higher_education.cfm (accessed 7 Apr. 2016).

116 J. FLOOD, ‘Legal Education in the Global Context Challenges from Globalization, Technology and Changes in Government Regulation’, *University of Westminster School of Law Research Paper*, No. 11-16 [33].

117 The Law Society, ‘Report into the Global Competitiveness of the England and Wales Solicitor Qualification. An Investigation into the Potential Impact of the SRA’s Training for Tomorrow Proposals on the Global Reputation of Solicitors of England and Wales’, July 2015, p 20.

118 *Ibid.*, p 27.

Similarly, in Australia, Australian qualified Asian lawyers tend to be from an Asian background: Here, ‘lawyers with Asian language skills tend to have Asian heritage and that it is unusual to find an Anglo-Celtic lawyer with these abilities’. ‘But Asian-Australian lawyers face a “bamboo ceiling” in the law; a recent report by the Asian Australian Lawyers Association found that only 3.2 per cent of large law firm partners have Asian cultural backgrounds. This is a small proportion considering that 9.6 per cent of the general population are Asian-Australians.’¹¹⁹

One UK lawyer mentioned in an interview that in particular with business in China it is important to have a common law qualified lawyer with excellent Chinese:

In China, I went to China a few years ago, and they said, what people are crying out for are UK or US qualified, Chinese lawyers, but no Hong Kong lawyers. They need to be like, mainland China with Chinese as first language, but with a US or UK, these people are like gold dust because they will give us access to work, the people the locals want to deal with, but they need to do this UK or US, they need to be able to work in the UK US firms, in UK and US law.¹²⁰

There are very few of these professionals with native Chinese language background currently working in London-based UK firms and the competitiveness of UK firms could be enhanced by attracting more students from overseas jurisdictions such as China to study and qualify in the UK.¹²¹

This applies equally to EU students who achieve a UK degree and qualification and then work in their first language jurisdiction: ‘you’ve got much a chance of getting a job, fewer cultural issues of, you didn’t go through the German system, therefore, we’ll employ you in our Frankfurt office because you are actually an English lawyer, albeit you are German, but that’s starting to open up’.¹²² There are more and more trainee lawyers working in the UK whose mother tongue is another European language and who have completed a UK law degree.¹²³

The ‘Born Global’ Research into the course choices of international students shows that they place a high value on learning further languages.¹²⁴ The report also shows how important tandem learning is for both home and international students.¹²⁵ The report emphasises the employability skills of UK graduates and sums up the benefits of foreign language skills as follows: ‘Within this fresh and

119 F. NELSON, *Lawyers Weekly*, 2015.

120 J.R. FAULKONBRIDGE & D. MUZIO, ESRC Award, Res-000-22-2957, interview no. 20, p 12.

121 Interview carried out with Senior Partner in Global Law Firm in Feb. 2016.

122 J.R. FAULKONBRIDGE & D. MUZIO, ESRC Award, Res-000-22-2957, interview no. 20 p 13.

123 Interview carried out with International lawyer in Global Law Firm in Feb. 2016.

124 Born Global, Summary of interim findings, The British Academy, 2014, p 28.

125 *Ibid.*, p 29.

broader conceptualisation of communication skills, English is an enabler, not a competitor to the development of other languages. English becomes the stepping stone to international communication and multilingualism'. For law graduates in the UK with a first language other than English it is useful to study subjects such as Comparative law which includes aspects of foreign law. Further, these students can benefit from a year abroad and placement with law firms, which will enable them to learn some of the legal language used in their country of origin.

4. Conclusion

It has been shown that the English language is spreading fast into legal systems not belonging to the common law. This article has attempted to enquire whether English alone is sufficient for a successful cross-border legal practice. The established use of English as a common legal language in cross border commercial transactions has become a reality. It has been argued that 'law piggy-backs the language'¹²⁶ and 'language often carries the law'.¹²⁷ The introduction of English as court language in Germany suffers from this phenomenon in that it will be difficult for German law and procedural law to compete with English courts just by introducing the English language. The use of English as a common legal language can be problematic, in particular when it is detached from the choice of English law as governing the legal relationship. When legal English does not carry common law but it is used to express the substantive law of a foreign legal system because the users of English will have to be careful not to fall into the well described traps and pitfalls of legal translation. To proclaim English as legal 'lingua franca' per se is thus problematic in that it either carries the common law or appears as a translation of national law. Multilingual drafting and experts from various jurisdictions are working together in the fine tuning of law and language. The tension between globalization and localization is a phenomenon that seemingly results in contradictions. It has been described as 'a continuous swing of the pendulum between supremacy of English and multilingualism'.¹²⁸ This article aimed to mediate between these tensions in defining a flexible multilingual strategy. It has illustrated that both, the use of English as lingua franca as well as a degree of knowledge of localised legal language is helpful for all lawyers who provide legal services for businesses with international contacts.¹²⁹ The key lies in the building of teams with

126 J.L. BIANCO, 'Born Global, Summary of interim findings, London: The British Academy', 2014, p 33.

127 P. VOGT, *International Legal Practitioner*, 2004, p (112) at 113.

128 *Lingua Franca, Chimera or Reality*, European Commission, Directorate General for Translation, 2011, p 43.

129 See Y. AHMED, LLB (European Legal Studies) The University of Hull 'The Case for Foreign Language Skills for Aspiring Lawyers', *The Guardian*, 7 July 2015, <http://www.theguardian.com/law/2015/jul/07/the-case-for-foreign-languages-as-an-aspiring-lawyer#comments>.

global mindsets and expertise in international and local lawyering. Some of that work is not technical legal work but at the interface between legal advice on technical matters and building client relationships. The future for the UK international legal practice lies with multilingual legal education in UK universities for both home and in particular international prospective legal professionals. Sensitivity for foreign legal language and cultural understanding will prove to be a key asset in an uncertain legal landscape during and after the process of Britain leaving the European Union.

