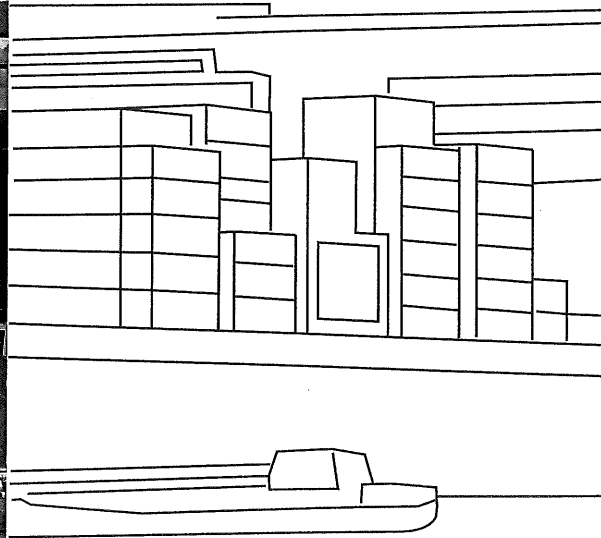


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1 LEGAL ANSWERS TO GLOBALIZATION

*Ingeborg Schwenzer and Claudio Marti Whitebread**

1.1 INTRODUCTION

Before turning to the main subject matter of this chapter, a few words shall be said about the development of international trade. As a result of globalization, the overall development of international trade over the last half century has been startling. Without having regard to the dramatic decrease of world merchandise exports in 2009, which in any case was equalized in 2010, it may be useful to have a look at the trend demonstrated throughout the last decades. World Trade Organization (WTO) figures for 2011 indicate that merchandise export trade worldwide amounted to USD 17,779 billion and merchandise import trade worldwide amounted to USD 18,000 billion.¹ These figures are approximately 100 times more than they were 50 years ago. The average annual growth between the years 2000 and 2010 was more than 5% for both exports and imports worldwide.² The highest growth is no longer found in North America and Europe, but instead it can be found in the transition economies from different points of the globe – particularly Brazil, China, Russia and some African countries.³ But Australia and New Zealand also display remarkable developments: annual growth between 2009 and 2010 was 17% for Australia and 14% for New Zealand.⁴

These economic developments have prompted legal answers in a variety of fields. Three of them shall be discussed here in further detail. In the first place, dispute resolution mechanisms have radically changed. Second, globalization of trade triggers the globalization of law. And third, legal education must eventually respond to these developments.

* All web pages were last accessed in November 2013.

1 World Trade Organization, *World Trade 2011, Prospects for 2012*, 10 May 2012, p. 16, available at <www.wto.org/english/news_e/pres12_e/pr658_e.pdf>.

2 World Trade Organization, *World Trade Report 2011*, p. 20, available at <www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf>.

3 World Trade Organization, *International Trade Statistics 2011*, p. 20, available at <www.wto.org/english/res_e/statis_e/its2011_e/its11_world_trade_dev_e.pdf>.

4 World Trade Organization, *World Trade Report 2011*, p. 36.

1.2 DISPUTE RESOLUTION MECHANISMS

In the international context, dispute resolution by domestic courts is, more often than not, no longer an adequate solution. There are different reasons for the parties turning to alternative dispute resolution mechanisms. In cases where none of the parties is clearly in a superior bargaining position and is thus unable to dictate the content of the contract, none of these parties will agree to be subject to the jurisdiction of the other party's domestic courts. The domestic courts of a third country are often not a viable alternative either. Furthermore, alternative dispute resolution is favoured because of its confidentiality, informality and the speed of the proceedings.⁵ In international settings, the preferred way of resolving disputes these days is through arbitration,⁶ with mediation gaining more and more importance.⁷

1.2.1 *International Arbitration*

Some figures may shed light on these developments. Within the last two decades, the number of arbitration cases handled by the twelve leading international arbitral institutions has more than tripled.⁸ Between 2005 and 2010 alone, there has been an increase of approximately 31% in arbitration cases.⁹ Empirical research suggests that more than 60% of international contracts nowadays contain an arbitration clause.¹⁰ It is further worth noting that the higher the value of a contract, the more probable it is that it contains an arbitration clause. For example, according to a recent survey, among the sale of goods cases arbitrated in 2008, only 18% were valued below USD 500,000. The bulk (49%) ranged between USD 1 million and 10 million. A significant number, 22%, were valued at over USD 10 million.¹¹

The worldwide shift in economic development from North America and Europe to so-called emerging markets is mirrored with regard to developments in institutional arbitration. Thus, between 2005 and 2010, the Hong Kong International Arbitration Centre (HKIAC) reported a 122% increase in arbitration matters, and the Singapore International

5 Cf. S. Vogenauer, *Civil Justice Systems in Europe*, 2008, Questions 49.1 and 51.1, available at <<http://denning.law.ox.ac.uk/iecl/pdfs/Oxford%20Civil%20Justice%20Survey%20-%20Summary%20of%20Results,%20Final.pdf>>.

6 See only I. Schwenger, P. Hachem & C. Kee, *Global Sales and Contract Law*, Oxford University Press, Oxford, 2012, para. 5.25.

7 N. Alexander, *International and Comparative Mediation*, Kluwer Law International, the Netherlands, 2009, p. 1.

8 These figures are based on the reported statistics published by the HKIAC, available at <www.hkiac.org/index.php/en/hkiac-statistics>.

9 *Id.*

10 Schwenger *et al.*, 2012, para. 5.25; Vogenauer, 2008, Question 48.

11 I. Schwenger & C. Kee, 'International Sales Law – The Actual Practice', *Penn St. Int'l. Rev.*, Vol. 29, No. 3, 2011, p. 447.

Arbitration Centre (SIAC) recorded a respective increase of an even greater 211%.¹² Hong Kong and Singapore have positioned themselves as neutral institutions to arbitrate cases particularly between Chinese and Western companies.¹³ Although International Chamber of Commerce (ICC) arbitration worldwide did not increase accordingly, ICC arbitration cases involving Asian-Pacific parties have almost doubled during the last decade, and the number of arbitration proceedings seated in the Asia-Pacific region has increased six-fold.¹⁴ New institutions specifically targeting Asian parties such as the Chinese European Arbitration Centre (CEAC) in Hamburg, Germany, have emerged recently. For Middle-Eastern parties, the new Dubai International Arbitration Centre (DIAC) continues to become more and more attractive.¹⁵

All these factual developments are the result of, and go hand in hand with, legal developments in arbitration. The legal foundations for international arbitration have been developed significantly in the second half of the 20th century, with the breakthrough being the New York Arbitration Convention (NYC) of 1958 ensuring the enforceability of both arbitration agreements and arbitral awards.¹⁶ Today, the NYC has 149 Member States, the few exceptions being mostly sub-Saharan African States and Pacific Islands, among them Tonga and Samoa.¹⁷ In virtually all states contracted to the NYC, the Convention has been implemented by domestic legislation. Such statutes provide a basic legal framework surrounding international arbitration agreements, arbitral proceedings, arbitral awards and their enforceability.¹⁸ Many of these statutes are based on the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (UNCITRAL Model Law), which was partly revised in 2006. The UNCITRAL Model Law is clearly supportive of the arbitral process; ninety jurisdictions now follow this trend, and among them are Australia and New Zealand.¹⁹ Countries with less supportive national legislation on international commercial arbitration, which can mainly be found in Latin America and the Middle East, are more and more losing ground. Despite these legal developments, the fact that national courts in

¹² These figures are based on the reported statistics published by the Hong Kong International Arbitration Centre (HKIAC), available at <www.hkiac.org/index.php/en/hkiac-statistics>.

¹³ J. Humphrey, 'International Arbitration: Following in the Footsteps of Globalisation', *Navigant Disputes & Investigations*, September 2011, p. 2, available at <www.navigant.com/~media/WWW/Site/Insights/International_Arbitration_Disputes_Investigations.ashx>.

¹⁴ Cf. S. Greenberg, C. Kee & J. Romesh Weeramantry, *International Commercial Arbitration, An Asia-Pacific Perspective*, Cambridge University Press, Cambridge, 2011, para. 1.147.

¹⁵ Humphrey, 2011, pp. 2-3.

¹⁶ G.B. Born, *International Commercial Arbitration*, Vol. I, Kluwer Law International, the Netherlands, 2009, pp. 92-93.

¹⁷ See the list of all contracting states of the NYC provided by UNCITRAL, available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

¹⁸ Born, 2009, p. 109.

¹⁹ So far, 90 jurisdictions have enacted legislation based on the UNCITRAL Model Law, see <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

some parts of the world still display a hostile attitude towards international arbitration and continue to be reluctant to enforce arbitral agreements and foreign arbitral awards cannot be overlooked.²⁰

In international arbitration, *ad hoc* arbitration and institutional arbitration can typically be distinguished from each other. Whereas *ad hoc* arbitration is more flexible, institutional arbitration is preferred nowadays because of its more structured and thus more predictable character.²¹ Again, UNCITRAL took the lead in harmonizing the rules applicable to international commercial arbitration. The 1976 UNCITRAL Arbitration Rules were originally designed for use in *ad hoc* international commercial arbitrations. However, they also served as a basis for many arbitral institutions to develop their own institutional rules.²² The UNCITRAL Arbitration Rules were revised in 2010 with the aim of adequately dealing with new challenges in international arbitration such as multiparty arbitrations or joinder, as well as with the aim of enhancing procedural efficiency.²³ Consequently, many institutional rules, such as the ICC Rules, the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules and the Swiss Arbitration Rules, have been revised recently too, all revisions having come into force in 2012. These revisions again focus on the issues of multiparty arbitration and expedited procedures.²⁴

Beyond these harmonizations of legal rules, the arbitration procedure is becoming more and more globalized because of the mere fact that lawyers, counsel and arbitrators working together in deciding a case are increasingly coming from different regions of the world with different educational, legal and cultural backgrounds.²⁵ In this respect, some scholars have even alluded to the emergence of a procedural *lex mercatoria*.²⁶

The most eminent example is the gradual convergence of the common and civil law approaches on certain procedural issues. Three examples can be given here: the first one relates to document production in arbitration. Whereas in common law legal systems, discovery, or at least document disclosure, is a common feature, civil law legal systems have traditionally taken a different approach. In international arbitration, it is now well established

20 Cf. Born, 2009, p. 146.

21 Cf. Born, 2009, p. 151.

22 Cf. Born, 2009, pp. 152-153.

23 See the description by UNCITRAL of the 2010 revision of the UNCITRAL Arbitration Rules, available at <www.uncitral.org/uncitral/uncitral_texts/arbitration/2010Arbitration_rules.html>.

24 Cf. N. Voser, 'Overview of the Most Important Changes in the Revised ICC Arbitration Rules', *ASA Bulletin*, Vol. 29, April 2011, pp. 783-820; D. Bateson, C. McKay & J. McKenzie, *China: Winds of Change: CIETAC's Revision of the Arbitral Rules effective 1 May 2012*, 19 May 2012, available at <www.mallesons.com/publications/marketAlerts/2012/Pages/Winds-of-change-CIETACs-2012-revision-of-the-Arbitration-Rules-effective-1-May-2012.aspx>; M. Scherer, *Revised Swiss Rules of International Arbitration enter into Force*, *Kluwer Arbitration Blog*, 31 May 2012, available at <<http://kluwerarbitrationblog.com/blog/2012/05/31/revised-swiss-rules-of-international-arbitration-enter-into-force/>>.

25 G. Kaufmann-Kohler, 'Globalization of Arbitral Procedure', *Vand. J. Transnat'l L.*, Vol. 36, 2003, p. 1323.

26 Kaufmann-Kohler, 2003, p. 1322 *et seq.*

that the tribunal may grant some level of discovery having due regard to the respective backgrounds and expectations of the parties.²⁷ Another example can be found in the examination of witnesses. In civil law legal systems, the judge is in control of taking evidence. In some places, ethical rules even prohibit counsel from having any contact with witnesses prior to the hearing. Thus, witnesses are questioned by the court, whereas in common law legal systems, it is counsel's task to examine the witnesses. In international arbitration, the common law approach prevails; as otherwise, counsel coming from a civil law background would be prejudiced.²⁸ The last example relates to the maxim *iura novit curia*: that means whether the parties must prove the law, as is the case in common law jurisdictions, or whether the court or the tribunal is free to establish and assess the content of the law, as is the case in civil law countries. Even if there are still differences, today there are clear tendencies towards gradually discarding the *iura novit curia* principle in international arbitration.²⁹

1.2.2 International Mediation

Additionally, the last several decades have seen the emergence of mediation as an instrument of international dispute resolution. Modern mediation gathered momentum in the 1970s in the United States, in the 1980s in Australia, the United Kingdom, Canada and New Zealand and, finally, in the 1990s in European civil law jurisdictions.³⁰ For the most part, the same arguments are put forward in favour of mediation as for arbitration. Moreover, mediation is considered to be more cost-effective, in particular when compared with arbitration.³¹ Finally, mediation is less likely to disrupt a long-term relationship between the parties than arbitration is, let alone litigation.³² Thus, nowadays many contracts contain the so-called 'multi-tiered' dispute resolution clauses (MDR clauses) under which the parties must first turn to mediation or conciliation before they move on to arbitration.³³ In the meantime, institutionalization has also reached mediation. In the 1990s, international commercial arbitration institutions, such as the ICC in Paris and the London Court

²⁷ Kaufmann-Kohler, 2003, pp. 1327-1328.

²⁸ Cf. Kaufmann-Kohler, 2003, p. 1329.

²⁹ See, in that regard, the decision of the Swiss Federal Supreme Court of 20 March 2007, 4A_3/2009, consid. 7.1., where the court ruled that it constitutes a violation of the parties' right to be heard when an arbitral tribunal builds its decision, without consulting the parties, on a legal basis which has not been addressed before.

³⁰ Alexander, 2009, p. 53; N. Alexander, *Global Trends in Mediation*, 2nd edn, Kluwer Law International, the Netherlands, 2006, p. 1. Further, mediation as preferred dispute resolution mechanism has a longstanding tradition in Asia, see only S.E. Hilmer, *Mediation in the Peoples' Republic of China and Hong Kong (SAR)*, Eleven International Publishing, 2009, p. 3.

³¹ Alexander, 2009, p. 49.

³² Cf. H. Smith, *Pros and cons of common ADR processes*, December 2007, pp. 2, 3, available at <www.herbertsmith.com/NR/rdonlyres/1CB5541-06B6-4D4E-A03C-8D3846868D10/0/prosandcons_ADR0508.pdf>.

³³ Alexander, 2009, p. 25.

of International Arbitration in London as well as national alternative dispute resolution organizations, began to develop their cross-border mediation services and facilities.³⁴ Just like with arbitration, over the last few years the number of international mediation cases has grown well above average in Singapore³⁵ and Hong Kong.³⁶

Regarding the legal regulation of international mediation, it was again UNCITRAL who took the lead. In 1980, UNCITRAL had already developed the UNCITRAL Conciliation Rules. In 2002, the UNCITRAL Model Law on International Commercial Conciliation was passed. Although both sets of rules were not as successful as their arbitration counterparts, they have contributed, to a great extent, to the evolving harmonization between mediation laws and rules worldwide.³⁷

Although mediation is certainly on the rise internationally, its drawback is still its non-binding nature.³⁸ This non-binding nature relates not only to the mediation clause itself but also to the mediated settlement agreement. The latter has legal force no stronger than any ordinary contractual agreement.³⁹

There is no instrument relating to mediation that is equivalent to the NYC which facilitates international recognition and the enforcement of arbitration clauses and arbitral awards. Neither the 2002 UNCITRAL Model Law on International Commercial Conciliation, nor the more recent 2008 European Union Directive on Certain Aspects of Mediation in Civil and Commercial Matters contain clear rules for the easy recognition and enforcement of mediation clauses and mediated settlement agreements. They both simply provide that settlement agreements should be binding and enforceable.⁴⁰ This must be regarded as a major disadvantage for the further globalization of mediation.⁴¹

34 Alexander, 2009, p. 56.

35 There has been an increase of the number of mediation cases referred to the Singapore Mediation Centre between July 2005 and April 2010 from 1,290 to 1,500. These figures are based on the statistics provided by the Singapore Mediation Centre, available at <www.mediation.com.sg/mediation_statistics.htm>. See further L. Seng Onn, *Non-Court Annexed Mediation in Singapore*, available at <http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_Singapore%20%28L%20Onn%29.pdf>.

36 The number of mediation cases handled per year by the Hong Kong International Arbitration Centre has increased between 2007 and 2010 from 15 to 100. These figures are based on the statistics of the HKIAC published in its annual reports available at <www.hkiac.org/index.php/en/annual-report>.

37 In 21 jurisdictions, mediation legislation based on the UNCITRAL Model Law on Commercial Conciliation is currently enacted, see <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html>. Various institutions have adopted the wording of the UNCITRAL Conciliation Rules for their own institutional rules, see Alexander, 2009, pp. 339-340.

38 Cf. M.L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, Cambridge, 2008, p. 13.

39 See M.C. Hilgard & J. Wendler, 'Enforcement', in P. Barclay (Ed.), *Mediation Techniques*, International Bar Association, 2010, pp. 193, 194.

40 Art. 14 UNCITRAL Model Law on International Commercial Conciliation; resp. Art. 6 EU Directive 2008/52/ on Certain Aspects of Mediation in Civil and Commercial Matters, OJ 2010 L 136.

41 See also Alexander, 2009, p. 1.

1.3 GLOBALIZATION OF LAW

Looking beyond dispute resolution mechanisms, the globalization of trade also necessitates globalization of the law. It goes without saying that different domestic laws form obstacles for international trade as they increase transaction costs considerably for market participants.⁴² Several surveys conducted during the last several years reveal that traders themselves believe that differences in contract law are one of the main obstacles for conducting cross-border transactions.⁴³ These include difficulties in finding out about the provisions of applicable contract law, obtaining legal advice, negotiating the applicable law as well as adapting standard terms to different domestic laws.⁴⁴ Thus, trade has always been the driver for the harmonization and unification of contract law in particular since the 19th century (beginning on a domestic level), moving to the international level in the 20th century.

Since there is a considerable imbalance in the accessibility of domestic legal systems, in practice only a few developed domestic laws prevail in choice of law clauses, irrespective of whether they are suitable for adequately governing international contracts. This leads to the conclusion that there is an urgent need for uniform rules on general contract law to be established, encompassing all conceivable relevant questions in a contractual business-to-business (b2b) relationship.

1.3.1 *UN Convention on Contracts for the International Sale of Goods*

It was against this exact background that UNCITRAL started working on the unification of sales law in 1968, culminating in the Convention on Contracts for the International Sale of Goods (CISG), which entered into force on 1 January 1988. The CISG proved to be the most successful private international law Convention worldwide. Today, there are 80 contracting states with the number continuously increasing.⁴⁵ According to WTO trade

⁴² Cf. E. McKendrick, 'Harmonisation of European Contract Law: The State We Are In', in S. Vogenauer & S. Weatherill (Eds.), *The Harmonisation of European Contract Law, Implications for European Private Laws, Business and Legal Practice*, Hart Publishing, 2006, pp. 14-15.

⁴³ See only S. Vogenauer & S. Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law – An Empirical Contribution to the Debate', in Vogenauer & Weatherill, 2006, p. 126.

⁴⁴ Schwenzer *et al.*, 2012, para. 5.32 *et seq.*

⁴⁵ The list of all current contracting states of the CISG provided by UNCITRAL is available at <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

statistics, nine of the ten largest export and import nations are contracting states, with the UK being the only exception.⁴⁶ It can be assumed that approximately 80% of international sales contracts are potentially governed by the CISG.⁴⁷

Moreover, a truly great success is the strong influence the CISG has exerted at both the domestic and international level. The Uniform Act on General Commercial Law enacted by the Organization for the Harmonization of Business Law in Africa (OHADA) is in many respects, at least in its sales part, practically a transcript of the CISG. The UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR) and now the Draft Common European Sales Law (CESL) are all modeled on the CISG. Furthermore, the European Commission's Consumer Sales Directive heavily draws on the CISG.⁴⁸ Similarly, the Sale of Goods Act in the Nordic Countries, the modernized German Law of Obligations, the Contract Law of the People's Republic of China and other East Asian Codifications, and the majority of the recent post-Soviet codifications in Eastern Europe, Central Asia and in two of the Baltic States, build on the CISG. Likewise, the draft for a new Civil Code in Japan follows the scheme of the CISG.⁴⁹ It is reported that in developing countries the CISG is used to teach traders the structures of contract law so as to improve their level of sophistication.⁵⁰

1.3.2 *Other UNCITRAL Endeavours*

In addition to the CISG, UNCITRAL has embarked upon the unification of many other areas of international trade. Some of these instruments again touch upon various questions of general contract law,⁵¹ especially the 1974 Convention on the Limitation Period in the International Sale of Goods, the 1983 Uniform Rules on Contract Clauses for an

46 Cf. World Trade Organization, *International Trade Statistics 2011*, p. 24.

47 See P. Schlechtriem & I. Schwenzer, in I. Schwenzer (Ed.), *Slechtriem & Schwenzer, Commentary on the Convention on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn, Oxford University Press, Oxford, 2010, Introduction I.

48 See I. Schwenzer & P. Hachem, 'The CISG – A Story of Worldwide Success', in J. Kleinman (Ed.), *CISG Part II Conference*, Stockholm Centre for Commercial Law, Juridiska Institutionen, 2009, pp. 123, 124.

49 I. Schwenzer, 'Regional and Global Unification of Sales Law', *EJLR*, Vol. 13, Nos. 3-4, 2011, pp. 372-373.

50 Schwenzer *et al.*, 2012, para. 3.21.

51 1974 Convention on the Limitation Period in the International Sale of Goods; 1978 United Nations Convention on the Carriage of Goods by Sea – The 'Hamburg Rules'; 1980 United Nations Convention on International Multimodal Transport of Goods; 1983 Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance; 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes; 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade; 1992 UNCITRAL Legal Guide on International Countertrade Transactions; 1992 UNCITRAL Model Law on International Credit Transfers; 1995 United Nations Convention on

Agreed Sum Due upon Failure of Performance, the 1992 UNCITRAL Legal Guide on International Countertrade Transactions and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. Despite these advances in globalizing international commercial law, important areas are still governed by domestic contract law.

1.3.3 *Other Initiatives for Establishing a General Contract Law*

Over the last 30 years, there have been numerous endeavours around the globe to establish sets of internationally uniform contract law.

1.3.3.1 UNIDROIT

On a global scale, UNIDROIT has engaged in elaborating PICC. Whereas the 1994 version of the PICC mostly covered the areas already dealt with under the CISG as well as validity issues, the 2004 version also addressed the authority of agents, contracts for the benefit of third parties, set-off, limitation periods, assignment of rights and contracts, and the transfer of obligations. Finally, the 2010 version contains a chapter on illegality and a section on conditions as well as detailed rules on the plurality of obligors and obligees and on the unwinding of contracts.⁵² Thus, the PICC 2010 now cover all areas that are perceived to concern contract law in most legal systems. Still, the practical importance of the PICC is rather limited, as they are an opting-in instrument, applicable only by the parties' choice of law.⁵³ Surveys suggest that in international commercial contracts the PICC are chosen in only 0.6% of all cases.⁵⁴ Furthermore, with the PICC being soft law, many domestic courts will not even accept such a choice of law.⁵⁵

Independent Guarantees and Stand-by Letters of Credit; 1996 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, with additional Art. 5*bis* adopted in 1998; 2001 UNCITRAL Model Law on Electronic Signatures with Guide to Enactment; 2001 United Nations Convention on the Assignment of Receivables in International Trade; 2005 United Nations Convention on the Use of Electronic Communications in International Contracts; 2007 UNCITRAL Legislative Guide on Secured Transactions; 2007 Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods; 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – the Rotterdam Rules; 2010 UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property.

⁵² Schwenzler *et al.*, 2012, paras. 3.48-3.50.

⁵³ Cf. R. Michaels, in S. Vogenauer & J. Kleinheisterkamp (Eds.), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, Oxford University Press, Oxford, 2009, Preamble para. 5.

⁵⁴ See Greenberg *et al.*, 2011, para. 3.140.

⁵⁵ Michaels, in Vogenauer & Kleinheisterkamp, 2009, Preamble para. 7.

1.3.3.2 Regional Endeavors

On a regional level, a number of initiatives have been taken to harmonize or unify contract law.

Several approaches can be found in Europe that are all aimed at implementing a European Civil Code or at least a European Contract Law. First and foremost, the PECL shall be mentioned here. Starting with preparatory work in the 1980s, the PECL were published in three parts (1995, 1999, 2003). Part I covers performance, non-performance and remedies; Part II covers formation, agency, validity, interpretation, content and effects of contracts; and Part III covers plurality of parties, assignment of claims, substitution of the debtor, set-off, limitation, illegality, conditions and capitalization of interest. The PECL have a clear European focus, but also take into account the US-American Uniform Commercial Code as well as the Restatements on Contracts and Restitution.⁵⁶ Like the PICC, the PECL are so-called soft law. Although the parties, at least in arbitration, may choose to follow the PECL, to date there are no reported cases where this has occurred. More recently in 2009, the Study Group on a European Civil Code and the Research Group on EC Private Law published the DCFR. In contrast to the PICC and PECL, the DCFR not only addresses general contract law but considers virtually all matters typically addressed in civil codes except family law and laws of inheritance. The DCFR was, however, met with severe criticism not only with regard to the project's general idea⁵⁷ but especially with regard to drafting and style⁵⁸ as well as specific solutions found in the area of general contract and sales law.⁵⁹

Building on the DCFR, the European Commission published a proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) in October 2011. Thus, the idea of establishing a general contract law on the European level was not pursued anymore, but rather narrowed down to sales law. The content of the CESL is almost identical to that of the CISG and the UN Limitation Convention with additional provisions on defects of consent, unfair contract terms, pre-contractual information duties and contracts to be concluded by electronic means. Most notably, in contrast to the CISG, the CESL not only applies to b2b contracts but is in fact primarily aimed at contracts concluded with consumers. The CESL, too, is an opting-in instrument.⁶⁰ The future of this instrument is yet to be determined.

56 O. Lando & H. Beale, *Principles of European Contract Law, Parts I and II*, Kluwer Law International, the Netherlands, 2000, p. xxvi.

57 Schwenger *et al.*, 2012, para. 3.63.

58 U. Huber, 'Modellregeln für ein Europäisches Kaufrecht', *ZEuP*, Vol. 16, 2008, p. 744.

59 I. Schwenger & P. Hachem, 'Drafting New Model Rules on Sales: CFR as an Alternative to the CISG?', *EJLR*, Vol. 11, 2009, p. 460 *et seq.*

60 For a general overview of CESL, see D. Staudenmayer, 'Der Kommissionsvorschlag für eine Verordnung zum Gemeinsamen Europäischen Kaufrecht', *NJW*, Vol. 64, 2011, pp. 3491-3498.

In Europe, a few more private initiatives undertook similar projects, among them the Academy of European Private Lawyers that issued the Preliminary Draft for a European Code (2001) and the Trento Common Core Project.⁶¹

In Africa, first regard is to be given to the Organization for the Harmonization of African Business Affairs' (OHADA) Uniform Act on General Commercial Law (1998, amended in 2011). As mentioned above, the sales part of this Act strongly relies on the CISG, although it contains certain modifications. In addition to this Act, OHADA initiated moves towards establishing a Uniform Act on Contract Law. A draft was prepared in cooperation with UNIDROIT and published in 2004, heavily drawing on the PICC. For the time being, the future of this project is uncertain. Considerations for the harmonization of contract law based on the current international experience are also voiced in the framework of the East African Community.⁶²

Another recent private initiative aiming at the elaboration of Principles of Asian Contract Law (PACL) has been undertaken in Asia since 2009. Among others, participants come from Cambodia, Vietnam, Singapore, the People's Republic of China, Japan and South Korea. Until today, the chapters on formation, validity, interpretation, performance and non-performance of the contract have been finalized.⁶³

Likewise, in Latin America, general contract principles have been developed since 2009 within the framework of the *Proyecto sobre Principios Latinoamericanos de Derecho de los Contratos* hosted by a Chilean university. The countries covered by this framework up until now are Argentina, Uruguay, Chile, Colombia and Venezuela. However, the European approach seems to be considered as well.⁶⁴

Among these initiatives, a trend aiming at building common regional law by using global texts also exists. This can be seen, for instance, in the framework of the North American Free Trade Agreement (NAFTA) and now also in the framework of the Dominican Republic – Central America Free Trade Agreement (DR-CAFTA).⁶⁵

61 Cf. G. Gandolfi, *The Academy of European Private Lawyers and the Pavia Draft of a 'European Contract Code'*, available at <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-20.pdf>.

62 Cf. Schwenzer *et al.*, 2012, paras. 3.39-3.41.

63 For further information on PACL, see <www.fondation-droitcontinental.org/jcms/c_7718/projet-commun-de-droit-des-contrats-en-asie-du-sud-est>.

64 For the description of this project, see <www.fundacionfueyo.udp.cl/archivos/Proyecto%20sobre%20Principios%20latinoamericanos%20de%20derecho%20de%20los%20contratos.pdf>.

65 Cf. S. Zamora, 'NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade', 12 *Ariz. J. Int'l & Comp. L.*, 1995, Vol. 401, pp. 401-428; see also C.F. Jackson, 'The Free Trade Agreement of the Americas and Legal Harmonization', *ASIL Insights*, June 1996, available at <www.asil.org/insight3.cfm>.

1.3.3.3 International Chamber of Commerce

For decades, important contributions to the harmonization of international trade law have emanated from the ICC. As far back as 1936, the ICC published the International Commercial Terms (Incoterms®). Their latest version, the eighth edition, dates to 2010. Although in many sales contracts Incoterms are agreed upon and are thus of utmost practical importance, Incoterms cover only a small fraction of the parties' obligations in an international sales contract. With the Uniform Customs and Practice for Documentary Credits (UCP), the ICC has created another important instrument to facilitate international trade. Finally, the ICC provides innumerable model contracts and clauses for use in various types of international commercial transactions.⁶⁶

1.3.3.4 Interim Results

All these more-or-less regional projects and initiatives are ample proof of the urgent need for uniform rules on general contract law at an international level, a need that has resulted from the development of global trade. Regional endeavours to harmonize and unify general contract law cannot, however, fulfil the needs of international trade on a global scale.⁶⁷ Rather, different legal regimes in different regions lead to fragmentation. Instead of saving transaction costs and thus facilitating cross-border trade, international contracting may become even more complicated. Regional unification adds a further layer in addition to domestic rules and the well-established instrument of the CISG. Additionally, in many instances, not only does the terminology used in the general contract law instruments differ from that used in the CISG (which in itself leads to confusion); there will also frequently be contradicting solutions to one and the same legal problem. Finally, regionalization of legal systems reduces the number of cases decided on a truly international level, and hence has a negative impact on the predictability of the outcomes. The danger exists that the ongoing regionalization of contract law will lead to a regional focus on the various instruments and their interpretation, which would capture attention for decades and thus leave hardly any capacities, room, time or energy for a truly global approach.

Therefore, against this background, for the 45th session of UNCITRAL, Switzerland has submitted a proposal on the desirability and feasibility of possible future work by UNCITRAL in the area of international contract law. This proposal was supported by the majority of national delegates on 6 July 2012. In this way, UNCITRAL will embark on investigating further harmonization in this important field of commercial law.

⁶⁶ See Schwenger *et al.*, 2012, paras. 3.69-3.72.

⁶⁷ See also McKendrick, 2006, p. 29.

1.4 LEGAL PROFESSION AND EDUCATION

Globalization has, in the meantime, also reached the legal profession. In line with the growth of international trade in goods, there has been sustained growth of legal services markets over the last several decades. This has resulted in a growing number of multinational law firms with vastly expanded numbers of lawyers.⁶⁸ In 2009, the top ten law firms had offices in more than ten countries and seven of them had more than 70% of their lawyers placed outside the main offices. Also, the overall number of lawyers employed by the top level firms has risen sharply; today, over 30 law firms employ more than 1,000 lawyers, with the top-ranking US firm employing almost 4,000. There is a clear nexus between the size of a law firm and the internationalization of its practice.⁶⁹

The expansion of international law firms illustrates two perspectives: the first one can be labeled the 'follow your client' model, where law firms mostly spread to developing countries in which large multinational companies are operating. Prominent examples are China, Hong Kong and Singapore. Another pattern of expansion can be found in developed economies where foreign-owned law firms expand with the intent of equally servicing the local legal market.⁷⁰ A recent phenomenon is the increased outsourcing of legal business. This does not only concern administrative business processes, but has reached the core business related to legal work, such as document review, litigation support and legal research. India is reported to be the main destination for such outsourcing of legal services.⁷¹

The question arises whether young lawyers are truly equipped to meet the challenges of the globalization of their profession. This relates to their legal education. In most countries, law schools still focus on teaching domestic law. However, there are certain tendencies towards internationalization of legal education. It has been, and still is, common for many young lawyers of civil law jurisdictions to continue their studies in a common law country with the aim of receiving an LLM (Master of Laws) degree. During the last few decades, numerous exchange programs have been initiated that are sometimes or often combined with the possibility of undertaking a double degree. International moot competitions such as the Jessup Moot and the Willem C. Vis International Commercial Arbitration Moot attract thousands of students from all over the world

⁶⁸ World Trade Organization, Council for Trade in Services, *Legal Services Report 2010*, 14 June 2010, S/C/W/318, p. 3.

⁶⁹ World Trade Organization, Council for Trade in Services, pp. 2-3.

⁷⁰ World Trade Organization, Council for Trade in Services, p. 5.

⁷¹ World Trade Organization, Council for Trade in Services, pp. 6-7.

annually.⁷² Curricula of many law schools nowadays feature courses in international and/or comparative law and stimulate legal language skills with the focus naturally being on today's *lingua franca* English.

Despite all these endeavours, however, legal education is still orientated towards producing lawyers specialized in their home jurisdiction and not those who are more versatile in the global legal market. It cannot be disputed that certain fields of law still are and will be nationally confined, such as many areas of public law and criminal law as well as property law, family law and the law of inheritance. These fields still require predominantly domestically educated lawyers. However, in the long run, a genuine education of international lawyers must evolve on a comparative basis. Such a denationalized education should at the same time be delocalized, bringing together students from all over the world and thus equipping them with a truly cross-cultural and globalized learning experience.

1.5 CONCLUSION

Laws tend not to be the engine room of an economy; rather, they follow some steps behind. International trade, or perhaps more accurately, global trade, is no different. The globalization of trade transforms law. Industrialization at the beginning of the 19th century precipitated the codification and rationalization of law worldwide at the level of nation states. Global trade in the 21st century is moving us towards the anationalization and delocalization of law, the legal profession and finally, legal education.

72 Cf. T. Hutchinson, 'The Transnational Lawyer: GATS, Globalisation and the Effects on Legal Education', *Austl. & N.Z. J.L. & Educ.*, Vol. 11, 2006, p. 101.