Globalization and the Future of the International Practice of Law from a European Perspective

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A. Introduction

I. Globalization

On a political map the boundaries between countries are as clear as ever. But on a competitive map, a map showing the real flows of financial activity, these boundaries have largely disappeared. Global citizenship is no longer just a phrase in the encyclopaedia of futurologists. It is every bit as real and concrete as measurable changes in GNP or trade flows and investment flows.

By satellite beam, CNN brings bombing in Iraq, revolution on Tianammen Square in Peking into living rooms all over the world. The internet creates a Global Village. We can visit libraries anywhere in the world for the cost of a local telephone call.

Are Nissan cars assembled in Yorkshire English or Japanese cars? What nationality are Nike sneakers made in Korea? Or Sony Walkmen produced in Mississippi and shipped to Europe? Are Head Skis (Head, formerly American was taken over by Austrian Fischer) made in Germany still American or Austrian? What nationality does an Airbus have? Its parts come from Germany, UK, France and the Netherlands, assembled in France, with its parent company being a Dutch NV listed on the Paris and Frankfurt Stock Exchanges, which attract investors from Edinburgh and Boston?

Managers of businesses are having to make business decisions which cross national boundaries. They are concerned with where to find their markets, where their supplies, where best to manufacture and whom to employ. Meanwhile, consumers – ever more powerful – are buying across borders, travelling and working in other countries.

Law is classically a national affair, built on national history, culture and politics to meet national norms and needs and developed by national parliaments and

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administered by national courts, while each country has its own style of negotiating and confirming agreements and mediating them.

The fact is that users of legal services continue to be faced with bewildering lack of uniformity in laws affecting cross border business. Even within countries, legal systems are different. The US have so many different laws, Canada has common law provinces and a civil law province. Although Europe has tried to create one European Company Law, since 1965, there is still no chance of it happening. The reason is that each European State has its tradition and culture of corporate governance.

If the great multinationals become frustrated by the difference between the legal systems and the confusing difference in procedural and substantive law which leads to forum shopping and even to avoiding investments in certain countries, how much greater are these problems for the consumer?

On the other hand, it is logical that when doing business one should abide by the local laws and it is reasonable that each culture has its own laws and it is simply a fact that each nation or even state (of the US) develops and maintains and administers its own legal system.

Europe notices that all its directives (texts for laws accepted by the European Council, which must be transformed in each of the European States within two years) are always incorporated into national laws differently and then interpreted even more differently.

Nonetheless international businessmen and consumers (growing into global citizens) must be served in their international transactions and international mediation of disputes.

Up to 1970 an 'international lawyer' was an expert in international public law and international private law (conflict of laws). Now an international lawyer knows his own law well and because he deals with international matters he must understand foreign laws and foreign lawyers well.

II. Globalization Creates Work for Lawyers

Multiplied international transport, trade, investment and services have changed the practice of law over the last century and increasingly so in the last 20 years.

An OECD survey of the impact of legal services provided internationally showed that between them the net trade balances in respect of legal services of the US and the UK was little short of USD 2bn.[1] This shows the significance of the international market for legal services.

UK lawyers accounted for nearly 50 per cent of that USD 2bn, a figure of USD 830m. Given that the size of the legal profession in the UK is perhaps only a tenth of that in the US, the size of the British lawyers' contribution to the balance of trade

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[1] Source: OECD documents: International Trade in Professional Services, Assessing Barriers and Encouraging Reform.

nearly 15 per cent of the entire net trade balance from UK services is indicative of the scale. Moreover, a 1996 report confirmed that the English lawyers export earnings doubled in the last six years.[2] Although, the export numbers of lawyers in continental European countries in absolute numbers are lower, the increase, i.e., the doubling in about six years is the same.[3]

III. Differences in Legal Systems

Shipbuilding, architecture, accountancy, dentists and banking have become globalized professions. The product is the same. The intricacies and differences of each various legal systems makes it an extra ordinary difficult task to master the laws of more than one country. Arminjon, Nolde and Wolff[4] identified seven distinct legal families in private law: French, German, Scandinavian, English, Russian, Islamic and Hindu. Yet this is only to identify the main characteristics. Even within the family the difference between US, Australian, Canadian, New Zealand, English and Singapore company law produce many important differences (even within the 50 US states).

It is difficult therefore for a lawyer to become proficient in the laws of another country, let alone all the countries of the world.

The modern generation has quite a few lawyers who are qualified in two or three countries, but in the end they will be based and specialized in one country and will have as advantage that they will be able to communicate well with foreign lawyers. They will be good international lawyers.

Because of the difference in legal systems, international practising lawyers have to work together with foreign lawyers.

IV. Co-operation Between Lawyers

An English bank finances the building, operating and transfer (BOT) of an electricity plant built by German constructors in Italy for the distribution of electricity in Italy and Austria. The financing documentation is subject to English law, the construction agreement is under German law, the regulatory systems of Italy and Austria are relevant and most of the collateral is located in Italy as is the cash flow profit.

Lawyers from England, Germany, Italy and Austria must co-operate and understand each other well.

DASA, Aerospacial and CASA merge by contributing all their assets to EADS NV, a Dutch company to be listed on the Paris, Frankfurt and Spanish stock exchanges. The Dutch NV must satisfy all the French minority rights. Lawyers from Germany, France, Spain and the Netherlands must form good teams.

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[2] Source: Law Society of England & Wales returns; Commercial Bar Association returns of Barrister expert services; City of London Solicitor Company estimates.

[3] The differences between the English lawyers, their history and type of law and those continental lawyers are described below in a separate Section C:II *post*.

[4] *Traité de Droit Comparé* I (1950).

The same applies to mediation, arbitration or for teams of litigation lawyers if these type of transactions lead to a dispute.

Below, in Section C.V., I will discuss the possible forms of co-operation such as correspondents, best friends, alliances, and multi-office international firms.

B. How has Globalization come?

I. Historical Examples

In history globalization was caused by wars and imperialism. Examples are:

- the Roman Empire (*Pax Romana*);
- Napoleon (expansion of Code Napoleon);
- the British Empire (later the Commonwealth).

II. Reasons for Globalization since 1945

The reasons for the rapid peaceful globalization since 1945 have been:

Finance

- The Marshal Plan which brought US and European economics close to each other (the forming of a European Community was a condition for this help);
- followed by intensive investments of US corporations in Europe in the 1960s;
- followed by Eurodollar bonds (a lot of loans raised in Europe to cover US deficits caused by the Vietnam war and expensive space projects);
- followed by Swap transactions;
- project finance deals all over the world financed by US and UK banks;
- listings in Europe, including privatizations, raising capital e.g., from the US

Trade

GATT and now WTO rounds decreased levies on products from 1970 onwards. This has paved the way for a huge increase in trade.

Capitalism over Communism

The politics and economics of Russia, India and China have changed from Communism to a sort of free economy, opening up the borders for trade and even investment.

Regional Treaties

The EC is the prime example of a free trade treaty, which expands into political closeness (it is practically impossible for a Member State to be run by a dictator). It is being followed by groups such as the Association of South-East Asian Nations (ASEAN), the North American Free Trade Agreement (NAFTA) and the Common Market of the Southern Cone (MERCOSUR). These Treaties also lead to common views on human rights, feminism and environmentalism, all promoted by lawyers.

The Rome Treaty and the European Court of Human Rights in Strasbourg are good examples.

World Organizations
Of course the United Nations (UN), the World Bank, the Organization for Economic Co-operation and Development (OECD) and others also play their role.

Technology and Scientific Advances
The new telecommunications,[5] telephone,[6] radio, TV, Internet (trading via the Internet), IT, and combinations thereof are altering the fabric of modern society.

Big is Beautiful
The merger mania of the 1980s is even increasing. Concentration of business goes on. Car and aircraft manufacturers and banks merge to save costs and to increase market share. Food manufacturers aim for world trademarks. Internet service providers and publishers (America On-Line and Time Warner) merge to combine markets. Others dispose and split up to focus in order to acquire other core businesses. This creates enormous cross border investment.

Consumer Society
Consumption and spending and travelling have become a basis for a sound economy and a successful life and are helping to cause globalization.

III. European View of Globalization

Europeans generally see globalization as very positive. Many are thankful for these developments and thankful to the US for helping to cause them. Some are critical and see globalization as a modern form of US colonialism. Such critics argue that the US is economically too powerful and politically dominating and those people are not attracted to a culture that is obsessed by profit. They draw attention to the spiritual and cultural dimensions. The upheavals in Paris of 1998 and the protests at the World Trade Organization (WTO) meeting in Seattle in November 1999 are examples of certain criticism.

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[5] On 15 February 1997 the WTO concluded a telecommunications agreement to expand trade in telecommunications through commitments by members to liberalize market access and national treatment.

[6] The tender offer of Vodaphone to Mannesmann shows that there are 394m mobile phones and in 2009 there will be 756m in the world, one per seven inhabitants.

C. Globalization's Consequences for Legal Profession

I. Globalization creates Work for Lawyers

As described in Section A:II *ante*, globalization creates a lot of work for lawyers. Below I give a description of the different development in England and continental European countries.

II. English Lawyers and Continental Lawyers

English and American lawyers practise Anglo-Saxon law – common law – while Continental lawyers practice civil law. There are many comparisons of the two types of law: common and civil.

Case law	Codes
Long contracts	Short contracts
All possibilities covered	*Bona fides* to cover gaps
Extensive litigation	Short litigation
Discovery	Evidence on limited points
Witnesses heard in detail by lawyers	Witnesses heard on points by judge

Continental lawyers have written that common law is best for lawyers but is far from being best for clients and businessmen. It suffers from many handicaps, for instance the fact that it requires very lengthy documents, which increase costs and risk of internal confusion. The procedural law causes litigation in ordinary courts or even arbitration to be exceedingly costly and delays to be also much longer. Some say it takes more than five years to obtain a judgment in New York City.[7]

This is not the (only) reason why the American and English law firms are the biggest, most expansionist and well managed.

Indirectly, it is one of the reasons. In the American and English business world, which have used longer contracts for many years and which have felt the necessity to avoid litigation, businessmen have been using lawyers to advise them in business decisions for more than 100 years.[8]

Furthermore, it is my view that a common lawyer, because he or she is forced to look at detail and cannot solve problems with broad statements as *bona fides*, is inspired to be more creative and to see each case as a unique case. There is another important reason and that is the expansionist business in the last 100 years in the US

[7] Philippe Nouel, *Liber Amicorum* (Thomas Bär and Robert Karrer, Basel, 1997) p. 200; IBA research into the cost of litigation.

[8] Centenary book of Slaughter and May 1989; Linklaters & Paines, *The First One Hundred and Fifty Years* (Longman Group UK Ltd, 1987).

and UK and the raising of financing in capital markets that has taken place in the US and the City of London since about 1890. Typical businesses in the US and the City of London were financed by the public and detailed legal work was necessary. Typical businesses on the Continent were family businesses, which were financed by the family and sometimes by bank loans. Less detailed legal work was necessary. Stock exchanges only became very important around 1980 on the Continent.

In financial law it is obvious that Anglo Saxon lawyers are by far ahead and this type of law is – it must be said – profitable.[9] They have about 80 years more experience. Around 1900, New York and London had several law firms specialising in financial and business advice and the partners in the law firms would travel often with and for their clients. The typical lawyer on the Continent in 1960 practised as sole practitioner (partnerships were not allowed in France until 1950) and was a litigation lawyer who dealt with divorces, criminal matters and sometimes a business dispute.

In 1980, a typical continental large firm dealt with financial and corporate matters for only 25 per cent of its turnover.

Another reason is of course the predominance of the English language as world business language.

The fact is that continental lawyers got a lot of referral business matters from the US in the 1960s and 1970s (US acquisitions) and from the US and the UK in the 1980s and 1990s (M&A work as well as financing work). While working on these referral matters the Continental lawyers got to know – and copied? – the long style Anglo-Saxon contracts. Continental lawyers wanted to be friends with US and UK lawyers and many Continental lawyers spent a year in Anglo Saxon law firms, which educated them. Continental law firms have grown substantially and now provide a good local service. This has been a good way of Anglo-Saxon helping Continental lawyers in developing the business law practice on the Continent.

III. Developed Countries vs. Developing Countries

Since 1989, Eastern Europe and Russia have opened their economies to be free economies. One of the items is the development of a legal system with an independent judiciary (judges and lawyers).

Foreign US, UK, German and French lawyers have done a lot of development work. Most of the Eastern European countries have chosen to be educated in civil law for their general legal system, but in common law for their capital market system.

We have seen two types of attitudes by foreign firms:

1. help and educate in the development of law, refer parts of the transactional work to local lawyers, so that they can learn;
2. open up offices and buy the best local talent from the local firms, which

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[9] Francis Neate, *Global Law* (Practice 50th Anniversary International Bar Association, 1997).

makes it difficult for local firms to develop.

One could say that method 1. provides the benefits of globalization, but that method 2. provides a globalization which is in fact modern colonialism.

IV. Lawyers Must Co-operate

As is described in Section A: I, III and IV *ante*, law is classically a national affair and legal systems are and will remain different. Lawyers from different countries must co-operate to help international businessmen and consumers through the maze of different laws.

V. Methods of Co-operation

1. In the 1960s, US lawyers referred matters to European lawyers. In the 1970s, European firms set up informal information clubs that were not exclusive referral networks, but were set up to inform and help each other.
2. IBA Networking. In 1970, the IBA set up the Section on Business Law, and started annual conferences, where lawyers could meet each other, learn to see their laws in perspective, learn about the basics of foreign laws and above all to meet and get to know and learn how to communicate with foreign lawyers. This was an ideal basis for international networks.
3. Alliances. Firms that wanted to show their clients that they had an international capacity, showed on their letterhead that they had an alliance; an exclusive network that referred exclusively to those firms.

   The alliances limited themselves to the Continent, because the Continental firms did not want to lose referrals from many US and UK firms.
4. Branch Offices. Many firms from the US and UK, but also German, French and Dutch firms, started to build their own networks of branch offices. Paris is very popular (Paris has 15,000 lawyers; 4,000 are foreigners; the Board of the Paris bar of 15 even has two foreign members). Brussels, Frankfurt, Madrid, Warsaw, Budapest, Moscow, and now Amsterdam saw foreign firms setting up branches. Cherry picking is often the name of the game.
5. Mergers. We have also seen international mergers of firms, e.g., Loeff, Claeys, Verbeke; Stibbe, Simont, Monahan, Duhot (and nearly Gleisz); Lovell's, Bösebeck-Droste; Bruckhaus, Löber; Freshfields, Deringer, Bruckhaus; possibly Linklaters and others.
6. Best Friends. There are still important firms that focus on one country's laws and are in regular contact with two or three national firms in each country (their 'best friends') and thus set up teams with them.

VI. Professionalism vs. Commercialism

The 20th century has seen the moral man traded for the economic man[10] and the legal profession is certainly no exception from this trend. There is an increasing

tendency among lawyers to submit to the commercialism of today. Lawyers must invest in technology and must be able to pay for the best talent (the starting incomes of New York and London lawyers are phenomenal) in competition not only with other lawyers, but also with banks and consultants. The pressures of economies are strong, but we see little energy devoted to public service or *'pro bono publico'* work on behalf of those in need.[11]

VII. Different Forms of Lawyers in Different Countries

We must realize that lawyers in different countries have different positions and different rights. In some countries (e.g., Spain and France) lawyers have a monopoly both of defence in court and legal advice; in others (e.g., UK) lawyers only hold a monopoly of the defence in court but any person, even non-lawyers, can give legal advice. Furthermore, in some countries (e.g., Sweden, Finland), there is no monopoly at all and anybody can give legal advice and representation in court (except for some criminal offences).

The position of in-house counsel is also often different. In some countries (e.g., Spain) in-house lawyers have full lawyer status in the sense that they are members of the bar, can give legal advice to anybody, whether their employers or third parties, in other countries (e.g., UK, Ireland) they are equally members of the bar, but they cannot represent or advise anyone other than their employer, finally, in some countries (e.g., France, Belgium) they are not members of the bar, cannot represent their clients in court and cannot even be called a 'lawyer' (*'avocat'*) but only *'juriste'*.

VIII. Different Types of Lawyers

Some maintain that the profession is not a single profession but that there are many professions of lawyers.[12] Many feel that consultation and defence in court, that corporate law and the law of the individual, that work done by lawyers in big firms and that done by sole practitioners all belong to different professions. Some even feel that national bars should be split up into bars of specialists. There is a danger that globalization is helping to split up the profession between rural lawyers and office lawyers, between commercial and personal lawyers, between global law firms and big national firm lawyers and sole practitioners.

The WTO, which is investigating the legal profession, understands that there is a legitimate interest in lawyers and bars maintaining a control on the core values of the profession:

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[10] Don Eberly, 'Towards Civil Society' (1996) *The Wall Street Journal Europe*, 6th February.

[11] Chief Senor Anthony, Hans-Jürgen Hellury, Russel Miller, Ramon Mullerat, 'Professionalism vs. Commercialism. Do Lawyers Still Want to be a Profession?' (IBA Council Agenda, 20 May 2000).

[12] Alain Tyrell QC and Zihid Yagub, *The Legal Professions in the New Europe* (1996).

- independence of the profession;
- independence of each lawyer;
- avoidance of conflicts of interest;
- confidentiality;
- integrity.

This WTO investigation is leading to a classification committee, which may classify the profession differently from the old UN Classification used in UN Classification CPC and W120. The old classification was 'representation in court', 'criminal', 'tax', 'advice', 'transactions', 'notarial'. The WTO is now finding out that a better classification is 'home', 'foreign', 'third country' and 'international' law. It is not said that the WTO wishes to split the profession, but there is a danger that lawyers or bars may find this logical. If all lawyers find the above-mentioned core values of importance – and they should – they should all stick together in one bar and one profession.

D. Future of the Legal Profession

I. Core Values-Ethics

Notwithstanding the national differences among legal professionals there are certain essential principles which are common to all legal professions, and these principles include:

- the commitment to the independence of lawyers and the legal profession;
- the commitment to preservation of client confidences;
- the prohibition against conflicts of interest in the practice of law;
- the maintenance of high ethical standards.[13]

These core values are vital for the clients of all lawyers. These values are in the public interest of all clients and it is in the public interest of all nations that the public is assured that all lawyers abide by these principles.

II. Establishment and Regulation of Foreign Lawyers

Most nations deem that law is a national affair and most think it logical that national lawyers apply national law.

Bars and bar associations have understood that citizens have a right to receive legal services from lawyers of diverse training in any place. Concepts such as the

[13] IBA Res. 6 June, 1998.

'European lawyer' and the 'Intercontinental lawyer', who keep abreast of the legislation of different jurisdictions, will be common.

Freedom of movement and establishment, not easily applicable to lawyers due to the diverse legal systems, organization and functions, are starting to be regulated:

1. European internal establishment, through the application of the Services Directive (77/249/CEE), the Diplomas Directive (89/48/CEE) and the Establishment Directive (98/5/CE); and
2. for world-wide establishment, through the WTO which is still in an investigation phase.

For the world, the IBA proposes that each nation should have a regulation:

1. either giving a possibility for foreign lawyers to obtain a licence – after passing exams – to practice local law;
2. or giving the possibility for foreign lawyers to obtain a licence under certain conditions to practise their own foreign law.[14]

Many say there will be more deregulation. In any case, all countries will discuss the problems and make their own transparent regulation. The WTO does realize that the public has a legitimate interest in having a legal profession that provides quality, knows the law and maintains the core value principles mentioned under Section D:I *ante*.

III. Multidisciplinary Practices (MDPs)

The accounting firms wish to provide legal services through MDPs. They endanger independence, confidentiality and avoidance of conflicts of interests, which are the core value of the legal profession and serve for the protection of the public interest. The CCBE unanimously decided that MDPs should be banned.[15] The (IBA) wishes that MDPs are limited and only possible under strict conditions.[16] These views have been converged to the WTO. The Securities and Exchange Commission (SEC) is taking a strong opposition against MDPs. The practice is that accounting firms are splitting up. The public has an interest in being able to get legal advice from an independent lawyer who maintains the core values of his profession, without any accountant instructing him.

IV. Unity of the Profession

If the bars and bar associations wish to use the argument of public interest of quality, knowledge and maintenance of core values, the bars must ensure that the members

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[14] IBA Res. 6 June 1998.
[15] CCBE, Plenary Session in Athens, November 1999.
[16] IBA Res. 13 September 1998.

indeed maintain these values. It is up to all lawyers to maintain the core values. Each individual lawyer who fails to maintain the ethics rules will harm the profession as a whole. It is important for bars to maintain the unity of the profession.

V. Role of Bars and IBA

The national bars and the IBA have an important role to remind all lawyers of the core values, to maintain the profession as a whole and to defend the profession together against governments, the WTO and any other possible aggressors, and to provide a forum for discussion and planning of bars.

VI. In-House Counsel

The days are long past when outside lawyers only talked with the president of a company. In-house legal departments have grown and their role has become stronger. In-house counsel are now the strategic legal thinkers of enterprises. This was already the case in the US and is now increasingly the case in Europe.

With the growth of enterprises, the strength of in-house counsels will continue to grow.

Outside and in-house counsel should work well as teams.

VII. Involvement in Global Justice

Technical progress and global liberalization have not prevented wars and violations of human rights. Lawyers must realize that they cannot sit back and do nothing. This area is not only the work of politicians. Lawyers also have their responsibility and must do something for a better world.

VIII. Harmonization

There will be a lot of harmonization of laws but national and local interpretation will remain necessary for a long time.

E. Conclusion

Globalization and many connected developments are changing our society. Europeans have learned – through trial and error – that an independent judiciary and the maintenance of an independent legal profession that stays with certain core value principles, is in the public interest.

Bars and international bar associations are becoming more and more active and are realising that the protection of the profession is a joint interest and that bars should work together.

International lawyers must know their own law very well, speak several

languages, understand some principles of foreign law and above all be able to work efficiently in teams with foreign lawyers. This is necessary to assist the global entrepreneurs and global consumers.