HOW CULTURE, LAW, AND LANGUAGE ARE ALL BARRIERS TO EFFECTIVE CROSS-CULTURAL LEGAL COMMUNICATION, SPECIFICALLY INTERNATIONAL COMMERCIAL CONTRACTS

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

FACULTY OF LAW

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

April 1998

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Vancouver, Canada

Date April 27, 1998

DE-6 (2/88)

ABSTRACT

Today we live in a world of global economics, global communications, global politics, and attempts at the globalization of law. Because many countries around the world are adopting the laws of the western world, it may appear that, legally speaking, we are becoming more alike, however, a look below the surface reveals otherwise. What I attempt to show in this thesis is that the culture of a society affects, in a significant way, all aspects of that society, including its legal system and its use of language. The result being that if we wish to enter into any kind of international commercial relationship and expect it to be successful, we must be fully aware of the barriers to understanding created by the cultural, legal and linguistic differences which may not be readily apparent but which are clearly there. Because we automatically adopt the cultural values and norms of the society into which we are born, we take these values and norms as given, as automatic, as natural. It is only when we look carefully at other cultures do we realize that all the minute ways in which we see the world are culturally determined.

In Chapter One I look at the many cultural differences that exist between nations - those that are readily apparent and those that are so subtle that we could never hope to understand them on our own. In this chapter we see just how much our way of thinking and our use of language are directly affected by our culture. In Chapter Two we see how these cultural differences are totally interwoven with our legal systems and what happens when the legal system of one nation is transplanted into a completely different culture. We see that even though the written laws may look the same as those of the exporting country, the way they are understood and used by the importing country is directly affected by that country's legal and cultural background. Chapter Three continues to examine these cultural differences by looking at the relationship between languages and legal systems and at the insurmountable problems that exist in trying to translate legal documents from one language to another. The alternative, the use of legal English in the drafting of international legal documents, poses additional problems as we see how it is intimately tied to the common law system and in such a way that makes it difficult for a non-common law lawyer to understand it or understand it in the same way a common law lawyer would.

Finally, in Chapter Four, by analyzing extracts from actual international commercial contracts, we

see how closely the language, structure, and concepts used in the contract are tied to the legal system from which the drafter has come, which is often different from that by which the contract is governed, and, as a result, how they operate as barriers to a complete understanding of the contractual terms by the parties involved.

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"Only by manifold contrasts the contrary becomes completely clear; only by the observation of similarities and differences and the reasons for both may the peculiarity and inner nature of each thing be thoroughly established."

- Anselm Feuerbach
19th century legal philosopher

INTRODUCTION

This thesis has developed out of my experiences in Istanbul, Turkey where I developed and taught a course in Legal English for International Commercial Transactions. The course is specifically designed for lawyers who are non-native speakers of English, who have been trained in a legal system other than the common law and who wish to practise in the area of international commercial law. In the course, we work with actual international contracts in such areas as agency agreements, distribution agreements, licensing agreements, franchising, sale of goods, and joint ventures.

By being immersed for almost four years in a culture that was so different from my own, I soon came to realize that if we want to truly communicate with people of another culture, it is just as important to learn about the cultural differences as it is to learn the language. At that time I spoke of *culture* as being a *third language*. It is interesting to note that Edward T. Hall, a cultural anthropologist whose work I look at in Chapter 1, refers to culture as the *silent language*. We shall see that his description is more apt than mine.

In my teaching I was also exposed to discussing legal concepts with lawyers who were trained in a legal system very different from my own. I learned that we shared many concepts but there were also those that were unknown to either them or to me. As well, the way in which we categorized these concepts was very different. I also realized in the course of my teaching that the way in which we structure our contracts and the language we use in them is very closely tied to our particular legal system. The result of this was that I came to realize that a large part of the legal English that I was teaching, and which is found in the majority of international commercial contracts, is totally inappropriate in the international setting.

It was during the 1950's and 1960's that we witnessed the large scale exportation of western economic, political, and legal concepts in the name of *modernization* and *development*. By the 1970's many academics came to realize that because the legal systems of nations are so intimately tied to their individual cultures, to try to transplant the legal system of one society into a completely different society and expect it to work in the same way was sheer folly. This

knowledge however seems not to have been passed on to those in the economic, political and legal communities, many of whom continue to operate with these outdated and incorrect beliefs. I was one of them.

What we are seeing today in the push towards a *global economy*, is an accompanying push towards the *globalization of law*. Whether or not this *globalization of law* is actually possible is arguable, although certainly many attempts are being made. Part of the problem may well be that these attempts are based on the above-noted outdated and incorrect beliefs. And because of this, some would argue that what *globalization of law* there is, is only really happening among western nations. Nonetheless, in order for *developing* economies to try to partake of this *global economy* being driven by the west, they must first be seen to be adopting the economic, political and legal ways of the west. But what is getting lost in this push (and why I say it is arguable whether or not *globalization of law* is possible) is the reality that just because the same vocabulary may be used by these different nations, it does not mean that it is being used or understood in the same way.

What I attempt to show in this thesis is that the culture of a society affects, in a significant way, all aspects of that society, including its legal system and its use of language. The result being that if we wish to enter into any kind of international commercial relationship and expect it to be successful for both sides, we must be aware of the significant barriers to understanding created by these cultural, legal and linguistic differences which may not be readily apparent but which are clearly there.

I begin in Chapter 1 by looking at the many cultural differences that exist - those that are readily apparent and those that are so subtle that we could never hope to understand them on our own. Because we automatically adopt the cultural values and norms of the society into which we are born we take these values and norms as given, as automatic, as natural. It is only when we look carefully at other cultures do we realize that all the minute ways in which we see the world are culturally determined and not universal. In this chapter we see just how much our way of thinking and our use of language are directly affected by our culture.

In Chapter 2 we see how these cultural differences are totally interwoven with our legal systems and what happens when the legal system of one nation is transplanted into a completely different culture. What becomes clear is that even though the written laws may look the same as those of the exporting country, the way in which the importing country understands and uses these laws is directly affected by the legal and cultural background of that importing country.

In the first part of Chapter 3 we continue to see the impact of these cultural differences when we look at the relationship between languages and legal systems and the virtually insurmountable problems that exist in trying to translate legal documents from one language into another. Also in Chapter 3 we look at our own legal language in more detail and the history behind it because it is this legal language, legal English, which is the one being used worldwide in virtually all international commercial contracts. I believe that this scrutiny of legal English shows how it is tied to the common law system in such a way that it is difficult for a non-common law lawyer to understand it in the same way a common law lawyer does. I believe as well that this helps to highlight how inappropriate much of this language is in the international setting.

In Chapter 4 we look at extracts from some actual international commercial contracts and, in light of what we have seen in Chapters 1, 2, and 3, we see how closely these contracts are tied to the legal systems from which the drafters have come and, as a result, the problems the language, format, and concepts in these contracts can create in understanding. In this chapter I also look at how the various cultural differences impact on the negotiation and implementation of some international commercial contracts.

As I discuss in the conclusion to this thesis, I believe it is incumbent on all legal educators in North America (and probably the English-speaking common law world although at this point in time I am not familiar with what is happening in England, Australia or New Zealand), to become more aware of these cultural, legal and linguistic differences and to impart this knowledge to their students. If the western drafters of international commercial contracts continue to proceed with their format, language, and concepts without regard for the very real differences in understanding, it is highly likely that they are not going to come away from the transaction receiving what they expected. There are numerous stories of deals gone awry with each side blaming the other for

the problems. A lack of awareness and understanding of the very different ways in which people speak, of the way they view situations, of the way they react to situations, and of the way they understand these situations will most certainly result in losses, misunderstandings, and recriminations on both sides.

CHAPTER ONE - THE BARRIERS POSED BY CULTURE

I. INTRODUCTION

In order to communicate with someone from another culture, we must first learn to speak the same language. This, however, by itself, is not enough. If we want to fully understand the meaning and behaviour which are incorporated in the other individual's use of the language we must learn more about the culture from which that individual comes. This is because language does not operate on its own, but rather follows from one's thought processes which are greatly modified by the culture in which we are raised. As Edward T. Hall states, "...we must learn to understand the "out-of-awareness" aspects of communication."[1] Only by appreciating and understanding how much the culture into which we are cast controls these *out-of-awareness* aspects of communication, will we be able to truly communicate with each other.

There have been a variety of approaches taken in the study of intercultural or cross-cultural communication. In this chapter I will be looking at three. The first is the work of Geert Hofstede,[2] who has proceeded from an international business management perspective. He provides us with a broad framework into which the work of the other two approaches fit. The second approach I will look at is that of Edward T. Hall[3] who, as a cultural anthropologist, brings us first-hand observations from within different cultures. The final approach is that of Ron Scollon and Suzanne Wong Scollon[4] who have spent over twenty years researching intercultural intra-organizational communication in North America, Taiwan, and Korea from a linguistic perspective.

II. THE INTERNATIONAL BUSINESS MANAGEMENT PERSPECTIVE

Geert Hofstede, in his work, refers to an individual's thought processes as *mental programming*. He notes that even though everyone's mental programming is "partly unique" it is also "partly

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[1]Edward T. Hall, *The Silent Language*, Garden City, N.Y.: Doubleday & Company (1959) at 52

[2]See *Culture's Consequences, International Differences in Work-Related Values*, Beverly Hills: Sage Publications (1980) and "The Cultural Relativity of Organizational Practices and Theories" *Journal of International Business Studies*, Fall 1983 at 75

[3]See also *Beyond Culture*, Garden City, N.Y.: Anchor Press/Doubleday (1976); and Edward T. Hall and Mildred Reed Hall, *Hidden Differences, Doing Business With the Japanese*, Garden City, N.Y.: Anchor Press/Doubleday (1987)

[4]See *Intercultural Communication*, Oxford: Blackwell (1995)

shared with others".[5] Our collective mental programming

> "...includes the language in which we express ourselves, the deference we show to our elders, the physical distance from other people we maintain in order to feel comfortable, the way we perceive general human activities like eating, making love, or defecating and the ceremonials surrounding them."[6]

Hofstede believes that what is in the minds of the individuals becomes *crystallized* in the institutions of their society: in the

> "...government, legal systems, educational systems, industrial relations systems, family structures, religious organizations, sports clubs, settlement patterns, literature, architecture, and even scientific theories."[7]

And these institutions, in turn, reinforce the mental programming that led to their creation.[8]

It is, of course, not as simple as I have made it sound. Hofstede advises that there are also subcultural components to the mental programmes of individuals, such as those shared by individuals of the same educational level, socioeconomic status, occupation, sex or age group. In addition to this, some countries are more homogeneous than others. As well, Hofstede warns us that

> "[s]tudents of culture should be aware of linguistic, regional, verbal, ethnic, religious, or caste cleavages within nations which can make data nonrepresentative for the whole of the nation. But apart from such specific cleavages, when we compare cultural aspects of modern nations, we should try to match for subculture."[9]

Another matter of utmost importance in cross-cultural studies is the use of language itself. As noted above, language is not neutral. Hofstede discusses at length the methods he used in attempting to make the language of his questionnaires as neutral as possible and he points out that "[l]anguage in this case becomes a variable in the analysis and not just a source of bias."[10]

Notwithstanding all the potential for problems, Hofstede has found that "modern nations do have dominant national character traits which can be revealed by survey studies and by the comparison

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[5]Hofstede (1980) at 15

[6]Hofstede (1980) at 15

[7]Hofstede (1983) at 76

[8]Hofstede (1980) at 26

[9]Hofstede (1980) at 38

[10]Hofstede (1980) at 37

of measurable data on the society level."[11]

In the 1950's and 1960's, it was believed that the principles of sound management were universal, and that national differences should not matter. However, by the 1970's it became clear that this belief was incorrect and in fact national and even regional differences did matter, to the point that they

> "may become one of the most crucial problems for management - in particular for the management of multinational, multicultural organizations, whether public or private."[12]

Hofstede began collecting the data for his studies more or less by accident.[13] In 1971 he was working as a psychologist on the international staff of a large multinational corporation. Part of his job involved collecting data on the attitudes and values of every employee, from unskilled workers to research scientists around the globe. He did this by way of standard questionnaires. He ended up collecting over 116,000 questionnaires from employees in 40 countries. Later he became a teacher in an international business school where he asked the participants, who were managers from all over the world, to answer the same questions. Later still, when he was working as a researcher at the European Institute for Advanced Studies in Brussels, data for an additional 10 countries and 3 multi-country regions became available. In his work in Brussels he also looked at 40 other studies which had compared aspects of national character across borders and found that they confirmed the differences he had found in his study.

The main constructs that Hofstede used were *values* and *culture*. He defines a *value* as "a broad tendency to prefer certain states of affairs over others".[14] He notes that *culture* has been defined in many ways, but for his work he defines it as "the collective programming of the mind which distinguishes the members of one human group from another."[15] *Values* can be attributed to individuals as well as to collectives, however *culture* presupposes a collective.[16]

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[11]Hofstede (1980) at 38

[12]Hofstede (1983) at 75

[13]Hofstede (1983) at 77

[14]Hofstede (1980) at 19

[15]Hofstede (1980) at 25

[16]Hofstede (1980) at 19

In his work, Hofstede developed four different dimensions for describing national cultures, all of which are largely independent of each other. They are:

1. Individualism versus Collectivism;
2. Large or Small Power Distance;
3. Strong or Weak Uncertainty Avoidance; and
4. Masculinity versus Femininity.

The theoretical reasoning behind these dimensions was that "every dimension should be conceptually linkable to some very fundamental problem in human societies, but a problem to which different societies have found different answers."[17]

The Individualism/Collectivism dimension describes the relationship between an individual and his or her fellow individuals. It has numerous *value* implications and it is intimately linked to *societal norms*.[18] The central element in our *mental programming* which is involved in this dimension is our self-concept. At the Individualistic end of the scale are societies in which everyone is supposed to look after his or her own self-interest and maybe that of the immediate family members. This is possible because of the large amount of freedom given to each individual. At the Collectivistic end of the scale are societies in which the ties between individuals are very tight. People are born into groups which may be their extended family, their tribe, or their village. Everyone is supposed to look after the interest of his or her group and have no opinions or beliefs other than those of the group.[19] Hofstede found a tendency for the wealthy countries to be more Individualistic and the poor countries more Collectivistic,[20] but this was not universal, as he found a residual variance in the scores which could not be explained by wealth but rather, he suggests, by historical or traditional factors.[21] Not surprisingly, the United States (with an index of 91) heads the list as being the most Individualistic, with Australia (90) and Great Britain (89) following closely behind. Canada and the Netherlands follow next, each with an index of 80. Those countries which are the most Collectivistic are Venezuela (12), Colombia (13) and Pakistan (14). But following closely are Taiwan (17), Thailand (20), and

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[17]Hofstede (1983) at 78

[18]Hofstede (1980) at 213-214

[19]Hofstede (1983) at 79

[20]Hofstede (1983) at 81

[21]Hofstede (1980) at 233

Singapore (20).[22] Countries found in the middle are Japan (46), Spain (51) and Austria (55)[23] (although Hofstede did find that "values and organizations in Japan are shifting fast to the more individualistic side."[24]) Some of the *values* associated with work that can be found in the more Collectivistic countries are: emotional dependence on the company; moral involvement with the company; managers aspire to conformity and orderliness and rate security in their position as important; group decisions are considered better than individual ones; managers endorse traditional points of view; individual initiative is socially frowned upon; and people are thought of in terms of ingroups and outgroups. The comparative *values* found in Individualistic countries are emotional independence from the company; calculative involvement with the company; managers aspire to leadership and variety and rate having autonomy in their position as important; individual decisions are considered better than group decisions; managers endorse modern points of view; individual initiative is socially encouraged; and people are thought of in general terms.[25] Some of the *societal norms* Hofstede found to be associated with more Collectivistic countries are: people are born into extended families or clans which protect them in exchange for loyalty; there is a *we* consciousness; one's identity is based in the social system rather than in the individual; one's private life is invaded by organizations and clans to which one belongs; one's opinions are predetermined; expertise, order, duty and security are provided by the organization or clan; friendships are predetermined by stable social relationships but there is a need for prestige within these relationships; and value standards differ for ingroups and outgroups as opposed to applying to all in a universal fashion. Some comparative *societal norms* found in Individualistic countries are: there is an *I* consciousness; one's identity is based in the individual; everyone has a right to a private life and opinion; there is emphasis on autonomy, variety, pleasure and individual financial security; and, there is a need for specific friendships.[26] Hofstede notes that "[b]ecause they are tied to value systems shared by the majority, issues of collectivism versus individualism carry strong moral overtones."[27]

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[22]It is to be noted that China was not included in Hofstede's studies; also, if there is a correlation with wealth, as noted, it is possible that Taiwan and Singapore would score higher today.

[23]Hofstede (1980) at 222

[24]Hofstede (1980) at 236

[25]Hofstede (1980) at 230

[26]Hofstede (1980) at 235

[27]Hofstede (1980) at 215

The second dimension, that of Power Distance, looks at how a society deals with the fact that people are unequal.[28] Hofstede notes that all societies are unequal but some are more so than others and it is the Power Distance dimension that measures the degree of inequality.[29] "Inequality can occur in areas such as prestige, wealth, and power" but different societies will put different weight on the "status consistency among these areas."[30] Hofstede found that *values* about inequality are coupled with *values* about the exercise of power, and that in countries with a large Power Distance, power needs less legitimation than in countries with a small Power Distance. He goes on to state that in small Power Distance countries, such as Sweden, power is something the power-holders are almost ashamed of and they try to play it down.[31] Some of the *societal norms* Hofstede identified as coinciding with large Power Distance countries are as follows: there should be an order of inequality in this world in which everyone has his rightful place; a few in society should be independent but most should be dependent; hierarchy is related to existential inequality; superiors consider subordinates and subordinates consider superiors as being of a different kind; power is a basic fact of society which antedates good or evil, its legitimacy is irrelevant; power-holders are entitled to privileges and powerful people should try to look as powerful as possible; there is a stress on coercive power; the way to change a social system is by dethroning those in power; and, other people are a potential threat to one's power and rarely can be trusted.[32] The consequences for political systems are fairly evident from this, with an unsurprising factor being that tax systems protect the wealthy. Some of the consequences for organizations in large Power Distance countries are: greater centralization, a large proportion of supervisory personnel and large wage differentials.[33] The countries which showed the largest Power Distance are the Philippines,[34] Mexico, Venezuela, and India. Interestingly, France and Belgium also showed a fairly large Power Distance, with France ranking seventh from the top and Belgium ranking tenth. The countries showing the smallest Power Distance were Denmark, Israel, and Austria. Canada, the United States, Italy, and Japan were in the middle range with

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[28]Hofstede (1983) at 81

[29]Hofstede (1983) at 81

[30]Hofstede (1980) at 92

[31]Hofstede (1980) at 121

[32]Hofstede (1980) at 122

[33]Hofstede (1980) at 135

[34]This may be different today due to the change in the political situation.

Canada being smaller and Japan being larger.[35] Hofstede found that there is a global relationship between Power Distance and Collectivism: Collectivistic countries show large Power Distances but Individualistic countries do not always show small Power Distances.[36] As noted above, France and Belgium ranked high on the Power Distance scale, however on the Individualism scale France had a fairly high index of 71 and Belgium an even higher 75 (the range was from a high of 91 to a low of 12).

Hofstede's third dimension is Uncertainty Avoidance. Because uncertainty creates anxiety, human society has developed ways to cope with the inherent uncertainty in our lives. The solutions have been found in technology, law, and religion. "Technology has helped us to defend ourselves against uncertainties caused by nature; law, to defend against uncertainties in the behaviour of others; religion, to accept the uncertainties we cannot defend ourselves against."[37] Religion would include secular religions such as Marxism, dogmatic Capitalism, meditation, and science.[38] Hofstede notes that different societies have adapted in different ways and that these ways differ not only between traditional and modern societies but also among modern societies.[39] In weak Uncertainty Avoidance societies people have a tendency to feel relatively secure. These societies have

> "socialize[d] their members into accepting this uncertainty and not becoming upset by it. People in such societies will tend to accept each day as it comes. They will take risks rather easily. They will not work as hard. They will be relatively tolerant of behaviour and opinions different from their own because they do not feel threatened by them."[40]

In strong Uncertainty Avoidance societies there will be "a higher level of anxiety in people, which becomes manifest in greater nervousness, emotionality and aggressiveness."[41] As well, dogmatic, intolerant, ideological positions are more likely in strong Uncertainty Avoidance countries. The countries which ranked strongest on the Uncertainty Avoidance Index (UAI) were

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[35]Hofstede (1980) at 150

[36]Hofstede (1983) at 81

[37]Hofstede (1980) at 154

[38]Hofstede (1983) at 83

[39]Hofstede (1983) at 83

[40]Hofstede (1983) at 81

[41]Hofstede (1983) at 81

Greece (with a UAI of 112), Portugal (104),[42] Belgium (94), and Japan (92). On the opposite end were Singapore (8), Denmark (23), Sweden (29) and Hong Kong (29). Canada and the United States ranked in the middle with 48 and 46, respectively.[43] Some factors which Hofstede found to be associated with strong Uncertainty Avoidance are: more emotional resistance to change; a tendency to stay with the same employer; a higher average age in higher level jobs; managers should be selected on the basis of seniority; lower ambition for individual advancement; hierarchical structures of organizations should be clear and respected; company rules should not be broken; conflict in organizations is undesirable; initiative of subordinates should be kept under control; a lower tolerance for ambiguity in perceiving others; a lower readiness to compromise with opponents; a suspicion toward foreigners as managers; citizen pessimism about ability to control politicians' decisions; and pessimism about people's amount of initiative, ambition, and leadership skills.[44]

Hofstede noted that in societies with a lower tolerance of uncertainty (ie. with a strong Uncertainty Avoidance Index), those who control the uncertainty will be more powerful than if uncertainty is more easily tolerated. He went on to note that this explains the difference between Indian (UAI of 40), French (UAI of 86), and German (UAI of 65) authoritarianism,

> "In India it is pure personal power ("a basic fact of society which antedates good or evil"). In France it is the same, *plus* the fact that power holders control uncertainties, to confront which would be too threatening to many people. In Germany "the use of power should be legitimate", but the impact of formal power is strong because of the uncertainties it controls, which corresponds to many people's profound needs."[45]

Hofstede's final dimension is that of Masculinity/Femininity. The fundamental issue here is the relationship between the sexes and their roles in society. Hofstede has given the Masculine index to those societies with a "maximized social sex role division" and the Feminine index to those societies with a "relatively small social sex role division".[46] In Masculine societies

> "the traditional masculine social values permeate the whole society - even the way of thinking of the women. These values include the importance of showing off, of performing, of achieving

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[42]The figure for Portugal may be different today with the change in the political situation there.

[43]Hofstede (1980) at 165

[44]Hofstede (1980) at 176

[45]Hofstede (1980) at 189

[46]Hofstede (1983) at 85

> something visible, of making money, of "big is beautiful"."[47]

In more Feminine societies, the dominant *values* for both men and women are

> "those more traditionally associated with the feminine role: not showing off, putting relationships with people before money, minding the quality of life and the preservation of the environment, helping others, in particular the weak, and "small is beautiful"."[48]

Hofstede found the most Masculine country by far to be Japan with a Masculinity Index (MAS) of 95.[49] Austria was second with a MAS of 79, Venezuela next with 73, followed by Italy and Switzerland, both with 70. The most Feminine country was Sweden with a MAS of 5. Also at the Feminine end were Norway (8), the Netherlands (14), Denmark (16), and Finland (26). Both Australia and the United States placed above the mid-point with 61 and 62 respectively. Canada was rated more Feminine with a MAS of 52. France and Spain were more Feminine still with 43 and 42 respectively.[50] Some of the *societal norms* Hofstede found to be associated with Masculinity are as follows: performance and growth are important; achievement and independence are the ideal; decisiveness is important as opposed to intuition; and there is less benevolence shown towards the third world.[51]

Hofstede points out that isolating the dimensions, as I have done above, is a useful exercise in order to "structure our observations" but it must be remembered that in reality the four dimensions interact with each other. As mentioned above, he points out that the effect of interaction is particularly relevant for Power Distance and Uncertainty Avoidance and he has done a comparison of the four combinations. In this comparison he has noted what the implicit model of organization would be. They are as follows:

1. Small Power Distance/Weak Uncertainty Avoidance = Market
2. Small Power Distance/Strong Uncertainty Avoidance = A well-oiled machine
3. Large Power Distance/Weak Uncertainty Avoidance = Family

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[47]Hofstede (1983) at 85

[48]Hofstede (1983) at 85

[49]Japan has been undergoing a number of changes in recent years in this regard and may well have a different MAS today.

[50]Hofstede (1980) at 279

[51]Hofstede (1980) at 294 - 296

4. Large Power Distance/Strong Uncertainty Avoidance = Pyramid[52]

An illustration of how these work was conducted by a colleague of Hofstede's. He gave an organizational problem to three groups of students. One group was French, one West German and one British. The problem described a conflict between two departments and the students were asked to resolve the problem. The French students referred the problem to the next higher authority level (#4 - a pyramid). The West German students suggested the setting of rules to resolve such problems in the future (#2 - a well-oiled machine). The British students wanted to improve the communications between the department heads, possibly with some kind of human relations training (#1 - a village market). Hofstede believes that if an Indian had been given the problem, the fourth organizational model - the family - would have been employed.[53]

Hofstede found as well that the combination of Uncertainty Avoidance and Masculinity is the best predictor of "need for achievement". The "masculine risk-takers" appear to be the "entire Anglo cluster, plus some Asian countries: India, Phillippines, Hong Kong, and (marginally) Singapore."[54] Of interest in this regard is that the latter countries are former United Kingdom or United States colonies.

In reviewing Hofstede's work, it must be kept in mind that the economic interdependence of the world is growing at an incredible rate. This, along with the growth in technology, represents a major force at work in changing national cultures. As Hofstede's studies were conducted in the 1970's, it is possible that we would see significant changes in some of the data today. Hofstede himself notes that, because of the widespread influence of modern technology, some authors have concluded that all societies will become more similar.[55] He however believes that

> "technological modernization is an important force toward change which leads to partly similar developments in different societies. However, it does not wipe out differences among societies and may even enlarge them; as on the basis of pre-existing value systems societies cope with technological modernization in different ways."[56]

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[52]Hofstede (1980) at 319

[53]Hofstede (1983) at 87

[54]Hofstede (1980) at 324

[55]Hofstede (1980) at 343

[56]Hofstede (1980) at 343-344

Hofstede believes that the imposition of free-market capitalism on the more collectivist societies is likely to have "strongly disruptive effects" on these societies. This is because capitalism is rooted, historically and culturally, in individualism. He notes that many American managers and politicians have a problem recognizing that their type of capitalism is "culturally unsuitable" for more collectivist societies.[57] He suggests that

> "[v]arious forms of state socialism or state capitalism are more likely to appeal to the collectivistic values of people in this case, regardless of whether these alternative economic orders actually protect their people effectively."[58]

It would appear that China is trying to do just this. However, it is extremely unfortunate that Russia did not do the same, as Hofstede's prediction has been borne out In fact, what we see today is Russian President Boris Yeltsin trying to "rein in the free-wheeling "robber capitalism" of the past five years and replace it with a state-guided economy."[59]

Although Hofstede provides a chart showing the four dimensions for each country,[60] it is obvious that one is not going to be able to accurately predict the behaviour or thought processes of different individuals by simply slotting them into the chart. I do believe, however, that Hofstede's work is extremely valuable in that it gives us extensive insight into some of the *mental programming* of different national cultures. Just making us aware of the multitude of differing *values* and *societal norms* as well as the dynamics at work within different national cultures is, in itself, highly instructive. As all those engaged in cross-cultural study note,

> "[t]he cultural component in all kinds of behaviour is difficult to grasp for people who remain embedded in the same cultural environment; it takes a prolonged stay abroad and mixing with nationals there to recognize the numerous and often subtle differences in the way they and we behave, because that is how our society has programmed us."[61]

III. THE CULTURAL ANTHROPOLOGICAL PERSPECTIVE

Edward T. Hall would agree with this last-noted remark of Hofstede's, however he warns of some of the problems an approach such as Hofstede's presents when studying other cultures. In this regard he states,

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[57]Hofstede (1983) at 89

[58]Hofstede (1980) at 389

[59]See the Vancouver Sun, September 25, 1997 at A15 under "Yeltsin seeks end to freewheeling 'robber capitalism'".

[60]Hofstede (1980) at 315

[61]Hofstede (1980) at 28

> "[b]ecause cultures are wholes, are systematic (composed of interrelated systems in which each aspect is functionally interrelated with all other parts), and are highly contexted as well, it is hard to describe them from the outside. A given culture cannot be understood simply in terms of content or parts. One has to know how the whole system is put together, how the major systems and dynamisms function, and how they are interrelated."[62]

Working from "inside" a number of different cultures, Hall has managed to reveal even finer distinctions. The main components of his work which are of benefit to me for this thesis appear to fall within Hofstede's Collectivism/Individualism dimension. By putting the findings of the two together we gain an even greater understanding of this dimension, which, as noted earlier, has extensive *value* implications and is intimately linked to *societal norms*. The main components of Hall's work that I will be looking at relate to *time* and *context*. I will deal with a third component, *action chains*, very briefly.

Just as with other aspects of our culture, the way we view time is something we all take for granted and we assume that everyone sees it in the same way. Often, when we are in other countries and the citizens of those countries do not respond to time in the same way we do, we become angry and frustrated. We usually blame their different responses on other culturally-induced notions, such as rudeness, laziness, and the like. What we do not realize is that different cultures deal with time in very different ways, ways that are not at all related to rudeness or laziness. Hall has characterized the two different ways of dealing with time as monochronic time (M-time) and polychronic time (P-time). "M-time systems emphasize schedules, segmentation, and promptness. P-time systems are characterized by several things happening at once. They stress involvement of people and completion of transactions rather than adherence to preset schedules."[63] As Hall notes,

> "[f]or M-time people reared in the northern European tradition, time is linear and segmented like a road or a ribbon extending forward into the future and backward to the past. It is also tangible; they speak of it as being saved, spent, wasted, lost, made up, accelerated, slowed down, crawling, and running out. [These metaphors] express the basic manner in which time is conceived as an unconscious determinant or frame on which everything else is built. M-time scheduling is used as a classification system that orders life."[64]

The problem for M-time people though, is that many cultures around the world operate on P-

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[62]Hall (1976) at 195

[63]Hall (1976) at 14

[64]Hall (1976) at 16

time. As Hall notes,

> "Americans overseas are psychologically stressed in many ways when confronted by P-time systems such as those in Latin America and the Middle East. ... Particularly stressing to Americans is the way in which appointments are handled by polychronic people. Appointments just don't carry the same weight as they do in the United States. ... Nothing seems solid or firm, particularly plans for the future, and there are always changes in the most important plans right up to the very last minute."[65]

M-time systems have grown out of the industrial revolution where the labour forces were required to be on hand and in place at the factory at an appointed hour. Hall notes that without schedules it is unlikely that our industrial civilization would have developed as it has.[66] In this respect, Hall notes that Germany and Switzerland are classic examples of M-time cultures, "where the percentage of individuals whose personalities fit this pattern seems to be higher than among other peoples of the world."[67] He also tells us that the Japanese combine both M-time and P-time. "In their dealings with foreigners and their use of technology, they are quite monochronic; in every other way, especially interpersonal relations, they are polychronic."[68] This fact may seem quite strange. However, by looking closer at those cultures which have P-time systems, it becomes easier to understand.

As mentioned earlier, I believe there is a connection between the M-time/P-time paradigm and the Collectivist/Individualist dimension. The more Individualistic societies have grown out of the industrial revolution in Europe (I will speak more on this later) and, as mentioned above, it is out of this that M-time has developed. As Hall states many times in his writings, M-time is not inherent in man's natural rhythms and creative drives and, in fact, helps to alienate us from ourselves. This is readily apparent in our society where we often feel that *time* is controlling our lives, and where more and more people are suffering from "hurry sickness" because we are continually trying to accomplish more than is humanly possible.

Hofstede's more Collectivistic societies, however, share similar characteristics with Hall's P-time societies. Looking at Hofstede's listing of societal norms associated with the more Collectivistic

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[65]Hall (1976) at 14 - 15

[66]Hall (1976) at 16

[67]Hall & Hall (1987) at 17

[68]Hall & Hall (1987) at 18

societies, he states that there is a *we* consciousness, that identity is based in the social system, that one's private life is invaded by organizations and clans to which one belongs, and that the individual is emotionally dependent on the organizations and institutions to which he or she belongs. Hall notes that P-time people are committed to people and human relationships, and that they are more concerned with those who are closely related (family, friends, close business associates) than with privacy.[69] He goes on to note that

> "[i]n P-time systems, appointments mean very little and may be shifted around even at the last minute to accommodate someone more important in an individual's hierarchy of family, friends, or associates. Some polychronic people (such as Latin Americans or Arabs) give precedence to their large circle of family members over any business obligation."[70]

By realizing this, it is easy to understand the Japanese position. In order to maintain their plan for technological advancement following the Second World War, it has been necessary for them to adapt (in some ways) to the western notions of time, however, because their society is more Collectivistic than Individualistic, for all other matters, P-time controls. This adaptation to M-time by P-time societies does go beyond Japan. Hall notes that P-time people will master M-time as a different system when it is situationally appropriate.[71]

There are additional facets to the difference between M-time and P-time. Two of these relate to *waiting time* and *lead time*. Once again, these are areas that can be very frustrating for the M-time businessperson or lawyer. Because P-time people are not concerned with schedules and appointments, their notion of what is an acceptable *waiting time* is at great variance with that of M-time people. Anyone from an M-time culture who has lived or worked in a P-time culture is well aware of the difference. I lived and taught in Turkey, which is definitely a P-time culture, for just under four years. I would conclude that it is normal for traditional Turks (ie. those who have not become *westernized*) to be one-and-a-half to two hours late for a planned meeting. I would also conclude that the degree to which a Turk has become *westernized* will affect his or her ability to see the meeting as "situationally appropriate" for M-time scheduling.[72]

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[69]Hall & Hall (1987) at 18

[70]Hall & Hall (1987) at 19

[71]Hall (1976) at 18

[72]In this regard, one of my students, who has an extremely busy law practice, was complaining to me how her Turkish clients would often not show up for their appointments or would be late and all of this without advising her. She also complained how they would just drop by at any time, without an appointment, to talk about their files and find out how

The other facet, *lead time*, can again cause great frustration. In the United States, "lead time can be read as an index of the relative importance of the business to be conducted, as well as of the status of the individuals concerned."[73] The longer the *lead time*, the greater the importance. Once again, this does not carry over to other cultures. My experience in Turkey is similar to Hall's comments on Arab countries. He notes that it is "pointless to make an appointment too far in advance, because the informal structure of their time system places everything beyond a week into a single category of "future", in which plans tend to "slip off their minds".[74] In Japan, the lead time is usually much shorter than in the United States. The reason for this is that before a meeting can be scheduled, there must be extensive discussions within the organization. However, once consensus has been reached, the Japanese then want to move quickly. Hall calls this "slow, slow; fast, fast"[75]

The other major component of Hall's work which I believe falls within Hofstede's Collectivist/Individualist dimension, is what Hall calls *high- and low-contexts*. He notes that

> "Japanese, Arab, and Mediterranean peoples who have extensive information networks among family, friends, colleagues, and clients, and who are involved in close personal relationships, are "high context". As a result, for most normal transactions in daily life they do not require, nor do they expect, much in-depth background information. This is because it is their nature to keep themselves informed about everything having to do with the people who are important in their lives."[76]

At the other end are *low-context* (LC) people, which would include Americans, Germans, Swiss, Scandinavians, and other northern Europeans.[77] Low-context people have information networks but they are limited in scope and development. Hall notes that low-context people "feel the need to be contexted any time they are asked to do something or to make a decision. This need for detailed background information stems from the fact that [their] approach to life is quite segmented and focuses on discrete, compartmentalized bits of information."[78] As a result, they

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everything was proceeding. Her response to what was traditional Turkish behaviour had become totally westernized. I truly believe she would not have had this response if she was not always so short of time.

[73]Hall & Hall (1987) at 25

[74]Hall (1959) at 26

[75]Hall & Hall (1987) at 81

[76]Hall & Hall (1987) at 8

[77]Hall & Hall (1987) at 8

[78]Hall & Hall (1987) at 9

need "to know what is going to be in that compartment before they commit themselves."[79] This difference in approach can be very frustrating for both parties. Hall notes that

> "[high-context (HC)] people are apt to become impatient and irritated when LC people insist on giving them information they don't need. Conversely, low-context people are at a loss when high-context people do not provide *enough* information. One of the great communication challenges in life is to find the appropriate level of contexting which is customary both at home and abroad. Too much information frequently leads people to feel they are being talked down to; too little information can mystify them or make them feel left out."[80]

Hall notes that the French have never been easy for the northern Europeans, the Americans or the English to understand. He believes the reason for this may be that "French culture is a mixture, a melange, of high- and low-context institutions and situations. It is not always possible for the foreigner to predict in what proportions they will be found or in what order they occur."[81]

A comparison of the Japanese and American criminal trial systems exemplifies the difference between *high- and low-context* justice. As Hall notes, the Japanese trial has a completely different purpose.

> "Because of the inclusiveness of HC systems, it eschews the protagonist-antagonist conflict which characterizes the American court. Very high-context systems, by definition, take much more into account, and this has the effect of putting the accused, the court, the public, and those who are the injured parties on the same side, where ideally, they can work together to settle things. The purpose of the trial is to provide a setting where the powers of government can act as a backdrop for a performance, where the consequences and the impact of the crime are played out before the accused. It also provides an opportunity for the accused to be properly and publicly repentant for disrupting the orderly processes of life, for releasing the evil of disorder by failing to observe the regulative norms expected of decent human beings. In a word, the function of the trial is to place the crime in context and present it in such a way that the criminal must see and understand the consequences of his act. It is crucial that the culprit exhibit a high degree of contrition."[82]

This difference in the notion of *justice* is also highlighted by Alan Fox in his discussion of what the correct word for *justice* is in Chinese. Westerners would accept the notion that "justice is fairness", however Fox argues that there is "no exact parallel in the Chinese tradition." He says instead, "we see...an emphasis on the regulation of harmonious processes within the body of society. This can be seen in the use of the Chinese word *zhi* to refer both to governing and to

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[79]Hall & Hall (1987) at 9

[80]Hall & Hall (1987) at 10 - 11

[81]Hall (1976) at 94

[82]Hall (1976) at 96 - 97; it is interesting to note that in B.C. our Attorney-General has introduced a programme similar to this into the juvenile justice system to try to improve a system which clearly does not work.

healing."[83]

Another creation of western culture that is tied to *low-context* situations and institutions (and in particular to our legal system) is logic. Hall notes that experience has taught him not to trust logic, as he has worked with cultures that do not find logic to be an effective, convincing or acceptable way of arriving at a decision.[84] He argues that "Western philosophies and beliefs are...taken for reality when all they are is an idea or explanation"[85] just as "[t]he ideas and concepts of the Chinese philosopher Confucius mean one thing to the Chinese, [and] something else to Westerners."[86]

Dr. Rosalie Tung, from the School of Business Administration at the University of Wisconsin at Milwaukee, discovered this as well in her study on "Business Negotiations with the Koreans: a Cross-Cultural Perspective". She noted that

> "[v]irtually all American partners who were interviewed perceived that Koreans were illogical in the decision-making process. The Americans felt that the Koreans tended to focus on trivial or emotional matters rather than on issues that were the subject of negotiation. The Korean partners on the other hand felt that Western logic or reasoning may not be the only way of trying to persuade or convince your partners to pursue a certain course of action. According to S.H. Jang (a consultant in Korea), it is important to understand *kibun*, which translates as "the personal feeling, attitude, mood, the mental state which is an extremely important factor in ego fulfillment"."[87]

I became aware of this difference concerning *logic* when I was teaching in Turkey. I took it for granted that my students, Turkish lawyers, would understand what I meant when I said "What is the logical solution?" One of the exercises in my Legal English course deals with the problems that can arise from vague drafting. It consists of a municipal by-law with three parts,

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[83]Alan Fox, "The Aesthetics of Justice: Harmony and Order in Chinese Thought", in 19 *Legal Studies Forum* 43 (1995) at 43; see also Richard Steers at http://hoshi.cic.sfu.ca/forum/steers.html on the Internet for a summary of his presentation "Culture and Communication Patterns in Korean Firms" where he notes "when an individual in the West perceives that he has been injured, he will aim for fair resolution of the problem even though it may be at the expense of harmony. In several East Asian countries the opposite often occurs where the individual will subvert his own interests for the good of the society."

[84]Hall (1976) at 187 - 188

[85]Hall (1976) at 188

[86]Hall (1976) at 188

[87]Presented at the Pacific Region Forum on Business and Management Communication at the David See-Chai Lam Centre for International Communication on October 26, 1990 and reported on the Internet at http://hoshi.cic.sfu.ca/forum/tung.html

each of which can be interpreted in two different ways. The class was divided in two, with one group representing the municipal officers who were enforcing the by-law and the other group representing a lawyers association which wanted to make use of the by-law. Each group received, along with some other information, instructions on how it was to interpret the by-law, but it was not aware of the content of the instructions given to the other group. The goal of the exercise was to try to come to a resolution of the problem. But no class was ever able to do so. They just hammered back and forth at each other with their respective positions, even though the problem was set up in such a way that it was possible to *logically* work out a solution. I learned early that for every new class I needed to preface the exercise with two qualifiers: they could not take the matter to court,[88] and no bribes could be paid (both solutions having been proffered instantly in the first few classes). Only one student made the logical arguments that I was expecting. When I tried to prompt the others with my question "What is the logical solution?", no one was able to respond. In only one class did a very bright young man suggest that maybe our logic is different from Turkish logic.[89]

The final component of Hall's work which is relevant for my purposes is what he terms *action chains*. An action chain is an established sequence of events in which usually two or more individuals are involved.[90] Action chains can be simple (such as the series of verbal exchanges on meeting someone for the first time) or they can be complex (such as defusing an emotionally charged controversy between two parties). Hall believes that all social action involves some sort of action chain. For P-time people (who are generally HC), completion of a job is not as important as being courteous, kind, and sociable, so their action chains are built around human relations. It is not too difficult to imagine that the possibility for misunderstanding is great when an M-time person and a P-time person are engaged in an action chain, as not only will each view the process from different angles and have different objectives, but they will each have different priorities.[91]

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[88]I note that this is a similar response that the French students gave to the exercise conducted by Hofstede's colleague - it is also interesting to note that the Turkish education system was modeled on the French

[89]I have given this exercise to a friend of mine who teaches in a legal-assistant programme here in Vancouver. She advises me that her "western" students love the exercise but she has noticed that her immigrant students of Asian background don't enjoy it in the same way.

[90]Hall (1976) at 124

[91]Hall (1976) at 132

IV. THE LINGUISTIC PERSPECTIVE

The final approach I will be looking at in this chapter is that of linguists Ron Scollon and Suzanne Wong Scollon. I believe that their work gives greater dimension to the work of Hofstede and Hall and it does so in a direction that is beneficial for my purposes. The Scollons believe that the "major sources of miscommunication in intercultural contexts lie in differences in patterns of discourse."[92] They note that

> "...the discourses of our cultural groups, our corporate cultures, our professional specializations, or our gender or generational groups make it more difficult for us to interpret those who are members of different groups."[93]

This is because each of these groups has its own *discourse system*. And each discourse system has its own principles for organizing its presentations. As a result of this use of different discourse principles, Asians are often described as "inscrutable" and Westerners as "frank and rude". The following is an example of this different use,

> "...the Asian speaker uses a "topic-comment" order of presentation in which the main point (or comment) is deferred until a sufficient backgrounding of the topic has been done. ... On the other hand, a western speaker of English tends to expect a discourse strategy of opening the discussion with the introduction of the speaker's main point so that other speakers may react to it and so that he or she can develop arguments in support as they are needed. ... This difference in discourse pattern leads the westerner to focus on the opening stages of the discourse as the most crucial while the Asian speaker will tend to look for the crucial points to occur somewhat later."[94]

The Scollons point out that another major problem is the fact that languange is inherently ambiguous. We are only able to understand what someone else is saying to us by drawing inferences based on our general knowledge of the world.[95] The inferences we draw, of course, will be based on our concept of the normal, day-to-day world in which we live and which we take for granted. Where the problem necessarily arises in cross-cultural communication, is when the parties are drawing on their own concept of what a *normal, day-to-day world* consists of and, as these will often be very different, it will be difficult for each of them to draw the correct inference as to what the other person means.[96] This simple dialogue illustrates the point,

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[92]Scollon & Scollon (1995) at xii

[93]Scollon & Scollon (1995) at xi

[94]Scollon & Scollon (1995) at 1 - 2

[95]For example, to be able to understand the difference between the two sentences - There's a man at the door. and, There's a taxi at the door. - we must call on our general knowledge about men and taxis and how they wait "at" doors in order to understand the difference between these two sentences; Scollon & Scollon (1995) at 7

[96]Scollon & Scollon (1995) at 10 - 12

MS. ANDERSON:	Hassan was looking at your paper.
ABDULLAH:	He was?
MS. ANDERSON:	Yes. He copied some of your answers.
ABDULLAH:	Perhaps he didn't know the answers.
MS. ANDERSON:	I'm sure he didn't.
ABDULLAH:	Then it's lucky he was sitting next to me.

For us, Abdullah's final remark is confusing. This is because we would see this action as cheating. Abdullah, however, sees it as helping a friend. For Abdullah, no purpose is served by keeping information to himself when he can help someone else by sharing it, especially if this will save his friend from the embarrasment of doing poorly on the test. As well, if the situation were reversed, he would expect Hassan to do the same for him.[97] This short dialogue illustrates very well the different inferences drawn in collectivist and individualist societies.

This second dialogue illustrates another very common problem,

MS. YOUNG:	We will charge you $5 per unit if you order $10,000 units.
MR. KAWABATA:	That's a good price, Ms. Young.
MS. YOUNG:	So you accept that price?
MR. KAWABATA:	It's very good.
MS. YOUNG:	Great! Let's talk about a delivery schedule then.

What Ms. Young does not realize but which every Japanese would see automatically, is that Mr. Kawabata is saying no. In many Asian societies, people do not like to say no because to even imply displeasure or disappointment risks humiliating the other party, which must be avoided.[98]

To expand further on the example given earlier concerning the use of different discourse principles, the Scollons note that Asians often use an inductive (topic-delayed) pattern whereas

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[97]Craig Storti, *Cross-Cultural Dialogues, 74 Brief Encounters with Cultural Difference*, Yarmouth, Maine: Intercultural Press, Inc. (1994) at 15 and 26; I experienced a similar situation in Turkey - I had scheduled my various classes to write the final exam during their regularly scheduled class times, but after requests from a number of the students (Turkish lawyers), I changed this so that they would all write at the same time. The reason for this was that those who wrote first would tell those who wrote later what the questions were. When I said that they were only hurting themselves if they did so, the response was that they would have no choice, but that they would be obliged to tell the other students, even though they didn't want to, as it would be expected of them.

[98]Storti (1994) at 90 and 106; I found a similar situation in Turkey - the way I termed it is that people will tell you what they think you want to hear. One of the things I learned from this is to never ask anyone for directions, because they will never say they don't know but will point you in any direction and often the wrong direction.

Westerners more often use a deductive (topic-first) pattern. They stress that "there is nothing inherently Asian or Western in either of these patterns, since, as far as we know, both patterns are used in all societies."[99] But in trying to answer the question as to why Asians prefer an inductive pattern for the introduction of topics and why Westerners prefer a deductive one, the Scollons found themselves looking more closely at the collectivist/individualist dimension. Hall puts this *indirection* (as he calls it) on the part of Asians, down to their societies being high-context. The Scollons do note the difference between *inside* and *outside* interactions, but they have found as well, that in interpersonal relationships, there is a strong carry-over from Confucianism. They state that

> "[g]enerally speaking, Asians feel that such relationships as those within the family or between people who have frequent and longstanding relations with each other should be governed by careful propriety. That careful propriety in inside relationships includes careful concern for face relationships among participants in speech events."[100]

They go on to note that

> "...it is certainly accurate to say that hierarchy in relationships is much more consciously observed than it is in the west. The carry-over from Confucianism means that even today, most Asians are quite conscious in any interaction who is older and who is younger, who has a higher level of education, who has a lower level, who is in a higher institutional or economic position and who is lower, or who is teacher and who is student."[101]

In their discussions with Asians concerning the difference with Westerners in topic introduction, the Scollons realized that the crucial issue is not who speaks first but rather who is in the higher position, because in the Asian discourse system it is the person in the higher position who has the right to introduce the topic and this right supersedes the matter of who speaks first.[102] They point out that the ancient Confucian code *Li Ji* or *Li Chi*, the *Book of Rites*,

> "lays down quite a clear set of appropriate behaviours in interpersonal communication, which corresponds quite closely with Asian communicative practice in the twentieth century [but] our evidence is that Asians are not conscious, on the whole, of these ancient rules of etiquette."[103]

The Scollons go on to state that it is unusual for the person in the lower position to introduce his or her own topic without having first received permission from the person in the higher position.

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[99]Scollon & Scollon (1995) at 75

[100]Scollon & Scollon (1995) at 81

[101]Scollon & Scollon (1995) at 81

[102]Scollon & Scollon (1995) at 81

[103]Scollon & Scollon (1995) at 82

"While the *Li Ji* does not use the term, it seems clear that this is a description of the inductive pattern for the introduction of topics in a discourse."[104] As a result, the difference lies not in the introduction of topics but rather in the structuring of situations. This cultural structuring can take a number of different forms. In a *symmetrical deference politeness* form, all speakers will avoid the direct introduction of their own topics. (This is the form preferred by Asian businessmen at an initial business meeting.) In a *symmetrical solidarity* form, all participants assume that they are members of the same social or discourse group and, as such, feel free to introduce their own topics. (This is the form the American businessman expects.) In the final form, an *assymetrical (ie. hierarchical) politeness* form, if there is confusion on the part of the participants as to whether there will be mutual deference shown or deference for a higher position, there may be problems concerning the introduction of the topic. This can result in the appearance of one party asserting his or her power or attempting to take control inappropriately.[105] The Scollons note that this mismatch of strategies is not only a major cause of miscommunication, but "it can also be the source of bitterness and other negative attitudes when participants fail to come to agreement."[106]

Ancient Confucian texts continue today to have a strong influence in East Asian countries in a variety of different ways. These include the learning of classical Chinese writing and ethical philosophy, as well as kinship relationships. Two aspects of kinship which relate to the topic under discussion are *hierarchy* and *collectivism*. The discussion above shows the consequences of hierarchy on cross-cultural communication.[107] The emphasis on collectivism results in discourse in which individuals do not act independently but rather as part of a hierarchical relationship.[108] The problem this can present has become well recognized now among Westerners, as western negotiators generally have the authority to make decisions on the spot, whereas Asian negotiators are often restricted to the giving and taking of information.[109]

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[104]Scollon & Scollon (1995) at 82

[105]Scollon & Scollon (1995) at 85 - 87

[106]Scollon & Scollon (1995) at 87

[107]Scollon & Scollon (1995) at 125 - 130

[108]Scollon & Scollon (1995) at 131

[109]In 1989, when I was practising law, I was acting for a Hong Kong company that was wanting to purchase one-half of a city block in downtown Vancouver. The representative they sent was a young, recent university graduate and this was his first assignment. In meetings with the solicitors for the vendor, I was looking to this young man for instructions but he was

Another way in which collectivism affects discourse relates to *ingroups* and *outgroups*. The Scollons note that

> "...in a collectivist society, many relationships are established from one's birth into a particular family in a particular segment of society in a particular place. These memberships in particular groups tend to take on a permanent, ingroup character along with special forms of discourse which carefully preserve the boundaries between those who are inside members of the group and all others who are not members of the group. ...[M]embers of an ingroup feel that it is a kind of ingroup betrayal to use ingroup forms of language to non-members."[110]

It is easy to see that if the party on the other side of the communication is not aware of this difference, once again, there can be a misunderstanding, resulting in negative consequences.

Another aspect of culture that the Scollons see as playing a major role in intercultural communication, is the question of how a particular culture conceives the function of language.[111] They note that "Chinese in its many forms is a major aspect...of the definition of Chinese culture."[112] They have found that cultures are "different from each other in how much importance they give to one function of language over [another]."[113] For example, the Japanese "place a very high value on the communication of subtle aspects of feeling and relationship and a much lower value on the communication of information."[114] The Scollons note that the Japanese have a tradition of communication without language, which they call *isshin denshin,* and which

> "...has been strongly influenced by Zen Buddhism. This influence originated in China in the early Tang Period (AD 618-907) and has had a major impact on Chinese, Korean, and Japanese cultures, even in the modern period. In this tradition of thinking about communication, it is believed that the most important things cannot be communicated in language, that language is only useful for somewhat secondary or trivial messages. ...[W]e do know that throughout Asia, members of Chinese, Japanese, and Korean cultures have been strongly influenced in their thinking about language by such traditions. As a result, one might expect the average Asian to be somewhat more skeptical about the value of direct, informational communication, and to place a higher value on thinking deeply about a subject."[115]

The oft noted difference in the initial stages of business negotiations between Westerners and

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completely frozen with fear as he had no idea what to do. Needless to say, it was a difficult experience for both of us.

[110]Scollon & Scollon (1995) at 134 - 135

[111]Scollon & Scollon (1995) at 137 - 138

[112]Scollon & Scollon (1995) at 137

[113]Scollon & Scollon (1995) at 138

[114]Scollon & Scollon (1995) at 138

[115]Scollon & Scollon (1995) at 139

Asians illustrates this point. The Westerner likes to get right down to business on initial meeting because he or she believes that the best way to exchange information is by speaking directly. The Asian, however, likes to initially set up a series of social events so that the parties can "more directly approach each other and begin to feel more subtle aspects of their relationship."[116] What the Westerner is unaware of is just how much these social events are another form of business communication.

Another way in which the different notions about the function of language impacts on cross-cultural communication is in the "extent to which relationships are thought to be freely negotiated...or given by society in a fixed form".[117] The Scollons see a major difference in the way human relationships are understood in Asia (and other traditional societies) and the way they are understood in contemporary Western society. In Asian cultures, human relationships are thought of as being largely vertical, between preceding and following generations. In this way, most relationships are understood to be given by society, not negotiated. One's personal identity is given by the situations into which one is born. In contemporary Western society, relationships are made between people who freely choose to enter into them. Within the Asian or traditional societies, language is

> "...thought of as being used for the purposes of ratifying or affirming relationships which have already been given. On the other hand, in the contemporary western concept of relationships, language is seen as a major aspect of the ongoing negotiation of the relationship."[118]

As we have seen, the difference between group harmony and individual welfare is a major difference in the collectivism/individualism dimension. The Scollons note that one major difference between Ancient Chinese and Ancient Greek rhetoric was on this dimension.

> "Ancient Chinese rhetoric emphasized the means by which one could phrase one's position without causing any feeling of disruption or disharmony. Ancient Greek rhetoric, on the other hand, emphasized the means of winning one's point through skillful argument, short of, Aristotle says, the use of torture."[119]

The Scollons conclude that this additional difference in assumptions about the function of

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[116]Scollon & Scollon (1995) at 140

[117]Scollon & Scollon (1995) at 140

[118]Scollon & Scollon (1995) at 141

[119]Scollon & Scollon (1995) at 142

language will affect cross-cultural discourse between Asians and Westerners in the following way,

> "[w]e know that Asians will tend to state their positions somewhat less extremely if they feel that not to do so would disrupt the harmony of the negotiations. We also know that Westerners will tend to assume that each party has only in mind achieving their own best advantage in negotiations, and that they will do so, even if it should cause a feeling of disharmony. This difference in assumptions about what is actually going on can easily lead to more complex misinterpretations in the discourse."[120]

The foregoing discussion clearly illustrates not only the extremely subtle influence of cultural factors in discourse, but also the on-going influence of historical factors of which we are not even aware. Which leads me to now look at the historical factors behind Western discourse systems. I mentioned earlier in my discussion of Hall's work that different aspects of our western way of life are a result of the industrial revolution. The Scollons have developed this in more detail and look at how our forms of discourse have grown out of the Enlightment and, as a result, how the ideological tenets of that time continue to influence us today. They argue that it was Adam Smith's (1723-1790) *An Inquiry into the Nature and Causes of the Wealth of Nations*, that laid the foundation for the modern concept of capitalist economic exchange. Combined with this was Montesquieu's (1689-1755) *The Spirit of Laws*, which developed the concept of government by laws, out of which the American Declaration of Independence, Articles of Confederation, and Constitution were founded. They go on to argue that Immanuel Kant (1724-1804), in his essay "The Science of Right", laid down the principles upon which the idea of intellectual property rights (specifically, copyright) were established. And it was John Locke (1632-1704) who extended studies of the physical universe to include human beings as physical entities.[121] The Scollons note that

> "[t]his concept of the human being was a radical departure from the concept of the person upheld until that time in Europe, and, indeed, throughout most of the world. Before this, and elsewhere, humans have been thought of as deeply connected participants in a larger social and spiritual structure of society. The new Enlightenment concept of the human was to isolate each person as a completely independent, rational, autonomous entity.... Locke, Smith, Montesquieu, Kant and the other Enlightenment thinkers reduced humans and human life to the same simple principles: isolated entities and social laws."[122]

Jeremy Bentham (1784-1832), in trying to find "an ethical principle to replace the idea that good

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[120]Scollon & Scollon (1995) at 142

[121]Scollon & Scollon (1995) at 100

[122]Scollon & Scollon (1995) at 100 - 101

was defined by the authority of God or the Christian Church",[123] coined the term *Utilitarianism*. The Scollons summarize the main ideological tenets of the Utilitarian movement, which grew out of the Enlightenment, as follows:

1. "Good" is defined as what will give the greatest happiness for the greatest number.
2. Progress (toward greater happiness, wealth, and individuality) is the goal of society.
3. The free and equal individual is the basis of society.
4. Humans are defined as rational, economic entities.
5. Technology and invention are the sources of societal wealth.
6. Creative, inventive (wealth-producing) individuals are the most valuable for society.
7. Quantitative measures such as statistics are the best means of determining values.[124]

Our government-controlled public schooling grew out of this period along with an exaggerated value being given to formal learning, accompanied by a powerful devaluation of non-formal types of learning.[125] And, of course, what was taught in these schools was the ideological system of the Utilitarians. The Scollons argue that

> "[t]he seven principles...could easily be taken as the governing principles of schools throughout the European-based societies of the world. The emphasis in these schools is on the inventive and creative development of individuals who are seen to be in competition with each other. The goal is for them to become "productive members of society". There is an ever increasing emphasis on experimentation, rationalism, and technology. And evaluation is primarily based upon numbers (grades or marks)."[126]

The Scollons go on to outline the six main characteristics of the forms of discourse preferred within the Utilitarian discourse system:

1. anti-rhetorical
2. positivist-empirical
3. deductive
4. individualistic
5. egalitarian
6. public (institutionally sanctioned)[127]

What is meant by *anti-rhetorical* is that the "discourse forms should appear to give nothing but information,...they should appear to be making no attempt to influence the listener or the reader

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[123]Scollon & Scollon (1995) at 102

[124]Scollon & Scollon (1995) at 104

[125]Scollon & Scollon (1995) at 105

[126]Scollon & Scollon (1995) at 105

[127]Scollon & Scollon (1995) at 107

except through his or her exercise of rational judgement".[128] *Positivist-empirical* refers to the belief that scientific thinking is the best model for all human thinking. "It was believed that all reality was simply the interaction of the physical universe and universal laws of logic. It was assumed that the role of discourse was to simply state these observations and these results as clearly and directly as possible."[129] The Scollons explain the *deductive* form of discourse as resulting from the anti-authoritarianism and anti-rhetorical position of Utilitarianism. Since the relationships of the members of the discourse system are down-played, "the text of the discourse itself comes to have primary authority".[130] The *individualistic* form of discourse stresses that the sovereignty of the individual should be demonstrated. This is accomplished in two ways: the individual can say whatever he or she wants; and, what the individual says must be original. Prior to this, plagiarism was rampant, there was no author's copyright, and there was no property in ideas.[131] The notion of *egalitarian* discourse comes out of the ideological position that individuals are the basis of society. This notion however applies *only* to those individuals who are *members* of the Utilitarian discourse system.[132] The final characteristic of the Utilitarian discourse system refers to the fact that not all speech is *free* but rather only that which is institutionally authorized.[133]

This Utilitarian discourse system has come to be the central and dominating discourse system throughout the western world.[134] It is evidenced throughout "most western governments, virtually all western and international corporations, schools, private manufacturing and service businesses, [and] professional associations".[135] The Scollons believe that

> "[s]ince international business and government circles have generally taken the political and economic philosophies of the Enlightenment as self-evident, they have also taken this discourse system as self-evident."[136]

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[128]Scollon & Scollon (1995) at 108

[129]Scollon & Scollon (1995) at 109; it is interesting to note that the format that this Masters thesis must take follows the format discussed here.

[130]Scollon & Scollon (1995) at 109

[131]Scollon & Scollon (1995) at 110

[132]Scollon & Scollon (1995) at 110

[133]Scollon & Scollon (1995) at 111

[134]Scollon & Scollon (1995) at 114

[135]Scollon & Scollon (1995) at 115

[136]Scollon & Scollon (1995) at 118

The problem with this position, of course, is that it is not the only discourse system in existence. As a result, communications which are framed within a different discourse system are seen as "faulty or inefficient".[137] The Scollons go on to argue that "members of the Utilitarian discourse system are judged to be "progressive", "democratic", "free" and "developed", and non-members are judged to lack these assumed qualities."[138] The Scollons support their position by pointing to the 1948 Universal Declaration of Human Rights where the ideology of the Utilitarian discourse system "has been taken for granted as the natural and rightful state of human life on earth, though it includes many aspects which had never or rarely been observed in human culture before the seventeenth century, except by the aristocracy".[139]

One final point the Scollons make, which I believe not only underlies everything said so far but also impacts on our notions of dispute resolution, lies in the different ways in which cultures view the nature of the human person. Confucian ideology holds the view that human nature is basically good. In contrast to this, Christian ideology holds that humans are basically evil or sinful.[140] It is not difficult to see how this has been extrapolated into aspects of our culture, and in particular, into our criminal justice system.

V. CONCLUSION

It is clear from looking at the work of Hofstede, Hall and the Scollons, that the extensive cultural differences that exist between nations cannot help but have an impact on any form of cross-cultural interaction. Some of the areas of concern to me in this thesis are the impact these differences have on business negotiations, the formation and content of commercial contracts, and the objectives and management of the many international joint ventures which are entered into pursuant to these negotiations and contracts. I will be exploring these particular matters in more detail in Chapter 4, but first I will look at how these cultural differences impact on the various

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[137]Scollon & Scollon (1995) at 118

[138]Scollon & Scollon (1995) at 117

[139]Scollon & Scollon (1995) at 117; I would argue that in the public international law area, even though many of the international Conventions and Treaties may be driven by the western world and ratified by non-western countries, this does not mean that these non-western countries are accepting what is written. I would argue that the lack of compliance with a great many of these Conventions and Treaties testifies to the acceptance being not much more than bowing to pressure in an international forum.

[140]Scollon & Scollon (1995) at 152

legal systems of nations.

CHAPTER TWO - THE BARRIERS POSED BY LAW

I. INTRODUCTION

We have just seen in Chapter 1 how the bulk of our thought processes or mental programming (to use Hofstede's term) are formed by and shared with the society into which we are born and, as such, are completely interwoven with all aspects of this society, be it in family relationships, the educational system, the form of government, the language and methods of discourse, or the legal system. In this chapter I wish to look more closely at some of these legal systems. Quite clearly there are at least as many legal systems as there are countries, however I have chosen to follow a fairly standard process used by legal comparativists, namely the grouping of the various legal systems into legal families. Mary Ann Glendon, Michael W. Gordon and Christopher Osakwe note that

> "[c]omparativists believe that the grouping of legal systems into legal traditions or families is possible because within every national legal system there are certain constants as well as certain variables. In grouping law into legal traditions comparativists look for the constants Those legal systems that have the same recurrent constants fall into the same legal tradition. There is no unanimity among comparativists as to what denominators should be used in grouping legal systems into traditions of law. Among the criteria that are often used for this purpose, however, are the following: historical background and development of the legal system, theories and hierarchy of sources of law, the working methodology of jurists within the legal system, the characteristic legal concepts employed by that system, the legal institutions of that system, and the divisions of law employed within that system."[1]

The four major groupings I will be using are Western, Eastern, Traditional, and Religious.[2] These groupings or families are of course subject to subgroupings. Briefly, the Western family is divided into civil law and common law; Eastern is divided mainly into Chinese and Japanese; and for Religious, brief mention will be made of Hindu and Jewish law but the emphasis is on Islamic law.[3] Traditional would include mainly Black African law, however as it has minimal influence today in international commercial transactions, I will not be dealing with it within the

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[1]Mary Ann Glendon, Michael W. Gordon, Christopher Osakwe, *Comparative Legal Traditions*, St. Paul: West Publishing Co. (1982) at 4

[2]Although there is some dispute about this grouping, I have chosen to use it as I believe it to be the best structure for my purposes; for a discussion of alternative forms of grouping see the Introduction and Chapters One and Two of *Legal Systems and Social Systems*, Adam Podgorecki, Christopher J. Whelan & Dinesh Khosla (eds), London: Croom Helm (1985).

[3]Ahmed Aoued argues that Islamic law should be seen as a separate legal family rather than being included as part of the religious family. He notes that David & Brierley (1985) call it one of the greatest legal systems in the modern world and that it is completely original when compared to other legal systems; see Ahmed Aoued, "Algeria: Reconciling Faith and Modernity" in *Studies in Legal Systems: Mixed and Mixing*, Esin Orucu, Elspeth Attwooll & Sean Coyle (eds), The Hague: Kluwer Law International (1996) at 193

scope of this thesis.

In choosing these particular groupings or families, I hope to build on a number of the cultural differences we saw in Chapter 1, in particular, the differences between east and west. But in addition to this, a point I want to highlight in this chapter is that even though many countries have adopted western-style laws in their need and desire to *modernize*, their historical and cultural differences continue to play a significant role in how they understand these new laws and how they adapt them to fit within their own cultural context. As Mary Ann Glendon, et al, note "[l]aw is a form of cultural expression and is not readily transplantable from one culture to another without going through some process of indigenization."[4] In this regard, John Henry Merryman points out that

> "[i]n a substantial number of...nations the paper legal system will look much like that of France or Spain or Italy, or of England or the United States. But if one looks at the actual role of law in the lives of important elements of the population - the *penetration* of the legal system - the resemblance is only superficial. Thus along two dimensions, the aspects of social life that the law proposes to affect and the extent to which it actually does so, the scale of divergence of legal extension and legal penetration between societies can be, and often is, substantial."[5]

And Esin Orucu tells us,

> "...it is not the borrowing of the rules and provisions, even the principles and standards of another legal system that is crucial. What is crucial is the borrowing of a mode of thought and the handling of the law, its structure and sources."[6]

It is clear when we look at the law in China and in Japan and Islamic law that this difference in the *mode of thought* plays a significant role. For this reason I believe it is necessary for us to look at the historical background of these legal systems as it is this background which helps us to understand more clearly these different *modes of thought.* And understanding these is crucial, I believe, for any lawyer who wants to practice in the field of international commercial law.

But this difference in *mode of thought* is not restricted to the differences between east and west, as we will see that there is also a difference in thinking between the civil and common law systems even though these are both in the Western family of law. The differences between these

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[4]Mary Ann Glendon, et al (1982) at 10

[5]John H.Barton, James Lowell Gibbs Jr., Victor Hao Li, John Henry Merryman, *Law in Radically Different Cultures*, St. Paul, Minn.:West Publishing Company (1983) at 2

[6]Esin Orucu, "Mixed and Mixing Systems: A Conceptual Search" in Esin Orucu, et al (eds) (1996) at 338

systems are significant not only for the members of the countries where these systems have originated, or where they were introduced through colonization, but also for the overall international picture. This is because most countries which have voluntarily adopted western-style laws have chosen to follow a civil law system due to the ease provided by the codification found in such systems. However, a large number of the international commercial contracts in use today are prepared by international law firms emanating from the United States, Canada, England, and Australia - all countries with common law systems. Even if these law firms, or other English-speaking common law lawyers, are not preparing the contracts, often legal precedents written in English are being used by non-native English speaking lawyers in the drafting of their international commercial agreements or any other agreement that needs to be drafted in English.[7] The problem with this, as will be seen in Chapters 3 and 4, is that much of the language and many of the legal concepts found in these contracts are tied directly to the common law system.[8] For this reason I believe it is important not only for civil and common law lawyers but also lawyers from countries which have transplanted western laws to be more aware of the similarities and differences between these systems. As we will see when looking at the civil law portion of this chapter, differences exist as well between the various civil law countries (most noticeably between France and Germany). Such differences will also impact on those countries which have transplanted French, German, Swiss, Dutch or other European laws into the laws of their own countries.[9] As discussed in Chapter 1, until we are made aware of the many subtle differences between ourselves and others we often wrongly assume that they think

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[7]One of my students in Turkey told me of a Turkish law firm charging another Turkish law firm US$5,000 for a precedent for a joint venture agreement written in English. Also, while in Turkey, I reviewed the terms of a contract for a friend. He advised me that it had been prepared by what was considered the top Turkish law firm in Istanbul. It was clear that it had been drafted following a common law precedent and it was also clear that the drafter was not an English-speaking common law lawyer as some of the terminology being used was an attempt to copy legal English however it was used incorrectly. I admit that it was probably the best legal drafting I had seen by a non-common law lawyer who was a non-native speaker of English, however the lack of understanding of some of the terminology was evident.

[8]In this regard I note an upcoming International Bar Association Conference "International Financial Law" in Barcelona on June 10-12, 1998. The last session of the conference is entitled "English legalese in non-English contracts". The advertisement for the conference notes "[e]very day thousands of lawyers in non-English speaking countries draft contracts in English, to be used by English speakers and vice versa. This session focuses on the question of whether the English legalese used in these contracts means the same to both English and non-English speakers."

[9]These differences may also impact on any dealings with someone from a common law country who may make assumptions about one civil law system based on knowledge of a different civil law system.

the same way we do and that they understand what we are saying in the same way that we do.[10]

I believe as well that by developing some knowledge of those legal systems which are very different from our own it will ultimately help us to look more closely and more critically at our own system to see how it fits into the global perspective. As Duncan Derrett notes,

> "[t]here is little point in exploring the minutiae of one's own system if one has hardly grasped that it is itself only one of a group of intensely developed attempts to effectuate justice amongst human beings. It is only one method, agreeing perhaps with others in many places (as one would expect), yet disagreeing in many ways, ways of varying significance and importance - some apparently fundamental."[11]

It may be argued that the classification system I am using here is far too simplistic in today's world where so many jurisdictions have a complex mixture of legal traditions.[12] However, as stated by Esin Orucu, "complicated classifications create confusion and are not particularly helpful, and defeat the purpose, since classifications are made for the purpose of simplification."[13] As well, I agree with Duncan Derrett's position that "[a]n awareness of the broad features of the competing systems is obviously desirable."[14]

Any discussion of legal systems must invariably begin with a discussion of what is meant by *law*. This may seem like a simple exercise but, in fact, there are a variety of answers to this question, and as noted by Rene David, these "have merely served to keep alive a seemingly endless

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[10]The lawyers and legal scholars who prepared the UNIDROIT *Principles of International Commercial Contracts* can attest to this - Professor Marcel Fontaine, who was involved in the preparation of the Performance portion, noted "[i]t soon became clear that the contents of a chapter on 'performance of contracts' were perceived in quite different ways by common lawyers on one hand and civil and socialist lawyers on the other. ... The problems are not so much with the choice of the best technical solutions, but often mainly with the need to overcome barriers of understanding between the different legal systems. It has been difficult, and the outcome may not be completely satisfactory." - see XL *The American Journal of Comparative Law* 645 (1992) at 645 and 656.

[11]See the Preface by Duncan Derrett in *An Introduction to Legal Systems*, J. Duncan M. Derrett (ed), New York: Frederick A. Praeger Publishers (1968)at xv; Stanley Lubman, writing in 1991, noted that, with respect to the study of Chinese law, he has found "[f]oreign observers create additional difficulties by not being self-conscious enough about their own theoretical assumptions. Both extreme cultural relativism and insistence on intellectual categories derived from Western legal systems have threatened to skew study, with the latter trend more evident in recent years." (see "Studying Contemporary Chinese Law: Limits, Possibilities and Strategy", 39 *The American Journal of Comparative Law* 293 (Spring 1991) at 294)

[12]See Esin Orucu, et al (eds) (1996) for discussions of such mixed systems as Quebec, Scotland, Sri Lanka, Turkey, Hong Kong, Israel, South Africa, Algeria, Mauritius, Malta, and Japan, among others.

[13]See Esin Orucu in Esin Orucu, et al (eds) (1996) at 335.

[14]Derrett (ed) (1968) at xiv

dispute".[15] I do not propose to enter into this dispute but rather will deal with this question within each of the various groupings or families of law that I will be discussing. The reason for taking this approach is because of the completely different attitude toward *law* shown by different societies. We in the western world have grown up with the concept of the *rule of law*,[16] even if we do not know it as such. For us, laws are essential in order to keep our society well-organized and functioning in a productive manner. This concept would hold true as well for those countries governed by Islamic law. The situation however is quite different in many Asian countries, where the ideal of social peace and harmony is completely separate from the notion of *law*. In these countries, stress is placed on the obligation and duty of each individual to maintain the social harmony. Resort is made to the *law* only on rare occasions and only if all else fails. As has been seen in Chapter 1, it is this idea of *obligation and duty*, as opposed to the notion of *individual rights*, which highlights a major difference between eastern and western ways of thinking.[17] But it is not only eastern countries which look to obligation and duty as the harmonizing force in the society. African law also

> "is ignorant of law as a weapon placed in the individual's hands for defending himself. African law is bound up with the idea of duty. It takes the form of a rite which must be obeyed...".[18]

Just as with the definition of *law*, I believe that in order to better understand the differences between the various legal systems it is necessary to deal with them not by way of *analytical*

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[15]*International Encyclopedia of Comparative Law*, Vol. II, Chapter 1 - "The Different Conceptions of the Law" (1975) at 3

[16]Henry W. Ehrmann in *Comparative Legal Cultures*, Englewood Cliffs, N.J.: Prentice-Hall Inc. (1976) at 48 notes that "[i]f the rule of law is a widely used term in England and the United States, its meaning is often loose and shifting. A common denominator of its various meanings...includes an injunction against governmental arbitrariness, a high-level guarantee of "reasonableness" in relations between man and state."; P.S. Atiyah in *Law and Modern Society*, Oxford University Press (1983) notes at 64 that the concept of 'the rule of law' is very hard to pin down or define even though lawyers and politicians in western societies frequently make the claim that their countries are subject to the rule of law. He goes on to state at 66-67 that "[m]ore recently, academic lawyers have suggested that the Rule of Law is a concept with an identifiable content, much of which has to do with the procedures governing the making and enforcing of the law. ...[I]t has been argued that, although wide discretionary powers are not inconsistent with the idea of the Rule of Law, it is necessary that such discretions should be exercised and guided by open and relatively stable general principles of law. Similarly it has been said that the Rule of Law requires that laws should generally be prospective (and not retrospective), that they should be open, published and reasonably intelligible to those whose conduct is to be guided by them. So also the independence of the judiciary and the accessibility of the courts may be said to be requirements of the Rule of Law. ... New laws should, in general, be made after due publicity and after the opportunity for debate and consultation; adequate discussion should be allowed during the legislative process itself, and adequate warning should be given of legal change to those most affected."

[17]As it relates to China, see in this regard "The Chinese Concept of the Individual and the Reception of Foreign Law" by Herbert H.P. Ma in 9 *Journal of Chinese Law* 207 (Fall 1995).

[18]Keba M'Baye, "The African Conception of Law" in *International Encyclopedia of Comparative Law*, Vol. II, Chapter 1, Section VII at 138; M'Baye, at 140, defines 'African law' here not to mean law of the African continent but rather the law of Black Africa, Ethiopia, the Sudan, Somaliland and Madagascar.

comparison but rather by following more of a *descriptive* approach.[19] As Stanley Lubman notes, quoting from Berman, "[s]tudents of foreign law are always "in danger of uncritically transferring to [the foreign law] the assumptions which we make about the underlying foundations of our own law"."[20] It is for this reason that my treatment of the different legal systems (including our own)[21] is fairly detailed as I believe that such is necessary in order to help us better understand and thus eliminate some of the assumptions we make so uncritically.

II. THE WESTERN FAMILY OF LAW

As noted above, the Western grouping or family includes both civil law and common law systems. The civil law tradition emanated from western Europe whereas the common law tradition began its life in England. Both of these systems have been transplanted (voluntarily and by way of colonization) to various countries and areas around the world, however, for purposes of looking at the western family of law, I will only be discussing them as they relate to the countries of the western world.

Both the civil law and the common law have an historical connection with Roman law and, as such, they have a number of similarities. Similarities also result from the fact that they are both based on *reason* and *logic*, two concepts which took hold in western Europe at the time of the Renaissance of the 12th and 13th centuries[22] and were further developed during the Enlightenment of the 18th century. As noted in Chapter 1, the idea that *progress* was the goal of society also took hold in Europe at this time. Barton, et al, note that

> "[t]he idea of *progress* receives significant expression in Western law. ... What was new about the Age of Reason was its faith in reason as an agent of progress. ... It is this confidence in progress that underlies much Western (and particularly American) legal thought: a curious mixture of belief in the inevitability of social betterment and in the special ability of lawyers to hasten and direct the process."[23]

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[19]Some comparisons will inevitably arise, particularly between sub-groups within the same family, however the basic approach is descriptive.

[20]Stanley Lubman "Studying Contemporary Chinese Law: Limits, Possibilities and Strategy", 39 *The American Journal of Comparative Law* 293 (Spring 1991) at 323

[21]Another reason for presenting the common law system in such detail is to provide an underpinning for the history of legal English which is dealt with in Chapter 3.

[22]David & Brierley (1985) at 39

[23]John H. Barton, et al (1983) at 8

As noted above, the civil and common law systems also share a common adherence to the *rule of law* which, being inspired by the same notion of *justice*, often results in substantive solutions which are very similar.

At the same time that they share many similarities, these systems, because of their very different historical development, have a number of acute differences.

A. THE CIVIL LAW SYSTEM

1. Historical Development

The civil law system was initially developed during the 13th century in the universities of western Europe. As Rene David notes,

> "[t]he medieval universities considered the law as a model of social organisation and aspired to formulate the essence of justice rather than to impart to students a mastery of legal technique. The purpose of the study of the law was not to state which solution the courts would give to a trial in fact; and subjects such as procedure and evidence were left to practitioners and administrators. Law was to tell judges how they should decide in justice. It prescribed the rules which just men must observe in their social behaviour. The law, like morality, was a *Sollen* (what ought to be done), not a *Sein* (what is done in practice). The teaching of law adopted this view, therefore, that law was linked to philosophy, theology and religion."[24]

It was a combination of Roman law and Canon law which formed the basis for this teaching of law in the universities.

Roman law had been the law of the Roman Empire which, after the 5th century, ceased to exist in Europe. However, a compilation of this law, in the form of a *Code* and *Digest,* was prepared by the Emperor Justinian between the years 529 and 534 A.D.[25] and it was this compilation which the universities seized upon. This revival of Roman law initially took place in Northern Italy (centred at the University of Bologna) in the latter part of the 11th century where the

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[24]David & Brierley (1985) at 41

[25]J.A.C Thomas, "Roman Law" in *An Introduction to Legal Systems*, Derrett (ed) (1968) at 1; Geoffrey Sawer, "The Western Conception of Law" in *International Encyclopedia of Comparative Law* Vol.II, Chapter 1, Section II at 17 puts the dates at 530-534A.D. however other writers have put it at 529-534A.D.(see Frederic W. Maitland and Francis C. Montague's *A Sketch of English Legal History* New York: G.P. Putnam's Sons (1915) at 4 for one); Glendon, et al (1982) note at 16 that the *Corpus Juris Civilis* was made up of four parts: the Institutes, the Digest, the Code and the Novels, but that it was the Code and the Digest which together were meant to be a complete and authoritative restatement of Roman law.

scholars (who became known as the Glossators) tried to reconstruct and explain the *Digest*. But because it contained so many institutions and problems that no longer existed, this process gave way in the 13th century to the methods of the Commentators (or Post-Glossators) who began adapting the Roman law to the problems of their own day. They were influenced at this time by the new notion of *rational inquiry* and began to search for the rationale and underlying principles of the Roman legal rules.[26] This, however, was only the beginning, as the study and teaching of Roman law underwent an extensive evolution with the legal scholars moving further and further away from the positions and methods of Justinian's time.

It was in the 14th and 15th centuries when Canon law became a major influence in the study of Roman law and it was from Canon law that the principle that it is *just* for individuals to be bound by their promises - *pacta sunt servanda* (ie. agreements are binding) - was adopted.[27] As a result of the above-noted evolution, by the 14th and 15th centuries the universities were teaching a "modernized Roman law". However by the 17th and 18th centuries respect for Roman law had declined and the universities were showing more concern for "discovering and teaching the principles of a fully *rational* law".[28] It was at this time, the time of the Enlightenment, that interest in *reason*, *individual rights*, *justice*, and the *rule of law* were solidifying. And it was at this time that the belief was

> "... that man's reason was to be the sole instrument for establishing the just rules of an immutable, universal law common to all people for all time."[29]

This focus on reason allowed the legal scholars to develop rationalised principles and to formulate general definitions which eventually facilitated a period of codification of national laws. This codification began with the *Code Napoleon* in France in 1804. Germany followed with its Civil Code in 1896, as did Switzerland from 1881 to 1907.

Before the codifications, it was the norm that the rules of law being taught in the universities were not those laws which were being used in actual practice. It was the customary laws of each

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[26]Glendon, et al (1982) at 20-21

[27]David & Brierley (1985) at 44

[28]David & Brierley (1985) at 46

[29]David & Brierley (1985) at 46

country and often canonical laws which held sway in actual practice. As such, it was not until codification occurred that theory and practice became one. An additional consequence of codification, and an unexpected one, was that the tradition of the universities - the search for *just* laws and the proposal of a model law which was supranational - became obscured. Law was no longer seen to be associated as much with *justice* but rather with the will of the sovereign, and legal scholars came to view their own national codes as the only law of value.[30] This definitely was a move away from the origins of the civil law which "*was never founded on anything but a community of culture*. It came into being and continued to exist *independently of any political considerations*...."[31]

Concern over this focus on national codes and the move away from the tradition of the universities lessened over time as doctrinal writings[32] and judicial decisions began to play an essential part in the evolution of the civil law. In addition to this, the many international conventions, the development of comparative law, and the formation of and membership in the European Union has forced judges to look beyond their own national codes and consider foreign concepts and interpretations.

In the civil law system, a code is not expected to provide specific rules which can be applied immediately to particular situations, but rather it provides an organized system of general rules from which a solution can be deduced. As a result, there is a necessary degree of abstraction in civil law codes. They are expected to establish the *framework* of the law and provide the judge with *standards* in his or her decision-making but at the same time they leave the judge a certain amount of discretion in coming to a decision. As noted above, the judge will look to doctrinal writings and earlier judicial decisions to assist in this decision-making.[33] Phillipe Bruno explains the procedure as follows,

> "[b]ecause a society's morals are often ahead of its laws, the [civil] lawyer's task is to interpret the same article in light of this evolution. New law may be born from a new interpretation of the same article. Almost all of current French tort theory was created through a series of

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[30]David & Brierley (1985) at 66

[31]David & Brierley (1985) at 40

[32]Legal scholars play the key role in formulating doctrine.

[33]The amount of reliance on and importance given to previous judicial decisions does vary considerably from country to country.

> interpretations of the same article of the Civil Code by the French Supreme Court. The article has remained exactly the same since the origin of the Code, while its interpretation has evolved over the years, creating a complex and far reaching legal theory out of almost nothing. Because of the relative rigidity of the written rule of law, which cannot evolve until and unless it is changed, the developing interpretation of the rule has become an important source of law in civil law."[34]

In addition to looking at doctrinal writings and earlier judicial decisions, judges also make use of certain overriding principles[35] which are sometimes found in the enacted law but are also found outside it. These relate to the notion of *justice* and they reign supreme over any written law. They permit a judge to set aside or modify a statutory law if need be in the interests of *public order* or *good morals* so that a judge need not permit a decision which he or she deems to be socially unjust.[36] Without such overriding principles, there exists the risk that *law* and *justice* could become divorced from each other.

2. Structure and Divisions of the Law

An area which can cause major difficulties for lawyers from different legal systems relates to the structural differences between the systems. These include not only differences in the legal concepts used in each system, but also differences in the categories within which the legal rules in each system are arranged.[37] A result of these differences is that there can be a legal rule in one system which is completely unheard of in another (ie. the requirement of *consideration* in common law contracts is unknown in civil law systems),[38] or there can be a rule in one system

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[34]Philippe Bruno, "The Common Law from a Civil Lawyer's Perspective" in *Introduction to Foreign Legal Systems*, Richard A. Danner & Marie-Louise H. Bernal (eds), New York: Oceana Publications, Inc. (1994) at p 9

[35]Which Rene David calls *super-eminent principles*, see David & Brierley (1985) at 150.

[36]The common law system has similar principles based on the notion of *justice* as well as being based in the court's *inherent* jurisdiction.

[37]For an enlightening discussion of the problems faced by those from different systems see the comments made at the Symposium: Contract Law in a Changing World, by the lawyers and legal academics involved in producing the UNIDROIT *Principles for International Commercial Contracts*. These are recorded in *The American Journal of Comparative Law*, Vol. XL, Summer 1992, No. 3.

[38]Other examples of common law concepts unknown in civil law are the *trust, bailment, estoppel,* and *trespass*. Some examples of concepts found in civil law but unknown in common law are *paternal authority, acknowledgment of natural children, usufruct,* and *moral persons*. As well, an obligation which can be said to be the basis of civil law commercial contracts but is not found in common law contracts of the British Commonwealth countries (the United States, as a common law country, is the notable exception in this case) is that of *bona fides* or *good faith*. Although this situation appears to be changing, there is currently no general obligation on traders in British Commonwealth countries to deal in *good faith*. For a more detailed discussion of this see the article by Peter Jones, "Reasonableness, Honesty and Good Faith", *IBA Section on Business Law, International Sales Quarterly* (March 1995). But see also John H. Barton "Implications of International Legal Integration for Law Teaching" in *Law and Technology in the Pacific Community*, Philip S.C. Lewis (ed) Boulder: Westview Press (1994) at 318 where he notes that "[c]ivil law concepts of good faith are stronger than those in the United States and reach into the contract formation process." For a discussion of *good faith* at the negotiation stage see Michael Furmston,

which does not exist in the other system, however the same function performed by that rule will be performed in the other system by a rule of a different sort. In the latter situation, the end result of a particular problem may be the same in both systems, but what is different is the route which was taken to arrive at that result.[39] Philippe Bruno, a lawyer who holds both American and French law degrees, notes that with respect to the civil and common law systems,

> "...the same solution may apply in both systems for entirely different reasons. I have found that to be the case most often in the area of torts and tortious liabilities. The biggest surprise of all is when both systems have the same legal solution for the same reasons. All things considered, this happens relatively frequently."[40]

And Philippe Nouel, a French lawyer involved in the Channel Tunnel project, had the following to say on the difference between French and English rules of law,

> "[o]n the face of it, the rules were different, sometimes even contradictory; yet a common principle had to be found to exist. This daily miracle was made possible, largely because all of us, members of the panel, arbitrators and lawyers, decided to go beyond the mere wording of the legal provisions and find the basic principle behind them. The principle usually matched."[41]

Henry W. Ehrmann, in discussing the dual systems of law in Canada, notes that

> "...most observers believe that this dual system has not given rise to major difficulties [at the level of the Supreme Court of Canada]: even though the reasoning of the two groups of judges may occasionally have been different, they always reach the same results."[42]

As noted above, because of these different concepts and categories, a direct comparison of legal systems is virtually impossible. However, by looking at how a particular problem is solved in each system, one may then see how the system works for that particular problem and, ultimately, the similarities and differences in the result.[43]

Takao Norisada & Jill Poole, *Contract Formation and Letters of Intent*, Chichester: John Wiley & Sons (1998) at Chapter 10 - Is there a duty to negotiate in good faith?.

[39]Stanley Lubman (1991), writing about Chinese law, notes at 315 that "[i]n studying the "intended function and actual operation" of traditional law, we may discover that values and institutions in Chinese society may have served functions analogous to those of law in Western society."

[40]Danner & Bernal (eds) (1994) at 8

[41]Philippe Nouel, "'Cartesian Pragmatism': Looking for Common Principles in French and English Law", *International Business Lawyer* (January 1996) at 23

[42]Henry W. Ehrmann *Comparative Legal Cultures*, Englewood Cliffs, N.J.: Prentice-Hall Inc. (1976) at 15

[43]When I was teaching in Turkey, the procedure I followed was to discuss the meaning of a particular legal word or phrase. This involved explaining the legal concept behind the word or phrase. My students would then discuss amongst themselves what the legal Turkish word for this concept was. As Turkey has adopted the Swiss Civil Code, there were very few instances where the legal concept was completely unknown to them. By proceeding this way, basically from the bottom up, we were able to easily see the similarities and differences between the civil and common law systems. If I had proceeded by discussing *Contract Law* or *Tort Law*, as we know these topics in a common law system, my students would have been totally confused. Many of the concepts that we discussed (and which I would know as being part of contract or tort law) were understood by my students as being part of their *Code of Obligations* or their *Commercial Code*.

Turning to the structure of the various civil law systems, the main division accepted by all is that between private law and public law. This division dates back to Justinian's *Digest* where the law was divided into *ius publicum* and *ius privatum*; the former ultimately coming to refer to affairs of the state and the latter to affairs of the individual.[44] Even though this division is accepted by all civil law systems, the scope of these two divisions differs substantially among the various countries, with the greatest difference being between the French and the German systems.[45]

Charles Szladits, in the *International Encyclopedia of Comparative Law*, notes that the majority of European laws (namely Switzerland, Italy, Spain and Austria) follow the German scheme, however Belgium, and the Netherlands[46] with some qualifications, follow the French scheme.

Private law is usually divided into private law proper (or civil law) - which includes the law of persons, law of obligations, law of property (or things), family law and law of succession - and special laws which relate to specific groups of people - such as commercial law and labour law. Generally all the civil law countries divide the subject matter of private law proper (or civil law) in this way and arrange it in one code, the Civil Code, however the countries differ considerably in how their Civil Codes are arranged and structured.[47]

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[44]Charles Szladits states in "The Civil Law System" in *International Encyclopedia of Comparative Law*, Vol. II, Chap. 2 at p 16 that this division in Roman times was not all that important and it is only in modern times that it has developed into a fundamental division of the law; Christian Dadomo and Susan Farran in *French Substantive Law, Key Elements*, London: Sweet & Maxwell (1997) at 1 note that it was under the influence of the "Age of Reason" when doctrines on the "rights of man" became influential and the idea that no one was above the law became popular, that public law began to emerge as a separate subject.

[45]Within the French system, public law (*droit public*) is divided into constitutional law, administrative law, financial law, and public international law. Private law (*droit prive*) includes private law proper (*droit civil*), commercial law (which includes maritime law), civil procedure, penal law (even though of a public law nature, it is attached to private law because many provisions protect private law relations), and certain special areas of law where private and public law are intermingled, including labour law, agricultural law, industrial property law and copyright, air law, forestry law, mining law, insurance law, transport law, and private international law. Within the German system, public law includes constitutional law, administrative law, tax law, penal law, criminal procedure, civil procedure (including the law of execution), bankruptcy, the law of non-contentious litigation, church law, and public international law. Private law is divided into civil law proper and that special part of the private law which includes commercial law, law of companies, law of negotiable instruments, copyright, law of competition (which includes patents, trademarks, and designs), and private international law. Labour law is generally viewed as being neither private nor public. For further discussion of the differences see Charles Szladits in the *International Encyclopedia of Comparative Law*, Vol II, Chapter 2 at 15-76

[46]Although the Netherlands has prepared a new Civil Code which was proclaimed in force in 1992.

[47]The structure and arrangement of most civil codes have been influenced by and copied from the French, German, or Swiss Civil Codes. The French Civil Code is divided into 3 books: Book I. Of Persons; Book II. Of Property and the Different Kinds of Ownership; and Book III. Of the Different Ways of Acquiring Property. The German Civil Code is markedly different from the French and is divided into 5 books: First Book - General Part; Second Book - Law of Obligations (this book deals with contracts and torts); Third Book - Law of Things (this book deals with real and personal

The above-noted distinction, drawn in some countries, between civil law and commercial law is not a logical one for those of us from a common law system, but Charles Szladits tells us that it has come about for historical reasons,

> "[f]or many centuries commercial law, as an international *jus mercatorum*, consisted of the customs of merchants applied by the consular jurisdictions and the courts of fairs and markets. Most of its institutions (for example, banking, commercial associations, bills of exchange, bankruptcy) originated from rules and customs developed during the Middle Ages in the great maritime centers and the cities of Northern Italy. With the disappearance of the traditional international fairs and markets, the international courts were discontinued, but commercial custom as a special body of rules remained as part of the national law, frequently being administered by special national courts for commerical matters. ... Unlike the English law merchant, commercial law was not absorbed into civil law on the continent."[48]

Szladits notes that this dichotomy of civil law and commerial law, and hence civil and commercial codes, has led to some difficulties and confusion within the countries that have both. And Ole Lando notes that this confusion extends to relations between the different civil law countries because in some countries, "commercial law has never existed as a distinct legal concept and in others it has been abandoned. In those [countries] which have retained it, its scope and limitations are conceived differently."[49]

In addition to the codification of the law, another significant difference between the civil and common law systems relates to the procedures followed in matters requiring litigation. As noted by Philippe Bruno,

> "[j]udges are at the centre of the civil law system. Not only do they issue the final decision, but they decide everything else related to the matter at hand as well. There are no rules of evidence, no cross-examination, and no objections, because judges have sole discretion to decide what evidence to accept, what questions to ask of the witnesses and what behaviour to tolerate in the courtroom. With the exception of certain criminal cases, there are no juries to decide factual questions because the judges have been trained and chosen to play this role."[50]

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property); Fourth Book - Family Law (including marriage and divorce); and the Fifth Book - Inheritance Law. The Swiss civil law is in two codes: the Civil Code and the Code of Obligations. The Civil Code is made up of 4 books: I. Law of Persons; II. Family Law; III. Law of Inheritance; and IV. Law of Property. The Code of Obligations has 5 parts: I. General Provisions (for creation of obligation by contract, tort, and unjust enrichment); II. Particular Obligations (for particular contracts like sale, loan, etc.), III. Commercial Associations; IV. Commercial Registers, Firms and Commerical Bookkeeping; and V. Negotiable Instruments. For a more complete discussion of the codes see *International Encyclopedia of Comparative Law*, Vol.II, Chapter 2 at 67-70; and Herbert J. Liebesny *Foreign Legal Systems: A Comparative Analysis*. 4th Revised Edition, The George Washington University (1981) at 29-46.

[48]*International Encyclopedia of Comparative Law*, Vol II, Chapter 2 at 70

[49]Ole Lando, "European Contract Law", in *International Contracts and Conflicts of Laws*, edited by Petar Sarcevic, London: Graham & Trotman/Martinoff Nijhoff (1990) at 8

[50]Danner & Bernal (eds) (1994) at 5

He goes on to note that "litigation under common law is not something for which the civil law lawyer is fully prepared legally, mentally and psychologically."[51]

It has been said that the litigation procedure followed in civil law countries is *inquisitorial* whereas in common law countries it is *adversarial.* Herbert Liebesny, disagrees with this distinction, because, from the viewpoint of a civilian lawyer in France, "the court must decide the case on the basis of the materials the parties have submitted, not on the basis of materials it has gathered itself, and both parties must be heard on all issues."[52] He does concede however that, from a common law point of view, "the judge in a civilian trial is more of an active participant in the proceedings and the trial therefore does not have the strictly adversarial appearance that it has in the United States or in England."[53] I would suggest, however, that a common law lawyer would well see the civil law system as *inquisitorial* due to the fact that the judge in civil law systems may, *on his or her own motion*, order the examination of witnesses, the provision of experts' reports, or that any legally admissible investigative measure be taken. An additional reason for this *inquisitorial* designation could well be that

> "...in France and other continental countries conversations between an attorney and prospective witnesses, be they his own or those of his adversary, are regarded as a breach of professional ethics. ... ...[P]roof-taking is primarily the court's function and the lawyer therefore tends to wait for the court proceedings. A "coached" witness may make a bad impression in court."[54]

As the objective of the civil law judge is to establish the truth, he or she will

> "direct the case and see to it that the parties provide complete information on all relevant points and make all the applications and motions which the progress of the matter may require."[55]

A.K.R. Kiralfy, in a discussion of English law, gives a good overview of the common law procedure, which helps to illustrate why it has been designated as *adversarial.* He states that

> "[t]he judge preserves a neutral position between the parties and decides the case on the relevant evidence put before him by the parties on their own initiative and at their own expense. Not only does he not need to seek other proofs for himself but if he had personal knowledge of the facts of the case he would have to disqualify himself from trying it at all. The conduct of the case is largely left to advocates (barristers in the superior courts), who examine and cross-examine witnesses as to the facts and present legal authorities to the court on matters of law. The judge

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[51]Danner & Bernal (eds) (1994) at 6

[52]Herbert J. Liebesny (1981) at 309

[53]Herbert J. Liebesny (1981) at 309

[54]Herbert J. Liebesny (1981) at 308 and 327

[55]Herbert J. Liebesny (1981) at 331

> only occasionally intervenes to give some legal ruling necessary for the further conduct of the case or to ask for clarification of some ambiguous statement. At the close of the case the judge will 'sum up' the facts and direct the jury, if any, on the law."[56]

Kiralfy goes on to point out some of the distinct deficiencies in the common law system. Specifically, by

> "...treating the trial as a contest of parties, [the adversary system] limits the power of the court to arrive at the objective truth of a case, and the doctrine of precedent makes us slaves of the past and not infrequently compels the judges to give legal rulings of which they openly disapprove."[57]

As noted above, judges in civil law countries often look to earlier judicial decisions when interpreting the various code provisions, however, the weight required to be given to such is not the same as in common law countries. The general principle in civil law countries is that court decisions are *not* a source of law. In practice, however, case law often plays a significant role and it does so in different ways. Some countries will regard "[a] series of decisions of superior courts applying a particular legal rule...as creating a sort of "custom"."[58] Judges will then be obliged to follow this custom. Another way in which case law influences subsequent court decisions is under the *guise* of interpretation of the legislative texts. Rene David notes,

> "[n]ot only does it often...distort the rules enacted by the legislature, but judges find decided cases of such persuasive value that it is difficult not to see therein the acceptance of a pure rule of precedent."[59]

The major difference, however, with the common law is that the civil law judges are *not bound* to follow these earlier decisions in the same way as common law judges are.

B. THE COMMON LAW SYSTEM

1. Historical Development

> "For a thousand years our law has pursued an ordered path, linking the past and present, though sometimes the steps may have been slow and even faltering. ... The English legal system, which includes for this purpose that of the United States of America and of most of the British Commonwealth of Nations, has been peculiar among modern systems in this unbroken link with the past. It is the heritage of a profession and a people which made its own law and whose debt to foreign systems is small."[60]

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[56]A.R. Kiralfy "English Law" in Derrett (ed) (1968) at 181

[57]Derrett (ed) (1968) at 192

[58]*International Encyclopedia of Comparative Law*, Vol II, Chapter 3 "Sources of Law" at 117

[59]*International Encyclopedia of Comparative Law*, Vol II, Chapter 3 at 116

[60]A.K.R. Kiralfy, *Potter's Historical Introduction to English Law and Its Institutions, Fourth Edition*, London: Sweet & Maxwell Limited (1962) at 4

As noted above, the common law system originated in England. In examining its history, we find that different writers have divided it into different periods.[61] Rene David uses what he calls "four principal periods".[62] I note his divisions because I find his categories to be most illustrative of the distinctive features of the common law system (even though some may disagree with the actual dates he has chosen for each period). The first is the Anglo-Saxon period - that period before 1066 (when the Normans conquered England). The second period runs from 1066 to the accession of the Tudors in 1485. It was during this period that the *common law* (that is, the law common to *all* of England as opposed to local custom) was developed. During the third period, which runs from 1485 to 1832, the *rules of equity* developed alongside the common law. And the fourth period, from 1832 up to the present, is the period in which statutory law was greatly expanded and in which governmental and administrative authorities began to have more authority over peoples lives.[63]

English legal historians generally place the beginning of English law at the end of the period of Roman occupation (that is, at the start of the 5th century) when the different Germanic tribes (Saxons, Jutes, Danes and Angles) divided up England.[64] Knowledge about the law in this Anglo-Saxon period is limited, however it is known that it was made up of the local customary rules of the different tribes and that tribunals were set up for its enforcement but there was no specialised legal profession. It was also in this period that conversion to Christianity took place in England. Kiralfy notes that "[n]o proper estimate has been made of the effect of Christianity on English law, but there is no shadow of doubt that it was far-reaching."[65] It was around the year 600 that Aethelbert, the King of the Jutes in Kent, put the law of his people into written form. It consisted of ninety brief sentences written in Anglo-Saxon, the language they spoke and

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[61]A.K.R. Kiralfy (1962) uses six periods: the Anglo-Saxon Era, the Norman Conquest, the Middle Ages, The Renaissance and Civil Wars, the Age of Stability and Stagnation, and the Age of Reform and Legislation; see Maitland & Montague (1915) who use eight different divisions.

[62]David & Brierley (1985) at 309

[63]David & Brierley (1985) at 310

[64]David & Brierley (1985) at 310

[65]A.K.R. Kiralfy (1962) at 9; the extent of this influence however did not carry over into the post-Conquest law because of the separation of church and state under the Normans and also because of the feudal origins of the common law - see Kiralfy in Derrett (ed) (1968) at 160

which would eventually become English.[66] The laws of four other kings of this period were also put into writing: Ine of Wessex (688-726), Offa of Mercia (757-96), Alfred (871-901), and (the great Dane) Canute (1017-35).[67] A review of these shows that law at this time was concerned with the simple facts of life: the sale of goods, redress for violent injury, and the ownership and possession of land.

With the Norman Conquest of 1066 came the end of tribal rule. It did not however mean the end of Anglo-Saxon law, as William the Conqueror expressly proclaimed that Anglo-Saxon law would continue in force.[68] It did so with the exception, however, of the law related to the ownership and possession of land. As Kiralfy notes,

> "one of the first results of the Conquest was that the land law tended to become Norman, and so assimilated to Continental feudalism. This assimilation was of great importance in the development of the common law since disputes over large landholdings were brought into the King's courts and determined according to Norman law, and land law remained the main part of the common law until the seventeenth century."[69]

Initially the local courts (county or hundred courts, feudal courts, and ecclesiastical courts) continued to handle the great bulk of matters that needed to be dealt with, but under Henry II (who ruled from 1154-89) the King's court, which had up to this point dealt mainly with the protection of royal rights and the causes of the King's barons,

> "...flung open its doors to all manner of people, ceased to be for judicial purposes an occasional assembly of warlike barons, became a bench of professional justices, [and] appeared periodically in all the counties of England under the guise of the Justice in Eyre. Then begins the process which makes the custom of the king's court the common law of England."[70]

Because there was no written Norman Code and because the written laws in England were in Anglo-Saxon, which the Normans, who were French-speaking, could not understand, the King's

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[66]See Frederic W. Maitland & Francis C. Montague, *A Sketch of English Legal History*, New York: G.P. Putnam's Sons (1915), Appendix I at 193 for these rules.

[67]Maitland & Montague (1915) at 3-10; Maitland & Montague, at 13, tell us that Edward the Confessor, the last of the English kings never made a law; these written texts of laws were called Dooms

[68]David & Brierley (1985) at 311; Rene David notes that it is still possible today for English lawyers to invoke a rule of law dating from this period; see also S.F.C. Milsom,, *Historical Foundations of the Common Law* 2nd Edition, London: Butterworths (1981) at 11; Kiralfy (1962) at 13 notes that several attempts were made during this period to restate the old law.

[69]A.K.R. Kiralfy (1962) at 13

[70]Maitland & Montague (1915) at 31; see S.F.C. Milsom *Historical Foundations of the Common Law, 2nd Edition*, London: Butterworths (1981) at 27-31 for a discussion of the Eyre system

court "could be a law unto itself."[71] It in fact preserved many of the English institutions, particularly those advantageous to the King, but the private law which it began to develop was very much like the customary law of Northern France.[72] It soon became necessary however to diverge from Norman customs due to the unique form of English feudalism.[73] As Kiralfy notes,

> "The judges had necessarily to use discretion in devising rules, but these rules had to be maintained as strict law and logically and rigidly worked out, for the sake of security of title. ... It was because so little was certain in the matters that came before them that the judges of this period manufactured law fast, and the rapidity of the development of this royal justice was not viewed with favour by many, as appears from certain clauses of Magna Carta. It was indeed the strength of the royal authority in this country, due to political and constitutional causes, which enabled the common law to progress so far in the age preceding Edward I."[74]

The judges at this time were not lawyers but royal officials from the civil service who were selected because of their particular learning - they had some training in Canon law and often Roman law, but they also tended to attach much weight to *natural justice* (or morality), as it was understood at that time.[75]

The *common law* which was developing in the King's courts was known, at the time, as *comune ley*. As the conquerors spoke French, it was 'legal French' which was the language spoken in these courts and which was carried throughout the land by the travelling justices.[76] However, the written language of the law was the same as in the rest of Europe - it was Latin.[77] Maitland and Montague tell us that hundreds of years would pass before anyone would try to write about the law in English, and "when at length this is done, the English will be an English in which every important noun, every accurate term, is of French origin."[78]

By the end of the middle ages, the King's courts had become the only courts of justice.[79]

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[71]Maitland & Montague (1915) at 32

[72]Maitland & Montagure (1915) at 32

[73]A.K.R. Kiralfy (1962) at 20

[74]A.K.R. Kiralfy (1962) at 20-21; Edward I ruled from 1272-1307

[75]A.K.R. Kiralfy (1962) at 20

[76]I will be discussing the use of French in the law courts in greater detail in Chapter 3.

[77]David & Brierley (1985) at 312; Maitland & Montague (1915) at 32-35

[78]Maitland & Montague (1915) at 32

[79] The ecclesiastical courts were still operating, however they only heard cases in relation to marriage and the discipline of clergy - David & Brierley (1985) at 314-5.

However, it was not automatic that one would be entitled to bring a matter before them. As Rene David notes,

> "...to press a claim before the king's courts was not a right but a favour which the royal authority might or might not grant. The person who solicited this privilege had first of all to address his request to an important royal official, the Chancellor, asking him to deliver a writ (*breve*), the effect of which was to enable the royal courts to be seized of the matter upon the payment of fees to the Chancery. Apart from this procedure the judges could only be seized directly upon a complaint or petition (*querela, billa*). ... It was not automatic that a writ would issue from the royal Chancery or that the judges would be convinced that they should take up a matter upon which a complaint was lodged. ... For some considerable time, each instance had to be individually examined to determine whether it was expedient that the writ should issue, and the list of established situations where writs were granted automatically (*brevia de cursu*) was slow to grow."[80]

If a particular type of action was brought often enough, the writ would acquire a common form. When this happened it became known as a *writ of course* (or *breve de cursu*). Such a writ then automatically gave rise to a form of action.[81] During the reign of Henry II there was no limitation put on the number and variety of writs which the clerks of the Chancery could issue. However, by 1258 (during the reign of Henry III) with the passage of the Provisions of Oxford, the Chancellor was no longer able to seal a writ which was not a *writ of course,* unless the King and Council[82] otherwise agreed.[83] The Statute of Westminster II in 1285 attempted to remedy the resulting rigidity by allowing for *actions on the case*, wherein the Chancellor could deliver a writ in instances which were closely similar to those for which there was a *writ of course*. This expanded the permitted writs somewhat but not to any great extent.

Because an action could generally not be commenced without a writ, "...no right could be

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[80]David & Brierley (1985) at 315

[81]The *writs* of this time simply called on the defendant to respond to the King's judges concerning the specific matter in question (such as a claim that a debt was owing). It did not tell the judges how they were to determine the rights of the parties. That was left to the judges themselves, to decide as they saw fit.

[82]The King's Council was originally called *Curia Regis*. The authority of the King's Council came from the notion that, after the breaking away of the common law courts from the Council, a residue of justice was left in the King. This residue of justice was exercised by the King in Council. This notion allowed the Council to intervene in a wide variety of cases. As well, it was not confined to the writ system or any special rules of procedure. The Chancellor was the president and most learned member of the Council which, by the time of Edward I, was primarily made up of the magnates who were to become the House of Lords (ie. the highest court of the realm). For a discussion of the King's Council see A.K.R. Kiralfy (1962) at 138-148.

[83]The feudal barons fought against the flow of cases to the king's court as this reduced the cases going to their courts and subsequently reduced feudal dues. It was during their temporary increase in power that the barons were able to stem the tide of new writs by way of the Provisions of Oxford.

recognized by the common law unless a writ existed which provided a remedy for its breach."[84] Even though the substantive remedy was not readily known at the time of commencing the action, if there was a permitted writ under which an action could be commenced, the court would have jurisdiction to hear the matter and ultimately would determine a substantive solution. (This requirement of a *specific* writ has been considerably relaxed over time, however the notion that one cannot bring a matter before the court unless there is a recognized *cause of action* for which the law will provide a remedy has continued to today.)

Over time each form of action developed its own procedural peculiarities which were required to be followed. As Rene David notes,

> "[t]o each writ there corresponded in effect a fixed procedure which laid down the other steps to be followed, the handling of incidental questions, the admissibility of evidence, and the means of enforcing the decision. In any given procedure the plaintiff and defendant had to be styled by specific wording; their inappropriate use in another procedure would be fatal to the proceeding."[85]

What developed was a very rigid and procedurally-oriented system.[86] As Maitland and Montague note, "...our jurisprudence...became a commentary on formulas."[87] And it became a system which was highly unsatisfactory. Because of their dissatisfaction with the *common law* and its system of writs, people began more and more to appeal, by way of petition, to the King, as "the fountain of justice",[88] to provide them with some form of remedy. "These petitions covered a miscellaneous collection of complaints which were originally dealt with by the King's Council, but some of them came to be looked upon as routine matters. They were then relegated to the Chancellor, who in time established his own Court of Chancery."[89] The decisions emanating from the Chancellor in the beginning appear to have been based in natural justice and therefore derived from moral rules.[90] As well, Kiralfy tells us that

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[84]A.K.R. Kiralfy (1962) at 21

[85]David & Brierley (1985) at 316

[86]Sir William Holdsworth in *A History of English Law*, Volume II, Fourth Edition, London: Methuen & Co. Ltd. (1936) at 475 notes that "it is not surprising [at this time] to find that statutes relating to procedure pure and simple are more numerous than any of the other statutes which deal with matters of pure law."

[87]Maitland & Montague (1915) at 101

[88]A.K.R. Kiralfy (1962) at 33

[89]A.K.R. Kiralfy (1962) at 34

[90]Rene David states that the substantive principles applied by the Chancellor were largely taken from Roman law and Canon law - see David & Brierley (1985) at 325.

> "[t]he special remedies introduced by equity to supplement the common law are similar to those of Roman law and no doubt inspired by them. Specific performance of contracts rather than payment of damages is used in English equity, but, characteristically, only where land is in question. ... The injunction, by which the Chancery judge forbids the performance of some act, *e.g.*, publication of a book or the construction of a building, is also similar to the Roman interdicts."[91]

Over time, these decisions of the Chancellor became more systematized until the "application of *equitable* doctrines soon amounted to additions and correctives to the *legal* principles applied by the royal courts."[92]

It was at the time when the Tudors came to power in England, in 1485, that the common law courts started to take a back seat to the Chancellor's courts of equity and, before long, came perilously close to being permanently replaced by the Roman law being propounded in continental Europe at that time.[93] But the common law lawyers fought back and in the end,

> "a compromise was worked out which left the Common law courts and the court of the chancellor side by side, in a kind of equilibrium of power. ... A tacit understanding was established on the basis of the *status quo*. It was understood that the jurisdiction of the chancellor was to remain but that it would attempt no new encroachments at the expense of the Common law courts; it would also continue to adjudicate according to its precedents and thus escape from the criticism that it was arbitrary. ... Even the nature of Equity itself was to change: the chancellor, as a legal or political figure, was no longer seen as judging on the basis of morality alone and tended to act more and more as a true judge."[94]

This dual structure of English law has continued up to the present time, and the rules of *equity* have become as strict and *legal* as the common law rules. Now, if there is to be any intervention to correct a defect in the law, it is the role of Parliament to enact the necessary legislation. But at the time of this judicial rivalry, statutory law was very limited.

With these restrictions on the development of the law by the courts, and with the changing social and economic conditions of the 16th century, came the need for the development of statutory

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[91]Derrett (ed) (1968) at 177; One area of law which was developed by the courts of *equity* and which is completely foreign to the civil law is the notion of the *trust*. But it was because of the very different way in which the civil law developed that there was no need for such.

[92]David & Brierley (1985) at 325

[93]See F.W. Maitland's lecture on this subject reproduced in *English Law and the Renaissance*, Cambridge University Press (1901).

[94]David & Brierley (1985) at 327; see also A.K.R. Kiralfy (1962) at 36-51 for a full discussion of the judicial rivalry of this period.

law.[95] Now, an additional role for the courts was to interpret (and develop) the principle that had been laid down in the statute. It was at this time, with the decision in *Heydon's Case*,[96] that the rule to be used by the courts for the interpretation of statutes was formulated,

> "That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discussed and considered: First, what was the common law before the making of the Act; Secondly, what was the mischief and defect for which the common law did not provide; Thirdly, what remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth; Fourthly, the true reason of the remedy: and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy...."[97]

At this same time, with the increase in commerce, distinct rules of mercantile law were developing quite separate and apart from the common law, and often at odds with the common law. These rules were based on custom and were international in character, often following Roman law. They were initially dealt with by the Admiralty Courts, but with the common law judges trying to restrict the jurisdiction of those courts, the law merchant (or *lex mercatoria*) was taken over by the common law courts. In doing so, the common law lawyers "assumed power over shipping, marine insurance, and many other commercial matters, and accepted mercantile custom as a living source of common law."[98]

With the rise of Jeremy Bentham[99] and the Utilitarian philosophy, there was a call for the simplification of the procedures in the courts and the elimination of all of the archaisms in the law. Many at this time thought that codification of the law would be the answer to making it more accessible and more scientific. Quite clearly the codification movement did not succeed, however it did succeed in forcing Parliament to turn its attention to legislative reform - not to overturning the law but rather to developing it and at the same time eliminating that which was obsolete.[100] And, of course, this role of Parliament has continued up to the present day. The 19th and 20th centuries are exceptional in the unprecedented development of statutory law. Not

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[95]It was at this time that bankruptcy legislation was first introduced, as well as the Poor Law Acts which dealt with the problems of destitute labourers and their families.

[96](1584) 3 Co.Rep. at f. 8a

[97]A.K.R. Kiralfy (1962) at 45-46

[98]Derrett (ed) (1968) at 171

[99]Bentham lived from 1748-1832 and was an English jurist as well as a philosopher.

[100]A.K.R. Kiralfy (1962) at 60-61

being fettered by the forms of action and procedures of the courts, Parliament was able to turn its attention to the substantive law. Not only has this era seen an increase in what can be called *public law*[101] (such as constitutional law and administrative law) but as well there has been an increase in *social legislation* (such as landlord and tenant legislation, workers compensation legislation, legislation concerning a minimum wage, and labour legislation, to name a few).

2. Structure and Divisions of the Law

The common law, unlike the civil law, was never a law of the universities nor a law of principles. Rather it is a law that was, and is, shaped by practitioners. As noted by Kiralfy,

> "The 'tough law' of the Inns of Court in London, bodies of legal practitioners, assumed the authority in England enjoyed by the law professors abroad, with a resultant stress on the practical and useful rather than the logical and philosophical."[102]

Even today, legal scholars have little authority in the common law.[103]

Because of the way in which the common law has developed, the concepts which have emerged and the resultant categories into which the concepts have been organized, appear to a civilian lawyer to be rather disjointed and overlapping. Tony Weir believes that

> "[t]he absence of clear divisions is principally attributable to two factors. First, the jurisdiction of the higher courts is unified, for they can deal with all justiciable matters, whether public, private, commercial, civil or criminal;.... Secondly, English law has grown in bits according to need and was not laid down in slices by an act of will, and "any sytem of law in which legal rules are always created ad hoc must at its best lack form and symmetry"."[104]

Unlike the civil law, in the common law there was no overall doctrine or theory, "with the result that legal topics and subdivisions of topics grew up in tight compartments."[105] For example,

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[101]Common law lawyers are familiar with this term however it does not carry the same distinction as in civil law countries since we do not have the same major division between public and private law.

[102]Derrett (ed) (1968) at 166

[103]Legal scholars often will attempt to distill principles from the decided cases in order to clarify a particular area of the law, however their texts or treatises are mainly for the benefit of students and practising lawyers. These treatises are sometimes considered by the courts but only as secondary sources and only if there is no case law on the matter in question or if the area of law is in transition.

[104]Tony Weir, "The Common Law System", *International Encyclopedia of Comparative Law*, Vol II, Chapter 2 (Structure and the Divisions of the Law) at 77

[105]Derrett (ed) (1968) at 167; there is no agreed upon curriculum in common law universities, however it is probably safe to say that there would be basic topics in Contracts, Torts, Criminal Law, Evidence, Civil Procedure, Criminal Procedure, Real Property, Company Law, Trusts (and Succession), and Family Law. As well, there would be a variety of other courses in a variety of areas including Tax Law, Conflicts of Law, Administrative Law, International Public Law, International Private Law, Commercial Transactions, Employment (or Labour) Law, Immigration Law, Insurance Law,

instead of having a *Code of Obligations* that deals with the obligations individuals have towards each other, be it by way of contract or personal actions, the common law has the category of *Contracts* within which it deals with all the rules related to contracts. It also has the separate category of *Torts* wherein it deals with all the rules related to tort law. There may be overlap between some of the principles incorporated within each of these categories, but common law lawyers would not think about these and *may* only come to recognize them in the discussion of a particular problem.[106] As Kiralfy notes,

> "[t]he law luxuriated in sophisticated detailed rules to meet infinitely various situations but at a very low level of abstraction. Convincing solutions of pressing disputes were preferred to abstract and internally elegant worlds of legal norms."[107]

It is because of this that the common law system can be described as *inductive* (as contrasted with the civil law being *deductive*), in that a ruling is arrived at after consideration of a number of actual cases similar to the one in question, as opposed to finding the solution to a particluar problem by looking at a limited number of unchanging prescriptions. The natural corollary to this is that, as noted above, the common law courts are not so much governed by the notion of finding the truth, but rather of providing solutions to disputes. Because of this function, the common law courts have become mired in procedural matters, including evidentiary rules. The early emphasis on procedure and evidence has continued up to the present day, even though attempts are continually being made to streamline them.

As a result of the device of reviewing earlier decisions in order to arrive at a solution in the matter before the court, the doctrine of *stare decisis* (or *binding precedent*) developed. As Kiralfy tells us

> "[b]y following each other's decisions, wherever not obviously defective, judge-made law imitated the uniformity of custom and the unchanging character of the words of statute law. Precedent was evolved as a curb on possible over-weening acts of judges, and began to make the common law predictable for litigants. ... Where parties are likely to make arrangements in advance to regulate their affairs with confidence, as in transactions with property, the courts proceed carefully and

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Intellectual Property Law, and Maritime Law, among others.

[106]In discussing with my Turkish students the case of *Donoghue v. Stevenson* (as an example of how the common law develops), they could not understand the difficulties that the plaintiff faced in that case because in their (civil law) system such an action would have been automatic. A number of the students declared quite hostilely that it was a stupid case, and one of the older students (who had been practising for about 30 years) stated that he would never have taken on such a silly case.

[107]Derrett (ed) (1968) at 167

> responsibly. They are especially careful not to overrule long-accepted decisions which parties obviously used for their guidance."[108]

If there is no case law or statutory law which applies to the matter in question, the common law begins with the premise that everything is lawful. As such, the courts try to give every transaction its intended effect, unless it violates some paramount consideration such as being contrary to public morals or public order. As Kiralfy states,

> "...the layman devises a transaction or creates a relationship, his legal advisers clothe it in legal form, and the court, in case of dispute, passes judgment on its validity. The layman does not wait for judicial approval before he acts, nor is anyone concerned with the tidy place to be filled by his conduct in the legal pattern."[109]

Since the common law "does not directly deal with abstractions like honour, prestige, [or] general comfort",[110] we find the courts are generally aimed at redressing material loss. As such, a court will only accept jurisdiction in a matter between private parties if the complaining party can show that he or she has actually suffered some loss.[111]

Because the common law generally provides a fair amount of freedom of movement, the notion of *reasonableness* has developed in order to put a check on this freedom.[112] This notion also allows the law to adapt to changing conditions, as the standards required will change along with changes in such things as experience and technological advances. This requirement of *reasonableness* permeates all areas of the common law - it can be found in tort law,[113] in contract law,[114] and in criminal law[115] to name just a few.

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[108]Derrett (ed) (1968) at 163-164

[109]Derrett (ed) (1968) at 162

[110]Derrett (ed) (1968) at 178

[111]The party as well must have a recognized *cause of action.*

[112]As noted above, unlike the civil law, common law countries (the United States being the only exception) do not have the specific requirement that traders must act in good faith towards each other. See Peter Jones, "Reasonableness, Honesty and Good Faith" IBA Section on Business Law *International Sales Quarterly* March 1995; the determining factor is what the *reasonable* person would do, or expect, or understand in the circumstance in question - of course it is not always possible to verify this empirically and the answer ultimately depends on the view of the court. It has been said that the *reasonable person* is simply the anthropomorphic embodiment of the court's idea of justice (as per Lord Radcliffe in *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.) at 728)

[113]Generally, liability in tort will follow from the failure of one party to take *reasonable* care to avoid a *reasonably* foreseeable injury to the other party.

[114]It can be argued that the purpose of the law of contracts is to protect each person's *reasonable* expectations.

[115]One can use *reasonable* force in defending oneself.

Those western countries, besides England, which are adherents of the common law include Canada, Australia, New Zealand, and the United States. Even though the United States is considered a common law country, there are some decided differences between it and the other countries just mentioned. Because the United States is made up of 50 individual states,[116] each with its own statutory and case law, there has been some concern over the uniformity of American law. As a result, there has been a move to have uniform or model laws drafted which each state would then adopt (with any variations necessary for that particular state). The Uniform Commercial Code (the UCC) is one such uniform law which has been adopted wholly or substantially by all of the states.[117] It governs various aspects of commercial law, and as such, plays a decided role in international commercial transactions.[118] The American Law Institute has also created a series of Restatements of the law in such areas as Contracts and Torts. These Restatements set out what the law in the general category is, how it is changing, and what direction the authors (leading legal scholars in the field) think it should take. These Restatements do not have the force of law, however, they have had a definite impact on American law and are frequently cited by the courts. The UCC and the Second Restatement of the Law of Contracts make the United States different from the other common law countries mentioned due to the fact that in the other countries, contract law (and commercial law to some extent) have not as yet been codified but are still to be found in the case law.[119]

III. THE EASTERN FAMILY OF LAW

The Association for Asian Studies (the AAS), the leading organization of Asian scholars in the United States, has created categories or *families* within Asian law itself. They are as follows:

1. China and Inner Asia (China, Mongolia, and Tibet)
2. Northeast Asia (Japan and Korea)

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[116]And the District of Columbia.

[117]Black's Law Dictionary, Abridged 6th Edition, 1991

[118]The UCC and the Second Restatement of the Law of Contracts were among the national codifications or compilations used by the working group of UNIDROIT as guides in their preparation of the *Principles of International Commercial Contracts* (see *The American Journal of Comparative Law* Summer 1992 No.3 at 675-681); often the UCC of a particular state will be part of the governing law of an international contract where one party to the contract is American; it is because of the UCC that the United States is the only one of the above-noted common law countries which specifically requires parties to a commercial transaction to act in good faith.

[119]American contract and commercial law also differ substantively from English law and for the last three decades Canada has been turning more and more to American case law in these areas and away from the English.

3. Southeast Asia (the ASEAN countries[120] and Indochina)
4. South Asia (India, Nepal, Pakistan and Sri Lanka)[121]

James Feinerman notes that "within these legal systems another pattern of influence and common norms emerges." He divides them as follows:

1. Confucian nations of East Asia (China, Japan, Korea and Vietnam)
2. Buddhist nations of Southeast Asia (Thailand, Burma, Cambodia and Laos)
3. Hindu nations of South Asia (India and Sri Lanka)
4. Islamic nations of Asia (Pakistan, Malaysia and Indonesia)[122]

In addition to these, of course, is the influence of the different legal systems brought by colonizers. The common law influence has affected India, Pakistan, Sri Lanka, Burma, Malaysia and Singapore. The civil law influence (from colonial times) has affected Vietnam (French) and Indonesia (Dutch). Other Asian countries which escaped colonization (such as Japan[123] and Thailand) have adopted some form of civil law in their attempts at legal modernization, with most of them following the model of the German Civil Code. As Feinerman notes,

> "...the attractions of the civil code are legion: it is relatively compact, requires little or no specialized interpretation, and can instantly create formal requirements of a legal order."[124]

But as discussed above, these Codes invariably undergo a process of indigenization. Rene David goes so far as to say that "the western structures and institutions in many instances are no more than a facade, behind which social relations continue to be ruled in large part by the traditional models."[125] It is for this reason that it is important to look at the traditional models and influences that were in existence before the western influence, in addition to looking at how the two have blended.

As noted earlier, I will be dealing here only with the law of China and that of Japan. As the categorizations of the AAS show, these legal systems differ greatly today, but as noted by Feinerman, they do share a Confucian influence. In looking at these two systems we will see

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[120]ASEAN is the Association of Southeast Asian Nations which was formed in 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei joined in 1984. ASEAN is a regional grouping for the purposes of trade.

[121]See James V. Feinerman, "Introduction to Asian Legal Systems" in Danner & Bernal (eds) (1994) at 96.

[122]Danner & Bernal (eds) (1994) at 96; Buddhism has also had an influence on Japanese law, as will be seen below.

[123]As will be seen, the American occupation of Japan after 1945 did bring with it an American influence in Japanese law.

[124]Danner & Bernal (eds) (1994) at 98

[125]David & Brierley (1985) at 517

how the Confucian influence has continued even though there have been other influences which have effected major differences.

A. CHINESE LAW

1. Historical Development

Confucianism is the basis for the form of social order which has been the ideal in China for centuries. Confucius lived between 551 and 479 B.C.. Before his time, the Chinese regarded mankind

> "...as being so organically a part of the system of the universe that not only did human society depend in the final resort on natural forces but that these forces in their turn were themselves affected by human conduct. Any action by man which was not consonant with the natural order tended to disrupt the cosmic rhythm, and if serious or widespread enough could result in calamities of the greatest sort."[126]

These beliefs were not opposed by Confucius but rather were taken up and developed by him. In the process of this development, Confucius eliminated theology - he declined "utterly to express any views on such matters as the immortality of the soul, or the existence of a personal god."[127] What he did stress was the importance of man's duties in *this* world. And the way in which to teach men these duties was through education and example. For Confucius,

> "...the most effective method of instruction was the polishing of manners by a scrupulous observance of etiquette and the cultivation of such refining arts as music. ... ...in a properly regulated community penalties...would scarcely ever be used."[128]

"In traditional Confucian terms, a ruler should govern by means of virtue rather than law."[129] As Confucius stated

> "[i]f the people be led by laws and uniformity sought to be given them by punishments, they will try to avoid punishments but have no sense of shame. If they be led by virtue and uniformity sought to be given them by *li* [proper behaviour], they will have a sense of shame and, moreover,

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[126]H. McAleavy, "Chinese Law" in Derrett (ed) (1968) at 107

[127]Derrett (ed) (1968) at 107; see also Yosiyuki Noda "The Far Eastern Conception of Law" in *International Encyclopedia of Comparative Law* Vol II, Chapter 1 at 122 where he notes that "Confucius spoke neither of marvels, nor of extraordinary force, nor of disorder, nor of divinity. ... Zilu [a disciple of Confucius] asked the master if one should serve the gods. Confucius replied: 'If I cannot yet serve men well, how shall I so serve the gods?' Thus he is preoccupied with the world of men. So is Xunzi, one of the most illustrious Confucianists:...Reality gets out of sight if you admire Heaven without paying any attention to the world of man."; however, Benjamin Schwartz, in Barton, et al (1983) at 106, says the question of Confucius' religious attitude is much debated.

[128]Derrett (ed) (1968) at 108

[129]Barton, et al (1983) at 103

> will become good."[130]

This is the basis of the belief that more laws do not make for a more harmonious society. In fact, in Confucian thought, the opposite is true, namely, an emphasis on law "makes people more litigious and loop-hole happy, and...diverts attention away from the more important work of moral education."[131] When there is an emphasis on law, people will develop a contentious spirit and will no longer be in awe of their superiors. By internalizing the rules of proper behaviour, society will operate more harmoniously and there will be no need for law. This raises the question of what is *proper behaviour*? Feinerman tells us that

> "[s]elf-cultivation, the performance of one's allotted social role and yielding to others in the resolution of disputes were highly valued. The preservation of social harmony was emphasized above all other social goods."[132]

Confucius did recognize that there are always going to be some segments of society that need to be controlled by law, and as such law (or *fa*) did occupy a legitimate place in the nature of things. "In all areas where *li* cannot be made to apply, *fa* must be employed to maintain order."[133]

Following Confucius' death, his opinions were unable to withstand the emergence of a group of political philosophers known as the *legalists* or the *school of fa*. This group came into being at a time when warring kingdoms were vying for domination of the Chinese world. The *legalists*, even though they accepted Confucius' definitions of *li* and *fa*, did not believe that *li* alone was enough to order this society, but rather asserted that social order could only be maintained by *fa*.[134]

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[130]From Benjamin Swartz ,"On Attitudes Toward Law in China" in *Government Under Law and the Individual*, Milton Katz (ed) Washington, D.C. American Council of Learned Societies (1957) at 27-39 (reproduced in Barton, et al (1983) at 108).

[131]Barton, et al (1983) at 104

[132]Danner & Bernal (eds) (1994) at 101; I believe a recent development in South Korea in the wake of the current financial crisis and the drastic drop in the value of the won is illustrative of this attitude and is something which would be unheard of in the western world, namely the collection of gold, by the government, from private citizens in order to raise badly needed foreign currency. The request was made January 5, 1998 and continued until January 31, 1998. People delivered rings, necklaces, bracelets, keys, coins, bars, and turtles (a common gold item held by Koreans) which were then melted down into gold ingots. By January 13, 1998 the government had collected more than 40 tonnes worth more than US $400 million - see the Vancouver Sun, January 12, 13, 1998.

[133]Barton, et al (1983) at 108

[134]Benjamin Schwartz in Barton, et al (1983) at 109

Benjamin Schwartz tells us that "the typical Confucian attitude revolves about [this] basic dichotomy".[135] He states that *li*, which has been translated as *propriety*, is associated with Confucius himself, whereas *fa*, which has been translated as *law*,[136] is associated with the harsh Ch'in dynasty. This dynasty came into being in 221 B.C. after the kingdom known as Ch'in overran all its rivals and united them into one empire which the outside world began to call China.[137] H. McAleavy, in his article on Chinese Law, states that

> "[t]he victory was achieved by the construction of a ruthless machinery of government for which the blueprints were devised not by idealists pining for cosmic harmony but by men whose theories have earned for them the name of *Fa Chia* or *Legalists* and who taught that the commands of a ruler rigidly enforced were the only source of law that deserved to be taken seriously."[138]

In other words, the *legalists* believed that it was the will of the sovereign that was the primary source of law.

While the Ch'in dynasty did not last very long (as the severity of its rule provoked a rebellion), it created for the first time, in this vast area of warring kingdoms, a centralized bureacratic empire. Along with creating a centralized government it created what would today be called administrative law. It also initiated "...all sorts of institutional changes by government enactment."[139] With the disappearance of the Ch'in dynasty and the rise of the Han dynasty, Confucianism once again became the official state philosophy, however, the structure that the

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[135]Benjamin Swartz in Barton, et al (1983) at 104

[136]These translations are very simplistic and as Schwartz notes, in Barton, et al (1983) at 105, the actual situation is much more complex. He states that "[t]he term *li* embraces a far richer range of meanings than anything encompassed by the pale word "propriety". ... ...the word *fa* is probably much narrower in its scope of reference than many Western conceptions of the meaning of law. ... ...social role is the key term in the Confucian definition of social structure: the structure of society is basically a network of relations of persons enacting certain social roles. Social roles do not merely place individuals in certain social locations but also bear within themselves normative prescriptions of how people ought to act within these roles. The notion "father" does not refer to a social status but prescribes a certain pattern of right behaviour. ... Later Confucianism reduces these relations to the "five relations" - relations between father and child, husband and wife, elder and younger brother, ruler and subject, friend and friend.... These categories are presumed to embrace all fundamental relationships. ... Now within this structure *li* refers to the rules of conduct involved in these basic relationships. They are the rules governing the behaviour of the individual in his own social role and governing his behaviour toward others in their social roles. ... Another aspect of *li* is its association with moral force rather than with the sanction of physical force. ... ...in a society where men are governed by *li*, conflicts of interest can be easily resolved. Both sides will be ready to make concessions, to yield (*yang*), and the necessity for litigation will be avoided." See pages 104-110 for a more detailed discussion of the difference between the two; see also Liang Zhiping "Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture" in 3 *Journal of Chinese Law 55* (Summer 1989) for a discussion of the meaning of *fa*.

[137]Yosiyuki Noda notes that the period from 481- 221 B.C. is known as the *Fighting Kingdoms* period - see *International Encyclopedia of Comparative Law*, Vol II, Chapter 1 at 121.

[138]Derrett (ed) (1968) at 108

[139]Barton, et al (1983) at 110

Ch'in dynasty created, a centralized bureacratic state, remained. Along with it remained the basic structure which the *legalists* had devised for compelling the enforcement of rules - a detailed system of penal law. The Han dynasty, which was created by one of the leaders of the revolt against the Ch'in dynasty, ruled for the next four hundred years, until 220 A.D.. Since that time, a central government has been the norm in China.[140]

Even though the rule of the Ch'in dynasty was short-lived, the orthodox Confucian attitude toward *fa* was strongly felt. *Fa chih*, which is, ironically, translated as the *rule of law* has become associated with

> "harsh despotism, heavy reliance on brute force, and oppressive demands on the people by an interventionist state.... Furthermore, all attempts to improve society by heavy reliance on institutional change initiated by state enactment has also been associated with *fa* as a result of this experience."[141]

Over the centuries, the Chinese people have learned to fear a formal legal system, yet, as Feinerman tells us, "Confucian rulers developed increasingly comprehensive structures of legal rules for governing the far-flung empire."[142] The enactment of penal and administrative codes by these successive dynasties followed on the Ch'in model, along with "severe chastisement decreed against those who infringed these statutes".[143] Feinerman notes that

> "[t]hese laws were an amalgam of Legalist severity and Confucian moral suasion, an example of what one Chinese scholar has called the "Confucianization of law"."[144]

A result of this Confucianization of law has been

> "...to inhibit the growth of an all-inclusive legal system and of an elaborate system of legal interpretation. It has inhibited the emergence of a class of lawyers and has, in general, kept alive the unfavorable attitude toward the whole realm of *fa*."[145]

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[140]McAleavy in Derrett (ed) (1968) at 108

[141]Barton, et al (1983) at 110

[142]Danner & Bernal (eds) (1994) at 101

[143]McAleavy in Derrett (ed) (1968) at 109; the earliest dynastic code and the one which set the pattern for future legislation was that of the T'ang dynasty in the 7th century A.D.. It consisted of two parts - a body of statutes called *lu*, which imposed penalties for certain acts, and a body of positive ordinances called *ling*. Both parts were concerned with what we would call *public law*.

[144]Danner & Bernal (eds) (1994) at 101; the Chinese scholar referred to here by Feinerman is Professor Ch'u T'ung-tsu (see Schwartz in Barton, et al (1983) at 111).

[145]Barton, et al (1983) at 111; Feinerman notes in Danner & Bernal (eds) (1994) at 102 that "...before China's contact with the West, traditional Chinese called those who assisted others with pleadings and legal documents *songgun*, best translated as "litigation tricksters". Overcoming such deeply entrenched attitudes has been a difficult task for China's modern legal order."

Before the 20th century, all contracts and commercial transactions were governed by customary practice which had been developed by associations of merchants or tradesmen known as *hang* (which is usually translated as *guilds*). As McAleavy notes,

> "[a]s far as the cosmic rhythm was concerned...it scarcely mattered - so long as good faith was kept - what rules were created by custom to govern business contracts."[146]

The Confucian state was more than happy to have parties settle their affairs between themselves and not resort to the law. If an individual did appeal to a magistrate for help in settling a dispute, this individual, even if in the right, would be seen as a trouble-maker.[147]

The introduction of Western law had its beginnings in 1842 when the Opium War with Britain ended in the Treaty of Nanking, the first of the so-called Unequal Treaties. One consequence of these Treaties was that foreign residents were able to extract extra-territorial concessions from the weak Qing dynasty. It was at this time that

> "...the Western powers told nineteenth-century China that its full sovereignty would be restored only when more "civilized" Western-style laws were promulgated."[148]

Because of this, the last dynasty, the Qing, and the successor Republican government which came to power following the revolution of 1911, tried to *modernize* the legal system. But it was not until a new government had been established following the Nationalist Revolution of 1926-1928 that a series of codes, based on Swiss, German and French models, was adopted.[149] On the surface, China now had a European-style system of law. However, in reality, traditional concepts and customary law persisted. Rene David notes that if by chance an individual did go before the courts

> "...the Chinese judges still decided according to the standards set by Confucius rather than by an application of the rules of written law. They would for example refuse to evict a poor tenant who had committed no fault if the landlord were well-off and not in need of the premises; they granted delays to borrowers in embarrassed circumstances if their creditors were rich."[150]

David goes on to note that "[e]ven the most advanced thinkers considered a return to the

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[146]Derrett (ed) (1968) at 110

[147]McAleavy notes in Derrett (ed) (1968) at 125 that "...the giving of legal advice to the public was regarded as an encouragement of litigation, and was a crime."

[148]Danner & Bernal (eds) (1994) at 102

[149]The codes were a Civil Code in 1929-1931 (encompassing private and commercial law), a Code of Civil Procedure in 1932, and a Land Code in 1930.

[150]David & Brierley (1985) at 524

principles of Confucius to be desirable."[151] The Nationalist laws in fact were abrogated in February of 1949[152] but not because they were not working. It was because the Communists under Mao Zedong[153] had come to power.[154]

"Beginning from the Marxist principle that law is the embodiment of the will of the ruling class, the Chinese Communist Party [CCP] leadership since 1949 has consistently stressed the point that law must serve the tasks of rebuilding Chinese society."[155] Initially, fundamental laws based on the Soviet model were adopted.[156] However, the history of the CCP in China has been a history of "frequent reversals and radical shifts in course" and has "engendered caution and suspicion" when it comes to a new legal order.[157]

But it has become clear to both the Chinese people and their leaders, as a result of the excesses and suffering during the Anti-Rightest Campaign (also known as the Great Leap Forward) of the late 1950's and the Great Proletarian Cultural Revolution of the late 1960's, that greater due process (in the sense of fundamental fairness and substantial justice) is required. Victor Li tells us that "[s]ince the fall of the Gang of Four in 1976, China has been moving sharply toward expanding the role of law."[158] China's new leaders (for the most part themselves victims of the Cultural Revolution) in their determination to prevent such abuses from ever occurring again have

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[151]David & Brierley (1985) at 524

[152]Laszlo Ladany in *Law and Legality in China, The Testament of a China-watcher*, London: Hurst & Company (1992) at 55 sets this as the date on which all Nationalist laws were abrogated, however, H. McAleavy in Derrett (ed) (1968) at 128 puts the day in September 1949. Ladany notes that the old laws were annulled eight months before the government of the People's Republic was established and that it was in September 1949 that a provisional Constitution was promulgated and the courts were set up.

[153]In the past the written form for the pronunciation of Mao's name has generally been Mao Tse-tung. The newer form is Mao Zedong.

[154]Victor H. Li, in "The Evolution and Development of the Chinese Legal System" in *China: Management of a Revolutionary Society*, John M. H. Lindbeck (ed), Seattle: University of Washington Press (1971) notes at 226-227 that the administrators continued to use a number of the Nationalist laws even though they had officially been abrogated.

[155]Danner & Bernal (eds) (1994) at 103

[156]Although no criminal code was published until 30 years after the establishment of the People's Republic.

[157]Danner & Bernal (eds) (1994) at 104; as Laszlo Ladany (1992) at 79 notes "[t]he country had been ruled by the arbitrary will of the masters and by inner departmental regulations and instructions which had not been made public."

[158]In "The Drive to Legalization" in Anne Thurston & Jason Parker (eds) *Humanistic and Social Research in China*, Social Science Research Council (1980) reproduced in Barton, et al (1983) at 127.

turned toward a form of the *rule of law* as the answer.[159] Victor Li notes that

> "[t]rying the Gang of Four in a court of law was a key element in the legalization drive. The leadership, essentially, was tellling the public that even the most critical national issues can be dealt with by legal means. The lesson was supposed to be that individuals and enterprises also ought to turn over their legal problems to the judicial system for resolution."[160]

At the same time, the reformist forces, following the lead of Deng Xiaoping, have determined that economic development is now the main task for China's leaders and population.

2. Structure and Divisions of the Law

The decision to abandon Maoist policies of isolation and self-reliance in favour of greater openness to the developed world and with it an openness to foreign investment made it evident in China that there was a need for a legal framework that was acceptable to the West.[161] In this regard, a new Constitution was promulgated in March of 1978.[162] And "[o]n July 1, 1979 the first seven major laws to be promulgated by the National People's Congress since the 1950's were announced, including a law authorizing Sino-foreign joint ventures and the first criminal code and criminal procedure code since the founding of the People's Republic."[163]

But by 1982 extensive revisions had to be made to the Constitution, then again in 1988 and again in 1993 in order to keep up with the numerous changes that were occurring, including the emergence of the private economy.[164] A noted Chinese jurist has stated that the 1993

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[159]At the Third Session of the Eleventh National Party Congress on December 13, 1978, Deng Xiaoping said the following in his speech to the Congress: "Democracy has to be institutionalized and written into law, so as to make sure that institutions and laws do not change whenever the leadership changes or whenever the leaders change their views.... The trouble now is that our legal system is incomplete.... Very often what leaders say is taken as law and anyone who disagrees is called a lawbreaker. That kind of law changes whenever a leader's views change. So we must concentrate on enacting criminal and civil codes, procedural laws and other necessary laws.... These laws should be discussed and adopted through democratic procedures." Four dimensions emerged in the Congress debate: 'to perfect the law' (ie. ensure complete codes), 'to observe the law and to act according to law', 'to insure equality before the law', and to strengthen the 'supreme authority of the law' in the life of the state (see Ronald C. Keith *China's Struggle for the Rule of Law*, New York: St. Martin's Press (1994) at 9)

[160]In "Gang of Four Trial", Los Angeles Times, February 2, 1981, Part II, Page 5, reproduced in Barton, et al (1983) at 132; the Gang of Four were brought to trial in December 1980, the trial lasted until January 25th.

[161]Danner & Bernal (1994) at 104

[162]It laid out the goal of the "four modernizations" and emphasized promotion of socialist democracy and the elevation of science and education.

[163]Danner & Bernal (eds) at 104

[164]Yu Xingzhong, "Legal Pragmatism in the People's Republic of China" in 3 *Journal of Chinese Law* 29 (Summer 1989) at 44; for a discussion of the development of the regulations for private enterprise see Alison W. Conner, "To Get Rich is Precarious: Regulation of Private Enterprise in the People's Republic of China", 5 *Journal of Chinese Law* 1 (Spring 1991)

amendments mark "an important and big step toward a rule-by-law society."[165] It was in the 1993 amendments that Deng Xiaoping's theory of "building socialism with Chinese characteristics" was first set out. Another significant amendment at this time was the replacement of the wording "[t]he state practices economic planning on the basis of socialist public ownership" with the new wording "[t]he state practices a socialist market economy."[166]

Feinerman notes that

> "[i]n at least four areas, formal legality has begun to make inroads in the People's Republic of China that could not have been predicted a decade ago. These areas are: state structure, the domestic economy, the criminal justice system and international commerce. Each one has not only been touched by the recent developments in law; they have been shaped, even transformed, by law."[167]

However, Feinerman does go on to state that "[a]t the same time, it is important not to be misled by the formal aspects of legal change; a nuanced examination of both legislative change and its impact on Chinese society is necessary for a proper understanding."[168] He points out that, with respect to foreign investment in China, there has been a series of legal regulations: rules permitting foreign companies to open representative offices in China (1980), constitutional

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[165]OW2903134793 Beijing XINHUA in English 1334 GMT 29 Mar 93; as to the use of this particular term, Ronald Keith notes this "...was featured in Richard Baum's distinction between 'rule by law' and 'rule of law', the former connoting 'statist instrumentalism' and the latter, a 'pluralist law' reflecting a 'delicate balance of social forces, acting as a shield to protect various socio-economic classes and strata against "the arbitrary tutelage of government"'. The former invokes both the doctrines of traditional Chinese legalism and the 'bureacratic ethos of Soviet socialist legality, as elaborated under Stalin and subsequently transferred to the PRC in the 1950s. The latter evolved out of a flowering pluralism which challenged the political monopolies of the European feudal estates." (see Ronald Keith (1994) at 7); but see also Jiang Ping, "Chinese Legal Reform: Achievements, Problems and Prospects", 9 *Journal of Chinese Law* 67, (Spring 1995) at 75 where he draws the distinction between 'rule by law' and 'rule by man' and states "[s]erious attention must be paid to...encouraging respect for rule by law rather than rule by man in China."; I believe it is important to note that Jiang Ping uses the phrases 'rule of law' and 'rule by law' interchangeably and as such it may simply be a question of semantics and not an understood and clearly discerned distinction on the part of the Chinese.

[166]See Amendment 7 which amends Article 15 of the Constitution.

[167]Danner & Bernal (1994) at 105; but note the argument of Yu Xingzhong in "Legal Pragmatism in the People's Republic of China" 3 *Journal of Chinese Law* 28 (Summer 1989) at 47 where he argues that "[t]he purpose of law is only "to finalize, stipulate, and standardize that policy of the party which has proven correct and effective." What is "correct and effective" is necessarily determined by the CCP. Anything inconsistent with the policy of the CCP is therefore neither correct nor effective. The process is simple: begin with CCP policy, articulate it into legal form, and the result is law. "Socialist law is an important and necessary tool for realization of the party's policy," observes one legal scholar." "It plays a particular and active role in the implementation of party policy." Thus, law is always an expression of policy and has no independent status of its own."; see also Pitman Potter, *Foreign Business Law in China, Past Progress and Future Challenges*, San Francisco: The 1990 Institute (1995) at 5 where he notes that "...laws and regulations are enacted explicitly to achieve immediate policy objectives of the regime. Law is not a limit on state power; it is a mechanism by which state power is exercised."; see also the comments by Feinerman that the National People's Congress (NPC) is meant to function as China's legislature, however foreign observers usually refer to it as China's 'rubber stamp' legislature as it is the CCP that has all the power (see Danner & Bernal (1994) at 110).

[168]Danner & Bernal (1994) at 105

guarantees to protect "lawful rights and interests of foreign investors" (1982), conditions under which joint ventures may be formed and operated (1983), and protection for intellectual property through Trademark (1983) and Patent (1985) laws. But at the same time he points out that "[d]ifficulties have presented themselves at almost every turn to those foreigners who have become any more than tangentially involved with China's economy."[169] Pitman Potter notes that in 1994 a unified Foreign Trade Law was enacted. Prior to this

> "...Chinese foreign trade relations were governed by a variety of specific laws and regulations governing different aspects of the system, often with little or no attempt at consistency. This approach continues even after the enactment of the Foreign Trade Law...."[170]

And Jiang Ping, a Professor of Law with China University of Politics and Law, notes

> "[a]lthough many excellent laws have been promulgated in China, enforcing these laws is a continuing problem. This problem is particularly severe where the government is concerned, as failure on the part of the government to observe the law undermines the whole concept of the rule of law."[171]

One of the results of the opening up of China was that the Chinese people began to see they were not doing as well, economically, as their neighbours. As part of the process of reform, the CCP introduced the notion of *exchange by contract* between state enterprises in an attempt to overcome the inadequacies of the traditional institutions and they enacted the Economic Contract Law of the People's Republic of China (1981) to govern these contracts. A review of the way in which these contracts operate leads a Westerner to conclude that this is more administrative law than contract law.[172] However, Cheng and Rosett note that

> "[w]esterners tend to associate contract and contract law with individualism, autonomy, and private agreement. But to a considerable extent contract is ambivalent in these respects. The link between contract law and market structure is subtle and potentially confusing. Use of contract law to structure economic transactions does not necessarily imply an open market structure in that economy. Contract law has been used in a variety of nonmarket economies.... ... In this sense, "contract" can be adopted to serve a socialist system of central planning almost as readily as it can be used to support a capitalist system of free enterprise. At the very least, contract techniques make it easier to decentralize the planning process by allowing the parties at the operating ends of the system to create a binding form of obligation, the contract order. Although the central planner may remain in control of the operation, everything does not have to stand still and wait for the issuance of detailed commands from the center before the plan is translated into specific

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[169]Danner & Bernal (1994) at 106

[170]Potter (1995) at 11

[171]Jiang Ping (1995) at 74

[172]See Barton, et al (1983) at 701-712 for a discussion of the contract system in state enterprises and for a reproduction of portions of the Economic Contract Law.

transactions."[173]

China has tried to keep these domestic contract transactions separate from the international transactions and to this end has adopted two distinct legal regimes. However as Cheng and Rosett note "[t]here is an inevitable tension between these two systems."[174] They cite the comments of Stanley Lubman in this regard,

> "not only is there a question of allowing domestic transactions to be influenced by internationally recognized legal concepts, but in practice there is also the danger that international contracts in trade and investment transactions, despite their ostensible dependence on recognized international principles, come to be influenced by fluid, flexible and anti-legal Chinese notions. I'll show you my scars sometime."[175]

Cheng & Rosett note that "[a]s China joins the world system, it is increasingly confronted with the indivisibility of that system and with the infeasibility of selectively choosing to adopt some aspects of that system and to reject others."[176] Jiang Ping tells us that there is recognition of this problem and that

> "[i]n the push to overhaul China's legal system, this fragmentation in the law of contracts is to be changed. In two years, a uniform law of contracts is to be promulgated. ... ...one of the proposed goals of the new contract law is to prevent excessive state interference into the formation of contracts and thereby to facilitate the operation of the market economy."[177]

In looking at China's methods of dispute resolution, Pitman Potter notes that the Foreign Economic Contract Law (FECL) lists four different procedures for settling disputes involving foreign business interests. These are consultation, mediation, arbitration, and litigation. Although the emphasis is on consultation and mediation, the FECL does not explicitly require parties to go through these first before seeking redress through arbitration or litigation. However, if there is an arbitration clause in the contract or an arbitration agreement, the FECL will not allow the

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[173]Lucie Cheng & Arthur Rosett, "Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Heirarchy to Market, 1978-1989" in 5 *Journal of Chinese Law* 143 (Fall 1991) at 162-164

[174]Cheng & Rosett (1991) at 190

[175]Cheng & Rosett (1991) at 190-191

[176]Cheng & Rosett (1991) at 191

[177]Jiang Ping (1995) at 70-71; Potter (1995) notes at 17-18 that "...in the Foreign Economic Contract Law, trade contracts must be in compliance with state policies, as these represent official articulation of the public interest. Similarly, the Customs Law and the regulations on import and export licensing refer specifically to the need for policy control. This permits approval authorities (whose consent is generally a condition for legal validity) wide discretion in approving trade transactions."

parties access to the courts.[178] But this may not be such a bad thing, as Donald Clarke notes that China's courts are "often unable or unwilling to enforce legal standards."[179] He cites a number of reasons for this: the judges may lack the necessary education;[180] the judges may be corrupt or partial;[181] the decision of the judge may be overriden by higher authorities within the court;[182] the court as a whole is subject to outside pressures and is vulnerable to local government direction;[183] and the courts have little in the way of autonomous enforcement powers.[184] Jiang Ping notes that because of these problems, "some people have argued for the creation of an integrated court system that is independently administered and separately financed."[185] But he also notes that this would not be easily accomplished because it would require a Constitutional amendment as well as a change in the practice of the courts.

With respect to arbitration, Potter notes that all Chinese standard form contracts require that disputes be handled by the China International Economic and Trade Arbitration Commission (CIETAC) even though this is not required under the FECL. He goes on to state that

> "...the general consensus is...that the arbitration results at CIETAC at least are generally fair and generally reach the "correct" results, even if often for the wrong reasons. Foreign lawyers may participate directly on behalf of their foreign clients, and the CIETAC list of arbitrators available to be selected to decide a given case contains a number of respected foreign jurists. Indeed, some studies have shown that CIETAC decisions favor the foreign side more often than not. CIETAC is relatively internationalized and keenly interested in maintaining its international reputation."[186]

A problem arises however when trying to have this decision enforced, as CIETAC does not have the authority to enforce its own decisions. Only the courts do. And, as noted above, this may be difficult. As Potter states,

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[178]Potter (1995) at 70

[179]Donald C. Clarke, "Dispute Resolution in China" in 5 *Journal of Chinese Law* 245 (Fall 1991) at 257

[180]Because there was little legal education for many years there is a great shortage of qualified persons to serve as judges - Clarke (1991) at 257.

[181]Official corruption is a serious problem in China and it extends to the judiciary - Clarke (1991) at 258.

[182]Courts at all levels have an Adjudication Committee headed by the president of the court and it has the power to override the decision of the judges - Clarke (1991) at 260.

[183]It has long been the practice for local Party secretaries or Party committees to review and approve the disposition of cases by the courts - Clarke (1991) at 261.

[184]For the various reasons see Clarke (1991) at 263-268.

[185]Jiang Ping (1995) at 73

[186]Potter (1995) at 76

> "[t]he conflict between the internationalism of the Chinese arbitral organs and the parochialism of the courts present obstacles to the full development of a foreign dispute resolution system in China. For without the enforcement powers of the courts, arbitral decisions, domestic and foreign alike, are rendered moot. Unfortunately cooperation between arbitral and judicial organs seems increasingly remote...."[187]

Another major difficulty facing China today is the "problem of legally defining the parameters of government authority in general."[188] As Jiang Ping notes

> "[b]esides its power to promulgate laws, the government has the power to issue administrative plans or orders of sweeping scope, as it did in the heyday of the planned economy. Further, the government has unbridled discretion to interpret the law or to suspend enforcement of a law by administrative fiat. If something is not done to limit the government's ability to arbitrarily manipulate the law, people will lose their confidence in the concept of rule by law."[189]

In addition to this, much of the legal system remains closed to *outsiders* - this is not only foreigners but also the Chinese. There are many *internal* laws and regulations which are disclosed only to government officials and the Party elite.

Jiang Ping concludes that "in light of these problems, one should not be overly optimistic about the prospects for improvement within the next 5 to 10 years in the enforcement of laws in China. Although by the end of this century, I think China will have the trappings of a comparatively complete legal system, the situation will not be equally promising in terms of the credibility of this system."[190]

B. JAPANESE LAW

1. Historical Development

The first written information on Japan is found in a Chinese book, *Chronicle of the Former Han Dynasty*, written around the end of the 1st century A.D.[191] From Chinese records, it is hypothesized that the Japanese state came into existence in the 3rd century A.D. under the Queen Himiko. Those records also tell us that in the 3rd and 4th centuries A.D., law in Japan was not

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[187]Potter (1995) at 79

[188]Jiang Ping (1995) at 74

[189]Jiang Ping (1995) at 74

[190]Jiang Ping (1995) at 75; at 67 Jiang Ping notes that "according to the five year plan for legal reform drafted by the Eighth People's Congress, close to 152 laws are expected to be enacted between 1993 and 1998."

[191]The Japanese language did not have a written form until the end of the 4th century A.D. when it began to use modified Chinese characters.

distinguished from social or religious rules but was seen as the will of the gods.[192] Yosiyuki Noda notes that "[t]raditional Japanese religion considers ancestors as gods; hence Himiko served the gods and the foundation of her political power was religious."[193] At this time, positions in public office were hereditarily occupied by the leading families, as were certain trades and crafts.[194] Noda notes that

> "[t]he governmental institutions of the era were not influenced in any way by foreign civilization and in them is reflected the manner of thinking that is peculiar to the Japanese people."[195]

Because of its geographical isolation, Japan was free from foreign invasion until 1945. It did however have relations with China and was influenced by this contact throughout different periods of its history. As Noda tells us,

> "[t]here can be no question of denying the very powerful and millenial influence that Chinese ideas have exercised upon the whole Japanese culture, and naturally the conception of the law has not escaped it. However, this is not to say that Japanese culture is a faithful copy of the Chinese. The ecological, historical, and characterological circumstances of the development of the two cultures are not the same."[196]

It was in the 7th century A.D. that a centralized government (similar to that in China) under a single Emperor, and Chinese-style legal codes, *ritsu-ryo*, were developed.[197] They introduced "a form of state and moralistic planning"[198] and their purpose was "to educate ignorant men and lead them toward the Confucian ideal."[199] The codes devised a land sharing system[200] and contained a series of prohibitions (*ritsu*) along with rules of administration (*ryo*).[201] Under this system, the imperial government distributed public offices and land to individuals in accordance with the

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[192]Yosiyuki Noda, *Introduction to Japanese Law*, University of Tokyo Press (1976) at 19-21

[193]Noda (1976) at 21; the religion at this time was Shintoism.

[194]Joseph Ernest de Becker, *Elements of Japanese Law*, Yokohama (1916) (reprinted in 1979 by University Publications of America, Inc.) at 1

[195]Noda (1976) at 21

[196]*International Encyclopedia of Comparative Law*, Vol II, Chapter 1 at 129

[197]Also at this time Buddhism became the state religion under the control of the Emperor - see Aritsune Katsuta, "Japan: A Grey Legal Culture", in Esin Orucu, et al (eds) (1996) at 250

[198]David & Brierley (1985) at 534

[199]Noda (1976) at 23

[200]Prior to this, the land was owned by the large clans or families who also held political power in conjunction with this ownership. These clans lost the land and the power to the imperial government.

[201]The codes closely imitated the codes of the Chinese T'ang dynasty with some adaptations being made for the customs and social conditions peculiar to Japan.

ritsu-ryo.[202] Hereditary occupation of offices was abolished and eligibility for public office was now based on education and merit. As well, everyone was now free to practice any trade, profession or craft they liked. But as this egalitarian philosophy of ancient China was unknown to Japan and certainly at odds with the existing conditions, the system did not function well and most of the provisions fell into disuse.[203]

In the 9th and 10th centuries a seigneurial system developed in its place. Under this system, estates (*sho*) were created "by means of usurpation, hoarding, and accepting offers of those who wanted to submit themselves to the patronage of the strong".[204] In addition, within the *sho,* the master came to have legislative, administrative and jurisdictional powers. At the same time, a new military class (*samurai*),[205] made up of members of the powerful families from the provinces, was developing. Over time, this increase in the power of the masters of the *sho* (and resultant decrease in the power of the central government) along with the increase of the power of the *samurai* in the provinces, resulted in the Genji clan gaining control of the imperial government in 1185 and establishing its own military government (the *Bakufu*) at Kamakura. This form of military government continued until 1868. Throughout this period the Emperor had no control over the imperial government and held no power. He did however continue to be a revered and important figure.[206]

From a legal perspective, the centralization of the *ritsu-ryo* gave way to feudalism. Noda tells us that "[t]his feudal system developed in two separate stages, dual feudalism and unitary feudalism."[207] During the regime of dual feudalism, there was a mix of feudalism and *sho*. The *sho* were the economic basis of the feudal system,[208] however, only the *samurai* were governed

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[202]A certain amount of land was given for life to each person six or more years of age - see Noda (1976) at 25. But as de Becker (1916) notes at 2, neither sale nor succession was allowed. On death, the land reverted to the state.

[203]Noda (1976) at 24 notes that these laws were not formally abrogated and some were even applied after 1868; for Japan, as an agrarian society, the rules governing land-holding were simply not conducive to this way of life.

[204]Noda (1976) at 25

[205]Also known as *buke* or *bushi*.

[206]When the position of the emperor was created in the 7th century, the idea that he was a living god was also invented, so as to give his powers religious authority - see Noda (1976) at 25.

[207]Noda (1976) at 26

[208]as Henderson (1968) notes it "rest[ed] solidly on the rice tax".

by it. Under Yoritomo, the head of the Genji clan,

> "a hierarchical order was established with Yoritomo at the top. In this order the inferior owed his superior a duty of devoted service and the latter gave the former some benefits by way of reward. ... ...each group of *samurai* linked by a blood relationship constituted a coherent unit directed by its head. The head had the right and the duty to receive obedience from the members of his group. ... The vassal owed his overlord an absolute duty of fidelity but had no legal right to ask for the fulfillment of the overlord's duties. ... In this characteristic, it is said, is the essential difference between vassalage in Japanese feudalism and Western feudalism."[209]

The *sho* eventually came to an end after Yoritomo, as the chief of the military, was able to send his vassals onto each *sho*, even those not belonging to him. The rights of these *samurai* sent by Yoritomo increasingly exceeded those of the masters of the *sho* until eventually the *sho* regime broke down entirely. The law at this time was generally of a customary nature with the exception of the personal law governing the *samurai* which has been likened to a code of chivalry.

With the disappearance of the masters of the *sho* there arose local lords (*daimyo*) who seized power over the lands in question (*han*). These *daimyo* were perpetually at war, each trying to gain power over all of Japan. Finally, in 1603, Tokugawa Ieyasu succeeded and established a unitary feudal regime encompassing all of Japan. Under this regime, all of Japan, including the imperial court, was dominated by the *samurai,* although the Emperor did continue to be the symbol of national unity and the spiritual head of the country. The hierarchical structure which had been created earlier continued and, along with it, the absence of any rights on the part of the vassals. The head of this regime was simply the strongest of the *daimyo* and bore the title of *shogun.*

The regime of the Tokugawa *shoguns* continued up to 1868 and is known as the Tokugawa or Edo[210] era. Throughout this period, social order was maintained by the strict separation of the social classes (essentially a division of vocations) which were arranged in a hierarchy. The four vocational classes, from top to bottom, were *warriors*, *farmers* (or *peasants*), *artisans*, and *merchants.*[211] Dan Henderson notes that

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[209]Noda (1976) at 27

[210]Present-day Tokyo

[211]Merchants were on the bottom of the hierarchy because they were regarded as unproductive.

> "...within the major status groups there was much refinement of rank, title, and status, particularly among the warriors. Even in the rural villages there was a social hierarchy of old and new families and other kinds of people (eg. serviles, tenants, and so forth), which were often based on unwritten pedigree, custom, and tradition, but sufficiently pronounced to leave no doubt that the village was not egalitarian. Second, the authoritarian Confucian family relations - father and son, husband and wife, older brother and younger brother - constituted a universal status system throughout all strata of society, derived from birth and with profound influence on the law and, as a model, on political concepts as well."[212]

Confucianism was made the official ideology of the country as it supported the hierarchical order which had already been established.[213] As Noda notes "[the rulers] tried to convince the people that the established order was an immutable natural order. The result was that authoritarian ideology was deeply rooted in the heart of the nation."[214] In addition, "[t]he whole way of life of a Japanese was determined on the basis of the class to which he belonged: the type of house inhabited, the type and colour of cloth worn and type of food consumed were all predetermined."[215] Minutely defined rules were developed which specified exactly how each individual was to act in every situation. These rules of behaviour are called *giri*. As Rene David writes,

> "[t]he *giri* therefore replaced law and, according to some Japanese, even morality. It was spontaneously observed not so much because it corresponded to a series of moral values or strict duties but rather because social reprobation attached to its non-observance. It would be a source of shame, a loss of face, for a Japanese not to respect one of the *giri* in which he was involved. A code of honour, wholly customary, thus determined all forms of behaviour. Until recent times, the system of the *giri* made any intervention of law in the western sense useless and even offensive."[216]

In addition to the rules for each status, it was forbidden for anyone to change his status, and each social level was clearly separated from the others by an "impenetrable barrier; each individual belong[ed] from birth to a given social status which impose[d] on him a manner of life adapted

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[212]Henderson (1968) at 49

[213]Kyoko Inoue in *MacArthur's Japanese Constitution, A Linguistic and Cultural Study of Its Making*, Chicago: The University of Chicago Press (1991) at 42 notes that "[o]ne element in the Confucian tradition...was the desirability of cultivating benevolence and wisdom in political rulers. ... This aspect of the Confucian thought...later proved to be of great importance. Not only was it used to justify the Restoration [during the Meiji era], it also helped foster among its leaders a strong, elitist sense of responsibility to rule the nation well for the benefit of the people. The top-ranking bureaucrats, politicians, and business leaders in contemporary Japan still conceive of their roles in these terms."

[214]Noda (1976) at 32; as Henderon (1968) notes at 49, it was also a 'natural' principle that men were unequal and status law must treat them unequally.

[215]David & Brierley (1985) at 537

[216]David & Brierley (1985) at 538

to that status."[217]

The law of this period was mainly local customary law, emanating from each *daimyo* over his vassals.[218] However there was some legislation, mainly to regulate the relations between the *Bakufu* and the *daimyo*, but also governing foreign relations, communication, Christianity, currency, and other matters affecting the country as a whole.[219] But as Dan Henderson notes

> "[t]he unifying thread running through the whole Tokugawa governance was the rule-by-status. This was essentially administrative, not legal. From the shogun at the top to the individual person at the bottom, this thread ran by successive delegations of power, unpoliced by justiciable law. ... The critical fact was that against the authority of any of these superiors (feudal, village, or family) there was almost no right of appeal - no legally justiciable right either before a court or even before the next higher official superior. ... The law...left settlement of...disputes to the will of the master, father, teacher, or other superiors as a matter of "jurisdiction"."[220]

Henderson goes on to note that

> "Tokugawa law did not stop at simply prohibiting suits against superiors.... In the traditional *ritsu-ryo* format, it also supported these prohibitions with harsh criminal penalties...."[221]

And Noda tells us,

> "...it is clear that the law for most Japanese meant little else than the means of constraint used by the authorities to achieve government purposes. Powerless before the government might, the people could only obey, but because they were not convinced they developed a complex (*menju-fukuhai*) which became part of their psychological make-up."[222]

What *menju-fukuhai* means is "that one obeys one's superior outwardly but rebels against him inwardly."[223]

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[217]Noda (1976) at 33

[218]Each *han* was politically and legally autonomous.

[219]Inoue (1991) notes at 43 that "[i]n addition to fiercely persecuting Christians, [the *Bakufu*] issued orders preventing ships or people from leaving Japan, as well as forbidding Japanese living outside the country from returning. The bakufu allowed a small amount of foreign trade to be conducted through Nagasaki, a city they ruled directly. Only those Western nations that did not send missionaries were allowed to participate in that trade...and in practice that meant only the Dutch."

[220]Henderson (1968) at 52

[221]Henderson (1968) at 53

[222]Noda (1976) at 37

[223]Noda (1976) at 37; life for the *farmer* or *peasant* class, which made up 80% of the population, was extremely difficult during this period. They had heavy burdens in the form of taxes and service and as such were required to live very frugally and work from dawn to dusk. The *artisans* and *merchants* were of even lower status than the *farmers* and also had many restrictions placed on them to make sure they did not try to rise above this status.

It was during the Tokugawa era that a policy of isolation was maintained. For 250 years the Japanese people had virtually no contact with the outside world.[224] But in 1853, Commodore Perry of the United States Navy arrived in Japan, accompanied by four warships, to ask Japan to once again open its doors to foreigners. The intention of the United States was clear and the *Bakufu* was forced to comply. By 1858 it had entered into commercial treaties with the United States, England, France, Russia, and the Netherlands, but because of its ignorance of international law, it entered into these treaties on unequal and unfavourable conditions. These treaties were the final nail in the coffin of the *Bakufu* and its system of military government and in 1867 the last Tokugawa *shogun* handed power back to the Emperor.[225] Thus began the Meiji era.[226] And thus began the process of westernisation.

Suffering from the humiliation of the treaties of 1858, the goal of the country now was to put Japan on an equal footing with the world powers. She needed to advance her industry and agriculture and, at the same time, become strong militarily. But she could only do this with a strong central government and a modernized state. In 1869 the *daimyo* surrendered title to their *han* and registries of their people to the Emperor. And in 1871 these autonomous domains became a centrally supervised system of prefectures, thus signalling the end of the fuedal era. To modernize the state Japan turned to Western laws. As adoption of the Common law would have been a long and difficult process, she looked to the Civil law of the European continent. French and German legal experts were brought in to work with Japanese drafters to adapt the Continental law to Japanese society.[227]

In 1882 a *Criminal Code* and the procedural *Code of Criminal Instructions* were brought into

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[224]It is not completely clear why they instituted isolation but it is thought that they may have feared that the Western powers would use trade and Christianity to meddle in Japanese affairs - see Inoue (1991) at 43; Inoue also notes at 39 that it was during this period that "many of modern Japan's fundamental political ideas and patterns of political behaviour developed."

[225]In the late 17th century a group of intellectuals advocated the revival of Shintoism along with the mythical origin of Japan and the imperial family. In the late 18th century this group criticized the Confucian ideology and the *Bakufu*. As Inoue notes at 43, [t]hose criticisms eventually became politically significant, because of their emphasis on reverence for the Emperor, and his role as the head of Japan, perceived as one household." This revival gave added legitimacy to those who opposed the rule of the *Bakufu* in the name of the Emperor.

[226]Also called the Meiji Restoration.

[227]An English legal advisor helped with the drafting of the Constitution.

force.[228] In that same year the *Regulations for Bills of Exchange and Promissory Notes* were introduced. A *Constitution* was enacted in 1889.[229] The first *Bank Regulations* were announced in 1890. And in 1890 and 1891 a number of principal enactments were brought into force, including: the *Law for the Organization of Municipalities, Towns and Villages;* the *Law of the Constitution of the Courts;* the *Code of Civil Procedure;* the *Regulations Governing Prefectural Organization*; the *Regulations Governing Rural District Organization;* and the *Law of Administrative Litigation.* The *Commercial Code* came into effect in 1893 and the *Civil Code* in 1898. With the introduction of the Bank of Japan as the central banking organ and the adoption of the gold standard, Japan's economy, in 1897, became linked to the world economy.

In less than 30 years capitalism had become firmly rooted in what had previously been an isolated country governed by feudal institutions. But even though these feudal institutions had been eliminated, the way of life they engendered - the interests of the individual subordinated to the group and the inferior bound to the superior by strong ties of loyalty and obedience - continued on in the everday lives of the people. Ishii notes that

> "[t]heir preservation was beneficial to the government leaders, first of all, because it helped them to maintain their power. And secondly, they were preserved because of the need to employ extreme measures in overcoming the several decades handicap which separated Japan from the Western powers."[230]

Yet the new codes which had been introduced were all predicated on

> "...a bourgeois society in which every individual is presumed free and equal with everyone else, in which all legal relationships constitutive of rights and obligations are formed by the individuals themselves, and where legal relationships are created by the exercise of the individual's free will."[231]

Before these codes the Japanese had no knowledge of *rights* or *legal duty* and the drafters, in creating the codes, had to create new words for such notions. There were great debates on even

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[228]Henderson (1968) notes at 77 that a part of the criminal law which was "enormously important to politics was, however, outside of these codes. This body of special laws included the Police Regulations on Public Meetings, the Press, Libel, Book Censorship and Peace Preservation. Violation of these controls were criminal offences. ... This technique of the special police law was a useful vehicle for the authoritarian control of popular or parliamentary agitators throughout the Meiji era, particularly during the period of constitution-making (1881-1890)...."

[229]The Constitution guaranteed executive supremacy by recognising broad imperial prerogatives, but it also provided for a Diet, including a Lower House, of elected representatives.

[230]R. Ishii, *Japanese Legislation in the Meiji Era*, (1958) reproduced in S. Salzberg (1988) at 72

[231]Noda (1976) at 58

introducing the idea of *rights* in the Constitution as "in regard to the Emperor the Japanese subject had nothing but a definite station in life and obligations."[232] But, notwithstanding the concern, the Constitution and the codes did not change the society. Noda believes that the reason for this is that the lower-ranking *samurai,* who were the main instigators of the political reform of this period,

> "had absolutely no intention of abandoning the feudal principles which they considered constituted a morality far superior to the European. They understood that they could not preserve Japan's independence without recourse to the material means that the Western powers controlled, but they believed that it was possible to adopt the material civilization of Europe and to harmonize it with Oriental morality. ... All the modern industrial enterprises were promoted by the government and then given by way of concession to individuals subject to the diligent protection of the state. The Japanese bourgeoisie was nurtured by the government, and was, in a sense, the favorite daughter of absolutism. There was neither liberalism nor individualism in its spirit."[233]

The position Inoue takes is that "...although there was widespread discontent before the collapse of the *bakufu*, there was no popular movement for a new political order based on a different set of governing principles."[234]

With her defeat and surrender in World War II and the subsequent American military occupation, Japan was forced to accept the Potsdam Declaration and, with it, substantial changes. Under the declaration, the Japanese Government was required to

> "remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion and of thought, as well as respect for the fundamental human rights shall be established."[235]

Guided by General Douglas MacArthur, a new Constitution was enacted,[236] including a new bill of rights, and the existing codes and laws were amended so as to be in harmony with the Constitution. Alfred Oppler notes that there

> "were powerful movements among the people of enthusiastic support of Occupation objectives. ...some of these movements had existed long before the war, but were repressed and became dormant. Their followers had welcomed MacArthur as liberator. ... MacArthur therefore had some reason to believe that the majority was in accord with the principles of the new Constitution.

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[232]Henderson (1968) at 78

[233]Noda (1976) at 59

[234]Inoue (1991) at 55

[235]*Political Reorientation of Japan* (Report of Government Section, Supreme Commander for the Allied Powers, September 1945-September 1948) reproduced in S. Salzberg (1988) at 99

[236]It has been called the MacArthur Constitution.

There was, however, a great deal of confusion as well as enthusiasm...."[237]

The new Constitution and new laws have certainly effected change in Japan, change which is continuing today and will continue for some time. But as Rene David notes, writing in 1985,

> "[i]t is true that Japanese *mores* are evolving, and they are approaching more and more, especially in urban society and among members of the younger generation, those presupposed by their law. But from all points of view Japanese society is still far from being a western society. The former habits and ways of thinking are still very much alive among the majority of Japanese, even those living in cities, the working classes and in commercial dealings. ... In Japan the application of modern law runs counter to Japanese mystical sentimentalism, the outcome more of a poetic than a logical spirit, which has rendered the Japanese historically indifferent to the ideals of individual freedom and human dignity entertained in the West."

2. Structure and Divisions of the Law

As has been seen above, there has been both a civil law influence and a common law influence in the laws of Japan. As the codes created during the Meiji Restoration were based on French and German law, Japan became a civil law country both substantively and procedurally. However, during the American occupation between 1945 and 1951, there was a great influx of American law and institutions. The Constitution of 1946, along with the necessary corresponding amendments to other legislation, were drafted by American lawyers. As such, American common law is now evident in Japanese constitutional law, administrative law, the family and succession provisions of the Civil Code, and the company law section of the Commercial Code, as well as in the area of criminal procedure. In addition, Japanese antitrust law and labour legislation are patterned after American notions.

This mix has created some problems. Takayanagi, writing in 1963, noted that

> "[i]f one compares commentaries on the Philippine constitution with those on the new Japanese constitution, he will be surprised at the striking difference in the mode of exposition and interpretation, even in cases in which the constitutional text is exactly the same. The former works reveal the mind of common-law lawyers, the latter that of jurists trained in the civil law. Thus Japanese jurists' interpretation of principles of common-law origin has sometimes been justly accused of resembling the interpretation of an English text through canons of German grammar, and, in some cases, serious misinterpretations have resulted."[238]

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[237]Alfred C. Oppler, *Legal Reform in Occupied Japan*,at 43-49 (reproduced in Salzberg (1988) at 111); see also Kyoto Inoue (1991) for an interesting look at how the English and Japanese versions of the MacArthur Constitution differ in meaning.

[238]Kenzo Takayanagi, "A Century of Innovation: The Development of Japanese Law, 1868-1961" in *Law in Japan: The Legal Order in a Changing Society*, Arthur Taylor von Mehren (ed), Cambridge: Harvard University Press (1963) at 37

However, more recently many Japanese are studying in the United States so one may assume that this problem should be lessening. But what is of even greater importance in the interpretation and use made of the various laws relates to the continued influence of the distinctive Japanese *mores* as well as (for lack of a better term) the Japanese national temperament.[239] Noda notes that

> "...it might be thought that this attitude of the Japanese derives from Confucian influence. However, though Confucian influence is undeniable, Chinese ideas constitute only one of the many factors which have gone into the formation of the Japanese conception of law. Indeed the essential factors appear to be, along with Chinese and Buddhist ideas, geographical and historical conditions and the basic character of the Japanese themselves."[240]

As Noda and others note, the Japanese, who belong to a character type of *emotive* predominance, "feel an aversion to the law".[241] As well, an indifference to logic can "...be noted in the Japanese character right from the earliest period."[242] At the same time, the Japanese readily adopt strange or foreign things. "Japan has received ideas from China, India, and Europe and, with little regard for logical coherence, the Japanese have allowed these ideas from different sources to coexist without ever asking whether one system of thought is compatible with the others."[243] Noda goes

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[239]As Professor J.M. MacIntyre noted in his paper "Dispute Resolution in Japanese and Canadian Labour Law" for the 1985 U.B.C. Conference *Canadian Perspectives on Japanese Law*, "...what happens in practice is not always what appears in books, and [the Canadian labour lawyer finds] that he is only touching the surface of a very complex combination of culture, traditional law, and new law." (at 2)

[240]Noda (1976) at 160; J. Toshio Sawada in *Subsequent Conduct and Supervening Events*, Tokyo: University of Tokyo Press, and Ann Arbor: Univeristy of Michigan Law School (1968) at 173 cites Nakamura's *Ways of Thinking of Eastern Peoples - India, China, Tibet, Japan* (1964) with respect to his analysis of the Japanese character and notes the following: "spirit of tolerance; overstating of social relations; social relationships take precedence over the individual; observance of family morals; absolute devotion to specific individual symbolic of the social nexus; sectarian and fractional closedness; weak awareness of religious values; indifference to logical rules; lack of interest in formal consistency; slow development of exact logic; intuitive and emotional tendencies; tendency to avoid complex ideas; fondness for simple symbolic expressions; lack of knowledge concerning the objective order."

[241]Noda (1976) at 166; Zensuke Ishimura in "Legal Systems and Social Systems in Japan", Podgorecki, et al (eds) (1985) at 119-20 notes that, following Kawashima's lead, surveys done in the 1970's revealed a lenient attitude toward the law and law enforcement. In response to the statement "If you are confident that the purpose of your action could be justified, you do not mind breaking the law", 51% were in agreement and 43% were not. In response to the statement "I like those public officers who pervert the law according to the circumstances", 66% in one survey and 73% in another were in agreement with 29% and 20%, respectively, not in agreement. In response to the statement "Law should be applied to the circumstances. It is not wise to apply the law literally." 62.3% in one survey and 65.7% in another were in agreement.

[242]Noda (1976) at 169

[243]Noda (1976) at 169; in a footnote Noda quotes from Grieger with respect to the difference between intellectualizing and emotionalism - "Intellectualizing and emotionalism vary in an inverse ratio the one to the other. Emotionalism has its basis in the innermost recesses of our being and this is why a person whose mental life is controlled by emotions demonstrates little inclination or liking for rigorous logical structures. He is little worried about pure rationality in thought or conciseness in expression."

on to note that "[t]he systems of thought that have been introduced to Japan one after the other have thus undergone no logical confrontation with each other."[244] "In this mental climate it is possible to speak of a fashion in ideas. An idea is not followed because it is rationally convincing, but because it is newer and therefore satisfies curiosity so much the better."[245]

As well, the Japanese have been influenced by both Confucianism and Buddhism.[246] The Confucian influence has been noted above. What Buddhism preaches is resignation - "[d]o not rebel against the conditions in which you find yourself, but follow your fate to the end."[247] As Noda notes

> "[t]hese two doctrines became deeply ingrained in the subconscious of the Japanese people for over more than a thousand years, and against such a background it is very difficult for a lively consciousness of subjective rights to be created."[248]

Kyoko Inoue, in discussing the Japanese understanding of the concept of rights, notes that in Western thought, "...rights normally imply corresponding duties on the part of others."[249] But in Japanese thought there is a greater emphasis on *nonspecific* obligations. She notes that

> "[t]wo ideas central to the Japanese ethos during the long feudal era were the concepts of *on* and *giri*. *On* refers to a nonspecific sense of indebtedness and gratitude in hierarchical relationships, particularly of the [*samurai*] toward his lord (called *chu*) and of a child toward its parents (called *ko*) for their benevolent care and sacrifice. This concept is expressed in writings as far back as eighth century Japanese legends.... ... An individual had the obligation to serve his lord and parents, not simply as individuals, but as figures who personified (or occupied) important social positions. ... More generally, the emphasis on *on* and *giri*, rather than on rights, reflects a profound difference in the way the Japanese view the relationship of the individual to society. The Japanese never see themselves primarily as individuals, but as participants in social relations with other people, and they identify with roles they are expected to perform. They do not emphasize their claims against their group or community so much as their obligation to contribute to the smooth and harmonious functioning of society."[250]

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[244]Noda (1976) at 170

[245]Noda (1976) at 171

[246]Motoori Norinaga, a scholar of the Edo period, in an attempt to explain the Shintoist quality of Japanese thought has stated, "If it is difficult to rule without Confucianism, rule according to Confucianism. If Buddhism is indispensible to government, use Buddhism. Both Confucianism and Buddhism constitute the temporal aspect of Shintoism." (see Noda (1976) at 170)

[247]Noda (1976) at 172

[248]Noda (1976) at 172-3

[249]Inoue (1991) at 51

[250]Inoue (1991) at 53; David Cohen and Karin Martin in "Western Ideology, Japanese Product Safety Regulation and International Trade" 19 *U.B.C. Law Review* 315 (1985) note at 359 that "[j]ust as the Japanese individual in feudal society exchanged loyalty for protection from a lord, today he seeks similar economic and social security from the state."

Toshio Sawada conducted a study of Japanese businessmen to test the hypothesis "that the pertinent positive law rules are generally ignored in business practice."[251] He found that

> "...the very idea of resort to law in matters relating to contracts is found to be generally incompatible with the basic characteristics of the Japanese.[252]

In looking into the reasons for this non-legalistic approach, he states that he did not try to

> "...unfold an overall picture of the Japanese national character as such, but through a discussion of some selected materials, trie[d] to show what types of pronounced features of the Japanese are relevant in the understanding of their attitude toward law, contracts, dispute avoidance, and dispute resolution."[253]

Sawada classified the various basic characteristics of the Japanese into three main categories: those connected with fatalism; those concerned with the sense of solidarity; and those which show a neglect of logic. In explaining the attitude toward *law*, he found that the communal solidarity and neglect of logic categories were pertinent. "One relies on others and expects them to act in a certain manner. It is not desirable, therefore, for one to conceive his expectation or claim as a "right" which may be asserted."[254] Sawada notes that these two features "are incompatible with the very purpose of codified laws, that is, to *clarify* the *rights* and *obligations*."[255] However he notes that as the Japanese still tend to be submissive, they do respect laws which reflect authority or establish organizational structure, such as criminal and administrative law. When it comes to law governing actions between individuals, they "...prefer

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[251]Sawada (1968) at 162

[252]Sawada (1968) at 162; Gordon Matei in "Challenging the Myths: Japanese and Canadian Attitudes Towards Commercial Contracts" at the 1985 U.B.C. Conference *Canadian Perspectives on Japanese Law*, argues that it is important to realize that there is a disparity between the "traditional" Japanese attitude toward contracts and the attitude of the modern-day Japanese businessman engaged in international trade. He argues that today the Japanese businessman will probably have similar attitudes towards the contract as those of the Canadian and that it is very likely that he will "insist that the contract be as precise as possible, cover a wide range of potential problems and allocate legal rights and duties among the parties in the event of all foreseeable occurances." However Matei does acknowledge that there is one fundamental difference that does linger and it relates to the function of the actual written document. He notes that "[t]he Canadian sees it as a safety net which will be there to use only in the case of an emergency. It is for his own protection. ... Some Japanese, on the other hand, see it also as a weapon which might be used against them in the event of unforeseen circumstances. ... ...should events occur which place them in an uncomfortable position, they worry that the Canadians will hold them to the letter of the agreement." (at 19) I would suggest that this difference goes to the root of the different attitudes towards the purpose of a contract. I would also suggest that the similarities that Matei found and used to conclude that the attitude towards contracts is no longer different, in fact do not relate to attitudes towards contracts but rather simply relate to what is good business practice. The areas where he found differences - as noted above and also as noted at 15 in the different responses to standard contractual provisions - are the key components in showing there are different attitudes towards commercial contracts.

[253]Sawada (1968) at 169

[254]Sawada (1968) at 178

[255]Sawada (1968) at 178

discovering vague and case-by-case solutions to such relationships rather than subjecting themselves to impersonal standards of law."[256]

With respect to the creation and maintenance of contractual relationships, Sawada states that the communal tendency and neglect of logic are again pertinent. He notes that

> "...whenever possible, the Japanese...attempt to fuse their contractual relations into the family-like atmosphere of a communal society. ... Even if they have entered into the contract in a legal spirit, the reversion from modern contractual relationship to the more archaic relationship promptly tends to occur. ... ...such a personal relationship is often manufactured, for it affords a unique sense of security. And it is alien to the maintenance of a pleasant personal relationship to know that certain *rights* or *obligations* arise or terminate under a *contract* at a *specific point in time*. ... Thus the proper means of solving problems arising in connection with the performance or non-performance of contracts is subtle extralegal negotiation."[257]

With respect to dispute resolution, Sawada notes that "[b]itter disputes have been known in all types of communities."[258] However, he points out that the Japanese

> "...generally abhor impersonal, logical and clear solutions. The parties to a dispute prefer (1) quietly working out solutions themselves (2) without resort to the objective rule (3) in vague, quantitatively indeterminate ways."[259]

Nothwithstanding this, Sawada does note that in large, industrial communities people are more *rights conscious* and it is "...common to see attempts to take maximum advantage of legal provisions to escape from obligations."[260] He also notes that changes are taking place in the Japanese attitude to law, contract, and dispute resolution. In particular,

> "...the emphasis on the individual rights guaranteed in the post-war constitution had great impact on the younger generation through the revised curricula of primary and secondary schools. The comprehensive discussion of individual rights in social studies textbooks and the formation of...student's self governments served to enhance consciousness of rights, and trained students to express their opinions and to assert their rights. ... As to contracts, a move towards more objective legal solutions is discernible both in the preventive measures taken by businessmen and in their manner of settling disputes."[261]

Sawada notes that the signs of transition are such that "[i]n large cities such as Tokyo the

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[256]Sawada (1968) at 179

[257]Sawada (1968) at 180-2

[258]Sawada (1968) at 183

[259]The latter being for the purpose of saving *face*; Sawada (1968) at 183

[260]Sawada (1968) at 187

[261]Sawada (1968) at 190-191

changes may rapidly result in a drastic transformation of the community into an individualistic society."[262] Notwithstanding this, "...a number of traditional Japanese traits still regulate the conduct of business, particularly among companies conjoined in vertical or horizontal associations." As well, "the present survey of business practice in cases of impossibility or changed circumstances revealed that traditional behavioural patterns are still extant."[263]

Kawashima, writing in 1974 about the legal consciousness of contract in Japan, notes that with respect to the form of contract provisions, "...indefinite contract provisions that give a feeling of uneasiness to Westerners give a feeling of security to Japanese."[264] And conversely, contracts which are made definite and fixed give the Japanese a feeling of uneasiness because they would lack flexibility. Kawashima goes on to state that

> "[i]n Japanese contracts the parties not only do not stipulate in a detailed manner the rights and duties under the contract but also think that even the rights and duties provided for in the written agreement are tentative rather than definite. Accordingly, when a dispute arises, they think it desirable at that time to fix such rights and duties by means of ad hoc consultation. Therefore, even something such as the due date of a debt is not thought of as something strictly defined but as fixed "give or take a few days"."[265]

Kawashima notes further that

> "...even if detailed provisions are inserted in contracts, they do not have very much significance; and consequently, the parties do not read them carefully or regard them seriously. Rather, when problems arise, it is very important for them to "confer in good faith", to arrive at a harmonious settlement, and to let the dispute "wash away". In this sense the confer-in-good-faith clause is the core of our country's contracts. Accordingly arbitration is not employed in Japan and *a fortiori* courts cannot be adapted to such purposes. There is a great fondness for conciliation (*chotei*), and it has been affirmed as an institution of national law and is used extensively."[266]

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[262]Sawada (1968) at 193

[263]Sawada (1968) at 225; it would appear that the lack of change in this area is continuing as was shown in Matei's study (noted above) which was conducted at least 17 years after Sawada's study.

[264]T. Kawashima, "Legal Consciousness of Contract in Japan" *Law in Japan* (1974) (reproduced in S. Salzberg (1988)) at 190

[265]Kawashima (1974) at 191

[266]Kawashima (1974) at 192; as noted by Michael K. Young in "Dispute Resolution in Japan: Patterns, Trends, and Developments" in *Legal Aspects of Doing Business with Japan 1985*, Isaac Shapiro (Chairman), New York: Practising Law Institute (1985) at 325-326, "[i]n an ongoing relationship, give-and-take is constant, imbalance of interests the rule. It is felt, therefore, that to be settled fairly, a dispute must be resolved in the context of the parties' relationship as a whole, and that it is the parties themselves, not 'outsiders' (which includes the courts, the law, and other external agencies) who should do the settling. ... This attitude manifests itself in two ways: aa. a preference for including in contracts a clause stating 'disputes will be settled harmoniously through consultation between the parties', rather than arbitration or litigation-oriented 'choice of law and forum' clauses that create the need to resort to outside parties; and bb. a preference on the part of courts and arbitrators not to adjudicate disputes, but to facilitate settlements through compromise by the parties themselves."

As noted by other writers, Kawashima agrees that this contract consciousness is changing but he also notes that

> "[i]t is not rare for many Japanese businesses that are engaging in transactions with foreign businesses not to read or to ignore the clauses written in contracts, to invite economic disaster, and to damage their commercial reputations."[267]

And Noda concludes that

> "[p]resent indications are that the Japanese attitude to law will continue to become more Westernized but that the Japanese outlook will not necessarily come to be identical with that of the West. Japan has often adopted European ideas which have enriched the Japanese spirit greatly, particularly with respect to rationality and objectivity, but this has never prevented the Japanese spirit from retaining its congenital characteristics. The Japanese spirit will change in the course of time, but it will always be Japanese."[268]

IV. THE RELIGIOUS FAMILY OF LAW

As we have already seen, religion has played a major role in the development of many legal systems. So the question arises, why is there a separate grouping for religion? The answer is that the Jewish, Hindu and Islamic religions are more than belief systems. They are systems of law and actually form part of the written laws of different countries. How Islamic law differs from Jewish and Hindu law, and why I will be dealing with it in more detail, is that it not only impacts on individuals' personal lives but, as well, some of its tenets impact on international commercial matters. With the current resurgence around the world in Islam[269] and with its importance in countries which are actively involved in international commerce, I believe that a basic introduction to some of its tenets is important.

A. JEWISH LAW

"Jewish law is an all-embracing body of religious duties, regulating all aspects of Jewish life."[270] It is made up of rules governing private and social behaviour as well as rules of worship and ritual. Those parts of Jewish law governing personal status actually form part of the modern-day

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[267]Kawashima (1974) at 194

[268]Noda (1976) at 183

[269]Hassan Afchar, a Professor at the Faculty of Law in Tehran, Iran, notes in "The Muslim Conception of Law" in *International Encyclopedia of Comparative Law*, Vol II, Chapter 1 that since World War II, the number of Muslim countries has been continually on the increase.

[270]Ze'ev W. Falk, "Jewish Law" in Derrett (ed) (1968) at 28

law of Israel. Its most important application is with respect to domestic relations, however some of its concepts can also be found in Israel's *Joint Houses Law* (1952) and its *Succession Law* (1965). Jewish law applies to all Jews, regardless of domicile, citizenship, or belief.

B. HINDU LAW

Duncan Derrett notes that "Hindu law is applied as part of the law of the land to over 400,000,000 Hindus in India, Pakistan, Burma, Malaysia, Singapore, Aden, Kenya, Uganda, and Tanzania".[271] It is also applied to a limited extent in the West Indies. And it is the foundation of the national legal system in Nepal.[272] As with Jewish law, it is a personal law which every Hindu carries with him or her. The designation of Hindu means an Indian by racial extraction who is not a member of a non-Hindu community. In other words, someone who is not a member of the Muslim, Christian, Zoroastrian (Parsi), or Jewish religions. A Sikh or a Buddhist can be Hindu as, originally, these were both reform movements within Hinduism. Just as with Jewish law, to be a Hindu for legal purposes it does not matter that the individual be a believer, however as Derrett notes "...the vast majority of Hindus adhere to the basic religious postulates of the indigenous Indian civilisation." Hindu law has been codified in India and forms part of the personal law relating to succession, marriage, divorce, and guardianship.

C. ISLAMIC LAW

1. Historical Development

The Arabian peninsula, which includes Saudi Arabia, Yemen, South Yemen, Oman, the United Arab Emirates, Qatar and Kuwait, is the cradle of Islam. It is a hot, dry area with only two oases, at Mecca and Medina, and they became rivals for the trade route which crossed Arabia between the East and the West. Although there is some dispute over the extent to which other legal systems have influenced Muslim law[273] Afchar simply notes that,

> "...Mecca had commercial dealings with India and the Roman Empire and it is inconceivable that

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[271]Duncan M. Derrett, "Hindu Law" in Derrett (ed) (1968) at 80

[272]Duncan Derrett & T.K. Krishnamurthy Iyer, "The Hindu Conception of Law" in *International Encyclopedia of Comparative Law*, Vol II, Chapter 1; see also Charles S. Rhyne *Law and Judicial Systems of Nations*, Washington, D.C.: The World Peace Through Law Center ((1978) under 'Nepal'.

[273]See Dr. S.E. Rayner *The Theory of Contracts in Islamic Law: A Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and the United Arab Emirates*, London: Graham & Trotman (1991) for a discussion of the various positions in this dispute.

> no legal system existed which could deal with the needs of this commerce. The merchants of Mecca, like their Western counterparts, had a commercial law based on custom. Also the Jews living in Medina had some influence over the Arabs as is shown by the rules relating to the ceremonies of the pilgrimage, animal sacrifice, marriage and divorce amongst others. ... On the whole, in the first century of Islam the ancient system of arbitration and established customs continued to be applied. However, some of these customary practices were displeasing to the more enlightened...."[274]

It was in 570 A.D. that Muhammad, the Prophet of Islam, was born into an aristocratic family in Mecca. Persecution forced him to leave Mecca for Medina where in 621 a dozen Medinese had embraced his teachings. By 622 the number had increased to 75. "The essential aim of the Prophet was to replace the old tribal organization by the Community of the Faithful. ... The differences of opinion between the religious sects were causing unease amongst the people and pushing them, without being aware of it, towards the search for a new faith, one able to guarantee a less vulnerable stability."[275] Muhammed preached a belief in one God, "kind and merciful, creator of everything for the well-being of men, his greatest creation before whom the angels were forced to bow down."[276] As it was a simple religion, without mystery or a ministry, it expanded very quickly. Before Muhammad's death in 632 he had conquered the whole of the Arabian peninsula. But it was under the Umayyad dynasty (661-750) that "Islam was transformed from the small and closely knit religious community of Medina into a vast military empire with its central government at Damascus."[277] Afchar notes that

> "[u]nder the Umayyads...the greater part of Spain was conquered. ... In the north, Islam extended to the borders of Asiatic Turkestan, and in the West to the Pyrenees. In the East it reached as far as Sind and the Punjab. In the south its dominion was bounded by the Red Sea, the Indian Ocean and the Nubian desert, and on the West by the Atlantic Ocean. The conquered territories equalled about twice the area of Europe today."[278]

With such a vast territory to govern, local governors were appointed. These governors typically delegated their judicial powers to an official called the *qadi* (or *kadi*). But because Islamic law "was moulded by Islam which accepted, transformed or forbade, according to the circumstances,

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[274]*International Encyclopedia of Comparative Law*, Vol II, Chapter 1 at 85; it is thought that the Islamic prohibition of *riba* (usury or interest) may have come into being because of the usurious interest rates being charged at the time and that this is the reason there is no exact definition of *riba*, namely because the existing circumstances were well known.

[275]*International Encyclopedia of Comparative Law* Vol II, Chapter 1 at 86

[276]*International Encyclopedia of Comparative Law*, Vol II, Chapter 1 at 86

[277]Derrett (ed) (1968) at 58

[278]*International Encyclopedia of Comparative Law* Vol II, Chapter 1 at 86

already existing practices rather than creating new ones"[279] the decisions of these *qadi* produced a great diversity in legal practice. The *Qur'an* (or *Koran*), believed to be the word of God as revealed to Muhammad,[280] is "historically and ideologically the primary expression of the Islamic law."[281] However, it is not a code of law, but rather a basic formulation of Islamic ethics[282] and as such, it often produced differences of opinion. As well, with Islam encompassing such a broad empire, the local customary law at the time included Byzantine, Roman, and Persian law.

Mounting hostility, generally, against the Umayyads found particular expression in the area of the law. As Coulson notes

> "[p]ious scholars, concluding that the practices of the Umayyad courts had failed properly to implement the spirit of the Qur'anic precepts, began to give voice to their ideas of standards of conduct which would represent the systematic fulfillment of the true Islamic religious ethic. Grouped together for this purpose in loose studious fraternities, they formed what may be called the early schools of law. These schools mark the true beginning of Islamic jurisprudence, and their development derived a major impetus from the accession to power of the Abbasids in 750; for the legal scholars were publicly recognised as the architects of an Islamic scheme of state and society which the Abbasids had pledged themselves to build. From Abbasid times onwards it is upon the jurist, or *faqih* [or *fakih*], that attention must focus; for it was the *fuqaha* who formulated the doctrine, which it was simply the task of the *qadi* to apply."[283]

But the problem of different interpretations continued. Afchar notes that "[e]ach of these schools claimed to follow one of the most famous of the Companions of the Prophet[284] and regarded him as its founder."[285] Within these different schools, which were situated in different cities in different countries, jurists were entitled to exercise their personal reasoning (*ra'y*) which was

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[279]*International Encyclopedia of Comparative Law* Vol II, Chapter 1 at 90

[280]In 609-610 A.D

[281]Derrett (ed) (1968) at 55

[282]An example of one of these basic formulations is "O ye who believe! Fulfill all obligations." It is unanimously agreed that this formulation is applicable to all obligations, contracts, and covenants between individuals as well as between individuals and God. P. Nicholas Kourides, citing Yusuf Ali, notes that there are three kinds of obligations: divine obligations arising out of our relationship with God; mutual obligations we enter into with our fellow man; and tacit obligations to morally uphold society's framework. - see P. Nicholas Kourides "The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts", 9 *Columbia Journal of Transnational Law* 384 (1970) at 394-5 (reproduced in Barton, et al (1983) at 618)

[283]Derrett (ed) (1968) at 59

[284]Afchar states, at 87, that for a person to be recognized as a Companion of the Prophet there were three conditions to be satisfied: he must have met the Prophet when he was converted; it must have been possible for him to understand the *hadith* (which basically refers to the words, deeds, behaviour and expressions of approval attributed to the Prophet) and to commit it to memory; and he must have died a Muslim.

[285]*International Encyclopedia of Comparative Law*, Vol II, Chapter 1 at 91

obviously conditioned by their social environment. Afchar notes that

> "[f]rom the beginning there was a wavering between the Sunna[286] and reasoning to provide the answer in different cases. Although the jurists within each school were agreed on the general principles recognized by their Imam [religious leader], they differed between themselves on points of detail. Several of the jurists banded together, thus transforming the various local centres into personal schools. Thus with time the number of solutions unanimously agreed became less and less."

Of the original schools, the four main ones are *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali*. The founder of the *Hanafi* school is considered by many as the father of Muslim juridical science. He accepted only a limited number of the *hadith* and Afchar notes that the *Hanafi* school adheres more than any other to the letter of the law, however it does accept that the law may change with the times. This school first developed in Iraq but now the majority of Muslims in Egypt, Syria, Turkey, the Balkans, Afghanistan, Pakistan, India and China belong to the *Hanafi* school. As well, the Sunnites[287] in Iraq, who are a minority in that country, are mainly of the *Hanafi* school.

Afchar tells us that the traditions of Medina, the city of the Prophet, form the cornerstone of the *Maliki* school and that the *Maliki* doctrine "permits more differences than that of any other *Sunni* school, and it accepts that to the extent that this is necessary, adaptation may be made because of circumstances of time and place."[288] This school predominates in Africa, with the exception of Egypt and parts of East Africa.

The head of the *Shafi'i* school was originally a student of *Malik* in Medina. He then travelled to Iraq and studied the teachings of the *Hanafi* school. He tried to reconcile the two schools by adopting a position mid-way between them. Coulson tells us that

> "Shafi'i was the first jurist to expound, systematically and unequivocally, the principle that certain knowledge of Allah's law could be attained only through divine revelation. Outside the *Qur'an*, he maintained, the only other legitimate material source of law lay in the decisions and precedents of the Prophet Muhammad [the *sunna*]. ... Where problems arose which were not specifically solved by any text of the *Qur'an* or *sunna*, Shafi'i acccepted the necessity for reasoning, but only in the strictly disciplined and subsidiary form of reasoning by analogy (*qiyas*) [or *kiyas*]. ... [For Shafi'i, the] function of jurisprudence was not to make law but simply to discover it from the substance of divine revelation and, where necessary, apply the principles enshrined therein to new

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[286]The *sunna* is one of the sources of Islamic law and it is the main source after the *Qur'an*. It is composed of all the *hadith*. The *sunna* is also called the Traditions.

[287]See below for a discussion of the differences between Sunnites and Shiites.

[288]*International Encyclopedia of Comparative Law*, Vol II, Chapter 1 at 92

> problems by analogical reasoning. ... Shafi'i's avowed aim in thus formulating a firm theory of the sources from which law should be derived was to instil into Muslim jurisprudence a uniformity which was conspicuously lacking at this time. ... But...his dream...was not to be realised."[289]

Afchar notes that adherents of this school are found in East Africa, in Central and Southern Arabia, in the Middle East amongst most of the Kurdish tribes, and that it dominates in Central and South East Asia (in Malaysia, Thailand, Vietnam, and the Philippines) and in Indonesia.

The fourth school is the *Hanbali* school which represents a return to the Medinan tradition. It espoused that the *Qur'an* and the *sunna* were of primary importance and that *qiyas* could only be resorted to if no solution could be found in a *hadith*. This school went through a number of phases, the last being the Wahhabi movement. "At the beginning of the twentieth century Wahhabism strove to give importance once again to almost extinct traditions and held itself out to be the sworn enemy of innovation."[290] The doctrine of the *Hanbali* school is that applied in Saudi Arabia. Afchar notes that there are also many Hanbalites found in the United Arab Emirates.

Coulson tells us that

> "...it is clear that the schools represent essentially distinct systems whose individual characteristics were fashioned largely by their circumstances of origin and growth. The philosophy of the mutual orthodoxy of the schools should not obscure the fact that geography and history created a four-fold division in the legal practice of Sunni Islam."[291]

In trying to ascertain the divine law (the method of doing so is called *ijtihad*), orthodox Islamic jurisprudence followed the methods of Shafi'i: look first to the *Qur'an* and the *sunna* and if no answer can be found then turn to *qiyas,* reasoning by analogy (which replaced the individual reasoning (*ra'y*) of the jurists). Orthodox jurisprudence then added to Shafi'i's theory by including the doctrine of *ijma* (or *idjma*). *Ijma* is translated as 'consensus' and refers to the agreement of the qualified legal scholars in a given generation.[292] As Coulson explains it - "*ijma*

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[289]Derrett (ed) (1968) at 61-62

[290]*International Encyclopedia of Comparative Law*, Vol II, Chapter 1 at 93

[291]Derrett (ed) (1968) at 64

[292]This is the definition given by Coulson. Afchar states that "[s]ome hold that the agreement must be that of all Muslims, others that it must be of the learned, and there are others who maintain that it is enough if there is agreement of one generation of learned men belonging to one of the centres of theological study." (at 88)

thus guarantees the totality of the results of *ijtihad* legitimately exercised."[293] *Ijma* is considered to be an infallible expression of God's law. For orthodox jurists, the four sources of the law, in descending order of importance, came to be the *Qur'an*, the *sunna*, the *ijma*, and *qiyas*.[294]

According to Afchar,[295] it was after 975 that the adherents of these four schools, called *Sunni* jurists, believed that they alone were orthodox. He states that "[t]hey held all others to be heretical and accused them of dividing and wrecking the Muslim community."[296] The largest of these other schools is known as *Shi'i* (or *Shi'a* or *Shi'ah*).[297] Afchar tells us that the *Sunni* jurists eventually came to believe that the *Shi'i* school had no theological or legal aspect, but were purely a political movement.

The Sunnites and the Shiites differ in a number of important ways: one of the main differences relates to who they believe are the true successors of the Prophet; another difference relates to the sources of the law - Shiites do not accept reasoning by analogy (*qiyas*) but rather reason (*'aql*) and for them this is the most important source of law after the *Qur'an* and *sunna*. Afchar argues that *'aql* provides greater scope for future development than does *qiyas*. The Shiites and Sunnites differ as well on how the *hadith*, which together make up the *sunna*, are verified and classified, which of course results in each using different *hadith* in formulating what the law is.[298] The people of Iran and the majority of the people of Iraq are Shiites. Afchar notes that there are also many Shiites in Lebanon, Kuwait, India, Pakistan and Indonesia.

Within *Sunni* law, the *ijma* (or consensus) endorsed the various doctrines of the four schools as being equally legitimate. But it also created a problem in that it served to close the door on

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[293]Derrett (ed) (1968) at 64

[294]Or as Parviz Oswia in *Formation of Contract, A Comparative Study under English, French, Islamic and Iranian Law*, London: Graham & Trotman (1993) at 68 states: the Koran, the Traditions, Consensus, and Analogy.

[295]See the footnote to Professor Afchar's contribution in the *International Encyclopedia of Comparative Law* where it is noted that there is disagreement between his view of the Muslim conception of law and that of European Orientalists. For a different presentation on the difference between Sunnites and Shiites see Coulson in Derrett (ed) (1968) at 65.

[296]*International Encyclopedia of Comparative Law*, Vol II, Chapter 1 at 93

[297]Another of these schools is *Sufism*. The 'whirling dervishes' of Turkey are of the *Sufism* sect.

[298]See the *International Encyclopedia of Comparative Law*, Vol II, Chapter 1 at 93-95 and Owsia (1993) at 68-70 for more detailed discussions of the differences between the two.

ijtihad (independent effort). As Coulson states

> "...the contemporary situation was irrevocably ratified inasmuch as to propound any further variant opinion was to contradict the *ijma*, the infallible expression of God's will...."[299]

So from the 10th century on, jurists became nothing more than imitators "bound to accept and follow the doctrine established by their predecessors."[300] This is known as the era of *taqlid* or imitation. The legal literature that developed simply amounted to exhaustive commentaries on the works of the originators of the doctrines.[301] What inevitably followed from this was a divergence of theory and practice. With respect to criminal law and land law, the general practice was that these cases were assigned by the ruler to an official other than the *qadi*. These officials were seen as imparting the ruler's law as opposed to God's law. But Coulson notes that

> "[w]ithin the accepted bounds of their jurisdiction, the courts of the *qadis* also deviated in certain limited respects from the strict doctrine of the Shari'a texts on the ground of social or economic necessity. This was particularly the case in the realm of civil transactions, where the doctrine expounded by the classical jurists was of a highly idealistic character. Here, the twin basic prohibitions of *riba* (illicit profit) and *gharar* (uncertainty) had been developed to a degree of systematic rigour which eliminated any form of speculative risk in contracts and which postulated standards totally unrealistic in the light of the practical demands of commercial and economic life. Shari'a courts therefore in certain instances recognised and applied elements of the local customary law."[302]

What also developed at this time was a special branch of legal writings called *hiyal*. These are legal fictions created to allow one to achieve indirectly what could not be achieved directly through the *shari'a*.[303] Abraham Udovitch notes that "[i]n later *Hanafi* literature, this...circumvention is incorporated into the very body of the legal codes."[304] And Coulson notes that *Shafi'i* courts also accepted the validity of *hiyal*, however the *Maliki* and *Hanbali* courts outrightly condemned this manipulation of the law.

The 19th and 20th centuries and the impact of Western civilisation have wrought many changes

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[299]Derrett (ed) (1968) at 66

[300]Derrett (ed) (1968) at 66

[301]The total of this literature together is called the *shari'a*.

[302]Derrett (ed) (1968) at 69

[303]For example, to overcome the restriction of *riba*, the device of a double sale was created. Another device was to label interest charges as 'service charges' since the *shari'a* allows one to charge for services rendered.

[304]Abraham L. Udovitch, *Partnership and Profit in Medieval Islam*, Princeton: Princeton University Press (1970) (reproduced in Barton, et al (1983) at 621)

on Islamic law and major changes have occured in civil, commercial and criminal law. Coulson notes that

> "[t]he *Shari'a* law of civil obligations, based upon the comparatively simple commercial activities of medieval Arabian society and involving a total prohibition of any form of interest on capital investment, was quite incapable of catering for modern systems of trade and economic development. Equally insupportable in the modern state was the criminal law of the *Shari'a*...such as amputation of the hand for theft and stoning to death for adultery, were no longer generally acceptable from a humanitarian point of view. ... As a result of these considerations the nineteenth century witnessed the abolition of the *Shari'a* criminal law and the law of civil transactions in most Muslim countries and a large-scale reception of codes of European law to replace it."[305]

Another area that has undergone change is that of *taqlid* (imitation) which has been openly challenged and, as a result, the door of *ijtihad* (independent effort to determine the divine law) has been re-opened. Rayner notes that

> "[i]n the interests of a logical necessity to incorporate the novel principles of the twentieth century and its concomitant institutions, the rejection of *Taqlid* was accepted by all but the most stubborn of traditionalists as the lesser of two evils: to recognise the body of the law as a living, progressive organism relevant to the modern day; or to reject it as a dead and rigid antique. The methodology employed by the modern jurists in their *Ijtihad* is no less eclectic than that used by their eighth century predecessors.... ... The legal modernists wanted revisionism at the cost of Islam; yet they were not prepared to abandon altogether the cultural and spiritual ascendancy of their Islamic heritage. Therefore token representations of the Classical tradition were interspersed among the code provisions, partially thwarting the abhorrence of the Traditional jurists, and proving, perhaps, the firm hold that the religious tradition has on the minds of even the most modern of jurists."[306]

2. Structure and Divisions of the Law

As is clear from the discussion above, it is only possible to speak of the structure and divisions of Islamic law generally. Between the different Muslim countries there is great variation in the modernist and traditionalist attitudes and, as such, both the substantive and procedural law differ considerably. Even within each country these elements are at odds and Coulson notes that "[t]raditionalist and modernist elements at present lie in uneasy juxtaposition, often within the ambit of a single piece of legislation."[307] Because of these differences I will look only at some of the basic characteristics of Islamic law as it relates to commercial matters and will make reference to some of the more traditionalist countries as discussed in the recent works of Dr.'s Rayner and Owsia.

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[305]Derrett (ed) (1968) at 70-71

[306]Rayner (1991) at 48

[307]Derrett (ed) (1968) at 77

The duties outlined in the *Qur'an* with respect to commerce are either positive or negative injunctions. The positive injunctions can be seen as requiring "...meticulous honesty, consideration and delicacy in business relations, and, above all, fair dealing".[308] As noted above, a Muslim must fulfill all his obligations, "but if his business partner through hardship is forced to request cancellation of the contract, he should not insist upon execution."[309] The negative injunctions in the *Qur'an* are derived from the Muslim abhorrence of unjustified enrichment.[310] These injunctions are made up of six prohibitions:

1. the prohibition of usurping another's property
2. the prohibition of *Riba* (usury, interest)
3. the prohibition of *Gharar* (risk) which includes any element of uncertainty
4. the prohibition of hoarding or monopoly
5. the prohibition of *Maysir* (gambling or aleatory transactions)
6. the prohibition of bribery.

Mutual consent, which is one of the most important concepts in the Islamic law of obligations, is authorized by both the *Qur'an* and *hadith*. Rayner tells us that the concept of freedom of contract does exist in Islamic law but discussion concerning it centres around the different types of contracts beyond the nominate contracts that were established by the early *fuqaha* (legal scholars). There are some who hold that there is no freedom of contract in Islamic law and that the list of nominate contracts is closed, however, Rayner states that the majority of the *Hanbali* school advocate freedom of contract. She goes on to note that

> "[a]n argument which is gaining more force in the modern era, is that the only condition required according to Qur'anic stipulation for the validity of any contract is the mutual consent of the contracting parties. ... These advocates thereby conclude that subject to such consent, and such prohibitions and limitations as yet set down by the law, every contract is valid whether or not they coincide with any of the recognized nominate contracts."[311]

Notwithstanding the argument that freedom of contract does exist, Islamic law provides for

> "...considerable intervention by a judge to reconstruct or readjust an existing contractual obligation. Thus extra-contractual obligations may be imposed upon the parties by this judicial intervention.

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[308]Rayner (1991) at 80

[309]Rayner (1991) at 81

[310]Joseph Schacht notes that unjustified enrichment means "receiving a monetary advantage without giving a countervalue". If someone does receive it then he must give it to the poor as a charitable gift - see Joseph Schacht *An Introduction to Islamic Law*, London: Oxford University Press (1964) (reproduced in Barton, et al (1983) at 615).

[311]Rayner (1991) at 94; Rayner notes that in 1961 in Damascus the Congress of the Week of Islamic Law stated that all kinds of contracts are acceptable provided they do not contradict the basic principles of the *shari'a* law of contract and the general principles of Islam. She states, at 96, that the majority of the Arab states followed suit.

> ... A court could also intervene, for example, in a case of *istighlal* (unfair advantage), where a disproportion of obligation exists between the contracting parties, to readjust those obligations in a more 'equitable' manner. The system of judicial intervention may therefore set aside the private arrangements of the contracting parties by seeking justification in an Islamic system of 'equity'. The intervention nevertheless operates in conjunction with the high esteem accorded to sanctity of contracts in Islam."[312]

Even though recognition is given to non-nominate contracts, most modern Civil Codes do recognize the Islamic nominate contracts, of which there are four basic ones. These are:

1. *bay'* (sale) - where right of ownership passes for consideration
2. *hiba* (gift) - where right of ownership passes without consideration
3. *ijara* (hire or rent) - where transfer of possession occurs for consideration
4. *'ariya* (loan) - where transfer of possession occurs without consideration

Other nominate contracts include *salam* (a contract for delivery with prepayment); *mudaraba* (silent partnership agreement; equity sharing between bank and client); *sharika* (partnership); *rahn* (mortgage); *ju'ala* (award); *wadi'a* (deposit); *al-muzara'a* (an agricultural contract where labour is exchanged for land, seed and plants); and *'umra* (an unconditional donation in perpetuity). Oswia notes that with respect to Iran, the Civil Code has followed the French theory of contract, however it has also retained, almost intact, the *shari'a* law of nominate contracts and this has produced a number of anomalies, in that it has particular aspects which are neither French nor Islamic.[313]

Even though, as noted above, the *Qur'an* prohibits *riba* and *gharar*, many modern Islamic codes permit both. What is evident in the constitutions of these countries is a provision requiring jurists to follow the *shari'a* law "where no specific provisions of the relevant codified law exist."[314] The Civil Codes of Egypt, Iraq, Kuwait, and Dubai explicity allow contracts containing elements of *gharar*. And the constitutions of Kuwait and Bahrain expressly authorize judicial enforcement of contractual agreements for the payment of interest on commercial loans (which is arguably

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[312]Rayner (1991) at 93-94

[313]Where some of the anomalies also arise is in the fact that the basic statutory provisions on contracts are the same as before the 1979 revolution, however the approach to the interpretation and application of these provisions has greatly changed - see Owsia (1993) at 148-150.

[314]Rayner (1991) at 97

contrary to the prohibition of *riba*).[315] Rayner argues that it has been absolutely necessary for these countries to make these changes due of the "vast machinery of international commercial relations".

It is to be noted that *riba* has been defined as 'usury' or 'interest'. The reason for this is that there is no clear definition given in the *Qur'an* or the *sunna*. *Riba* today is usually translated as 'usury' or 'excessive interest' however it means literally 'increase in' or 'addition to'.[316] The traditional pious interpretation requires the elimination of 'interest' in any form whatsoever and in recent years there has been an increase in support for this interpretation. The Islamic Jurisprudence Academy of the Islamic Conference held in 1986 supported this restrictive interpretation and condemned all interest-bearing transactions as void. A variety of mechanisms have been employed to avoid *riba*: *mudaraba* (equity sharing between client and bank; silent partnership agreement); *muqarada* (Islamic bonds on which no interest is earned but whose market value varies with the anticipated profit share); and lease financing. As well, there has been an upsurge in Islamic banking in the Middle East. Ann Mayer notes that many of the Islamic banking arrangements are inspired by *mudaraba* however she also notes that this mechanism is ill-suited for many situations, such as demand deposits, savings deposits, short term loans, and consumer credit.[317] A number of countries, such as Egypt, Bahrain and Kuwait, are not following this fundamentalist approach, however a number of others, such as Iran, Pakistan and Saudi Arabia, are. Rayner notes that even though neither the *shari'a* courts nor the administrative courts in Saudi Arabia will uphold *riba*, Islamic banking is not mandatory in Saudi Arabia. This however is not the situation in Iran and Pakistan where there is statutory enforcement of Islamic banking. Rayner notes that the current situation regarding Islamic banking is somewhat tenuous and that "[t]he divergence of opinions between the commercial bankers and the public customers, the Islamic bankers and the international community is resulting in a cavalcade of new suggestions

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[315]Rayner (1991) at 98 notes that the provisional draft of the federal Commercial Code of the UAE also recognises and enforces interest payments on commercial loans.

[316]Interestingly, David Mellinkoff in *The Language of the Law*, Boston: Little, Brown and Company (1963) at 89 notes that "[u]ntil expulsion from England in 1290, the Jews...had a virtual monopoly of undisguised money-lending, for interest was forbidden to Christians by both the Church and the common law. *Usury* carried its meaning from Classical Latin *usura* - not excessive but any charge for the use of money."

[317]See Ann Elizabeth Mayer, *Islamic Law and Banking in the Middle East Today*, Middle East Executive Reports (October 1979) (reproduced in Barton, et al (1983) at 623)

for an interest-free, internationally compatible system of banking."[318]

She adds that

> "[t]he fact...that modern commercial legislation upholds the collection of interest and is prepared to award legal recognition to contracts which are undeniably *ribawi*, does not settle the problem once and for all. The legal protection for such contracts is...not predictably assured in any of the Gulf Constitutions.... The consequence must, understandably, be that parties entering into any contract tainted with *riba*, should not automatically anticipate that the courts will enforce it, although where there are express provisions, it is likely that these will be upheld, subject to no other illegality."[319]

She also notes that even if there is legislation in place allowing for *riba*, in practice, more and more lawyers and judges, as a matter of conscience, are refusing to entertain cases involving it. As well, the current trend of public opinion is largely against *riba*.

Another prohibition, that of *gharar*, as noted above, is permitted in some countries, however if the amount of risk or uncertainty exceeds all reasonableness, the transaction will be forbidden. In order to prevent *gharar*, all matters concerning consideration, the date of payment, the identification, quality and quantity of the product, the date of delivery, and any other necessary matters must be established at the time of contracting. Some examples of contracts which would be invalid for *gharar* are ones that provide for payment "three days after harvest", or ones for a sale involving non-existent or future objects, such as future crops. What constitutes an acceptable or reasonable level of uncertainty, of course, differs between the four Schools.

The notion of *gharar* (risk) is based on the prohibition of *maysir* (gambling). And it is because of the prohibitions of both *maysir* and *gharar* that our western notion of 'insurance' is forbidden in Islamic law. Rayner notes that "...the effect of gambling was regarded as similar to that of alcohol. Speculation, like alcohol, they said, leads to the neglect of religious duties."[320] However, the *shari'a* generally accepts speculation in commerce as the *Qur'an*

> "draws an unambiguous distinction between unnecessary risks taken for frivolous purposes, and necessary risks encountered in pursuit of business. The risks attendant upon business were regarded as unavoidable. Islam therefore, if somewhat reluctantly, accepted the legality of some

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[318]Rayner (1991) at 303

[319]Rayner (1991) at 288

[320]Rayner (1991) at 293

> commercial transactions which were aleatory in nature because it recognized that all business ventures anticipating yield of profit inevitably entail certain incalculable and unavoidable risks. To deny this form of speculation would be to stifle the essence of enterprise which forms an indispensable process conducive to productivity."[321]

With respect to insurance, it would appear that the *shari'a* permits insurance where both parties share an equal risk and, as such, both hope that the contingencies insured against do not occur, however, the majority of the Arab states today accept the legality of insurance contracts for the purpose of profit and as such regulate them by statute. As well, in some of the Arab states the position taken on stock-exchanges has been clarified and officially sanctioned by statute. Saudi Arabia does not have a stock market however the Saudi Government Financial and Economic Agency operates a Stock Index and provides facilities for security dealing and trading of shares by the banks.

V. CONCLUSION

In this chapter I have tried to show how completely different the concepts and attitudes towards law are in different cultures. I believe it has become clear in looking at the legal systems in China and Japan and under Islamic law that there is an incredible diversity in how those countries which have transplanted western laws (or have had western laws imposed upon them) actually deal with these transplanted or imposed laws.[322] It is clear that the old ways continue even though there is an appearance in the legislative texts that new ways have been adopted. We have seen that China (albeit reluctantly) and Japan (much more quickly) are moving more *towards* the western ways, whereas what we are seeing in many Islamic countries is the reverse - it is a move *away* from some of the western ways and a move back towards traditional Islamic law. The adoption of western ways has been necessary in order for many countries to take part in international commerce and the growing global economy, however (and I believe the move of some Islamic countries is evidence of this) we cannot assume that this will always be the case. The position of the West has been that these countries needed to *modernize* their laws and in order to do so needed to become more like the West. However, I would argue that this attitude

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[321]Rayner (1991) at 297

[322]See also Brian Z. Tamanaha, *Understanding Law in Micronesia, An Interpretive Approach to Transplanted Law*, Leiden: E.J. Brill (1993) for an extremely interesting look at how the Micronesians have adapted to and adapted the transplanted American law.

has come about because of a lack of understanding of, and a lack of interest in learning about, these other cultures.[323] Their adoption of western laws has generally come about because they were in a weaker position economically. But this may not always hold true, and I believe that we will be witness, in the next century, to a change in this balance of power. (I shall discuss this matter in more detail in the conclusion to this thesis.)

Quite apart from where I believe we are going, the differences we have seen between the legal systems create problems today with respect to communication between parties coming from these different systems. In the next chapter I examine in more detail some of the specific problems related to language and the different legal systems.

I noted at the beginning of this chapter that it is very often the English-speaking common law lawyers who are drafting the many international commercial contracts currently in existence. Clearly these lawyers are going to draft these contracts in a manner that they know and understand. We have seen in this chapter how different the common law is from the civil law and we have seen the manner in which the common law developed. What we will see in the next chapter is how closely the language and style of common law contracts is tied to this development of the common law system. And in the final chapter we will see just how inappropriate much of this language is for international commercial contracts.

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[323]See Tamanaha (1993) at 2 for a discussion of the Law and Development Movement of the 1950's and 1960's which helped to foster this attitude.

CHAPTER THREE - THE BARRIERS POSED BY LANGUAGE

> "If terms be incorrect, then statements do not accord with facts; and when statements and facts do not accord then business is not properly executed; ...when business is not properly executed, order and harmony do not flourish; when order and harmony do not flourish, then justice becomes arbitrary; and when justice becomes arbitrary the people do not know how to move hand or foot.... Hence whatever a wise man dominates he can always definitely state, and what he so states he can always carry into practice, for the wise man will on no account have anything remiss in his definitions."[1]

I. INTRODUCTION

It should be abundantly clear at this point that culture and law are inseparable. We have also seen that culture and language are inseparable, as it is our culture which helps to determine how we see the world and it is our language which helps us to express that view. Or as M.J. Shapiro puts it,

> "[p]ersons do not simply express their individual thoughts in words; they enter the flow of language and particular discursive practices which contain preconceived ways of thinking...."[2]

As noted in Chapter 1, we can only *truly* communicate with each other if we understand the culture lying behind the words. And this holds true with respect to legal communication. In this chapter I will be looking more closely at the relationship between law and language and how the common law has developed its own special form of legal language, legal English.

II. THE PROBLEM WITH TRANSLATIONS

The translation of the legal rules of one culture, expressed in their own special language, into the language of another culture, with its different legal rules and different legal terminology, is fraught with difficulties.[3] Comparativists all make mention of the variety of problems created by language when looking at foreign legal systems. As Alan Watson notes,

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[1]From *The Analects of Confucius* as translated by W.E. Scothill, Yokohama: Fukuin Printing Co. (1910) at 609, 611 (reproduced in Dennis R. Klinck *The Word of the Law*, Ottawa: Carleton University Press (1992) at 38, endnote 1; see also a different rendering of this passage at 8 in Klinck (1992)).

[2]M.J. Shapiro, *Language and Political Understanding: The Politics of Discursive Practices*, New Haven: Yale University Press (1981) (reproduced in Klinck (1992) at 18)

[3]For an interesting look at how the *official* translators in Japan intentionally translated the MacArthur Constitution so as to make it acceptable to the Japanese (and at odds with the English version) see Kyoko Inoue, *MacArthur's Japanese Constitution, A Linguistic and Cultural Study of its Making*, Chicago: The University of Chicago Press (1991); see also Kamanaha (1993) at 47-55 "A Case of Translation", for a discussion of the problems resulting from different versions of the Micronesian Constitution - one in English and one in Pohnpeian.

> "...too frequently linguistic deficiencies interpose a formidable barrier between the scholar and his subject. This...must be emphasized. What in other contexts would be regarded as a good knowledge of a foreign language may not be adequate for the comparatist. Homonyms present traps. The French *contrat, domicile, tribunal administratif, notaire, prescription, juge de paix*, are not the English contract, domicile, administrative tribunal, notary public, prescription, and justice of the peace."[4]

As we have seen, the reason for the latter is because each legal system has its own concepts, rules, and corresponding terminology. And they are not always translatable between systems. Some actual examples have been illustrated by Rene David in looking at the translations of two international treaties,

> "[t]here are many cases where a concluded international treaty has been interpreted differently in one country or another, for want of...precaution. Thus, it was noticed (but only afterwards) that the word *debt* used in the English text of the Treaty of Versailles, does not have the same meaning as the word *dette* used in the French text of the same treaty. In the same way, in a Treaty between Germany and Switzerland it has been observed that a reference to "the date when the contract was concluded" does not refer to the same moment according to German and Swiss laws."[5]

The many difficulties encountered by UNIDROIT[6] in trying to create its *Principles of International Commercial Contracts* are also illustrative of this problem. The objective of the *Principles* is "to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied."[7] But when the different members of the Working Group tried to create the *Principles*, they encountered tremendous difficulties because of the different approaches, different concepts, and different terminology that each of them used in their own legal systems. One of the solutions they devised in order to eliminate some of the problems was to deliberately avoid "the use of terminology peculiar to any given legal system."[8] To do so they made use of terms commonly used in international contract practice, however, where necessary, they created entirely new concepts with corresponding new terminology.[9]

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[4]Alan Watson, *Legal Transplants An Approach to Comparative Law*, Edinburgh: Scottish Academic Press, (1974) at 10

[5]Rene David & John E.C. Brierley, *Major Legal Systems in the World Today, An Introduction to the Comparative Study of Law*, London: Stevens & Sons (1968) at 7 footnote 14

[6]The International Institute for the Unification of Private Law headquartered in Rome, Italy.

[7]UNIDROIT *Principles of International Commercial Contracts*, Rome (1994) note 26 at viii

[8]UNIDROIT *Principles* (1994) note 26 at viii

[9]UNIDROIT *Principles* (1994) note 24 at 1128

Rene David advises us that when one is translating the legal vocabulary between French, German, Spanish, Italian, Dutch, Greek or Portugese legal systems, there is *generally* no problem as the vocabulary employed as these systems were developing was the same and the concepts were the same. However subsequent changes in the national laws of these countries have brought some problems as the same term may continue to be used but the substantive law underlying the term may have changed. In the same way, in the various common law countries the same term may be used for a similar concept however the substantive law, which has developed independently in each country, may be different.[10]

Amber Lee Smith, in discussing the problems inherent in translations of foreign law, echoes Alan Watson and notes that

> "[i]naccuracy in translations has two forms: in one, the translator chooses the wrong word altogether because of the unfamiliarity with one of the languages. This kind of inaccuracy is easy to identify because the resulting document does not make sense. More subtle inaccuracies occur when the translator, because of unfamiliarity with legal matters or with the differences among legal systems, chooses the wrong word for the context. An example of the latter problem is the translation of the Spanish word *notario* from a Mexican document as *notary* or *notary public* in English. This translation does not in any way convey that in Mexico the *notario* is a lawyer who has served an additional clerkship in the office of another *notario*, or that the functions of the *notario* are crucial to the conveyance of any real property and are quite distinct from the basic signature authentication functions of the notary public in the United States."[11]

Parviz Owsia adds her comments to the matter of problems in translation between legal systems,

> "[t]he French and English ways of analysing and framing a legal concept are significantly different; the Islamic way fundamentally diverges from both; and the Iranian way is at variance totally with that of the English and partially with that of either French or Islamic. As a result, it is not sufficient simply to render a passage, whether out of statutory provisions, judicial decisions, or juristic writings, from French, Arabic, or Persian into English to conduct a proper comparative study. ... Similar or identical terms and expressions used under two linguistically close legal systems are often misleading since they may represent divergent legal concepts. ... The same is true...in Arabic and Persian. *'Aqd*, an Arabic term equally used in all Islamic schools and Iranian law to denote contract, does not have the same legal significance when Islamic and Iranian laws are compared."[12]

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[10]Or conversely, the same concept may have different terminology, such as the tort of *passing off* which exists at common law but which is covered by the *Lanham Trade Mark Act* in the United States and as such is known by the terminology used in that legislation, namely the *likelihood of confusion*.

[11]Amber Lee Smith, "Foreign Law in Translation: Problems and Sources" in *Introduction to Foreign Legal Systems*, Richard A. Danner & Marie-Louise H. Bernal (eds), New York: Oceana Publications, Inc. (1994) at 268

[12]Parviz Owsia, *Formation of Contract, A Comparative Study under English, French, Islamic and Iranian Law*, London: Graham & Trotman (1993) at 183-184

These translation problems are not just restricted to the different legal concepts and rules, as is shown by looking at the Japanese language. Yosiyuki Noda tells us that the Japanese language "...is capable of expressing every subtle shade of feeling, but is quite unsuited to expressing the logical relationship between objective things. It is a language of poetry, not of science."[13] And Ruth Benedict notes that "[b]oth the Chinese and the Japanese have many words meaning *obligations*. The words are not synonyms and their specific meanings have no literal translation into English because the ideas they express are alien to us."[14] As we can see, both these statements support the premise noted above that *words give shape to thought.*[15]

This premise is supported as well by the work of Clifford Geertz, a legal anthropologist, who has looked at what he calls the *distinct legal visions* of the Islamic, the Indic, and the Malaysian, as represented by Morocco, Bali, and Java respectively. By analyzing the adjudicative styles that are connected with three specific words (one from each society) which cannot be adequately translated but which Geertz alternately refers to as meaning *right*, *law*, or *justice*, he argues that "[l]aw...is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent - vernacular characterizations of what happens connected to vernacular imaginings of what can."[16]

The works of L.J. Mark Cooray[17] and Brian Z. Tamanaha[18] serve to elaborate this premise even further. Cooray looks at some of the problems encountered in de-colonized Sri Lanka in changing the existing body of law from English into *swabasha* (mother tongue). In discussing the problems legal educators faced when they were requested to teach, in Sinhala, laws which were written in English, he notes that

> "[t]he language of the law is something more than a medium. ... Law appears to be tied to language in a way no other subject is. ... [The law] is a deliberate system for regulating actual

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[13]Yosiyuki Noda, *Introduction to Japanese Law*, University of Tokyo Press (1976) at 12

[14]Ruth Benedict, *The Chrysanthemum and the Sword, Patterns of Japanese Culture*, Boston: Houghton Miflin Company (1946) at 99

[15]See Klinck (1992), Chapter 2 "Language and Thought", for a full discussion of this.

[16]Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective" in *Local Knowledge, Further Essays in Interpretive Anthropology*, New York: Basic Books, Inc. Publishers (1983) at 215

[17]In *Changing the Language of the Law, The Sri Lanka Experience*, Quebec: Les Presses De L'Universite Laval (1985)

[18]In *Understanding Law in Micronesia, An Interpretive Approach to Transplanted Law*, Leiden: E.J. Brill (1993)

> human behaviour in a society. It has an inbuilt machinery which affects all persons directly merely on the strength of what it states. If in other subjects language is outside knowledge and is a means of getting at it, in law, substance and language are necessarily interwoven and are inseparable."[19]

Tamanaha, writing from what he calls an *interpretive* perspective (and which Geertz calls *hermeneutics*), notes the thesis of his work as follows:

> "...in Micronesia and, by extension, in comparable situations of transplanted law, the content of legal norms (what they mean), the substantive import of laws and principles and of legal ideals, such as democracy and the rule of law, are often of secondary consequence to the barriers and connections which exist on the level of thought and meaning. The point I consistently press is that what counts first is whether you think, know, and understand what is shared by the group of legal actors, or by other interacting communities of thought, and only second what that thought or knowledge stands for or represents. ... Legal analysis seldom directly considers the impact of barriers and connections on the level of thought and meaning."[20]

What becomes clear from all this is that the problem of translation goes to the very root of the system in question. Another example: how does one translate *common law* and *equity* so as to impart the history which is what gives these words their meaning in a common law system?[21] One may argue that it is not necessary to do so in the context of an international commercial contract, but whoever makes this argument would be wrong because virtually every international commercial contract that has been drafted by a common law lawyer using standard precedents containing language that he or she is used to, will make use of the phrase *in law or in equity*, or there will be a reference to *equitable remedies*.[22] The latter could very well be translated as *fair remedies* which we common law lawyers know is not correct and which could ultimately create problems, particularly in light of the different cultural attitudes toward dispute resolution. One can only surmise how *in law or in equity* would be translated. Since the general rule for legal translations has been to translate literally, such a translation may give the impression that this means "what is written in the law or what is determined to be fair", which of course is not

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[19]Cooray (1985) at 15

[20]Tamanaha (1993) at 17-18; Tamanaha notes at 101 - 103 that his methodology differed from that of Geertz in that he did not follow the common social science model of participant-observer where the individual "begins with an already informed theoretical perspective" but rather was first a fully involved participant (ie. a practising lawyer in Micronesia) and only later learned about the theoretical disciplines which "resonated" with his experiences as a participant. I note this because it coincides with my experiences in Turkey, in that I proceeded initially from a typical ethnocentric perspective which changed the longer I was there but has only come to full realization upon doing the research for this thesis.

[21]When dealing with these words in my Legal English course, I actually give an historical explanation for them (and the students thus learn that *equity* has a number of meanings).

[22]We will see an actual example of this in Chapter 4.

correct.

Susan Sarcevic in her latest text, *New Approach to Legal Translation*, notes that

> "...literal translation dominated legal translation until relatively late in the twentieth century. Literal translation is characterized by the use of linguistic equivalents such as literal equivalents, borrowings, and naturalizations. While the majority of linguistic equivalents are terms created to designate concepts foreign to the target legal system, natural equivalents are terms that actually exist in the target legal system. ... One of the most respected reformers, the late Justice Pigeon [of Canada] rejected the use of literal equivalents which correspond only in appearance."[23]

Gerhard Obenaus, in his argument for the need to teach legal translators how to become information brokers, quotes two definitions which he believes

> "...summarize how the bulk of theorists and practitioners view legal translation: Legal documents...require a special type of translation, basically because the translator is more restricted than in any other form. [and] The translator's main task [in translating legal documents] is to translate a text as precisely as possible. He has to find linguistic equivalents which in their legal relevance correspond to both the original text of the source language and the translated text of the target language."[24]

Obenaus goes on to state "[t]hese definitions are not necessarily incorrect, yet the fact that legal texts require precision and impose restrictions on the translator is all too often misconstrued to mean that they have to be translated literally, leading to unsatisfactory and awkward results. In legal translation, then, translators tend to disregard the text as a whole and operate at the word and sentence level much more frequently than in other areas."[25] But as Obenaus notes "[t]he close link between legal documents and the cultural system from which they stem should come as no big surprise to most translators who have worked with legal documents. ... What is surprising, however, is that we are all the more unwilling to let go of the notion of equivalence when it comes to legal documents."[26]

And the errors which obviously ensue in the translation of legal documents can lead to serious

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[23]Susan Sarcevic, *New Approach to Legal Translation*, The Hague: Kluwer Law International (1997) at 233-234

[24]Gerhard Obenaus, "The Legal Translator as Information Broker", in *Translation and the Law*, Marshall Morris (ed), Amsterdam: John Benjamins Publishing Company (1995) at 248

[25]Morris (ed) (1995) at 248

[26]Morris (ed) (1995) at 249

consequences. In this regard Sarcevic cites Christopher Kuner,[27] with respect to international treaties, where he notes that "[t]he growing trend toward providing authentic texts of treaties in four or more languages poses dangers to the peace and stability of the international order."[28]

Sarcevic tells us that "[t]here appears to be no consensus among lawyers and linguists on acceptable translation techniques, let alone on a theoretical approach to legal translation."[29] And she notes that "[a]s a result of the tremendous burden placed on translators by the incongruency of legal terminology, some lawyers have openly doubted whether texts can be translated from one legal system into another."[30] However, she adds that "[f]or the most part, lawyers are content to say that a translation equivalent is acceptable if it would not be misleading." But, as she continues, "[o]bviously this statement offers little help to translators who need to know in which circumstances a functional equivalent could be misleading."[31]

And as Vicki Beyer and Keld Conradsen put it,

> "...legal translation is extremely difficult; one is translating not only the words on the page but the underlying legal system as well. This fact exposes an additional difficulty, namely that the legal system is both defined and constrained by the language that expresses it. Legal philosophers have long admitted that the imprecise nature of language as a means of communication creates tension in legal discourse; reasonable minds can differ as to the meaning of any given expression. Yet, the translator is expected to render the expression into a different language without "interpreting" it or changing its meaning."[32]

With respect to the translation of international contracts, Beyer and Conradsen note that

> "[c]ontract translation also becomes difficult when there is a complex agreement between the parties or when the contract is for the transfer of certain specialised technology. In an international transaction there may be several parties, each making different contributions to the transaction. The situation is further complicated when subsidiaries or joint venture companies are formed and these second tier entities have agreements with the parent companies under the same contract. As a contract is supposed to convey the intent of the parties, it is essential that the

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[27]From his article "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning" in *Comparative Law Quarterly* 40:4, 953-964 (1991)

[28]Sarcevic (1997) at 1

[29]Sarcevic (1997) at 2

[30]Sarcevic (1997) at 233, she cites Michael Beaupre *Interpreting Bilingual Legislation*, Toronto: Carswell (1986) for this position; it is for this very reason that legal dictionaries going from one language to another are usually full of errors and as a result are more dangerous than helpful.

[31]Sarcevic (1997) at 241

[32]Vicki L. Beyer & Keld Conradsen, "Translating Japanese Legal Documents into English: A Short Course" in *Translation and the Law*, Marshall Morris (ed), Amsterdam: John Benjamins Publishing Company (1995) at 146

translator fully understand the nature of the transaction."[33]

I would expand on this and add that not only do these contracts convey the intent of the parties, but with long term joint venture agreements these contracts are the documents which establish the details of the working relationship that the parties expect to have over a number of years. Serious errors in translation could have a devastating impact on the entire operation of the joint venture.[34]

Maurice Wolf, who specializes in international business transactions and is a senior partner with a Washington, D.C. law firm, believes that

> "[w]hile somewhat cumbersome, the only practical answer to this problem is to work simultaneously in the two languages, to have two working drafts. Then, when provisions are discussed, they can be translated into the other language and then discussed in the translated form. This procedure will provide both parties with agreed-on working texts, both in the original and in translation. It is also far easier to reach agreement, working in increments than to try to reach agreement, on the translation of text of a completed agreement."[35]

Wolf also believes that there should be only one executed document between the parties, rather than one in each language, because it is impossible for them to be identical. He goes on to state that if the agreement may have to be enforced in the courts of the non-English speaking country, then it is best to execute the agreement which is in that country's language. The reason for this is that

> "[m]any developing countries, in particular the Latin countries, will require any contract or agreement in a foreign language which is to be the subject of litigation or arbitration in that country, to be translated by a court appointed or approved official translator. The parties to the action do not have any input or control over that translation and the translator, although perhaps perfectly competent in both languages, not having been a party to the negotiations, will not totally understand or appreciate many of the nuances and concepts. Unfortunately the parties will be bound by this 'official' translation which may be erroneous or at least not completely capture the meaning and/or intent of the parties as set forth in the original language of the executed

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[33]Morris (ed) (1995) at 160-161

[34]While I was in Turkey one of my students was reviewing and correcting the translation of a contract. The client had originally been with the largest foreign law firm in Istanbul and had been assured by that firm that the Turkish and English versions of the contract read the same. The client had misgivings and approached the firm my student was with. She advised me that there were in fact a number of discrepancies between the two versions.

[35]Maurice Wolf, "Special Issues and Problems Affecting International Joint Ventures in Emerging Nations" in *International Joint Ventures*, Washington, D.C.: Federal Publications Inc. (1993) at V-7

agreement."[36]

Wolf's recommendation may well be the best way to proceed, however it is a time-consuming and expensive method which may not always be possible. In addition to this, many English speaking common law lawyers simply do not realize how serious the language issues are and continue to create their own documents using their own legal language and concepts fully expecting the other party or the translators to understand.[37]

III. LEGAL ENGLISH GENERALLY

> "...this Society hath a peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their Laws are written, which they take special Care to multiply...."[38]

There is no dispute that the language of the law is distinctly different. As George Woodbine, writing in 1943, noted, "[t]he professional language of the present day lawyer in the English speaking countries can hardly be called English. There are English words in it, to be sure, but at its core it is medieval French of a particular type.... ... [The words and expressions] have lost their original French pronunciation, but they have retained their medieval legal meanings with such tenacity that even today they are useful only to the lawyer."[39] And Yon Maley notes that

> "[i]n the past twenty years, there has been a great efflorescence of interest in the language of the law from linguists, sociolinguists, ethnographers, discourse analysts, ethnomethodologists, and semioticians.... Much of the comment has been critical and has been directed at its bizarre and inaccessible forms; a related criticism is directed to the social consequences of the inequalities of power it realises. Lawyers themselves, particularly those of a reforming bent, have also begun to look more closely and critically at its characteristic forms and patterns. As a result of the analyses

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[36]Wolf (1993) at V-8; in September 1997 the International Bar Association hosted a conference on Language and the Law. In the brochure advertising the conference they cited a number of problems that have arisen: "A foreign supplier had sent an offer to a Hungarian company. The purchase price was indicated in Forints. However, the word 'billion' was not translated properly and it remained 'billio' which means a thousand times more money than the amount in English. The Directors of the Hungarian company were so shocked they immediately turned to another supplier."; "A Hungarian company started legal action to claim damages from a foreign company and to try to freeze the company's bank account to secure the money. However, the relevant bank account was outside Hungary. The company submitted a petition to a provincial court in the non-English speaking country, where the account was held, requesting the court to freeze the bank account on the basis of the Hungarian procedure. However, the court insisted that the translation of the Hungarian petition should be done by their own 'official translator'. The translator mistranslated the word 'petition' because in Hungarian it is written the same way as 'income'. As the translator had translated it into 'income', the judge was unable to understand why the Hungarian company wished to freeze the account because it 'had an income' already."

[37]The joint venture agreement that I will be discussing in the next chapter comes from the same seminar that Maurice Wolf was speaking at. It was created by another American lawyer, but not one who specializes in international commercial law but rather one who handles *some* international business transactions.

[38]From Part IV of Jonathan Swift's *Gulliver's Travels* (reproduced in Dennis R. Klinck, *The Word of the Law*, Ottawa: Carleton University Press (1992) at 133)

[39]George E. Woodbine, "The Language of English Law" in XVIII *Speculum* 395 (1943) at 395

> and critiques a great deal of legal language has been described and to a certain extent explained. However, because the language of the law is not one homogeneous discourse type but a set of related and overlapping discourse types, and because such a range of different theoretical models has been applied to each, but never to the whole, each analysis speaks only for itself. Whatever coherence or consistency may underlie or inform the language of the law as a whole is not available to view."[40]

Among these different researchers, the language of the law has been variously described. Roberta Kevelson calls it a "technical, idiosyncratic sublanguage system".[41] Peter Goodrich (appearing to be in agreement with Swift) calls it an "archaic, obscure, professionalised and impenetrable language"[42] which "has invariably...been the object of an elitist, revelatory or hierophantic, culture of interpretation."[43] With respect to the written form of the language, David Crystal and Derek Davy believe that "[i]t is essentially visual language, meant to be scrutinized in silence: it is, in fact largely unspeakable at first sight...."[44] Some writers, including Bernard Jackson, believe it to be an autonomous language.[45] However others, such as Georges Mounin,[46] see it as "no more than a specialized form of the ordinary language."[47] Mounin's argument is that

> "...although some social group or class may have a specific lexicon, and even particular phonological and syntactic characteristics of its own, the essential bases of the natural language - the same phonology, the same general lexicon, the same morphology and the same syntax - are still found in it. Without them, there could be no understanding whatsoever between lawyers and non-lawyers of the same natural language group. Those features which do distinguish class or legal language are therefore to be regarded as socio-linguistic phenomena, and not questions of language proper."[48]

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[40]Yon Maley, "The Language of the Law" in *Language and the law*, John Gibbons (ed), London: Longman (1994) at 13-14; It may be argued that Dennis Klinck (1992) has tried to pull together these different analyses into some sort of coherent whole.

[41]"Language and Legal Speech Acts: Decisions" in *Linguistics and the Professions: Proceedings of the Second Annual Delaware Symposium on Language Studies*, R.V. DiPietro (ed), Norwood, N.J.: Ablex (1982) at 122 (cited in Klinck (1992) at 133)

[42]Peter Goodrich, "Law and Language: An Historical and Critical Introduction", 11 *Journal of Law and Society* 173 (Summer 1984) at 173

[43]Goodrich (1984) at 178

[44]David Crystal & Derek Davy, *Investigating English Style*, Bloomington: Indiana University Press (1969) at 194

[45]See Jackson (1985) at 47 where he states "[g]iven the way the legal lexicon is constituted, and the nature of any semantic relations...,then legal language, having a lexicon constituted in a manner different from that of the ordinary language, and involving terms related to each other in ways different from those of the ordinary language, must be autonomous of the ordinary language."

[46]Klinck (1992) notes at 135 that another proponent of this position is H.Ph. Visser't Hooft.

[47]Klinck (1992) at 134; Jackson (1985) at 47 also states "Mounin, while conceding that the language of law has both lexical and syntactic peculiarities, notes that it needs to draw upon the whole resources of the natural language for its intelligibility."

[48]Jackson (1985) at 47

Jackson responds to this by saying that

> "Mounin's argument explains only cases of *apparent* intelligibility of legal language to the layman. The layman reads legal language as if it were natural language; he may be quite oblivious to those systemic differences which give the same words a different meaning to the lawyer. Equally, we have to account for the occurrence of incomprehension of legal language even amongst those who have a sophisticated knowledge of the natural language concerned. ... It is lack of knowledge of the system, rather than lack of knowledge of individual lexical items, which produces this effect."[49]

Based on my own experience, I tend to agree with Mounin as I have found that it is essential for my students to be at an advanced level of regular English before they take my course in Legal English. Those students I allowed in who were at an upper intermediate level of English simply could not grasp the legal English anywhere near to the same extent as the advanced English students. At the same time, the students were required to be upper-level law students or practising lawyers, as without some pre-existing knowledge of (western) legal concepts it was impossible for them to understand the course material. It may be argued that this latter point supports Jackson's position, however, I would argue that having some knowledge of the legal concepts is no different than having any specialized, technical knowledge. And my students did not have to have a *complete* understanding of the common law system to come to understand commercial contracts written in legal English, although, to support Jackson, I must admit that they would not understand them in *exactly* the same way that I would.[50] However, the fact that my course, which is based on international commercial contracts, would not be understood at all by those unfamiliar with a free-market economy adds, I believe, further support to Mounin's position. In the end, I do not believe the distinction between the two positions is really that. I agree with many of Jackson's points and I agree that to have a *complete* understanding of the legal lexicon it is necessary to have a knowledge of the system.

With respect to the use made by judges of the *ordinary meaning* of words in legal interpretation, and the supposed support this gives to Mounin's position, Jackson responds that

> "[t]he non-legal sense of a word adopted into the legal lexicon provides the jurist with the source of one possible choice as to its particular meaning in law. But the choice...can only be made from within the legal system, and does not occur automatically as a result of the semantic pull of the

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[49]Jackson (1985) at 47-48

[50]But even if they could not understand them to the same depth as I would (meaning that I would understand extenuating situations that could possibly arise and how these would be dealt with) does not mean that the understanding that they have may not be adequate for the purposes at hand.

non-legal meaning."[51]

Again, I have no disagreement with this, and in fact agree that one must have *some* understanding of the system to be able to know when a legal or non-legal meaning will be given to a particular word. But once again one does not have to have *complete* understanding of the system, but rather some knowledge of the area in question. Obviously, this matter is one that I deal with in my Legal English course and I have found that once the students have been made aware of the different legal meanings that have been given to non-legal words, and in what context this legal meaning is to be used, they then have no difficulty with these words and when they are to be used. Again, they have not learned the *entire* legal system to be able to do this.

It would appear that Dennis Klinck also supports Mounin's position when he concludes

> "[p]erhaps this is to say no more than that any technical specialist will read an ambiguous (ordinary/technical) or a technical text differently than a non-specialist; that does not justify our saying they speak different languages. Arguably, the specialist simply has a more sophisticated knowledge of the same language."[52]

Klinck makes this statement after drawing the conclusion from Jackson's position concerning the use made in law of the *ordinary meaning* of words that "[o]ne interesting possibility arising from this is that even people speaking the same words, and using the same syntax, may be speaking different languages."[53] I have repeated this statement because I believe Klinck is incorrect when he says that the two speakers would be using the same syntax.[54] His statement is supportable when dealing with a piece of literature, as literature is often specifically written to include different levels of meaning, however I do not believe this can be said about legal English.[55] As

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[51]Jackson (1985) at 50

[52]Klinck (1992) at 138; Klinck also states in Chapter two of his text that he believes legal language not to be an autonomous language but rather a technical sublanguage.

[53]Klinck (1992) at 137

[54]It is interesting to note that Woodbine (1943) makes almost the same statement as Klinck but eliminates the reference to syntax. He states at 396 "[s]o it happens that our lawyers may use the very same words that laymen use and yet speak a different language."

[55]And in fact the example he includes after this statement is a poem entitled "The Notary". I believe Klinck confirms my position when he expands on his thesis at 154-155 and notes that the poem "can be read as at least two different language varieties. I imposed a "legal" reading on the poem, because my instructions were to read it as a lawyer would. Given such expectations, it was perhaps inevitable that I should find it full of "legal language". If I had been asked to do a theological reading, I would probably have found the language to be predominantly religious." Doing a "legal" reading or a "theological" reading of a poem is far, far removed from using legal language to accomplish some task within the law. It may be that Klinck has used this example to try to force his argument that the lexicogrammatical characteristics are not

any lawyer knows, it is easy to spot a non-lawyer trying to use legal language. Those who do not have any understanding at all are most easily spotted and readily dismissed (oh what power we wield!) however those who are using the lexical items (ie. the words) correctly often still do not *sound* the same and may prompt the lawyer to ask if the speaker is a lawyer. I believe the reason for this 'not *sounding* the same' is that the speaker is not using the same syntax. To clarify what I am talking about, I quote Bernard Jackson who tells us that

> "[t]wo essential features of any natural language are a lexicon and a grammar. The former is the totality of words (or dictionary) recognised as belonging to that language; the latter combines a syntax (rules governing the combination of words in sentences, so as to produce sense) and a morphology (rules governing the formal variations of a word depending on its context)."[56]

And legal English does have its own syntax.[57] I have found in my teaching that this different syntax poses just as many problems as the different lexicon.[58] But this syntax not only makes it difficult for lawyers who are non-native speakers of English to understand a document written in legal English, it also makes it difficult for the native speaker of English who is a non-lawyer.[59] As will be illustrated in Chapter 4, the need for unambiguous language in common law contracts, and hence in legal English, often necessitates dispensing with what would be considered, in regular English, to be good grammar and adopting instead structures which help to avoid ambiguity. This often results in the repetition of a number of words and awkward or run-on sentence structures which can be very confusing. As Crystal and Davy note

> "[i]t seems that many types of discourse...prefer to convey connected information in a series of short sentences which need linking devices to show their continuity, while legal English moves in the opposite direction by putting all such sequences into the form of very complex sentences capable of standing alone. ... ...almost the only formal linkage to be found between the long and self-sufficient sentences is the repetition of lexical items - and of this there is a good deal. The

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necessarily determinative in characterizing language as legal language but that one needs to consider as well the roles of function, context of use, and audience expectation. I for one am not convinced.

[56]Bernard S. Jackson, *Semiotics and Legal Theory*, London: Routledge & Kegan Paul (1985) at 33

[57]Risto Hiltunen in *Chapters on Legal English, Aspects Past and Present of the Language of the Law*, Helsinki: Suomalainen Tiedeakatemia (1990) at 25 notes that most studies on legal English have been on the lexical aspects of it whereas there are hardly any studies on the syntactical and textual structure.

[58]From my experience, the morphology of legal English presents few difficulties.

[59]Hence the plain language movement with respect to legal documents involving the general public. But I believe it is also true that the antiquated form of this syntax (particularly when combined with the use of antiquated words) even makes it difficult for many lawyers to understand what has been written. The really frightening consequence of this is that lawyers of a conservative bent (see Charrow & Erhardt below) or those who are just plain lazy are creating documents that even they themselves do not understand and which may not even make sense. This problem is not just limited to legal English, however, as one of my students in Turkey told me that sometimes he reproduces documents he does not understand and this is because they are the accepted, and expected, form and they are written in old Ottoman Turkish, of which a good portion of today's Legal Turkish is comprised.

> habit is to be expected in a variety which is so much concerned with exactness of reference. ... But the matter goes further than sentence connection, and legal English is in fact notable for the extreme scarcity, even within sentence structure, of the pronoun reference and anaphora [backward oriented reference to previously mentioned nouns] which are used so extensively in most other varieties."[60]

Crystal and Davy also point out that "anyone who tries to produce a spoken version is likely to have to go through a process of repeated and careful scanning in order to sort out the grammatical relationships which give the necessary clues to adequate phrasing."[61] As they note, "[t]he need to achieve precision or avoid ambiguity always takes precedence over considerations of elegance, and unusual sequences are as a result common".[62]

Of course the skill of the individual drafter also comes into play here and there are many who seem incapable of drafting easily understood yet legally unambiguous documents. I agree with George Orwell's argument that the "characteristics of the style of the passage correlate to qualities of the writer's thought: that it is sloppy, clumsy, vague, etc."[63] As well, Klinck notes that "ambiguity is not always present, and even where it appears to be, may be resolved by syntactic analysis".[64] He goes on to argue that the repetitiveness of legal English "contribute[s] to the formality and ritual quality of the language [thereby] making it impressive."[65] Charrow and Erhardt as well believe that some of this *bad* drafting continues because of a conservative element in the profession who do not want the *traditional* legal language altered.[66] There are also writers who subscribe to the view that language is deliberately manipulated in order to maintain domination.[67] Peter Goodrich suggests that "linguistic structure itself encodes inequalities of power and is also instrumental in enforcing them...."[68] And Dale Spender argues that "the group

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[60]Crystal & Davy (1969) at 201, 202

[61]Crystal & Davy (1969) at 194; this is of course what the students and I do in my legal English course and with some documents this can amount to verbal gymnastics!

[62]Crystal & Davy 91969) at 205 - some examples they give with this statement are: "the payment *to the owner* of the total amount"; and "any instalments *then remaining unpaid* of the rent".

[63]Klinck (1992) at 37

[64]Klinck (1992) at 261

[65]Klinck (1992) at 261

[66]Veda R. Charrow & Myra K. Erhardt, *Clear & Effective Legal Writing*, Boston: Little, Brown and Company (1986) at 19

[67]I will look at this idea in more detail when discussing international law firms.

[68]"The Role of Linguistics in Legal Analysis" 47 *Modern Law Review* 523 at 531 (cited in Klinck (1992) at 18)

which has the power to ordain the structure of language, thought and reality has the potential to create a world in which they are the central figures."[69] I must agree that from my personal observations as a practising lawyer there is certainly a segment of the legal profession who use legal language in this latter manner. At the same time, it must not be forgotten that in a common law system there is a very legitimate fear of altering language which has a proven track record. What is often the case is that the lawyer may want to simplify some of the language being used but simply does not have the time to verify that the particular wording in question has not been given a specific meaning and, as such, will continue to use what has not created a problem in the past. As Charrow and Erhardt note,

> "[the] view of language as carrying the power of the law appears to be one reason that lawyers resist even minor changes. For example, many lawyers would hesitate to substitute *stop* for *cease and desist* because they would worry that tampering with a time-honored term might somehow bring about the wrong legal result. There may be legal reasons (either because of precedent or statute) for retaining many terms, but there are few valid legal reasons for clinging to Latinisms (*prima facie*, *supra*); strings of synonyms (*null and void*; *any and all*; *rest, residue and remainder*); or archaic words and phrases (*witnesseth*, *thereinabove*, *hereinbefore*)."[70]

I prefer to phrase it differently than Charrow and Erhardt when I am speaking with people who complain about the way lawyers cling to their language. I prefer to say that *the law is in the words* and often it is for this reason that lawyers are not always able to change the way in which they use the words.[71] As well, as noted by Crystal and Davy,

> "...the complexities of legal English are so unlike normal discourse that they are not easily generated, even by experts. It is a form of language which is about as far removed as possible from informal spontaneous conversation. ... The reliance on forms which were established in the past and the reluctance to take risks by adopting new and untested modes of expression contribute to the extreme linguistic conservatism of legal English."[72]

Another of the many syntactic peculiarities of legal English is the regular use of double or multiple negatives.[73] Brenda Danet notes that negatives are an important syntactic feature of

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[69]*Man Made Language*, London: Routledge and Kegan Paul (1980) (cited in Klinck (1992) at 18); in this regard see also Arnold H. Leibowitz, "Language and the Law: The Exercise of Political Power through Official Designation of Language" in *Language and Politics*, William M. O'Barr & Jean F. O'Barr (eds) The Hague: Mouton & Co. Publishers (1976) at 449

[70]Charrow & Erhardt (1986) at 14

[71]Or as put by Sir Frederick Pollock & Frederic William Maitland in *The History of English Law*, Second Edition, Volume I (1898) (reissued in 1968 by Cambridge University Press) at 87 "...language is no mere instrument which we can control at will; it controls us."

[72]Crystal & Davy (1969) at 194

[73]For more extensive discussions on the different syntactic features see Crystal & Davy (1969) and Danet (1980).

legal English.[74] And Klinck points out that negatives are most likely to appear in contracts "where the parties may attempt to define the scope of their obligations by exclusion."[75] But Klinck goes on to note that negatives often appear in legal discourse as well, possibly because of "lawyers' habit of circumspection. They do not want to commit themselves by making strong or unqualified statements."[76] By using a double negative a statement is made weaker and less direct. The example Klinck gives to illustrate his point is the sentence "This is not unexpected." as opposed to "This is expected."[77] I believe this fear of making a strong or unqualified statement can again be tied to the common law system where often every word and every turn of phrase is scrutinized carefully in the hope of giving the other side an advantage or a way out of a situation. With respect to contractual language, I would suggest that the overuse of double or multiple negatives can also be attributed to the predominance of conditional clauses. As noted above, exclusion is often used to define the scope of one's obligations. If this is combined with the conditional *in the event of* or simply *if*, it is easy to picture the resulting double or multiple negatives. Native speakers of English generally have to stop and think about the meaning of a statement when they hear or see a double or triple negative. This difficulty is obviously multiplied when the reader is a non-native speaker of English.

An additional problem for the non-native speaker of English is the large number of collocations (regularly recurring combinations of words) which are specific to legal English.[78] Crystal and Davy note that the most characteristic collocations are those involving synonyms or near-synonyms, most often in pairs but sometimes in extensive lists. Many of these are a combination of English and French:[79] *last will and testament*; *terms and conditions*; *able and willing*; *goods and chattels*; *cease and desist*; *null and void*; *save and except*; *breaking and entering*; *free and clear*; *peace and quiet*; *force and effect; right, title and interest.*[80] These combinations, the use

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[74]Brenda Danet, "Language in the Legal Process", 14 *Law & Society Review* 445 (Spring 1980) at 481

[75]Klinck (1992) at 262

[76]Klinck (1992) at 262

[77]Klinck (1992) at 262

[78]Or as Charrow & Erhardt (1986) at 12 put it "[w]hole phrases and clauses exist that have no counterpart in everyday language."

[79]In some instances the words were originally Latin and have come via French.

[80]See Hiltunen (1990) at 54 for a more complete listing.

of which continues today, came about at the time when both English and French were being used in the law and there was some concern as to whether the words for the same referent had the same meaning. To avoid any problems the drafters began to include both terms and to "rely on inclusiveness as a compensation for lack of precision."[81] But as Mellinkoff notes, "[w]hat may have once been rationalized as necessary translation soon became a fixed style"[82] and one which lawyers used "[s]ometimes for clarity, sometimes for emphasis, and sometimes in keeping with the bilingual fashion of the day".[83]

An example of a collocation which is specific to contracts is *including but without limiting the generality of the foregoing.*[84] One of the shortened versions of this collocation is *including without limitation.*[85] Lawyers who are native speakers of English may think that use of the second form is an advance on their part in that they have reduced the verbosity and antiquated language of the contract. However, use of the second form in international commercial contracts is even more confusing than the first for non-native speakers of English. I assume that translators would have similar difficulties. And it is for this reason that collocations should be included in legal dictionaries. As Beyer and Conradsen note

> "[d]ictionaries are essential to ascertaining the meaning of unknown words. In the case of translation, dictionaries provide potential translations of those words. It is important to bear in mind, however, that dictionaries do not provide meanings or translation equivalents for phrases. Further, they only rarely describe the word in context. Therefore, it is strongly recommended that any word be looked up in several dictionaries.... ... ...even after a standard translation for a particular term has been chosen, be aware of the context in which the term is presented throughout the piece being translated...."[86]

But with collocations which have been judicially interpreted or have been used consistently over a period of time and have come to have a specific meaning or have come about because of a particular legal rule or principle, looking up the *individual* words in dictionaries will not only be of little assistance but will probably produce errors in meaning.

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[81]Crystal & Davy (1969) at 208

[82]Mellinkoff (1963) at 120

[83]Mellinkoff (1963) at 121

[84]For those who say that maybe this collocation should be eliminated entirely, I would argue to the contrary, as it has a specific and helpful purpose. To put it into plainer language would involve the use of many more words - as is evidenced by the drawings and language I must use to explain its meaning to my students.

[85]Another one is *including but not limited to.*

[86]Morris (ed) (1995) at 150

Another reason for including collocations in legal dictionaries designed for lawyers who are non-native speakers of English is the problem posed by articles and prepositions. These little words usually create the most difficulty for a non-native speaker of English.[87] At the same time, a common law lawyer is well aware of the errors that an incorrect or misplaced article or preposition can cause. Margaret Bryant has actually done a study on the part that articles, prepositions and conjunctions play in legal decisions and she notes that

> "[a]t least one of these three groups is used in almost every sentence that is spoken or read; occasionally, all three groups are present. ... Since these words are so generally used, even by the most illiterate, it seems that they should present little difficulty. On the other hand, these are the words that cause most of the trouble, for they are used freely and indiscriminately. The person who uses the word does not realize that he must not only select the correct word of relationship, but must also use it in the right place. If either necessity is violated, the whole meaning is changed."[88]

As discussed above, legal English has many syntactic peculiarities, however probably the most striking difference between legal English and regular English is the different lexicon. As Crystal and Davy note

> "[i]t is especially noticeable that any passage of legal English is usually well studded with archaic words and phrases of a kind that could be used by no one else but lawyers. It seems likely that these words give the man in the street his most reliable guide for identifying the language of a legal document."[89]

There are a number of distinctive features of the legal English lexicon. Like any specialized language, it has developed a number of specialized terms, such as *cause of action*, *defendant*, *plaintiff*, *negotiable instrument*, *stare decisis*, *ex parte*, *injunction*, *garnishment*, and *res judicata* to name just a few. David Mellinkoff refers to these as *terms of art* or *argot*,[90] however Brenda Danet prefers to call them *technical* terms.[91] Crystal and Davy note that *terms of art* are "those words and phrases about whose meaning lawyers have decided there can be no argument."[92] And they, like Mellinkoff, include within this category such words as *appeal*, *bail*, *defendant*, *landlord*, and *plaintiff*. I, like Danet, prefer the term *technical* as it does not require an additional

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[87]Articles are a particular problem if the native language does not use them, as is the case with Turkish.

[88]Bryant (1962) at 1

[89]Crystal & Davy (1969) at 207

[90]Mellinkoff (1963) at 16-19

[91]Danet (1980) at 476

[92]Crystal & Davy (1969) at 210

definition to make it clear what is being referred to. As well, the meanings given to words are always subject to change, particularly within the common law.

Another distinctive feature, as noted above, is the use of common words with uncommon meanings. Some examples of these are *action* (law suit), *alienate* (to transfer), *consideration* (a benefit to the promisor or a detriment to the promisee), *counterpart* (the duplicate of a document), *demise* (to lease), *instrument* (legal document), *motion* (a formal request for action by the court), *execute* (to sign a document), *serve* (to deliver legal papers), and *without prejudice* (without loss of any rights).

As well, because French, Latin, and English terminology were all being used as the common law was developing, we continue to use French, Latin and Old and Middle English today. A number of the French words in use today would include *agreement, attorney, claim, covenant, debt, easement, guardian, guarantee, heir, justice, lien, money, obligation, parties, partner, pledge, property, purchase, tort,* and *trespass.*[93] Although many of the Latin terms are gradually being eliminated there are others that continue to be used, including *ab initio, affidavit, bona fide, et al, in personam, in rem, proviso, mutatis mutandis,* and *pari pasu.* Old and Middle English words form the basis of many regular English words today, however there are others that have gone out of use in regular English but continue on in legal English. These include *master* (which is still used at sea, in shipping documents, and in maritime insurance contracts), *forthwith* (which is found in every commercial contract), *such* (used as an adjective), and *herein, therein, therefor, thereby, whereas, whereby,* and *witness* (all of which continue to be used in contracts). Apart from these words, there are also those which come from Legal French. They include *chose in action, estoppel, fee simple, attorney general, laches, metes and bounds, quash,* and *voir dire.*[94]

Legal English also uses what could be called *formal language* to a far greater degree than regular English. Some examples are *know all men by these presents, approach the bench, the deceased, may it please the court, came on for hearing,* and *pierce the corporate veil.* Two examples

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[93]See Hiltunen (1990) at 52-53 and Pollock & Maitland (1968) at 81 for more of these French words which have become basic to our legal vocabulary.

[94]The French origin is evident in such terms as *fee simple* and *attorney general* where the adjective follows the noun which is the opposite of English where the adjective precedes the noun.

which can be found regularly in international commercial contracts are *in the event of* and *time is of the essence.*

As well, legal English uses to a great extent words and expressions which have a flexible meaning. But as Mellinkoff notes, these are "to be distinguished from the inept, the inadvertent, and the unexpected."[95] Rather they are deliberately chosen because of the need, in the context in question, for a word or expression which is broad enough to include a number of possibilities but at the same time is precise enough to be fairly easily determined (again a necessity in common law contracts). The most common of these words would be *reasonable.* Some other examples are *adequate compensation, as soon as practicable, due care, existing, gross profit, incidental, in conjunction with, normal, promptly, substantial, sufficient, thereabout, undue influence,* and *unsound.*

At the same time, as discussed above, there is the need to be precise in order to avoid ambiguity. The collocation already noted, *including but without limiting the generality of the foregoing,* would fall within this category. This category would also include the use of a definition section within the contract to make it clear what the exact meaning for specific words, as used in the contract, will be. Some other collocations which would be included here include *shall not be deemed to limit, nothing contained herein shall, words in the singular include the plural and vice versa,* and *words used in the masculine gender include the feminine and neuter.*

To the non-common law lawyer the need for precision at the same time as the need for flexible language, along with the extensive use of peculiar collocations must seem rather strange. But as discussed, this is all because of the nature of the common law, namely, the need to spell out very clearly all aspects of the parties relationship but at the same time providing for all possible contingencies and future events. As Crystal and Davy note,

> "...the concern with meaning affects more than the choice of terminology. Lawyers know that anything they write, and much of what they say, is likely to be examined with an acuity that is seldom focused on other forms of language. It is as if the products of their linguistic activity become objects to be dissected and probed - often in a purely destructive way. Consequently, much care is called for in the construction of these 'objects'. When so much depends on the results of interpretation, the lawyer must go to great lengths to ensure that a document says exactly

[95]Mellinkoff (1963) at 21

> what he wants it to say, that it is precise or vague in just the right parts and just the right proportions, and that it contains nothing that will allow a hostile interpreter to find in it a meaning different from that intended."[96]

Because the impenetrable nature of legal English is so closely tied to the history of the common law system and the history of English generally, I believe that it is necessary to look more closely at the history of this language in order to better understand it and thereby consider what parts of it may no longer be necessary.

IV. THE HISTORY OF LEGAL ENGLISH

It was noted in Chapter 2 that after the Norman Conquest of England, French came to be the language spoken in the courts, whereas Latin was the language in which the laws were written. Although this latter situation came to be true, for a short period after the Conquest the laws continued to be written in either English or Latin, with Latin the predominant. Oliver Emerson notes that,

> "[f]rom the time of Aethelberht, writs and other acts issued by the government were in English or Latin. William continued this practice, so that the writs of his reign are all in Latin or English, none being in French. After William's time the use of English in government documents grows rarer.... But the place of English in this time is taken not by French,but by Latin, so common during the Middle Ages."[97]

Mellinkoff argues (even though he acknowledges that it cannot be fully proven) that it was not just French which was spoken in the courts after the Conquest but a combination of English, French and Latin.[98] George Woodbine appears to agree and states that

> "[t]he traditional belief has been that the use of French in England for all purposes was a direct result of the Norman Conquest.... ... Credence has been given to this traditional theory almost unanimously. ... In spite of its widespread acceptance...it lacks the support of any direct evidence from any first class source. It is, in fact, contrary to the weight of our best evidence, which strongly suggests, if it does not prove, that French after the conquest did not drive out English as a generally used tongue, and that the use of French for the purposes of pleading in the law courts did not become fixed until long after the conquest, perhaps not until the time of Edward I [1272-

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[96]Crystal & Davy (1969) at 212

[97]Oliver Farrar Emerson *The History of the English Language*, New York: The Macmillan Company (1935) at 69; see also Mellinkoff (1963) at 65-66; and see also L.M. Myers *The Roots of Modern English*, Boston: Little, Brown and Company (1966) at 120 where he notes that "[a]t least above the primary level (about which we know very little) the language taught in the schools was Latin, which was still regarded as the one important language of Christendom, and used for the most important documents of all kinds."

[98]Mellinkoff (1963) at 69

1307], the period at which it began to affect English legal literature."[99]

L. M. Myers tells us that if we are only looking at the written language at this time then we will believe that English was eliminated, however the reality is that "English was always the only language of the great majority of the people; and in an age when so few of them were directly affected by education there was never any real chance that it would be supplanted."[100] It was French and Latin that were considered to be the languages of learning.[101] Myers tells us that "[t]he language in which Latin was taught was French, which was used, when Latin was inappropriate or impracticable, for all important affairs as well as the everyday affairs of practically all people of either education or position."[102] One can surmise then that it is because of this that French has had such a substantial influence on the language of the law and in fact Woodbine notes that the lawyers who developed the technical language of the law were clearly subjected to some influence that did not affect the general population or at least not to the same degree.[103] Myers notes that between 1200 and 1400 there were many technical words borrowed

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[99]Woodbine (1943) at 397-398; Otto Jespersen, *Growth and Structure of the English Language*, 8th Edition, Leipzig: B.G. Teubner (1935) at 87 notes that the French influence "did not begin immediately after the conquest, and that it was strongest in the years 1251-1400...."; one explanation for this later introduction of French into the pleadings in the courts may be due to the fact that William declared the Anglo-Saxon laws would continue in force and these laws were administered in the hundred and county courts which continued on as before - see Woodbine (1943) at 405-406

[100]Myers (1966) at 120; Woodbine (1943) at 408 also notes that there is nothing "that indicates or even suggests that French crowded out English as the spoken language."

[101]Woodbine (1943) notes at 399 that information "tends to indicate that at [the time of Henry II (1154-89)] the learned man in England was trilingual and spoke English, French and Latin; that other people in the upper classes were bilingual and used both English and French."

[102]Myers (1966) at 120

[103]Woodbine (1943) at 399; Woodbine goes on at 399-400 to state "[j]ust what that influence was and when it was exerted is not easily determined. We know little or nothing about the English lawyer in the earlier days; his history is yet to be written, that is, if there were any lawyers at that time. The probability seems to be that for a long time after the coming of the Norman rulers, lawyers in the modern sense did not exist as far as the secular courts were concerned. In the ecclesiastical courts there were *advocati*, professional pleaders trained in the canon law.... ... As far as our present knowledge of the facts goes, the lawyer as we know him, the man who has been trained in the law and who makes his living by appearing for clients in court, comes on the scene rather suddenly in the last quarter of [the 13th century]."; but see Otto Jespersen (1935) at 79-82 who writes that "[w]e need only go through a list of French loan-words in English to be firmly convinced of the fact that the immigrants formed the upper classes of the English society after the conquest, so many of the words are distinctly aristocratic. ...[N]early all words relating to government and to the highest administration are French.... ... The upper classes, as a matter of course, took into their hands the management of military matters; and although in some cases it was a long time before the old native terms were finally displaced...we have a host of French military words, many of them of very early introduction. ... Another natural consequence of the power of the Norman upper classes is that most of the terms pertaining to the law are of French origin. ... As ecclesiastical matters were also chiefly under the control of the higher classes, we find a great many French words connected with the church...."; and see also Albert C. Baugh, *A History of the English Language*, Second Edition, London: Routledge & Kegan Paul Ltd. (1957) at 134-135 where he writes "[i]t is impossible to say how many Normans and French people settled in England in the century and a half following the Conquest, but since the governing class in both church and state was almost exclusively made up from among them, their influence was out of all proportion to their number. Whatever the actual numer of Normans settled in England, it is clear that the members

from French for use in government, law, religion and military affairs, which, as argued by Jespersen and Baugh, would be positions held and influenced by those of the upper classes.[104] But Emerson argues that since French reached the height of its influence in the 13th century and "was the tongue of half the courts of Europe...it is not strange that it should have been used in England as well."[105] Emerson also tells us that throughout the 13th and 14th centuries and even later "English was being influenced directly by Parisian French rather than by the Norman dialect."[106]

How ever it was that French came to have such an influence on the spoken language of the law, it was Latin that was the preferred language for writing. For two centuries it monopolised the language of the statutes and this continued through the first half of the 13th century.[107] But by the second half of the century, even though Latin predominated, some statutes were written in French.[108] By the 14th century French had become the dominant language of the statutes, even though some Latin did continue until 1461.[109] However by the end of the 15th century (following the introduction of the printing press in 1476 and the acceptance of the London Standard as the standard form of written English)[110] statutes began to be printed in English. It was also at this

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of the new ruling class were sufficiently predominant enough to continue to use their own language. ... For two hundred years after the Norman Conquest, French remained the language of ordinary intercourse among the upper classes in England."; but see also Emerson (1935) at 55 where he argues "[m]istaken conceptions as to the influence of the Norman conquest on the English language are largely due to erroneous ideas.... ... [T]he actual number of the Normans coming in at the conquest has been greatly exaggerated in popular estimation. In reality they were comparatively few in numbers...."

[104]Myers (1966) at 129

[105]Emerson (1935) at 72-73

[106]Emerson (1935) at 55

[107]Pollock & Maitland (1968) Volume I at 83

[108]The first statute in French was the Statute of Westminster, in 1275. From then through 1290 there were 11 in Latin and 9 in French. All the statutes of 1291-1295 were in Latin. The Great Charter in 1297 was in both Latin and French. - see Woodbine (1943) at 401

[109]Baugh (1957) at 161; Woodbine (1943) at 401-402; Woodbine also notes at 402 that "[a]s far as law and government are concerned, the influence which causes French to be used in England as a regularly written language, begins to operate not at the time of the Norman conquest, but some two hundred years later, following that other French invasion which took place after the marriage of Henry III to Eleanor of Provence, and led ultimately to [the battles of] Lewes and Evesham." Woodbine also tells us at 404 in footnote 3 that French, unlike English, was not a literary language at the time of the Norman conquest and "[t]his may explain why the Norman kings did not use written French in their documents, though they did use English."

[110]Baugh (1957) at 235; but see Hiltunen (1990) citing J.H. Fisher, "Chancery and the Emergence of Standard Written English in the Fifteenth Century" 52 *Speculum* 870 (1977) at 899 where he states that the Chancery played an important role in "raising the profile of English in the fifteenth century. ... Caxton, on returning to England in 1476, established his press, not in London, but in Westminster, "under the shadow of the government offices where Chancery Standard was by that time the normal language for all communication."" , Hiltunen notes that the Chancery Standard was not based on the London

time that the law was first written about in English, however it was not until the 16th century that a technical law-book in English was written.[111] The registers of writs and all court records, however, continued to be in Latin, and when common law pleadings became written they were also in Latin and continued in this way until 1731 when they gave way to English.[112]

Middle English was the form of English that was used in England from the period 1150 to 1500. Mellinkoff notes that

> "[i]t marks the end of the Germanic inflections of Old English. It is the link between a language overwhelmingly Anglo-Saxon and one that incorporates not bits but whole chunks of Latin and French."[113]

As noted above, by the end of this period the dialect known as the London Standard had become the accepted form of written English, however prior to this, Middle English was developing without standards or rules so that what resulted was a totally disordered language.[114] Myers writes that

> "[d]uring the whole of the Old and Middle English periods there was not a grammar, a dictionary, or even a spelling book of English in existence. There was not even complete agreement about the alphabet - either the letters of which it was composed or the sounds that some of these represented."[115]

And Mellinkoff notes that "[p]honetic spelling and varying degrees of literacy made the simplest word an adventure."[116] It was in this period of Middle English that the word *law* came to have its variety of meanings, meanings which continue up to this day: it can mean a particular rule; a body of rules; the profession of law; the action of law courts (as opposed to courts of equity);[117]

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regional dialect; but see Emerson (1935) at 81-83 and Myers (1966) at 140 who hold that the London Standard was the accepted dialect for written English

[111]Pollock & Maitland (1968) Volume I at 87

[112]Sir William Holdsworth, *A History of English Law*, Volume II, Fourth Edition, London: Methuen & Co. Ltd. (1936) at 479; Pollock & Maitland (1968) Volume I at 83

[113]Mellinkoff (1963) at 83; Middle English was the language of Chaucer.

[114]Myers (1966) at 140-141 notes that at this time the London Standard was not truly standardized as no one had as yet written its rules, but it had enough prestige that people throughout the country tried to comply with it.

[115]Myers (1966) at 123

[116]Mellinkoff (1963) at 84; Baugh (1957) at 243 notes that the development of English in this period took place under conditions peculiar to England, namely "none of the other modern languages of Europe had had to endure the consequences of a foreign conquest that temporarily imposed an outside tongue upon the dominant social class and left the native speech chiefly in the hands of the uncultivated."

[117]The continuing use of the language *in law or in equity* illustrates this use.

the custom of the country (as in *the law of the land*); and justice (as in *law and order*).[118] It was also at this time that words such as *notwithstanding*, also with multiple meanings,[119] came into being. As well, the many *where*[120] and *there*[121] words, which have become commonplace in legal documents, developed at this time. Many lawyers may be surprised to learn that these words which they so faithfully reproduce are simply the result of "the whimsey of personal choice and personal penmanship."[122]

It was during this period of Middle English that the law of contract was slowly developing in England. Even though there were few written documents at this time, some of the phrasing that did develop continues even to this day. Mellinkoff tells us that the introductory terminology *Know all men by these Presents* came into being at this time, as did *This is the agreement made between*.[123] It was also at this time that deeds (dealing with the transfer of land) were written with *recitals* listing the reasons for the grant and naming the parties present when it was being made. To this day, *recitals* are an integral part of most commercial contracts.

As the Middle English period progressed, the use of French declined in the general population,[124] however it stayed very much alive in the law. The Year Books, which first appeared in 1260 and continued until 1535, and which contained reports of court cases along with legal and personal comment, were written almost exclusively in French.[125] Mellinkoff notes

> "...it is generally agreed that from about 1272, the writers of the Year Books were writing not merely the law language they were accustomed to write, but were writing also the law language they heard spoken in court: law French. The end-date of oral law French trails off in a haze of

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[118]Mellinkoff (1963) at 84-85

[119]It can mean in spite of, nevertheless, still, yet, and although.

[120]Whereabouts, whereas, whereby, wherefor(e), wherein, whereof, whereunder, whereupon

[121]Thereabouts, thereby, therefor(e), therein, thereof, thereunder, thereupon

[122]Mellinkoff (1963) at 86; even though this may be the case I would argue that some of these words do perform a useful function in contractual language and for that reason they continue to be used.

[123]Mellinkoff (1963) at 91-92

[124]See Emerson (1935) at 61-68 for a discussion of this; see also Baugh (1957) at 169-177

[125]Woodbine (1943) at 401 notes that the early Year Books "were commercial and unofficial reports whose purpose was to show the technique of successful pleading"; Theodore F.T. Plucknett in *A Concise History of the Common Law*, Fifth Edition, London: Butterworth & Co. (Publishers) Ltd. (1956) at 273 notes that the earliest proto-Year Books are partly in manuscript and unpublished

uncertainty."[126]

Woodbine puts this date a little later and states that it is clear from at least 1285 that oral pleadings in the king's courts were in French and that it was "a practice which no one questioned and to which everyone conformed."[127] Pleadings were now conducted by professional pleaders who were "a special and professional class".[128] However English, rather than French, was probably their normal tongue as it is clear in the early Year Books that "both court and counsel knew English".[129] Mellinkoff believes the probable reason for this continued use of French in the law courts was that "[t]he more English became the common currency of all classes of society, the more French became the mark of the noble and wealthy."[130] And it was the noble and wealthy who sent their sons to study the law as not only were they the only ones who could afford it[131] but they also had a particular interest in land law which dominated the cases at that time.[132] Melinkoff also believes that they had an interest in preserving the mystery of the law. As he puts it,

> "[w]hat better way of preserving a professional monopoly than by locking up your trade secrets in the safe of an unknown tongue? ... [French] was never the language of the people. And as time passed it would become incomprehensible to any but the initiate."[133]

As noted above, the extensive influence of Old French continues in today's legal English. An example of the difference between Modern French and Old French can be seen in the word

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[126]Mellinkoff (1963) at 99; Mellinkoff cites Woodbine (1943) for this information however there is some error here - it may well be a typographical error as Woodbine does make mention, at 431, of 1292 being the date of the earliest printed Year Book.

[127]Woodbine (1943) at 429; Woodbine also notes at 429 that the use of French "may or may not have been customary in any one of the many other courts then functioning in England" as the source of this information only refers to the king's courts not to the secular courts.

[128]Woodbine (1943) at 429

[129]Woodbine (1943) at 431

[130]Mellinkoff (1963) at 100

[131]Holdsworth, Volume II (1936) at 479 notes that the common law was originally the law of the upper classes and even when it became the law for all classes it was still administered by the upper classes. He cites De Laudibus who stated "that it cost twenty marks a year to maintain a student in one of the Inns of Court, "and thus it falleth out that there is scant any man founde within the Realme skilful and cunning in the lawes, except he be a gentleman borne and come of a noble stock.""

[132]Holdsworth, Volume II (1936) at 475; Holdsworth also notes that this abundance of land law "was created for the most part by the labours of the lawyers".

[133]Mellinkoff (1963) at 101; Woodbine (1943) writes at 436, footnote 2, "[i]f French did not become the language of English law until the cradle tongue of the English people, including the lawyers themselves, was unquestionably English, the answer to the problem [of why French became the permanent tongue of lawyers alone] becomes plain."

contract. This is the Old French form of the word which was adapted from the Latin *contractus.* The Modern French form of the word is *contrat.* However, even within Old French there were variations depending on which dialect was used. The word *gaol,* still used in England, was from Norman-French whereas *jail,* which is used in Canada and the United States, was from Parisian French. Also, *ward* which is from northeastern Old French, and *guard* which is from central Old French, were at one time synonyms.[134] They continue to be synonyms in *warden* and *guard* however they are now opposites in *guardian* and *ward.* Mellinkoff tells us that this variation of the *w* and *gu* in the French dialects eventually resulted in a legal distinction being made between *warranty* and *guaranty* (now also *guarantee*), even though, like *guard* and *ward,* these were originally the same word.[135]

With the Statute of Pleading[136] in 1362 came the order that English was to be the language of court proceedings.[137] This however was difficult to accomplish for a number of reasons: the study of law was in French (with some Latin), plus the prescribed form of the writs, which, as we saw in Chapter 2, required strict adherence, could not be translated into English and say exactly the same thing. This was also the case with the oral pleadings which were required to follow the form of the writs. If the oral declarations and denials did not correspond exactly to the required form then the matter failed before the court. Pollock & Maitland give an example of an omission which would be fatal: "if there is to be a charge of felony, an irretrievable slip will have been made should the pleader begin with 'This showeth to you Alan, who is here',

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[134]This is the position Mellinkoff takes and he notes they are both from the same Old Teutonic source as Old English *weard,* guard, however, Emerson (1935) at 176 states that "*guard* is the French form of an original Teutonic word, the true English form of which is *ward.*

[135]Mellinkoff (1963) at 103; in the brochure announcing the IBA conference in September 1997 on Language and the Law, the following case was cited: "When working on a deal in Poland an English lawyer, a German lawyer and an Australian lawyer spent many hours negotiating the English language documentation arguing about whether different liabilities should be covered by a warranty, an indemnity or a guarantee. The day before the deal was signed they finally had the documentation translated into Polish only to be told by their Polish translator that there is only one word in Polish covering all three concepts."

[136]This statute was written in French.

[137]A brief excerpt, translated into English, reads as follows: ...because the laws, customs, and statutes of this realm be not commonly known in the same realm, for that they be pleaded, showed, and judged in the French tongue which is much unknown in the said realm...that all pleas which shall be pleaded in his courts whatsoever...or in the courts and places of any other lords whatsoever within the realm, shall be pleaded, showed, defended, answered, debated, and judged in the English tongue, and that they be entered and enrolled in Latin.... (this has generally been understood to be referring to the oral pleadings) - see Emerson (1935) at 64-65

instead of 'Alan, who is here, appeals William, who is there'...."[138]

It took approximately one hundred years before the transition actually took effect and English became the main language spoken in the courts. Mellinkoff notes that "[t]he best informed surmise is that in the interim the basic pleadings remained French, but the closely associated argument at the bar was increasingly carried on in English."[139]

Meanwhile in the courts of equity, which had never been stifled by the required form of the writs and pleadings, English flourished. Records in this court were kept in English and the court itself was known as the "English side" of the court of Chancery whereas the common law side was known as the "Latin side".[140] Mellinkoff tells us that "equity pleadings were experiments in written English."[141] Because the applicants were literally *appealing* to the King for justice, the documents were filled with "an English stockpile of formalized piety and lament".[142] They were also filled with the various forms of *where* and *there* and *aforesaids* which were developing at this time. These documents also contained double negatives, yet their use at that time did not cause the same result that such a construction would give us today. "As long as they were used with different words, negatives reinforced rather than cancelled each other (as most of us still feel that they do, even though we have been trained not to use them that way ourselves)."[143] In these pleadings, English was mixed freely with French and Latin and it was at this time that the language we know today as *goods and chattels*; *lands and tenements*; *right, title and interest*; and *part and parcel*[144] came into being. Mellinkoff notes that what began as bilingual combinations (as discussed above) became a habit of multiplying words and "[s]ynonym for its own sake became an ornament of the age in which the legal profession matured."[145] Jespersen raises an interesting point with respect to these synonyms: he notes that in some instances the main

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[138]Pollock & Maitland (1968) Volume II at 605

[139]Mellinkoff (1963) at 115

[140]Holdsworth, Volume II (1936) at 480

[141]Mellinkoff (1963) at 116

[142]Mellinkoff (1963) at 116

[143]Myers (1966) at 154; Myers notes as well at 154 that the theory that two negatives makes a positive comes from classical Latin and was misapplied to English. This may well be why we continue to have difficulties with them today.

[144]See Mellinkoff (1963) at 121-122 for more of these doublings

[145]Mellinkoff (1963) at 121

difference between the English and the French is that the English is more colloquial and the French more literary, for example *begin-commence, hide-conceal, feed-nourish, look for-search for, inner-interior,* and *outer-exterior.*[146] This helps us to better understand the penchant the common law lawyer of today has for what is seen now as *more formal* useage, as clearly the lawyers of this earlier time followed the more literary version.

We now know that even though English began to be used more in the courts, and even though it "made a remarkable recovery"[147] from the chaos of the Middle English period, it was never able to supplant French as the language of the law. The reason for this has to do with the fact that the French used in the courts had become a very exact and technical language. And, as Holdsworth states, it may well have been because of the increase in the use of English that as French became "less of a living language, and more of a professional language, its exactness and technicality increased."[148] Coke, writing in the 17th century, noted that many of the

> "ancient terms and words drawn from that legal French are grown to be *vocabula artis*...so apt and significant to express the true sense of the laws, and are so woven in the laws themselves, as it is in a manner impossible to change them, neither ought legal terms to be changed."[149]

Of course this continued use of French prompted renewed complaints by the general public about the inaccessibility of the law. And in 1650 Parliament passed *An Act for turning the Books of the Law, and all Proces and Proceedings in Courts of Justice, into English.* The Act required that everything but English be eliminated from law writings and proceedings. But as Mellinkoff notes "[e]xcept for the Old English words *law, book, writ,* and the half French, half English *court hand,* every law word in the statute is borrowed from either French or Latin."[150] The Act lasted until 1660. With its repeal, the reports reverted once again to French and the forms of the pleadings to Latin.[151] However within twenty years, some reports were being published in

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[146]Jespersen (1935) at 93; Pollock & Maitland (1968) Volume I at 87 footnote 3 note that "the French that is a literary language in England under Henry III and Edward I should not be called 'Norman-French'; Parisian French, the French of the Isle of France, is already its model".

[147]Baugh (1957) at 243

[148]Holdsworth, Volume II (1936)at 480-481

[149]Holdsworth, Volume II (1936) at 481

[150]Mellinkoff (1963) at 127

[151]Holdsworth, Volume VI (1937) at 571

English.[152] This was a logical step as in the court proceedings all oral testimony was in English, all citations from statutes were in English (the statutes had been English since 1489) and any words cited from a will were in English.[153]

By the 18th century the domination of the law by French and Latin was over and in 1731 a new English-for-lawyers law was passed. However, the wording of this law "repealed too much of the bar's accumulated learning"[154] and by the time it was to come into effect, in 1733, it had been substantially modified by an amendment which "reinstated the customary law abbreviations and technical words".[155] Roger North, writing in the 18th century, noted that the rules of English law were "scarcely expressible properly in English" and that a man could never be a lawyer "without a knowledge of the authentic books of the law in their genuine language."[156] As we have seen, it is through these *technical* words or "genuine language" that French and Latin have continued to be a part of legal English.

The period beginning in 1500 and continuing up to today is that of so-called Modern English. Mellinkoff tells us that it was an "age when the law was spinning its finest webs, its intricacies doubling, and its expenses multiplying."[157] It was also the age of the printing press which helped to increase the literacy among the general population. It was at the beginning of this period that written pleadings (as opposed to oral) became the rule in the law courts and this, along with the printing press, had a far-reaching effect on the language of the law. Once again the fate of the lawsuit could depend on the words of the pleading. Holdsworth notes that

> "[u]nder the new system...the pleadings did not come before the court till they were complete. There was therefore much less chance of avoiding a fatal error before it was too late. At the same time the numerous cases decided upon points of pleading had tended to increase the minuteness, strictness, and precision of the rules of pleading. Practising lawyers, therefore, were laying an increasing stress upon the importance of these rules - a fact which is illustrated by the very large number of books of all kinds which were being published upon this topic at this period. And these lawyers had some reason; for this growth in minuteness and strictness and precision, made the manner in which the issue was reached and formulated of more importance than the substantial

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[152]Holdsworth, Volume VI (1937) at 571

[153]Mellinkoff (1963) at 130

[154]Mellinkoff (1963) at 134

[155]Mellinkoff (1963) at 134

[156]Holdsworth (1936) Volume II at 481

[157]Mellinkoff (1963) at 137

> merits of the case. It made it more and more possible for a skillful pleader to snatch a decision, in spite of a total absence of any substantial merit; and conversely, it made it quite impossible to win the strongest case unless it was properly placed before the court."[158]

Along with the development of the written reports of the cases developed the notion of *binding precedent* and by the 17th century it was the practice in the courts of equity as well as the common law.[159] As the 17th century progressed, the majority of the reports being published were written in English.[160] And even though the precedents of pleading and the technical rules and doctrines of pleading were most easily expressed in their original language, namely French, more and more English was being used in the courts. It had always been the language in the courts of equity, and it was now the language being used for new branches of the law that were developing, such as in commercial law and land law.[161] Also at this time, a number of the older authorities were translated into English, as English was what the lawyers themselves were now demanding.[162] French continued to be considered the language of the law, as all the technical terms were French, however it was now a French that was Anglicized.[163]

What the combination of precedent and printing press did was to vastly increase the body of law. As Mellinkoff tells it "[t]he more that was recorded, the more picayune the detail that counsel could ferret out for cavil. And higher grew the mountain of precedent."[164] Of course the mode of education, which "may be summed up in two words, lectures and argument"[165] (and the style which continues today) only added to this mountain. As Holdsworth notes, "no doubt it kept the practical, the argumentative, the procedural side of law prominently to the front - perhaps sometimes to the exclusion of legal theory."[166]

It was during the 16th and 17th centuries, when regular English was expanding rapidly, that many

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[158]Holdsworth, Volume VI (1937) at 570

[159]Plucknett (1956) at 349

[160]Holdsworth Volume VI (1937) at 572

[161]Holdsworth, Volume VI (1937) at 572

[162]Holdsworth, Volume VI (1937) at 572

[163]Holdsworth, Volume II (1936) at 481

[164]Mellinkoff (1963) at 140

[165]Holdsworth, Volume II (1936) at 506

[166]Holdsworth, Volume II (1936) at 508

of the law's technical terms came into being, such as *affidavit*, *alimony*, *corporation*, *subpoena*, all borrowed from the Latin. The scholars of the Renaissance were again leaning to Latin but English was also borrowing from Greek (*anonymous*, *autonomy*), French, Italian, and Spanish. Emerson notes that this expansion was in part a result of the strong desire in England to *improve* English and "to place it on a level with the classic tongues."[167] The means by which this was done was by "importation of words from the classical languages, especially Latin, and imitation of the rhetorical effects of the classical writers."[168] With this rapid expansion, English continued to be a disordered language[169] however, to correct this, purists established academies to create a standard grammar and in the 18th century lexicographers came on the scene to assist in this standardizing process.[170]

It would appear that our *formal* and *wordy* legal English syntax may well have developed out of this desire to imitate Latin, as well as from the translations of the early written pleadings which were in Latin. As Mellinkoff tells us,

> "literal translations failed to take into account that, unlike inflected Latin, intelligible English depends primarily on word order. Accordingly, the Latin predilection for holding a verb in reserve at the end of a sentence made grammatical monstrosities of pleadings translated into English. ... Following Latin form was not only clumsy but wordy. English made up in articles and prepositions what it lacked in inflection. "For instance," wrote Blackstone, "these three words, "*secundam formam statutii*," are now converted into seven, "according to the form of the statute.""[171]

The use of English as opposed to Latin also created problems with conjunctions. *And* is Old English and created few problems, however *or* has a much more varied history.[172] Mellinkoff notes that "[t]he exact point in time has not yet been fixed when an unsung draftsman consolidated the progress into uncertainty by a formal coupling of *and* with *or*."[173] Subsequent cases on the interpretation of *and/or* have resulted in a variety of conflicting results.

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[167]Emerson (1935) at 85

[168]Emerson (1935) at 85

[169]It had never had a fixed grammar.

[170]Emerson (1935) at 90, 95

[171]Mellinkoff (1963) at 146

[172]See Mellinkoff (1963) at 148-152 for a discussion of the various meanings which *or* has been given.

[173]Mellinkoff (1963) at 151

Punctuation was another area for confusion but Mellinkoff tells us that "[o]ut of [the] jumble of contrariety one common principle appears: all of this punctuation was addressed indirectly to the ear rather than the eye."[174] One problem created by this 'punctuation for the ear' was that it created "interminable sentences.... It also produced composition that was often sparsely punctuated and usually haphazardly punctuated."[175] The English statutes followed this system of oral punctuation as did written petitions, deeds, leases, contracts and other documents. As Mellinkoff notes

> "[t]he practical result for later generations of lawyers and legal scriveners was an indifference to punctuation and an addiction to the long sentence. The long sentence was not a matter of carelessness but of principle. That was the way it had always been done and that was the way to do it."[176]

Verbosity was common to regular English at this time however another factor that aided in the verbosity of legal English was the introduction of documentary evidence into court proceedings. As Mellinkoff notes,

> "[s]ince a party to a contract might easily become party to a lawsuit, the more verbose the document the better, lest the party be left to the uneven contest between a curt writing and a voluble disinterested witness. It was also easier now than in an earlier day to come by someone literate to set down a transaction in permanent form. As a result there was an increasing reliance on documentary evidence."[177]

Added to this was the development of the *parol* evidence rule. This gave "further encouragement to draftsmen to get it all in: the document would have to speak for itself."[178] Mellinkoff notes that the situation was even worse in the courts of equity. All in all, "[t]he attention to detail, the affection for detail, stimulated by the blossoming rules of evidence...was no anomaly."[179] The result being that,

> "[t]he finer the distinctions drawn, the more detailed were the documents drafted. Each distinction was reflected in more words. And each rash of words brought still further distinctions - now reduced to print for future lawyers to reproduce. Around and around."[180]

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[174]Mellinkoff (1963) 154-155

[175]Mellinkoff (1963) at 156

[176]Mellinkoff (1963) at 164

[177]Mellinkoff (1963) at 173

[178]Mellinkoff (1963) at 173

[179]Mellinkoff (1963) at 174

[180]Mellinkoff (1963) at 178

The fact that lawyers and clerks at this time were paid on the basis of the length of their documents also added to this verbosity.

But, as we saw in Chapter 2, "[t]he greatest obstacle to improvement of the language of the law was the mounting size and disorder of the law itself."[181] It was at this point that the argument was being made for codification of the law on the model of continental Europe, however, as we saw earlier, the common law lawyers had enough power to defeat this and, as such, English law continued with its practice of *precedent* instead of *principle*. And one of the complicating problems with continuing in this way was that the people who were creating many of these documentary precedents were either poorly trained or not trained at all in the law.

Of course the difficulties inherent in the common law system persist today. It is not easily understood by non-lawyers or non-common law lawyers. The language is difficult and the movement to simplify it continues. For a number of years now the Plain English movement has been very active and has progressed from being concerned mainly with those documents in which the general public is involved (such as mortgages, insurance policies, and leases) to general drafting practices[182] and to statutory amendments.[183] Drafting is also being taken more seriously now in law schools and in legal training programs.

However Mellinkoff raises an important point when he talks about the changes that both language and the meanings given to it go through. He notes that

> "[t]echnicality is a slow-formed compound of sophistication in both law and language. And continuity of the form of words gives no assurance of continuity of meaning in or out of the law."[184]

For this reason, elimination of those old words which we may think are redundant may in fact be dangerous because even though they added no real meaning at the time they were introduced,

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[181]Mellinkoff (1963) at 192

[182]See the innumerable texts available on legal drafting.

[183]See Philip Knight's article "New Words and Old Meanings" in 56 *The Advocate* 27 (January 1998) where he notes the changes made in 1997 to the *Revised Statutes of British Columbia* with the intent of "replac[ing] unnecessarily legalistic terms with more common expressions".

[184]Mellinkoff (1963) at 108

they may have come to have some special meaning at a later point in time. As well, words that had a special meaning when they were introduced may no longer carry that same significance today.

V. CONCLUSION

It is easy to see why legal English is difficult for non-lawyers, foreign lawyers, and even newly-called lawyers to understand. It is also clear that the lexicon and syntax of legal English is intimately tied to the common law system and its particular method of development in England. This method of development has generally been continued in those English-speaking colonies to which the common law system was subsequently transplanted. By highlighting this close connection, I believe this chapter helps to show how inappropriate some aspects of legal English (as we common law lawyers know it) are in the international commercial context. In the following chapter I will look more closely at this position.

CHAPTER FOUR - THE IMPACT OF CULTURAL, LEGAL, AND LINGUISTIC DIFFERENCES ON ACTUAL INTERNATIONAL COMMERCIAL CONTRACTS

I. INTRODUCTION

We saw in Chapter 2 that the common law and civil law systems proceed from completely different perspectives. The common law system is built on judge-made case law called *precedents* whereas the civil law system is based on codified *principles*. The basis of each of these systems impacts directly on how contracts within the systems are drafted.

We saw in Chapter 3 how the common law system requires the drafter to include all rights and obligations between the parties involved in the contract, as well as make provision for all possible contingencies and future events. We saw as well that the drafter must take care that the language used does not allow for any interpretation other than the one intended. The result of this is a very detailed and lengthy contract.

In contrast to this, contracts in a civil law system are typically short and contain statements that are far more general when it comes to the language being used. The reason for this is that the rules governing the relationship between the parties are contained in the relevant code provisions and as such the document does not need to spell out what is already written in the law. As Volkmar Gessner notes, it is only necessary to include details "insofar as the civil code shall be abrogated".[1] The problem with this style for international contracts is that its abstract drafting form requires that both parties be familiar with the underlying code provisions. However, in international contracts often the law of only one of the parties is chosen as the governing law of the contract, or the parties may choose the law of a third country, or they may not choose the law of a country at all but instead the *lex mercatoria*, or they may allow all disputes to be resolved at the discretion of arbitrators. It is for this reason that I believe the common law style lends itself more readily to international transactions as the rights and obligations of the parties are spelled out in far more detail thus giving the parties, and anyone trying to resolve a dispute, greater understanding of what the intent of the parties was. (Of course this latter statement is based on the assumption that the parties were in actual agreement about what was written in the

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[1]Volkmar Gessner, "Global Legal Interaction and Legal Cultures", 7 *Ratio Juris* 132 (July 1994) at 142

contract.) But to say that I believe the common law style generally is more appropriate for international transactions is not to say that I believe a contract used nationally should be used in its entirety internationally as there are many aspects of the style and language which are not appropriate in the international context.

In talking about the different drafting styles, Gessner goes so far as to say that "the art of contracting...is rather underdeveloped on the [European] continent and extremely elaborated and sophisticated in the common law cultures."[2] I agree for the most part with this statement, however, as will be seen in this chapter, *sophisticated* should be used advisedly, as many common law lawyers are far from sophisticated in their drafting skills.

Even so, the common law form is generally that being used today in the more complex international transactions. I believe there are three reasons for this: first, as noted above, because there is no global set of laws governing international contracts it is necessary to spell out in detail what the rights and obligations of the parties are and common law contracts provide a ready precedent; second, with the large number of American, Canadian, English and Australian law firms with permanent offices around the world,[3] it is the lawyers in these firms who are drafting a lot of these international contracts; and third, because common law contracts are in English, the language of international business, they again provide a ready precedent.[4]

To help illustrate my arguments, I have attached extracts from two precedents for an International Agency Agreement (see Appendices A and B). The extract in Appendix A, which is from an agreement which has been prepared by Thomas F. Clasen and is included in his text *International*

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[2]Gessner (1994) at 144

[3]John Barton and Susan Jordan in "The International Legal Community in the Pacific Basin" in *Law and Technology in the Pacific Community*, Philip S.C. Lewis (ed), Boulder: Westview Press (1994) note at 75 "[i]n most foreign cities, American law firms predominate among other foreign firms. But the American firms are not alone: British, Australian, and Canadian law firms are also venturing overseas. Canadian law firms of all sizes have opened offices in London, Paris, New York, Washington, Geneva, Brussels, Hong Kong, Shanghai, and Taipai - starting in the 1970s and accelerating in the late 1980s. Many Australian firms have set up Asian offices staffed with Australian lawyers fluent in Asian languages, laws, economics, and customs."

[4]Often contracts will be in English even though all the parties to the contract are not from countries in which English is the mother tongue and the law governing the contract is not that of a common law country. The agreement in Appendix E is an example of this. The parties are Swedish and Turkish and the governing substantive law of the agreement is that of Switzerland.

Agency and Distribution Agreements,[5] is illustrative of the common law form. The extract in Appendix B, which is from an agreement which has been created by the International Chamber of Commerce (ICC) as a model form for international trade, is more illustrative of the civil law form.[6] Many of the substantive provisions in these precedents are similar however the language and the style in which they are presented are very different.[7]

The extracts in Appendix C also illustrate the difference between these styles. These are some of the General Provisions of the UNIDROIT *Principles of International Commercial Contracts*.[8] The *Principles* were created by legal professionals from both civil and common law systems. The Comments which accompany the Articles are not just for clarification but actually form a part of the *Principles*. It appears to me that the form the *Principles* have taken are a compromise between the civil and common law professionals who created them. The Articles themselves are illustrative of a civil law style of drafting whereas the Comments satisfy the common law lawyer's need for greater explanation and detail.

The final agreements I will be looking at in this chapter are in Appendices D and E. The extracts in Appendix D are from a precedent for an International Joint Venture and Partnership Agreement. It was one of the *model forms* contributed by an American lawyer (who is a partner in a Washington, D.C. law firm) at a seminar he spoke at on International Joint Ventures.[9] The extracts in Appendix E are from an actual shareholders agreement in effect in Turkey. It is

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[5]Butterworth Legal Publishers (1992)

[6]I say *more* illustrative because this has been created to be used universally no matter what legal system the parties are from, however its format is far closer to a civil law contract than a common law one. It has been prepared by a working party composed of individuals from Italy, Belgium, France, Denmark, The Netherlands, the U.K., and the U.S. as well as a representative from the ICC Headquarters in Paris, France. The Chair of the working party is from Italy as well. Its focus appears clearly to be on European Community members as there are specific references to alternative provisions which are contrary to EEC Directives and Regulations. In fact, the indemnification provisions, as they relate to termination, (in Article 21 of the Model Contract) have been incorporated from the principles contained in Article 17.2 of the EEC directive (ie. the German system). (see section 3 "Provisions on Indemnity" in the Introduction to the Model Contract at VII)

[7]There is a major difference in some of the provisions in these precedents as the ICC form tries to strike a balance between the interests of the manufacturer and the distributor, whereas the Clasen form is definitely biased in favour of the manufacturer.

[8]The *Principles* represent an international restatement of general principles of contract law. Unlike international treaties, they do not require the endorsement of any government as they are not a binding instrument but rather one which the parties to the contract agree to adopt as the governing law of their contract or which may be applied if the parties have agreed that their contract be governed by 'general principles of law', the *lex mercatoria*, or the like.

[9]It can be found in *International Joint Ventures, Course Manual*, Washington, D.C.: Federal Publications Inc. (1993) at IV-40

between a number of Turkish companies and a Swedish company.

As was seen in Chapter 2, the formats preferred in China and Japan differ as well from those of the civil and common law systems. Currently in China all contracts with foreign parties must follow the Chinese standard form of contract. Professor Anna Han notes in her article on technology licensing to China,

> "[t]he government commercial negotiator's interest is negotiating contract terms, which are uniform throughout China. The negotiator is not the end-user of the technology and often has no understanding of the necessary or appropriate technology. The end-user, usually a factory in China has a strong interest in the quality and performance of the technology. However, it has little control over the commercial terms being negotiated."[10]

With respect to the Japanese, we saw that they prefer contract provisions to be written in a loose, indefinite style which provides flexibility so that details can be worked out later as matters or problems arise.[11] (See Appendix F for an example of the wording in a Japanese contract.) As noted earlier and for the reasons discussed in Chapter 3, such a style would make any common law lawyer extremely nervous.

Stella Ting-Toomey, in her study "Cross-Cultural Face-Negotiation: An Analytical Overview", notes that "[f]or Americans, a contract is legal and binding. [However] Asians like to renegotiate, as if the contract were the beginning of the talks".[12] And Dr. Rosalie Tung, in her study on "Business Negotiations with the Koreans: a Cross-Cultural Perspective" notes that "[i]n the Korean context, which is similar to that of Japan and China, the contract is considered an organic document which can change as conditions evolve."[13] Richard Steers, also looking at culture and communication patterns in Korea, found that "[m]any Koreans tend to give more credence to personal contacts unlike many Westerners who stress written contracts in business

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[10]Anna M. Han, "Technology Licensing to China: The Influence of Culture", 19 *Hastings International and Comparative Law Review* 629 at 641

[11]See Vicki Beyer & Keld Conradsen "Translating Japanese Legal Documents into English: A Short Course" in *Translation and the Law*, Marshall Morris (ed), Amsterdam: John Benjamins Publishing Company (1995) for a discussion of the difference between common law and Japanese contracts.

[12]Presented on April 15, 1992 at the David See-Chai Lam Centre for International Communication; for a summary of her study see the Internet at http://hoshi.cic.sfu.ca/forum/ting-too.html

[13]Presented at the David See-Chai Lam Centre for International Communication on October 26, 1990; for a summary of her study see the Internet at http://hoshi.cic.sfu.ca/forum/tung.html

relationships."[14] And Stephen Weiss has found that the Chinese sign contracts without feeling bound by them.[15] John Barton notes that "there is at least one case that demonstrates the problems of fitting the "Chinese way" of doing business, i.e. heavy reliance on good faith, into a Western contract framework: *Wang v. Hsu* (N.D.Ca.) 1991 U.S. Dist.Lexis 4398. The case involves sharp...distinctions between culturally-based contracting strategies...."[16] I would suggest that what these findings illustrate is not simply the preference for a different contracting style but rather a very different understanding, culturally, of *what a contract even is*. As David Flint, Robert Pritchard and Thomas Chiu write,

> "[s]anctity of contract is an essential element of the English common law but, because lawyers trained in common law systems tend to take sanctity of contract for granted, it is very easy for them to make mistaken assumptions about how other legal systems work."[17]

II. THE EFFECT OF THE DIFFERENT STYLES

In this section I will be comparing the termination provisions from the agreements in Appendices A and B. Termination provisions are an important area in international agency agreements because the national laws on such differ so greatly. A number of countries have legislation which gives an indemnity to agents on termination of the agency contract. Some countries have legislation equating agents with employees (see France, Belgium and Italy).[18] But at the same time, in many countries agents have no right in law to an indemnity on termination of the contract. It is because of this different treatment that the common law precedent in Appendix A is not called an agency agreement but rather an International Sales Representation Agreement.[19] As well, it is because the national laws differ so much that the ICC created the Model

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[14]Richard Steers, "Culture and Communication Patterns in Korean Firms", presented at the David See-Chai Lam Centre for International Communication on February 19, 1992; for a summary of his study see the Internet at http://hoshi.cic.sfu.ca/forum/weiss.html

[15]His study, entitled "Negotiations with the Pacific Rim: Cross-Cultural Challenges and Strategies", was presented at the David See-Chai Lam Centre for International Communiction on February 19, 1992; for a summary see the Internet at http://hoshi.cic.sfu.ca/forum/weiss.html

[16]John H. Barton, "Implications of International Legal Integration for Law Teaching" in *Law and Technology in the Pacific Community*, Philip S.C. Lewis (ed), Boulder: Westview Press (1994) at 319

[17]David Flint, Robert Pritchard & Thomas Chiu, "Constitutional and Legislative Safeguards for FDI: A Comparative Review Utilizing Australia and China" in *Economic Development, Foreign Investment and the Law*, Robert Pritchard (ed), London: Kluwer Law International and International Bar Association (1996) at 109

[18]See footnote 8 at VII in the Introduction to the Model Contract.

[19]Although it is arguable whether calling the agreement by a different name (and stating in the contract that it is not an agency agreement) is going to avoid what is in essence an agency agreement.

Agreement. This agreement is based on the assumption that it is governed "only by the provisions of the contract itself and the principles of law generally recognised in international trade as applicable to agency contracts (also called *lex mercatoria*)."[20] Any dispute is to be resolved through arbitration with the ICC (as per Article 23). The Introduction to the agreement notes that this solution "gives the arbitrators greater freedom to interpret the contract. Especially where the express terms of the contract are silent, the arbitrators will enforce trade usages and general principles of law."[21]

I will not be dealing with the various legal questions that may arise concerning the indemnity provisions in these agreements, but rather what I am looking at here are the possible effects of the different drafting styles.

In turning first to the ICC model (Appendix B) and Article 20 entitled "Earlier Termination", we see that Article 20.1 allows each party to terminate the contract in case of a *substantial breach* by the other party, or in case of *exceptional circumstances justifying* the earlier termination. Articles 20.2 through 20.5 expand on these terms used in Article 20.1.

The second sentence in Article 20.2 states "Circumstances in which it would be unreasonable to require the terminating party to continue to be bound by this contract shall be considered as exceptional circumstances for the purpose of article 20.1, above." This provision gives *no* examples of some of the circumstances that may be considered here. Undoubtedly what may seem *unreasonable* to one of the parties may not seem so to the other. The agreement even seems to recognize this last point in Article 20.6 where it states if "...the arbitrators ascertain that the reasons put forward by that party did not justify the earlier termination....". But to be able to come to this determination the parties would have had to resort to arbitration which is both costly and time-consuming. If the agreement had made it clearer what *type* of circumstances it would consider to be relevant here, then the parties would be able to better resolve the difficulties between themselves and, at the same time, they would have known this would be the case from the time they entered into the agreement. As the agreement stands, if the parties cannot agree

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[20]See the Introduction to the Model Agreement at V.

[21]See the Introduction at VI.

they must put their fate into the hands of the arbitrators.[22] With the common law style of drafting, the type of circumstance that would be acceptable here would have been spelled out in far greater detail.

It may be argued that Article 20.4 does just this as it notes some situations which would constitute *exceptional circumstances justifying* early termination. However I would argue that because this article begins with the word *furthermore*, it is *adding* to Article 20.2 rather than *clarifying* it. As well, because it does not use the same language as Article 20.2 or even make reference to Article 20.2 I believe this supports the argument that it is adding rather than clarifying. In fact, the latter part of Article 20.4 actually adds to the confusion when it states "...or any circumstances that are *likely to* affect substantially one party's ability to carry out his obligations under this contract." (my emphasis) Does one party just have to think that there *may* be a problem without having to actually show that his ability to perform has in fact been substantially affected? If the latter was intended then the wording need only be "or any circumstances that substantially affect one party's ability to carry out his obligations under this contract".

Because of the very fact that different countries have different laws with respect to agency agreements, there is even more reason to spell out clearly what would be considered here because if the parties to the contract are from countries with very different laws they would most likely be going into this agreement with very different notions of what would be applicable here. If the arbitrators are expected to resolve a dispute by relying on trade usages and general principles of law, then why not spell these out in the actual agreement so that the parties know in the beginning what they are getting into.

Looking at the first sentence of Article 20.3, it states "The parties hereby agree that the violation of the provisions under [specific listed Articles] of the present contract is to be considered in principle, unless the contrary is proved, as a substantial breach of the contract." What does *in*

[22]It can be argued that this is exactly what the ICC intended.

principle as used in this sentence mean?[23] As a native-speaker of English I would contrast the phrase *in principle* with the phrase *in fact*, as in "In principle this is what should happen but in fact the opposite happens." As a lawyer I ask why these words are included in this provision - are we not dealing with situations when a substantial breach occurs *in fact*? Do these words add anything or change the meaning of the sentence?

Looking at the second sentence of this Article 20.3 confuses me even more. It states "Moreover, any violation of the contractual obligations may be considered as a substantial breach, if such violation is repeated notwithstanding a request by the other party to fulfil the contract obligations." Does the reference here to "contractual obligations" mean those which were enumerated in the first sentence or does it mean any of the contractual obligations contained in the agreement? It is certainly not clear. If I ignore the words *in principle* in the first sentence then I would have to go with the latter interpretation because the first sentence has already said that violation of the provision results in what would be considered a *substantial breach.* However, if the words *in principle* in the first sentence are there specifically to mean *not in fact*, then maybe violation of an enumerated provision only becomes a *substantial breach* if the non-breaching party requests compliance by the breaching party and the breaching party does not comply. But this also raises a problem I have with the use of the word *repeated.* Should this read *continued*? That would make more sense in light of the remainder of the sentence because *repeated* means to do something again another time. Or is this what is meant - that the party must breach a provision twice before such a breach becomes a *substantial breach.* This interpretation would fit with the reference in this sentence to *contractual obligations* being to all provisions *other than* those enumerated in the first sentence. In other words, a single violation of an enumerated provision results in a *substantial breach,* however with respect to all the other provisions in the agreement, there must be a *repeated* violation (ie. more than once) of such provisions before this would be considered to be a *substantial breach.* But then another question arises with respect to this second sentence - is the non-breaching party *required* to request the breaching party to "fulfill the contract obligations" before the violation would be considered a *substantial breach*?

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[23]My students in Turkey told me that their codes (which are based on the Swiss Civil Code) are drafted in similar language and that *in principle* is used often.

Needless to say, I have a number of difficulties with the ICC Model Agreement. Article 20 is not the only Article that is drafted in such a way as to leave a number of questions unanswered. Some civil law lawyers may say that I am being overly picky, however, I would need to know the answers to these questions in order to properly advise my client on his/her position. As noted above, there is no underlying code that can be referred to to give me the answer. And it is not completely certain how the arbitrators would interpret these provisions or how they would determine what the *lex mercatoria* is in this situation.[24]

I believe this brief analysis supports Gessner's position that the art of contracting on the European continent is rather underdeveloped. A comparison with the extract in Appendix A shows how clarity can be achieved in drafting and without difficult or unnecessary language. The extract is fairly easy to understand[25] and the parties to the agreement know exactly where they stand at the time of signing the agreement. For example, the provisions in 7.2A and footnote 25 deal clearly with all the problems discussed above in relation to Article 20.3. I fully acknowledge that the ICC agreement, in trying to take a more balanced position between the parties, may create a more difficult drafting situation, however, I do not believe that the problems I have pointed out above can be attributed entirely to this situation. I also fully acknowledge that I am more comfortable with the document in Appendix A because it is a style to which I am accustomed, however, I found in my teaching in Turkey that my students, who were accustomed to the civil law style of drafting, preferred some comparable documents prepared in the common law style over their civil law counterparts because these common law documents spelled out more clearly what was being referred to.

As noted in Chapter 3 and above, it is the type of agreement in Appendix A which tends to make the Japanese nervous. As such, one may wish to make the argument that the Japanese would prefer the civil law style of drafting as illustrated by the ICC Model Agreement and that maybe

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[24]This is because the modern *lex mercatoria* is arrived at by looking at international conventions, arbitration decisions, and accepted trade practices or trade usages - see Aleksandar Goldstajn's article "Reflections on the Structure of the Modern Law of International Trade" in *International Contracts and Conflicts of Laws, A Collection of Essays*, Petar Sarcevic (ed), London: Graham & Trotman/Martinus Nijhoff (1990) for a discussion of the various sources of the modern *lex mercatoria*.

[25]My students in Turkey had virtually no trouble in understanding this agreement, however I must say that they did not see this agreement until the second part of the course. By this time they had become completely familiar with the structure of a common law contract: with the standard boilerplate provisions, with definitions, with conditions precedent, with representations and warranties, and with which parts they needed to give more of their attention to.

the civil law style would be a better structure for international contracts. I think, however, that this assumption would be risky as, I believe, as noted above, that it is not so much the form which is the determining factor for the Japanese (and the Koreans and Chinese) but rather the underlying notion that the agreement is organic and can be modified as situations change. And such a notion is not in accord with the civil law lawyer's idea of what a contract is.

III. THE LANGUAGE BARRIERS

The reference noted above with respect to the use of *in principle* in the ICC Model Agreement illustrates, I believe, one of the dangers inherent in literal translation. A similar situation could result with some of those features of common law contracts which are foreign to civil law lawyers - such as *recitals* or *representations and warranties*. We saw in the last chapter when the use of *recitals* came into use in the common law. I personally find them very useful as they give background information on the reason for the current agreement. We common law lawyers know that they are not a part of the actual agreement between the parties but only give this background information, but how is someone not knowledgeable in the common law to know this. The same situation arises with *representations and warranties*. These are invariably found in every international commercial contract drafted by a common law lawyer but once again they are not something with which a civil law lawyer is familiar.[26] But, unlike *recitals*, *representations and warranties* are extremely important parts of any common law contract. The party to whom these representations and warranties are being made is relying on the representations being true and if they are not then that party is relying on the warranty being given with respect to them. If one of the lawyers in a transaction does not know what these are all about and their purpose, then he or she may not be too worried about making sure the representations are completely correct. However, if the other lawyer in the transaction does know what they are about and is relying on them, then obviously problems may ensue. Because common law lawyers know what representations and warranties are about and take them seriously (or at least should do) we usually do not bother to spell out in the agreement what they are for and that the other party is relying on them. However, for an international contract I would

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[26]One of my students in Turkey, who had studied and been called to the bar in Germany and was working with a large German multinational in Istanbul, told me that the company's legal department in their head office in Germany, in trying to understand what these *representations and warranties*,among other things, were all about, had brought in a legal translator to help explain common law contracts to them.

suggest that it is necessary that this be done.

In the precedent in Appendix D, Article IV sets out the representations and warranties of the parties to the agreement. It gives no explanation but even worse, it talks about the parties *jointly and severally* representing and warranting. This is not language that is easily understood and again it would be better to spell out more clearly what is meant.

An even more difficult problem with language occurs when a precedent, which is used for national transactions, is not altered when being used for an international transaction. I believe the precedent in Appendix D is an example of this. This contract is completely in the style used by common law lawyers for national transactions. In addition to this, a number of its provisions are very poorly drafted. These poorly drafted provisions are not easy for an English speaking common law lawyer to readily understand, so the amount that a non-native English speaker who is not a common law lawyer understands, I would suggest, varies considerably. I use this contract in my Legal English course to introduce the students to a sample of what they may encounter in their practice, as it is not unusual for international contracts to be drafted in the United States by an American lawyer.[27]

There are numerous provisions in this contract which I could highlight as being poorly drafted, however I shall cite just a few. I noted above how important the representations and warranties provisions are. For this reason alone, they should be carefully drafted. Yet the first two of the following provisions are taken from Article IV which is the representations and warranties section:

> 4.01.05. Effect and this Agreement. Neither the execution and delivery of this Agreement and the License Agreement nor the consummation of the transactions contemplated hereby and thereby nor compliance by XYZ and XYZ Newco with any of the provisions hereof and thereof will: (i) conflict with or result in a breach of any provision of their respective Charter, Certificate of Incorporation or By-Laws; (ii) violate, breach or, with the giving of notice or passage of time, constitute an event of default (or give rise to any right of termination, cancellation or acceleration) under any of the terms, conditions or provisions of any note, bond, mortgage, indenture, license, agreement or other instrument or obligation to which

[27]When I was in Turkey one of my students was having to review a contract drafted in the United States to ensure that it complied with Turkish law. The contract was in the same drafting style as that in Appendix D.

> XYZ and/or XYZ Newco is a party, or by which XYZ and/or XYZ Newco or any material portion of their respective properties or assets may be bound, except for such violations, breaches or defaults (or rights of termination, cancellation or acceleration): (y) as to which requisite waivers or consents shall have been obtained by the Closing Date, or (z) which taken as a whole are not material to the business or financial condition of XYZ and/or XYZ Newco or any of their respective properties or assets.

The following is a list of some (but not all) of the aspects of this provision that would create problems for a non-native English speaker (from a language perspective):

a) It consists of one very long sentence which is difficult to follow.

b) It is not clear what the heading Effect and this Agreement means.

c) The uncommon (or legal) meaning for the word *execution* is used and the reader may well not know this particular meaning.

d) The use of the word *delivery* may cause confusion as the only reason it is there is because of the old common law rule stating that deeds (ie. documents under seal) must be physically delivered to the other party in order for them to be valid. Such wording is of no use at all in this agreement and in fact is incorrect. A common law lawyer would read it and ignore it. But a non-native English speaker and non-common law lawyer or legal translator would not know to do this.

e) The use of *hereby*, *thereby*, *hereof* and *thereof* may cause immediate confusion not only because they are unfamiliar words but also because of the way in which they are used, namely *hereby* and *hereof* are referring to *this Agreement* and *thereby* and *thereof* are referring to the *License Agreement*. (This is a common syntactical structure used in legal English drafting.)

f) The wording *conflict with or result in a breach of any provision* is also a common syntactical structure in legal English which can cause confusion for the non-native English speaker. This example is not as difficult as some, as the object (*any provision*) of the verb collocation (*conflict with*) is in fairly close proximity. However, often there will be a long list of verbs or verb collocations with the corresponding object at the very end of the list. This is illustrated in this provision by the words *ii) violate, breach or, with the giving of notice or passage of time, constitute an event of default (or give rise to any right of termination, cancellation or acceleration) under any of the terms,...* What would

be *violated* here are *any of the terms*.... This object is separated from the verb by twenty-eight other words.

g) This use of, what could be called, near synonyms is extremely confusing for the non-native English speaker and is unnecessary. I believe the drafter could have found much simpler language to accomplish the same as this subpart ii) is trying to do.

h) Because a foreign corporation is involved here (in this case a Finnish joint-stock company) the drafter should ascertain what the constituting documents of the foreign company are called. Countries vary considerably with respect to the types of corporations they have and the ways in which they are created. In this agreement XYZ is the Finnish company and XYZ Newco is a corporation organized under the laws of the State of Delaware, U.S.A. yet the same terminology for their constituting documents is used. It is highly likely that they are not the same.

i) The list of words *terms, conditions or provisions* is unnecessary and can be adequately dealt with by the word *provision* alone.

j) What is being conveyed by the words *any note, bond, mortgage, indenture, license, agreement or other instrument or obligation to which XYZ and/or XYZ Newco is a party, or by which XYZ and/or XYZ Newco or any material portion of their respective properties or assets may be bound* again can be handled in a much simpler manner with far fewer words. I would suggest that it can be written as *any agreement or obligation by which XYZ and/or XYZ Newco, or any material portion of their respective assets, may be bound.* A reduction from forty-three to twenty-two words. This rendition of course assumes that the non-native English speaker understands *material* and *respective* which may, in fact, not be the case.

Another provision from Article IV is the following:

> 4.01.07. Disclosure. No representation or warranty by XYZ or XYZ Newco in this Agreement or the Schedules provided pursuant to this Article IV contains or, as of the Closing Date, shall contain any untrue statement of a material fact or omits or, as of the Closing Date, will omit to state a material fact necessary to make the statements made therein, in light of the circumstances under which they were made, not misleading.

The following are some of the problems I have with this provision:

a) The inclusion of the word *warranty* in this provision is incorrect. The provision is dealing with statements, which means representations *not* warranties. Including it adds to any confusion a non-common law lawyer may already have as to what *representations and warranties* are.

b) There is no need to make reference to *as of the Closing Date,* and along with this the inclusion of the future tenses of the verbs *contain* and *omit*, as the introductory portion of Article 4.01 already includes *as of the Closing Date.* To include it here is redundant and simply adds words that make understanding more difficult for the non-native English speaker.[28]

c) The use of multiple negatives, beginning with the very first word and finishing with the last two, makes even a native English speaker pause to make sense of what is being said here. The insertion of a lot of unnecessary verbiage only increases the difficulty. In trying to understand what *not misleading* is referring to we need to eliminate these unnecessary words. We end up with *No representation omits to state a material fact necessary to make the statements made therein, in light of the circumstances under which they were made, not misleading.* But this is still not easy to understand. In my course, in order to help explain what it means, I give my students the following example: the statement "The President did not vote against the bill" does *not* say that the President voted for the bill or that the President is in favour of the bill, however, this statement may be understood by some to mean just that. In other words, there may be a material fact which has been omitted (such as that the President abstained from voting) and because of this omission the statement can be misleading. Returning to the provision, in order for anyone to understand what the drafter is trying to address here one, as well, must understand that often people will use the English language in such a way as to intentionally deceive.[29] The result being that the non-native English speaker must first try to understand what the words in the provison are saying and then must try to decode

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[28]I cannot see a reason for the use of the older English future form for the verb *contain* but the modern form for the verb *omit*. I would suggest that it is a result of sloppiness, however, I do not believe it would cause any problems for non-native English speakers and suspect that they would understand both as the future tense, as *shall* is used in modern English in the first person singular and plural of the simple future.

[29]I met a businessman in Seville, Spain who told me that he liked to negotiate in English rather than in Spanish because in English he can be more evasive in the way he says something (ie. more deceitful) whereas in Spanish he must be more exact.

the reason for them. All said, one still does not need to use such contorted language in order to say the same thing.

d) The first part of this provision, *no representation contains any untrue statement of a material fact*, is unnecessary because of the whole purpose of representations and warranties, namely that the parties are making representations to each other and warranting that they are true. The reason for these representations is that it permits the other party to rely on them and eliminates the need for such party to independently verify the facts so represented. It appears to me that the drafter of this agreement is not too sure himself of what representations and warranties are.

The following is the final provision from the agreement in Appendix D that I will look at:

> Section 12.03. Partnership Liabilities. If a Partner or any of its Affiliates shall, pursuant to express authorization of or approval by the Partners Committee, pay any amount on behalf or for the account of the Partnership with respect to any liability, obligation, undertaking, damage or claim for which the Partnership shall or may, pursuant to contract or applicable law, be liable or responsible, or with respect to making good any loss or damage sustained by, or paying any duty, cost, claim or damage incurred by, the Partnership, then the Partnership shall reimburse such Partner or Affiliate for such amount as shall have been so paid by such Partner or Affiliate. If the Partnership shall fail fully to reimburse such paying Partner or Affiliate, ABC and ABC Newco, or XYZ and XYZ Newco, as the case may be, shall indemnify such paying Partner or Affiliate by paying to it an amount equal in the aggregate to its Percentage Interest of the excess of (i) the aggregate payments by such paying Partner or Affiliate in respect of such liability, loss, damage, cost, claim or expense over (ii) the aggregate reimbursement, if any, which such paying Partner or Affiliate shall have received from the Partnership in respect of such payments.

This provision is made up of only two sentences. It is clear by just scanning it that it contains a lot of unnecessary words and unnecessarily difficult syntax. I do not plan to analyze it in detail but simply reproduce it as another example of how the language in an international contract can operate as a barrier to understanding. This provision is illustrative of a style of drafting which has developed in the United States and I believe it is this way because of the highly litigious nature of the American population.[30] In order for American lawyers to protect themselves from

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[30]For one writer's thoughts on this see Lawrence M. Friedman, "Are We a Litigious People?" in *Legal Culture and the Legal Profession* Lawrence M. Friedman & Harry N. Scheiber (eds), Westview Press, A Division of Harper Collins Publishers (1996).

being sued by their clients, they have developed this rather paranoid style which tries to cover off every possible argument that could ever be made against the contract. I would argue, however, that such a style, which is so confusing, simply opens new doors for error. And an additional problem, of course, is that it is totally inappropriate for international transactions. As noted by Parviz Owsia, "American drafts are, by contrast [to the English], often over-detailed and burdensome."[31]

I next wish to turn to the agreement in Appendix E. I am using this agreement because the parties to it are not from common law countries, however, it is clear that the agreement was prepared by a common law lawyer, most likely one working in one of the English speaking international law firms.[32] I say this not only because of the form of the agreement, but also because the language used to adapt the form to the particular factual situation has obviously been written by a common law lawyer who is a native speaker of English.

On the whole, I think this agreeement is well drafted in that it is much easier to understand than that in Appendix D, in terms of the syntax and language used. For example, the matters dealt with in section 4.01.05 in Appendix D (cited above) are dealt with in the agreement in Appendix E as follows:

> 19.01 Each of the parties hereto hereby represents to the others that the execution and delivery of this Agreement and the performance thereof will not contravene or constitute a default under its constitution, by-laws or any other agreement, instrument or other form of commitment to which any party hereto is also bound.[33]

But, as can be seen, this agreement also illustrates the continuing use made in legal English of formal language. As well, it illustrates the continuing use of Latin phrases. And both of these of course can be a problem if the parties to the agreement are not native speakers of English or are not from a legal system which uses this Latin terminology. Another problem with this

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[31]Parviz Owsia, *Formation of Contract, A Comparative Study under English, French, Islamic and Iranian Law* , London: Graham & Trotman (1993) at 179

[32]One of my students in Turkey gave me this agreement which I transcribed so as protect the identities of the parties. I do not know which law firm prepared it.

[33]I note that this agreement also uses *execution, delivery* and *performance* in this provision, just as the other agreement does. I would argue again that the use of *delivery* is not necessary but is used only because, as discussed in Chapter 3, it has always been used.

agreement is that it is completely in the form and language of a common law agreement, however, the parties are Turkish and Swedish, the corporation at issue is Turkish, and the governing law of the agreement is Swiss. All the corporate terminology used is that with which I, a common law lawyer, am completely familiar however it does not necessarily correspond to the way in which this particular type of Turkish corporation functions. I make this statement based on some very strong disagreements one of my brighter students had with the terminology used in this agreement and with the meanings attached to this terminology. When I gave him an English translation of the relevant Turkish code provisions dealing with corporate entities and which used this same terminology, he was better able to draw the connection between the two. However this raises in my mind the question of how accurate the translation of the code provisions really is. Because the types of corporations and the ways in which they are formed vary so much from country to country, including between common law countries, it is quite possible that parties are using the same word but are each giving a different meaning or understanding to that word (as was discussed in Chapter 3). Which really leaves one wondering if there is or can be a *true* understanding of this agreement (or a satisfactory resolution of any dispute) since the parties are Turkish and Swedish and the governing law is Swiss.

Another example of the formal language used in this agreement can be found in an Article dealing with the transfer of shares of the corporation:

> 11.06 In the event that the said shares are not accepted by any of the other parties upon the expiration of the period specified in paragraph 11.04, the vendor shall then be at liberty to transfer all, but not less than all, of the said shares, to any other person and at any price (not being less than the price specified in the offer under paragraph 11.03 of this Article), provided that such a sale is consummated within one hundred and twenty (120) days from the date of the notice by the Board of Directors of the offer pursuant to paragraph 11.03 of this Article, and provided further that such person, upon the request of the other parties hereto, accepts to become a party to this Agreement (with the same rights and obligations as the vendor party) as evidenced by its signing hereof before the consummation of the sale. In the event that the vendor does not so transfer such shares within such one hundred and twenty (120) day period, the right of the vendor to sell such shares pursuant to this paragraph 11.06 shall cease and the provisions of this Article XI shall again become operative.

Again the long sentence, so typical of the common law style, is used here. The difference however with what we saw in Appendix D is that this one does not have the long lists of

synonyms or near-synonyms nor the great separation between verbs and objects. As a result, it is not nearly as difficult to follow or understand. It does however use excessively formal language which is not necessary. For example, the first part of this provision could just as correctly read "If the shares are not accepted by any of the other parties before the expiry of the period in paragraph 11.04, the vendor can transfer all, but not less than all, of the shares to any other person for any price...".

The following two extracts are from the agreement in Appendix E and they illustrate the use of Latin terminology along with specific corporate terminology, neither of which may be understood by the parties to the agreement. The first is from Article 3.02 and relates to Share Capital:

> (c) Each of the parties hereto will take such steps as lie within its powers to ensure that the Company makes simultaneous allotment of the shares so applied for and each of such shares so alloted shall on allotment rank *pari passu* in all respects with the existing issued shares of the same Class of the Company.

I understand this language because I have practised in the corporate law area and, as noted above, this is common law language (and applicable to both British Columbia and Canadian companies). But would a Swede or a Turk or a Swiss understand it in the same way as I do? As this is a shareholders' agreement, it is an ongoing document which governs the actions of the various shareholders of the corporation and, obviously, it is to their advantage to be able to understand it. I would suggest that what is being said here can be said in a simpler fashion.

This next extract is from the Article dealing with the term of the agreement:

> 12.05 In case one or several of the parties terminate(s) this Agreement in accordance with paragraph 12.02, the non-defaulting parties shall have the right to purchase the defaulting party's shares in the Company. The purchase price for the said shares shall in such case be the lower of the fair market price or the par value of those shares. The provisions of paragraphs 11.04 and 11.05 shall apply *mutatis mutandis* to purchases under this paragraph 12.05.

This provision is certainly easier to understand, however the use of *par value* and *mutatis mutandis* would in all likelihood cause some difficulty. Again, I believe that it is possible to say these in a way that is more easily understood.

The drafter of the agreement in Appendix D may want to argue that the use of a form which is

usually used in national contracts is acceptable in that particular fact situation because, as the contract states, it is governed by the laws of the State of Delaware and the United States of America. As well, the courts in the State of New York have jurisdiction over any dispute. But what this argument fails to address is the potential for misunderstanding by the foreign party of the terminology used in the agreement.

But, apart from this, what is happening more often is that international contracts are providing for disputes to be settled through arbitration, and often only if previous discussion, conciliation or mediation have failed. For this reason alone, if for no other, it is important for the agreements to be drafted in more easily understood language.

IV. THE LEGAL BARRIERS

The inappropriateness of national contracts being used as *model forms* for international transactions goes beyond the language factor alone. Many of the provisions in these contracts deal with matters which are specific to a common law system. I have mentioned this already but will briefly expand on it in this section. It is clear from Chapter 2 that there are many differences in the legal systems of nations. These differences will naturally flow into and affect in a variety of ways any contract between parties from these different nations. It is clearly not within the scope of this thesis to detail how all these legal differences will affect such a contract. Rather what I hope to do here is point out some provisions that are regularly found in the more complex common law contracts and show how these, from a legal perspective, are misunderstoood or misinterpreted in the international context.

The following is from the extract in Appendix D:

> Section 11.09. Specific Performance.
>
> 11.09.01. Damages. The parties hereby declare that the respective rights of the parties under this Article XI are of a unique nature the loss of which may cause irreparable harm, and that it may be impossible to measure in money the damages which will accrue to a party hereto by reason of the loss of such rights or a failure to perform any of the obligations under this Article XI.
>
> 11.09.02. Equitable Relief. In the event of any breach or threatened breach of this Article XI, any party shall be entitled, as a matter of right, to a final order, from a court of competent jurisdiction, of injunctive and other equitable relief, and if any party hereto shall institute any action or proceeding to enforce by specific performance or other equitable relief the provisions hereof, any person

> against whom such action or proceeding is brought hereby waives the claim or defense therein that such party has an adequate remedy at law, and such person shall not urge in any such action or proceeding the claim or defense that such remedy at law exists.
>
> 11.09.03. Remedies at Law. This Section 11.09 shall not limit or constrain the right of a party to pursue and recover damages at law for breaches of this Agreement, including breaches of the Article referred to above.

As was discussed in Chapter 3, the way in which this provision is presented would make no sense to a non-common law lawyer. And, I would argue, there is no need to present it in this antiquated fashion, namely drawing the distinction between remedies at law and equitable remedies, since these have been merged procedurally and are now dealt with by the same court. Article XI is dealing with Proprietary Information and it is understandable that the owner of such would want to be able to make a claim for injunctive relief and not be limited to damages which could be very difficult to prove. However, this can be written in such a way that it is not necessary to refer to *remedies at law* or *equitable relief.*

Another matter that has arisen in international transactions is illustrated by the following provision from the agreement in Appendix D:

> 3.04.05. Good Standing. XYZ and XYZ Newco shall have delivered to ABC and ABC Newco original copies, dated within ten (10) days prior to the Closing Date, of (i) a certificate from the appropriate official of the Republic of Finland attesting that XYZ is duly organized, validly existing and in good standing in Finland, (ii) a certificate from the Secretary of State of the State of Delaware attesting the XYZ Newco is duly organized, validly existing and in good standing in Delaware, and ....

The question that arises is, what do *duly organized*, *validly existing*, and *in good standing* mean? And do these terms have the same meaning in Finland as they do in Delaware? Sarcevic and Volken, in their text *International Contracts and Payments*, note that because of the differences between corporations in the United States and Europe, the term *duly organized* carries a different meaning in these different jurisdictions.[34] They also state that "[i]f a corporation is duly incorporated and duly organized, it also fulfills the requirement of validly existing. This term

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[34]P. Sarcevic & P. Volken, *International Contracts and Payments*, London: Graham & Trotman/Martinus Nijhoff (1991) at 136; Wilfred M. Estey in *Legal Opinions in Commercial Transactions*, Second Edition, Toronto: Butterworths (1997) at 106 notes that "the current custom and practice in Canada is that a due organization opinion is not generally given."

has no independent meaning, at least not in corporate matters...."[35] In support of this statement the writers, who are European, cite the Americans S. FitzGibbon and W. Glazer in "Legal Opinions on Incorporation, Good Standing, and Qualification to Business (*sic*)".[36] This however may not be the case in all jurisdictions. Wilfred Estey, writing on the position in Canada notes

> "[i]f a corporation is expressed to be "validly existing" or merely "existing", this is understood to mean that the corporation has not ceased to exist by way of liquidation, dissolution or winding-up, whether voluntary or involuntary, by cancellation or forfeiture of its charter by the person responsible for administering the applicable corporations statute, by amalgamation with another corporation or corporations, or by the export of the corporation out of its incorporating jurisdiction. It is also understood to mean that, so far as counsel is aware, no proceedings, actions or steps have been commenced, or are threatened, with respect to any of the foregoing. The valid existence opinion therefore adds to the incorporation opinion by confirming to the opinion recipient that, not only was the corporation once properly incorporated, it still retains its status as a corporation at the date of the opinion."[37]

If this is the position in Canada, then it may also be the position in Delaware or in Finland, as Estey also notes that FitzGibbon and Glazer, writing in 1992, state that "[w]hether an opinion that a corporation is "validly existing" adds anything to the opinion that the company "is a corporation"[38] is the subject of debate."[39]

The same problem arises with *good standing*. Sarcevic and Volken say that

> "[t]he term "good standing" refers to the fiscal situation of a company. It indicates that the company has duly performed its tax obligations in the state of its [in]corporation and the state where it does its business. Therefore, the state authorities have no reason to revoke its corporate status."[40]

They again cite Fitzgibbon and Glazer as authority for this statement. However in a footnote they note that Fitzgibbon and Glazer state

> "[g]ood standing certificates are available in most states but mean different things.... Some states issue a single certificate relating both to the payment of taxes and to other matter[s], such as filing

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[35]Sarcevic & Volken (1991) at 136

[36](1986) 41 *Business Law* 461 at 470-471

[37]Estey (1997) at 108

[38]Estey (1997) at 101 notes that the current practice among commercial practitioners is to give the "is a corporation" opinion rather than the "due incorporation" opinion because of concerns about the meaning of "duly" in certain jurisdictions where the statutory presumption as to incorporation is rebuttable.

[39]Scott FitzGibbon & Donald Glazer, *FitzGibbon and Glazer on Legal Opinions: What Opinions in Financial Transactions Say and What They Mean*, Boston: Little, Brown (1992) at 123 (quoted in Estey (1997) at 108)

[40]Sarcevic & Volken (1991) at 136

of periodic reports with the state secretary."[41]

In British Columbia, a *certificate of good standing* is not what Sarcevic and Volken say it is. It is rather more in line with what Fitzgibbon and Glazer refer to in the latter part of their statement - it is issued by the Registrar of Companies if the corporation is up-to-date in filing its annual report and paying its annual filing fee. When I asked my students in Turkey what they would understand a *certificate of good standing* to mean and where they would get one, I received a number of different answers. Needless to say, if the lawyer requesting such documentation does not clearly ascertain what the equivalent document would be in the foreign jurisdiction, he or she may well not receive what was expected.

The same situation arises with respect to *legal opinions* which are now standard documents required in most large commercial transactions in the United States and Canada.[42] The agreement in Appendix D is no exception and it requires both parties to exchange legal opinions from their respective counsel. A problem that has arisen is that these *legal opinions* are now being required in a large number of international transactions,[43] however foreign lawyers (and courts) often do not understand what they are about. A number of my students in Turkey advised me that they had been required to give such opinions but when we were discussing them it was clear that they did not attach the same importance to them as a North American lawyer would, nor did they clearly understand what was being said in these opinions. For clarification of what these documents are, they are in the form of a letter and they are provided by the legal counsel of each party to the other party in the transaction. They now have a fairly standard form which generally includes the following statements:

1. X is a company duly organized, duly incorporated, validly existing and in good standing[44]

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[41]Sarcevic & Volken (1991) footnote 45 at 136

[42]They now have a fairly standard format and content, after much debate and discussion - for this see the Appendix at 140 in Sarcevic & Volken (1991).

[43]See Sarcevic & Volken (1991), Chapter 8 "Legal Opinions in International Transactions" at 125-140.

[44]Estey (1997) at 110 writes that "[p]reviously, it was common to request an opinion that a corporation was "in good standing". This was intended to confirm that the corporation was up to date in filing its annual corporate returns under the applicable statute, since failure to do so could, in some jurisdictions affect the ability of the corporation to carry on its business. Corporate solicitors became concerned, however, that the "good standing" opinion was susceptible to a broader interpretation.... ...[T]he accepted custom and practice in Canada is to no longer give "good standing" opinions...." However, he goes on to note that in the United States *good standing opinions* continue to be given but the term has a narrower meaning than in Canada.

under the laws of ....

2. X has the corporate power and authority to enter into and perform the...agreement.
3. All requisite corporate proceedings have been taken by X to authorize the execution, delivery and performance of the...agreement.
4. The...agreement is a legal, valid and binding obligation of X and is enforceable against X in accordance with its terms, except as may be limited by bankruptcy, insolvency or similar laws affecting the enforcement of creditors rights in general. In addition, enforceability of the obligations against X under the...agreement is subject to the general principles of equity.

When I asked my students if they thought a Turkish court would hold a lawyer liable for making a false statement in one of these legal opinions, they almost all said no with the reason being that the court would only see this as a letter. Yet at the same time in the United States, where these legal opinions originated, "...the U.S. judiciary has developed an increasing body of case law accompanied by regular legal writing on the topic."[45]

I have already discussed the legal ramifications of *representations and warranties* in the previous section. This is another area with which my students in Turkey were not concerned because they did not understand what they were for. In the first year of my course the students had commented that "this is Turkey" and a foreign lawyer should not expect a Turkish lawyer to be completely honest or careful about what went into the contract. At that time, a lawsuit by a client against his/her lawyer was unheard of. I advised them that if they were dealing with western clients they needed to be careful because they could be sued. At the end of the second year of my course, a student advised me that a Turkish lawyer had just been sued by a European client for what we would call negligence in the handling of the file. The European client won the lawsuit. At the end of the third year of my course, a student was asking me about insurance to protect her in case she made a mistake in her practice.

We saw in Chapter 2 that there has been a resurgence of traditional Islamic principles in many Islamic countries. The restrictions in Islam with respect to *riba* (interest) and *gharar* (risk) will of course impact on some international commercial transactions. I do not propose to discuss here all the possible ramifications, however, because I have been discussing agency agreements, I feel mention should be made of a possible impact of Islamic principles on such. The main area of

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[45]Sarcevic & Volken (1991) at 125

concern is with respect to the compensation paid to the agent for the work done. Normally an agent would receive a commission based on a percentage of the selling price of the product in question. However, as Thomas Clasen notes,

> "[i]n several Middle Eastern countries, contractors are prohibited from paying commissions or other contingent fees in sales to governmental agencies. Contractors must certify to the absence of such contingent fees and face substantial penalties for noncompliance."[46]

V. THE CULTURAL BARRIERS

We have seen from both Chapters 1 and 2 that one of the most important cultural differences between the east and the west is the individualism/collectivism dimension. I believe that it is this dimension, and along with it the different concepts of the function of language,[47] which are at the root of the different notions of *what a contract is*. For us in the west, the purpose of a contract is to set out clearly the rights and obligations of each party in relation to the other party. It helps us to ensure that our rights as individuals, in relation to the other individual to the transaction, will be complied with. It is the big stick that we can wield if the other party refuses to comply. Generally, however, in practice parties try to negotiate a settlement if there is a disagreement as this is usually the more sound route economically. As well, if there is an on-going relationship between the parties, negotiation may not end the relationship as litigation could well do. Nevertheless, we still see a contract as a legally binding document. This is to be contrasted with the Chinese, Japanese and Koreans who see it more as something organic which evolves as the relationship between the parties evolves. This latter concept of a contract makes sense when one understands that, within a collectivist society, the maintaining of harmony between the parties is of utmost importance. Added to this is the belief, in Chinese, Japanese and Korean cultures, that the most important things cannot be communicated in language but that language is only useful for somewhat secondary or trivial messages (as we saw in Chapter 1). When both sides think this way, and when there are cultural forces at work which assist the parties to think in this way,[48] then an evolving document makes perfect sense and, at the same

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[46]Clasen (1992) at 3-14 to 3-15

[47]As discussed by the Scollons and noted in Chapter 1.

[48]Eric Feldman in "Patients' Rights, Citizens' Movements and Japanese Legal Culture" in *Comparing Legal Cultures*, David Nelken (ed), Aldershot, England: Dartmouth Publishing Company Ltd. (1997) at 217 notes that "[w]hen individuals are angry, or feel cheated or abused, they are likely to walk away, or to change the subject, or to act extraordinarily politely, not to claim that their rights have been aggrieved. Such behaviour is not an indication that the parties do not understand rights, but that rights are not an acceptable tool of one-to-one argument. ... In Japan, asserting the primacy of individual over

time, is sufficient. However, if both sides do not think this way, as happens in international commercial transactions between parties from very different cultural backgrounds, problems can obviously ensue.[49]

Geert Hofstede, Edward Hall, and Ron and Suzanne Scollon all note that there is a move towards more individualism in Asian cultures. This is understandable with the global economy being driven by the western world. However, this move is simply that, a move. As the Scollons note,

> "[t]he roots of generational differences are buried deeply within the cultural constructs of each cultural group. We would not expect the new forms of individualism which are developing throughout Asia to have much in common with what is called individualism in America."[50]

Hofstede as well disagrees with the argument that societies will become more similar.[51]

So even though, with this global economy, we are gradually learning more about each other's ways, these cultural differences continue to influence our legal communication in a number of significant areas (beyond the form a contract takes). It is clear that these differences have an impact at the negotiation stage of an international commercial transaction. Stephen Weiss, in his study on negotiations within the Pacific Rim, found that "[d]efinitions of what negotiation means differ from culture to culture." He notes that

> "Americans rely in communication on conveying what we mean through words, whereas the Chinese and Japanese convey much of their meaning by what is not said, by saying things subtly, and by relying on context to supply meaning."[52]

We saw in Chapter 1 that Dr. Rosalie Tung, in her study on business negotiations with the Koreans, found that Americans and Koreans focus on different issues when they are negotiating.

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collective interests must be done with caution, since the rhetoric about rights makes clear the identification of such assertion with selfishness and arrogance."

[49]What I am speaking of here is to be distinguished from the situation where provision is made for the adaptation and renegotiation of long-term international commercial contracts by way of clauses such as *hardship, force majeure* and *special risks*. As Norbert Horn notes, "[t]he legal issue is that law can only recognize those patterns, justifications and procedures for the adaptation and renegotiation of contracts which are compatible with the basic principle of the sanctity of contracts. The stability of contracts must not be destroyed, but a necessary flexibility of contracts must be assured." - see "The Concepts of Adaptation and Renegotiation in the Law of Transnational Commercial Contracts" in *Adaptation and Renegotiation of Contracts in International Trade and Finance*, Norbert Horn (ed), Deventer, The Netherlands: Kluwer (1985)

[50]Scollon & Scollon (1995) at 225

[51]Hofstede (1980) at 343-344

[52]Weiss (1992)

She found that the Americans thought the Koreans focused on trivial or emotional matters rather than the real issues they were there to discuss. And she concluded that "[d]ifferences in value systems play a significant role in influencing people's perceptions on what is an important issue...."[53] She found as well that value systems affect an individual's ideas on negotiation procedure.

These findings are supported by what we saw in Edward Hall's work: that cultural differences affect the establishing of agendas for the negotiations and the keeping of appointments (as evidenced by the differences between *M-time* (monochronic) and *P-time* (polychronic) cultures), they affect the exchange of information within the negotiations (as evidenced by the differences between *high-context* and *low-context* cultures) and they affect the perceived order in which events within the negotiations should occur (as evidenced by the different *action chains* in different cultures). Geert Hofstede's work also supports these findings as he found that different cultures assign different importance to different matters (shown by his uncertainty avoidance and individualism/collectivism dimensions), they resolve matters differently (shown by his power distance and uncertainty avoidance dimensions), and they approach negotiations differently (shown by his power distance and individualism/collectivism dimensions). And certainly the findings of the Scollons, concerning the different discourse systems that different cultures have and the organizing principles that accompany these discourse systems, impact directly on cross-cultural negotiations.

Volkmar Gessner describes the cultural difference in the purpose of negotiations in another way,

> "[s]ome cultures (U.S., German) define negotiations as (inconvenient and costly) means to a legal result: a binding agreement which regulates future relations. All conceivable disputes have to be put on the agenda and transformed into contract clauses. For other cultures (Mediterranean, Arabian, Far Eastern) the meeting is the establishment of a business relationship which has an open future and cannot be regulated or cannot be regulated entirely in advance...."[54]

Gessner goes on to note that "[a] legal cultural background knowledge of these differences is a necessary condition for successful business negotiations."[55]

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[53]Tung (1990)

[54]Gessner (1994) at 141

[55]Gessner (1994) at 141

A large number of the international contracts being negotiated today are for joint ventures with the most common vehicle (particularly between developed and developing countries where a transfer of technology is generally involved) being a newly established corporation in which the parties to the joint venture are shareholders. It is this corporation which carries out the work of the joint venture. It is clear from Hofstede's findings, with respect to *values* and *societal norms* associated with work organizations, that the negotiating parties may well be going in with very different attitudes and understandings concerning how this corporation should be operated. This is not only going to affect the substance of the negotiations and hence the substance of the contract but also the success of the operation. Dr. Rosalie Tung looked at eighteen joint ventures between American and Korean entities covering a wide range of industries and services. Two of the points of difference she notes are:

1. Profit may not be the most important objective or motivator for the Korean partner; and

2. Money in the Korean context may not be the most important device in motivating employees - other factors involved in ego fulfillment are status, position title, office size, company car, chauffeur, and corporate credit cards.[56]

Professor Richard Steers advises us of some additional factors concerning Korean values associated with work. He states that "[i]n Korea the individual is motivated to succeed for spiritual rather than financial rewards. His work effort is also defined in terms of group rather than individual achievement.... In contrast, an employee in the U.S. is individually oriented." Dr. Steers goes on to add

> "[a]nother difference is that in a typical American company, if the group succeeds the manager takes the credit but if the group fails, the group is blamed. In Korea, it is the opposite. If the group succeeds, it receives credit for the success but if it fails, the manager takes the blame."[57]

And Dr. Michael Harris Bond of the Department of Psychology, Chinese University of Hong Kong, in his study entitled "Cross-Cultural Issues in Managing the Organization: The Case of Hong Kong",[58] notes that

> "[v]erbal and facial channels of communication are used differently. Differences are even

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[56]Tung (1990)

[57]Steers (1992)

[58]Presented on January 30, 1990 at the David See-Chai Lam Centre for International Communication, for a summary see http://hoshi.cic.sfu.ca/forum/bond.html on the Internet

> discernable at formal meetings in the symmetrical postures of Chinese and the asymmetrical poses of Westerners. Chinese rarely express their confusion or disagreement as this can disrupt harmony and challenge the superior. The messages, "no" or "I don't understand" are sent through long pauses, downward glances, or furrowed eyebrows. Westerners often miss the message when they are expecting to hear words equivalent to "no" or "I don't understand" and assume that silence means assent."

Even the choice of the form of the vehicle for the joint venture may be affected by different cultural values. P. Anthony McArthur, writing on joint ventures in Japan, notes

> "[m]ost joint venture companies in Japan take the form of a *kabushiki kaisha* (joint stock company). The *kabushiki kaisha* form was designed for wide public shareholding, and the *yugen kaisha* (limited liability company) is more appropriate for a closely held corporation. However, almost all large well known companies in Japan are *kabushiki kaisha*. Usually the *yugen kaisha*, which is more appropriate for joint ventures, is rejected in favour of the *kabushiki kaisha* for reasons related to public image rather than law."[59]

The use of this form for purposes of public image would appear to coincide with Hofstede's finding that Japan scored highest on the Masculinity dimension which means that it favours values which include the importance of showing off, of achieving something visible, of "big is beautiful".

In his article, McArthur points out how the cultural differences affect the joint venture in a variety of ways, including different philosophies of operation and management, marketing objectives, and the use and distribution of profits. He concludes with the following statement,

> "[t]here are many advantages to a foreign company undertaking business in Japan through a joint venture. However, experience has shown that the number of very successful joint ventures is not high. This is often due to the different objectives and requirements of the foreign and Japanese partners, and a lack of mutually agreed long term goals and operations."[60]

And Volkmar Gessner points out some of the potential problems for operations run by countries which are on opposite ends of Hofstede's uncertainty avoidance dimension. He notes

> "[i]f Hofstede is right that Germany is a "strong uncertainty avoidance" society and India a "weak uncertainty avoidance" society, one can easily imagine many legally relevant problems caused by

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[59]P. Anthony McArthur, "Joint Ventures in Japan" in *Canadian Perspectives on Japanese Law, Conference Papers*, U.B.C. (1985) at 9; see also Zenichi Shishido, "Joint Ventures between Enterprises from Countries of Different Economic and Political Systems" in *Japanese Reports for the XIIIth International Congress of Comparative Law* (Montreal, August 19-24, 1990), Tokyo: International Center for Comparative Law and Politics (1991) at 119 where he notes that in Japan entrepreneurs have ignored the intention of the legislators and are using the Kabushikigaisha form although it is not suitable for closely-held corporations. He notes that legislators are planning to divide the Kabushikigaisha form into a large corporation form and a small corporation form.

[60]McArthur (1985) at 26

> this difference: contract clauses, quality standards, security measures in constructing and running industrial plants all must lead to culturally divergent perceptions and legal positions...."[61]

As noted above, joint ventures often involve the transfer of technology from the developed country to the developing one. This transfer of technology, however, has become a sensitive subject between a number of countries, most recently between the United States and China. Because China is trying to develop a market economy but one with *Chinese characteristics*, in other words, without acceptance of all the western notions that accompany it, it presents a good example of cultures in conflict. In order to receive the technology, China, like many other countries, has had to put in place the requisite legal framework. However, as we saw in Chapter 2, there is a difference between enactment and enforcement.[62] With respect to China, one of the reasons for this difference may well lie in the cultural values related to the ideas of *ownership* and *licensing*. Anna Han notes that

> "[d]espite the availability of a fairly comprehensive set of intellectual property laws, international treaties, and specific enforcement plans under the Accord signed with the United States, infringement of intellectual propery rights remains rampant in China."[63]

Han goes on to state that, on the whole, this breach is not the result of a desire to steal the technology but rather a misunderstanding concerning which parties are entitled to share in it.[64] She notes that

> "Chinese society...has traditionally minimized the importance of individual rights. ...[B]enefits to the individual are secondary to the benefits that would accrue to the family, clan, village, and society. In short, Chinese tradition, fostered under Confucian doctrine, calls for the sacrifice of individual benefits for the greater good. ... This notion of public good is not only perpetuated in modern China but additionally enhanced by the introduction of Communism. Added..is the elimination of private ownership and its replacement with state ownership. ... The effect of this collectivist mentality...is that Chinese licensees often do not understand the concept of confidentiality. ...[T]he Chinese licensee's definition of a "third party" may be quite different from that of the licensor. The Chinese licensee...may not see another government-run factory that is under the same ministry as a third party. ...[It] is viewed as a sister organization that has traditionally shared information and technology with the licensee. ... This mentality, when applied to individual licensees of software, extends to the licensee's family and friends. Chinese licensees...would not view sharing the software with their family members as an infringement of intellectual property rights. Instead, the feeling is that the family members are really extensions of the direct licensee."[65]

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[61]Gessner (1994) at 142

[62]Turkey, like China, has enacted legislation however, like China, it is high on the U.S.'s list of abusers.

[63]Anna H. Han, "Technology Licensing to China: The Influence of Culture", 19 *Hastings International and Comparative Law Review* 629 (1996) at 637

[64]Han (1996) at 642

[65]Han (1996) at 639

Other areas of the international commercial contract that may be affected by cultural differences are those specifically related to time. We saw in Chapter 1, from Edward Hall's work, that different cultures have very different concepts of time. As time is an integral part of virtually every international commercial contract, it is easy to see how problems may arise. In our contract language we regularly use terminology such as *forthwith* and *as soon as reasonably practicable* to state when something must be done. Quite apart from the difficulties a foreign lawyer may have with this terminology from a language perspective or from a legal perspective, and even if we spell out in simpler language the legal definition of these terms, the understanding will still be different because of the different cultural conceptions as to what a *reasonable* period of time is when considering all the circumstances.

One final area of the international commercial contract that I will make mention of here is that dealing with dispute resolution. We saw in Chapter 2 that there are very different culturally-induced attitudes towards dispute resolution. This of course will affect the drafting of the dispute resolution provisions in the contract, but as noted above, what we are often seeing now in contracts is provision, initially, for amicable resolution of any dispute by discussion between the parties, followed by mediation or conciliation if discussion is unsuccessful, and subsequently followed by arbitration if all else fails. But even if the matter does go to arbitration, as we saw in Chapter 2, the parties may well have very different understandings as to how to put the matter in question before the arbitrators, what the role of the arbitrator is, and what the role of legal counsel is.[66]

VI. THE TECHNOLOGICAL AND ECONOMIC BARRIERS

A final and obvious but extremely important point that must be dealt with with respect to international commercial contracts is that often, when one party to the transaction is a developing country, there are technical and economic barriers, in addition to the language, legal and cultural barriers, which are often overlooked. As Parviz Owsia notes

> "[d]eveloping host countries are often unequipped to fully appreciate the sophisticated technical, financial, and legal aspects of the project and, not infrequently, the relevance of a contract pattern or form to the project at hand."[67]

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[66]There is a fair amount of legal literature on this very problem.

[67]Owsia (1993) at 177

And Dr. Owsia continues,

> "[m]ost of the available international contract patterns used with or without modification are products of industrialized and exporting countries prepared by interested agencies on the selling side. Though they attempt to strike a fair balance between the interests of consultant or contractor and those of the owner, they are based on certain assumptions which in practice may not hold good and end up for various reasons to the disadvantage of employers, particularly in developing countries. First, the structure of such contracts is not only sophisticated but sometimes unnecessarily complicated, particularly when put together with other contract documents, with abundant cross-references and cross-cross-references. This makes it hard to pin down the duties of engineer or contractor and occasionally culminate in dilution or even negation of an otherwise apparent duty. Secondly, it is assumed that both parties enjoy equal technical, legal and financial negotiation capabilities and skill, which is generally not the case. In many instances importing countries, often working through agencies of the government and with public funds, do not have the staff, experience, time, and the concern enjoyed by private consultants and contractors to strike a fair bargain through careful scrutiny of such contractual provisions. Thirdly, in many cases the time pressure for speedy and needed implementation of a project in developing countries results in rush interim contractual arrangements for the commencement of the project, under such formulas as 'letter of understanding' or an 'agreement in principle', with one of the internationally recognized contract form drafts attached to it. Finalization of contract documents, if contractual negotiations are to be properly conducted, may take many months of hard work and bargaining over various clauses of the draft which, in such a case, becomes more difficult to alter and may stand at the end closer to its original form than the particular needs of the project and the fair interests of the employer would warrant."[68]

[68]Owsia (1993) at 177-178

CONCLUSION

I noted in Chapter 4 that because of the global economy and the globalization of law some writers believe that societies are going to become more similar, with the result that there would be a convergence of *legal cultures*. Lawrence Friedman writes

> "...Japan is much more "Western" today than it was, say at the end of the second World War. One would expect then a degree of "convergence" in legal cultures and legal systems, despite the diverse historical traditions. That is, the systems and cultures would become more like one another, over time, in societies travelling down the same general road."[1]

One question that arises with this statement is firstly, what is meant by *legal cultures*? Writing in 1995, Masaji Chiba notes that

> "...the prevailing concept appears to be so different which can be seen in the usages such as 'attitudes and values concerning law' (Podgorecki, 1974, pp 227-229; Friedman 1975, p 15), 'legal tradition' (Ehrmann 1976, p 8; Berman 1983, p 11), 'interplay of four levels of legal phenomena from the law to consciousness' (Blankenberg & Bruinsma 1991, pp 8-9), 'popular legal practice formed from direct personal experience' (Macaulay 1989), and 'cultural configuration on law' (Chiba 1989, p 203)."[2]

Roger Cotterrell, in his article "The Concept of Legal Culture", notes the various definitions that Friedman alone has given to the term *legal culture* over the period 1975 through 1994[3] and concludes "[t]he imprecision of these formulations makes it hard to see what exactly the concept covers and what the relationship is between the various elements said to be included within its scope."[4] In Friedman's reply to Cotterrell's critique, he states that "[l]egal culture, as I have

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[1]Lawrence M. Friedman and Harry M. Scheiber, "Legal Cultures and the Legal Profession: Introduction" in Lawrence M. Friedman and Harry N. Scheiber (eds), *Legal Culture and the Legal Profession*, Westview Press, A Division of Harper Collins Publishers (1996) at 1

[2]Masaji Chiba, "Legal Pluralism in Mind: A Non-Western View" in *Legal Polycentricity: Consequences of Pluralism in Law*, Hanne Petersen and Henrik Zahle (eds), Aldershot, England: Dartmouth Publishing Company Limited (1995) at 73; see also David Goldberg and Elspeth Attwooll in "Legal Orders, Systemic Relationships and Cultural Characteristics: Towards Spectral Jurisprudence" in *Studies in Legal Systems: Mixed and Mixing*, Esin Orucu, Elspeth Attwooll & Sean Coyle (eds), The Hague: Kluwer Law International (1996) at 325 where they discuss the meaning of *legal culture*.

[3]"[P]ublic knowledge of and attitudes and behaviour patterns toward the legal system" (1975 at 193), "bodies of *custom* organically related to the culture as a whole" (1975 at 194), "those parts of general culture - customs, opinion, ways of doing and thinking - that bend social forces toward or away from the law and in particular ways" (1975 at 15), "attitudes, values, and opinions held in society, with regard to law, the legal system, and its various parts" (1977 at 76), "ideas, attitudes, values, and beliefs that people hold about the legal system" (1986 at 17), "ideas, attitudes, expectations and opinions about law, held by people in some given society" (1990 at 213, 1985 at 31, 1994 at 118)

[4]Roger Cotterrell, "The Concept of Legal Culture" in *Comparing Legal Cultures*, David Nelken (ed), Aldershot, England: Dartmouth Publishing Company Limited (1997) at 15; Tamanaha (1993) commenting on Friedman, states at 6 "[a]lthough his writing is full of programmatic assertions aimed at elaborating his conceptual scheme, the absence of any comprehensive attempt at specific application of the scheme is notable. Legal culture is set out so broadly that it can be used to explain just about everything in just about any way. Hence it explains very little. Perhaps that is why legal culture has not proven to be

defined the term, refers to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds."[5]

I prefer to approach the matter from the opposite direction from Friedman and look at *legal culture* from the perspective of those cultural values or ideology of a society which drive and shape its legal system. I believe these different approaches illustrate the very different understanding that Friedman and I have about the impact of cultural differences on the legal systems of nations. And I believe the different approaches we take are reflected in our different positions concerning whether or not there will be a convergence in legal cultures and legal systems. I return to Friedman's statement that he believes there is going to be a convergence in legal cultures and legal systems despite the different historical traditions. Needless to say, I disagree. And I believe this entire thesis supports my position. And I say this regardless of the different definitions we give to the concept of *legal culture*. Even using Friedman's definition, I believe he is incorrect. And, as just noted, I believe he is incorrect because of the direction from which he approaches the question.[6]

Marc Galanter takes, what I would call, a more realistic approach to this matter. He notes

> "[s]ome would take the extensive borrowing of American institutions and devices as an indication that America is leading the way to a convergent transnational legal culture. But legal cultures, like languages, can absorb huge amounts of foreign material while preserving a distinctive structure and flavor."[7]

And Wolfgang Wiegand in his article on the Americanization of law in Europe states specifically

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a viable concept."

[5]Lawrence M. Friedman, "The Concept of Legal Culture: A Reply" in David Nelken (ed) (1997) at 34

[6]It is surprising that Friedman continues to take this approach in 1996 when lawyers and legal anthropologists writing in the 1970's had found otherwise. Tamanaha (1993) at 8 quotes, among others, the words of L. Pospisil, *Anthropology of Law* (New York, 1971), "[i]n view of the recognition of the law's dependence upon the rest of the culture in which it exists, it amounts to folly to think that a legal system of one nation can be easily transplanted into another culture and applied to another society."

[7]Marc Galanter, "The Assault on Civil Justice: The Anti-Lawyer Dimension" in Friedman & Scheiber (1996) at 100; see also Tamanaha (1993) at 2-3 where he notes that Marc Galanter was one of the academics who precipitated the impending crash of the Law and Development Movement of mainstream legal academia. Tamanaha tells us that this Movement developed in the late 1950's and the 1960's during "...a heady period of exportation of the U.S. economic and political model in the name of modernization and development. Affirmative exportation of the legal model occured at the same time for the same reasons. Law was supposed to assist economic development by providing uniformity and predictability in the market, preserving incentives and insuring that the fruits of labor would be protected. Law was seen as necessary in political development to serve as a restraint on the exercise of state power through the separation of law and politics and the preservation of individual rights against the state."

that what is happening in Europe is *reception* of American law, not *convergence*. He notes that

> "[p]erhaps...the so-called reception of American law is nothing more than a common reaction to the needs of modern society which may have little or nothing to do with Americanization. ... The United States as the most industrialized nation dealt with many of these problems earlier than other countries. Legal scholarship and the judiciary developed solutions: and the solutions, because of the high standards of universities and the legal profession, were themselves at a high level."[8]

I would also suggest that the reception of American law is much more acceptable to European cultures, which share a similar economic, social and political history, than it is to those which do not share this history. This point is eloquently illustrated by Franz Wieacker, who writes

> "[t]here exists so far no planetary legal culture, but numerous new and old, frequently quite ancient, legal cultures have existed outside our continent. Besides our own (which becomes intelligible as a cultural entity only in contrast to the others), there are especially the following:
>
> On the one side, the legal and social systems of other, chiefly Asiatic high cultures, among them, as the ones reaching farthest in time and space, those of the Islamic world, India, and China. These, above all, present a challenge to Europeans to become conscious of the peculiar nature and the limitations of their own conception of law. Thus Europeans encounter in Ancient China a model that, at least originally, did not (in contrast to Europe) isolate the province of law from other societal sanction systems (that is, public morality); and they encounter in Islam a closer link between the interpersonal ("secular") law and revealed religious texts than is possible in Europe since the days when legal scholarship emerged at Bologna."[9]

This point is also illustrated by the current situation in Micronesia where the Constitution, District Charters and legal codes are taken almost directly from the United States' Constitution and national and state laws, often using identical language.[10] Tamanaha notes that

> "[a] qualitatively different type of barrier to understanding legal language, suffered by all Micronesians except those who spent substantial periods of time in the U.S., exists on the cultural level. The concepts which legal language refer to and evoke are ultimately products of the culture of the United States. These underlying cultural concepts still have not become pervasive aspects of Micronesian cultures. As a general matter - to identify only a couple of relevant characteristics - Micronesian cultures are community oriented not individual oriented, they value consensus, and they are highly stratified. Many of the cultural ideas underlying the legal language, from the most basic level like equality, democracy, individual rights, and individual autonomy, to notions like freedom of contract, the adversary system, and even the rule of law, have no analagous place to settle in the Micronesian cultural meaning strains. Explanation of these ideas in english does not help because it unavoidably becomes circular, refering back to other connected cultural ideas."[11]

And as found by Clifford Geertz, law is not merely a "technical add-on" to a society (as

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[8]Wolfgang Wiegand, "Americanization of Law: Reception or Convergence" in Friedman & Scheiber (eds) (1996) at 147-148

[9]Franz Wieacker, "Foundations of European Legal Culture", 38 *The American Journal of Comparative Law* 1 (1990) at 4

[10]Tamanaha (1993) at 36

[11]Tamanaha (1993) at 39

Friedman's definition of *legal culture* would seem to presume) but rather an "active part of it".[12] Geertz concludes that "[t]aken together, these two propositions, that law is local knowledge not placeless principle and that it is constructive of social life not reflective, or anyway not just reflective, of it, lead on to a rather unorthodox view of what the comparative study of it should consist in: cultural translation."[13]

I would suggest that Friedman's comment is the result of his ignorance of the depth and diversity of these other legal cultures and is a good example of the cultural relativism of which Lubman and Berman speak.[14]

But I believe another matter merits discussion here as well. The convergence of law should not be confused with the globalization of law. The two are not the same.[15] There is a certain amount of globalization of law occurring out of necessity in international commercial transactions because, as we have seen, national laws simply do not work satisfactorily in the international setting. For this reason, there is a need for rules specifically governing international transactions, separate and apart from national transactions. But, as should be clear at this point, this in itself is extremely difficult in light of the very different approaches and conceptions that different countries have to the problems at hand. And even when the rules have been created, whether or not parties will use them is another matter. But apart from this, the very development of these rules does not mean that there is a convergence of legal systems or legal cultures or an

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[12]Geertz (1983) at 218

[13]Geertz (1983) at 218; it is this *cultural translation* of the law that I have tried to accomplish in Chapter 2 of this thesis.

[14]Others in fact argue that what is happening is not greater uniformity but rather greater diversity - see Geertz (1983) at 216 and Jennifer Corrin Care & Susan Farran, "Law in the Pacific: Implications of Jurisdictional, Cultural and Ethnic Diversity for the Teaching of Law", 31 *The Law Teacher* 283 (1997) at 283.

[15]Goldberg & Attwooll (1996) at 326 note that "a widespread debate has begun regarding the supposed emergence of "global law", which both promotes, and is reflective of, the globalization of economic, political and communicative processes. ... An initial difficulty is defining what "globalization" means." Goldberg and Attwooll go on to quote Delbruck who defines globalization as "the process of denationalization of markets, laws and politics in the sense of interlacing peoples and iindividuals for the sake of the *common good*". They also quote M. Shapiro, who they note is less idealistic than Delbruck. Shapiro writes "when we speak of the globalization of law, we must be conscious that we are speaking of an extremely narrow, limited, and specialized set of legal phenomena set into a globe in which it is not at all clear whether the total quantum of human relationships governed by law has increased or decreased over the last century. We will almost always discover that we are really talking about North America, Europe, Australia and New Zealand. Japan will sometimes be on and sometimes off this globe." Goldberg and Attwooll go on to note that the "driving forces of this version of globalization are more to do with the impact and spread of transnational corporations, private law mechanisms, the globalization of lawyers.... and the 'Americanization of law'."

Americanization of international law.[16] The cause for the misunderstanding may well be, as Geertz states, that "...projections of aspects of our own [world] onto the world stage...leads us to imagine there is more commonality of mind in the world than there is or to mistake convergence of vocabularies for convergence of views."[17]

I wish to dwell on this position of Friedman's a little longer because it is a position which I find to be particularly dangerous. By advocating such a belief, Friedman encourages American lawyers and law students to close their eyes and minds even more to the cultural and legal diversity which actually exists. I noted in Chapter 2 that Stanley Lubman, writing in 1991, stated that with respect to the study of Chinese law he has found that

> "[f]oreign observers create additional difficulties by not being self-conscious enough about their own theoretical assumptions. Both extreme cultural relativism and insistence on intellectual categories derived from Western legal systems have threatened to skew study, with the latter trend more evident in recent years."[18]

It is the last part of this statement which is most disturbing. With the greater contact that now exists between different cultures, one would think that the opposite would be true. But it is attitudes such as that exhibited by Friedman being propounded by the very academics who are

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[16]In fact, as it relates to private international commercial transactions, the majority of these rules are being developed in Europe, not in the United States. I believe it is correct to say that the most widely used international uniform terms (commercially speaking) are the UCP (Uniform Customs and Practice on Documentary Credits) and INCOTERMS (International Commercial Terms), both of which were developed by the International Chamber of Commerce (ICC) which is headquartered in Paris. The ICC is very active in trying to create uniform documents and rules that can be used in a variety of international commercial situations. UNIDROIT, headquartered in Rome, has also been very active in this regard. The *Principles of International Commercial Contracts* is just one example of the work produced by UNIDROIT. As well, the *United Nations Convention on Contracts for the International Sale of Goods* (the CISG) was based on work done by UNIDROIT.

[17]Geertz (1983) at 221; Care and Farran, who teach law at the University of the South Pacific, note that before the introduction of the legal studies programme in 1985, "...the legal education available to Pacific Islanders was largely divorced from both cultural and ethnic considerations..." and also from the legal pluralism which exists on the Pacific Islands. The university serves the Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Western Samoa. Care and Farran note that "[l]ecturers have to become aware of different cultural norms when delivering lectures and conducting seminars, or assessing students' oral and written work." They note the general differences in cultural orientation between Pacific Island cultures and western/industrial/urban as follows: emphasis on the spiritual, on rank or authority, on the specific, on conformity, on interdependence, on the feelings of others, on blood ties, and on restraint (for the Pacific Islanders) as opposed to emphasis on the secular/scientific, on equality, on universals, on individuality, on independence, on individual rights, on the nuclear family, on criticism (for the western/industrial/urban) and they go on to state how these differences impact on the teachers and the students. - see Care & Farran (1997) at 283, 290.

[18]"Studying Contemporary Chinese Law: Limits, Possibilities and Strategy", 39 *The American Journal of Comparative Law* 293 (1991) at 294

training new lawyers which, I would argue, are helping to create this *backward* trend.[19]

But thankfully not all think in this way. John H. Barton, a Professor of Law at Stanford (as is Friedman) and a specialist in international business transactions, argues that "the task is to teach the student to "think like a global lawyer"."[20] He goes on to note that "[t]he contract and negotiation area is (*sic*) an obvious candidate for considering international issues. There are many ways in which national differences among parties can affect a transaction."[21] He notes further that

> "[p]robably the most important point in the contract sector is to prepare the student for the variety of possible forms of misunderstanding that can occur in an international transaction. The obvious examples arise from differences in the relevant law. ... What may be more important are differences in negotiating style. ... Even more important are differences in the concept of an agreement."[22]

Barton notes that there are very few good teaching materials available in order to accomplish what is needed and concludes that what he is suggesting

> "...will definitely require the development of new teaching materials. Few current materials attempt to develop the relevant forms of sensitivity. These new materials will require new vocabularies - for our vocabularies for describing negotiation...approaches are relatively weak. ... ...to present these issues will require stronger emphasis on the human and the transactional aspects of law and further movement away from the doctrinal approach to law. With the right emphasis, there is a good chance that we will prepare our students well for the Twenty-First Century."[23]

An area that Barton does not deal with to any great extent is that of language, which is my main area of concern. A complicating factor to this aspect of the problem is that the large number of English-speaking international law firms are quite content to maintain the status quo. They hold the key in this international arena and they have no reason to simplify or demystify the language,

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[19]Tamanaha (1993) notes at 3 that the death of the Law and Development Movement "...did not mean the end of the exportation of the U.S. legal model.... ... The crisis of self-confidence about law was predominantly an academic one which did not filter down to the ranks of legal practitioners, those who, informed by the liberal legal model, do legal work in developing countries. Furthermore, even if skeptical of the liberal legal picture, a lawyer must act as if it were true. It was and is a set of premises U.S. trained lawyers place at ground level when entering the legal arena. Being told, even persuaded, that the paradigm is false does not alter its reiteration the next time and every time. As a lawyer in Micronesia, whenever I did law I set aside all doubts and ignored the everpresent contradictions."

[20]John H. Barton, "Implications of International Legal Integration for Law Teaching" in *Law and Technology in the Pacific Community*, Philip S.C. Lewis (ed), Boulder: Westview Press (1994) at 317

[21]Barton (1994) at 318

[22]Barton (1994) 318-319

[23]Barton (1994) at 323

or the forms of the contracts being used, because they would then lose their advantage.[24] The whole purpose of my Legal English course is to try to give the local lawyers who cannot afford to be trained overseas some inside knowledge into this strange and difficult language and some understanding of the form the contracts take. But I believe we must also devote more time in our law schools, our bar admission courses, and our continuing legal education courses in training lawyers to draft these international documents in a way that is more appropriate for the international situation at hand.[25]

[24]Although I acknowledge that they are far more sensitive to the cultural and linguisitic barriers and as such will create documents which are more easily understood.

[25]The International Bar Association is starting to become active in this area as it is a matter being faced daily by IBA members.

BIBLIOGRAPHY

I. CHAPTER ONE - THE BARRIERS POSED BY CULTURE

Molefi A. Asante, Eileen Newmark & Cecil A. Blake (eds), *Handbook of Intercultural Communication*, Beverly Hills: Sage Publications (1979)

Ruth Benedict, *The Chrysanthemum and the Sword, Patterns of Japanese Culture*, Boston: Houghton Mifflin Company, (1946)

Alan Fox, "The Aesthetics of Justice: Harmony and Order in Chinese Thought", 19 *Legal Studies Forum* 43 (1995)

Edward T. Hall, *The Silent Language*, Garden City, N.Y.: Doubleday & Company (1959)

----------, *Beyond Culture*, Garden City, N.Y.: Anchor Press/Doubleday (1976)

Edward T. Hall & Mildred Reed Hall, *Hidden Differences, Doing Business With the Japanese*, Garden City, N.Y.: Anchor Press/Doubleday (1987)

Geert Hofstede, *Culture's Consequences, International Differences in Work-Related Values*, Beverly Hills: Sage Publications (1980)

----------, "The Cultural Relativity of Organizational Practices and Theories", *Journal of International Business Studies*, Fall 1983

Ron Scollon & Suzanne Wong Scollon, *Intercultural Communication*, Oxford: Blackwell (1995)

Richard Steers, "Culture and Communication Patterns in Korean Firms" on the Internet at http://hoshi.cic.sfu.ca/forum/steers.html (1992)

Craig Storti, *Cross-Cultural Diaglogues, 74 Brief Encounters with Cultural Difference*, Yarmouth, Maine: Intercultural Press, Inc. (1994)

Dr. Rosalie Tung, "Business Negotiations with the Koreans: a Cross-Cultural Perspective" on the Internet at http://hoshi.cic.sfu.ca/forum/tung.html (1990)

II. CHAPTER TWO - THE BARRIERS POSED BY LAW

P.S. Atiyah, *Law and Modern Society*, Oxford: Oxford University Press (1983)

The American Journal of Comparative Law, (Summer 1992)
Ulrich Drobnig, "Substantive Validity" at 635
Marcel Fontaine, "Content and Performance" at 645
Denis Tallon, "Damages, Exemption Clauses, and Penalties" at 675

John H. Barton, James Lowell Gibbs, Jr., Victor Hao Li, John Henry Merryman, *Law in Radically Different Cultures*, St. Paul, Minn.: West Publishing Company (1983)

James Boyle, "Ideals and Things: International Legal Scholarship and the Prison-house of Language", *26 Harvard International Law Journal* 340 (1985)

Lucie Cheng & Arthur Rosett, "Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Heirarchy to Market, 1978-1989", 5 *Journal of Chinese Law* 143 (1991)

Donald C. Clarke, "Dispute Resolution in China", 5 *Journal of Chinese Law* 245 (1991)

David Cohen & Karin Martin, "Western Ideology, Japanese Product Safety Regulation and International Trade" 19 *U.B.C. Law Review* 315 (1985)

Jerome Alan Cohen (ed), *Contemporary Chinese Law*, Cambridge, Massachusetts:Harvard University Press (1970)

Alison W. Conner, "To Get Rich is Precarious: Regulation of Private Enterprise in the People's Republic of China", 5 *Journal of Chinese Law* 1 (1991)

Christian Dadomo & Susan Farran, *French Substantive Law, Key Elements*, London: Sweet & Maxwell (1997)

Richard A. Danner & Marie-Louise H. Bernal (eds), *Introduction to Foreign Legal Systems*, New York: Oceana Publications (1994)

Rene David & John E.C. Brierley, *Major Legal Systems in the World Today, An Introduction to the Comparative Study of Law, Third Edition*, London: Stevens & Sons (1985)

Joseph Ernest de Becker, *Elements of Japanese Law*, Yokohama (1916) (reprinted in 1979 by University Publications of America, Inc.)

Duncan M. Derrett (ed), *An Introduction to Legal Systems*, New York: Frederick A. Praeger Publishers (1968)

Henry W. Ehrmann, *Comparative Legal Cultures*, Englewood Cliffs, N.J.: Prentice-Hall, Inc. (1976)

Jerome B. Elkind (ed), *The Impact of American Law on English and Commonwealth Law*, St. Paul, Minn.: West Publishing Company (1978)

Gunter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law", *26 Harvard International Law Journal* 411 (1985)

Michael Furmston, Takao Norisada, & Jill Poole, *Contract Formation and Letters of Intent*, Chichester: John Wiley & Sons (1998)

Mary Ann Glendon, Michael Wallace Gordon & Christopher Osakwe, *Comparative Legal Traditions In a Nutshell*, St. Paul, Minn.: West Publishing Co. (1982)

----------, *Comparative Legal Traditions, Text, Materials and Cases*, St. Paul, Minn.: West Publishing Co. (1985)

Jane Banfield Haynes & Patricia McDermott (eds), *Readings in Law and Society, 3rd Edition*, York University: Captus Press Inc. (1991)

W.F. Harvey, *A Brief Digest of the Roman Law of Contracts*, Oxford: James Thorton, High Street (1878) (republished in 1996 by Fred B.Rothman & Co., Littleton, Colorado)

Dan F. Henderson, "Law and Political Modernization in Japan", *Political Development in Modern Japan*, R. Ward (ed.) (1968) (reproduced in S. Salzberg, *Japanese Law* (1988) U.B.C. Japanese Legal Studies Program)

Sir William Holdsworth, *A History of English Law*, Volume II, Fourth Edition, London: Methuen & Co. Ltd. (1936)

Kyoko Inoue, *MacArthur's Japanese Constitution, A Linguistic and Cultural Study of its Making*, Chicago: The University of Chicago Press (1991)

Institute of Comparative Law, Waseda University (ed), *Law in East and West*, Tokyo: Waseda University Press (1988)

International Business Lawyer - *The Channel Tunnel Experience* (January 1996)

Francis W. Neate "Civil Law and Common Law: Rendezvous in Eurotunnel?"
Jean Naslin "A Completely New Legal Experience"
Philippe Nouel "'Cartesian Pragmatism': Looking for Common Principles in French and English Law"

International Encyclopedia of Comparative Law, Mouton: J.C.B. Mohr (Paul Siebeck) Tubingen (1975 - 1984)

Volume II - The Legal Systems of the World - Their Comparison and Unification (Rene David - Chief Editor)

Chapter 1 - The Different Conceptions of the Law (by R. David, G. Sawer, I. Szabo, H. Afchar, J.D.M. Derrett, T.K.K. Iyer, Y. Noda, K. M'Baye)
Chapter 2 - Structure and the Divisions of the Law (by R. David, Ch. Szladits, T. Weir, V.M. Tschchikvadze, S.L. Zivs, Ch. Chehata, J.D.M. Derrett, T.K.K. Iyer, E. Cotran)
Chapter 3 - Sources of Law (by Rene David)

Volume III - Private International Law (Kurt Lipstein - Chief Editor)

Chapter 24 - Contracts (by Ole Lando)

Peter Jones, "Reasonableness, Honesty and Good Faith" in 17 *International Bar Association International Sales Quarterly* 8 (March 1995)

Ronald C. Keith, *China's Struggle for the Rule of Law*, New York: St. Martin's Press (1994)

Frederick G. Kempin, Jr., *Historical Introduction to Anglo-American Law, In a Nutshell, Third Edition*, St. Paul, Minn.: West Publishing Co. (1990)

A.K.R. Kiralfy, *Potter's Historical Introduction to English Law and its Institutions, Fourth Edition*, London: Sweet & Maxwell Limited (1962)

Laszlo Ladany, *Law and Legality in China, The Testament of a China-watcher*, London: Hurst & Company (1992)

Eugene Langen, *Transnational Commercial Law*, A.W. Sijthoff Leiden (1973)

Victor H. Li, "The Evolution and Development of the Chinese Legal System" in *China: Management of a Revolutionary Society*, John M. H. Lindbeck (ed), Seattle: University of Washington Press (1971)

Herbert J. Liebesny, *Foreign Legal Systems: A Comparative Analysis*, Fourth Revised Edition, The George Washington University (1981)

Stanley Lubman, "Studying Contemporary Chinese Law: Limits, Possibilities and Strategy", 39 *The American Journal of Comparative Law* 293 (1991)

Herbert H. P. Ma, "The Chinese Concept of the Individual and the Reception of Foreign Law", 9 *Journal of Chinese Law* 207 (1995)

J.M. MacIntyre, "Dispute Resolution in Japanese and Canadian Labour Law", 1985 U.B.C. Conference *Canadian Perspectives on Japanese Law*

Frederic William Maitland, *English Law and the Renaissance*, Cambridge University Press (1901)

Frederic W. Maitland & Francis C. Montague, *A Sketch of English Legal History*, New York: G.P. Putnam's Sons (1915)

Gordon Matei, "Challenging the Myths: Japanese and Canadian Attitudes Towards Commercial Contracts", 1985 U.B.C. Conference *Canadian Perspectives on Japanese Law*

S.F.C. Milsom, *Historical Foundations of the Common Law, Second Edition*, London: Butterworths (1981)

----------, *Studies in the History of the Common Law*, London: The Hambledon Press (1985)

Yosiyuki Noda, *Introduction to Japanese Law*, University of Tokyo Press (1976)

Esin Orucu, Elspeth Attwooll & Sean Coyle, *Studies in Legal Systems: Mixed and Mixing*, The Hague: Kluwer Law International (1996)

Parviz Owsia, *Formation of Contract, A Comparative Study under English, French, Islamic and Iranian Law*, London: Graham & Trotman (1993)

Jiang Ping, "Chinese Legal Reform: Achievements, Problems and Prospects", 9 *Journal of Chinese Law* 67 (1995)

Adam Podgorecki, Christopher J. Whelan & Dinesh Khosla (eds), *Legal Systems & Social Systems*, London: Croom Helm (1985)

Pitman B. Potter, *Foreign Business Law in China, Past Progress and Future Challenges*, San Francisco: The 1990 Institute (1995)

Dr. S.E. Rayner, *The Theory of Contracts in Islamic Law: A Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and the United Arab Emirates*, London: Graham & Trotman (1991)

Charles S. Rhyne (ed), *Law and Judicial Systems of Nations, Third Revised Edition Covering 144 Nations*, Washington, D.C.: The World Peace Through Law Center (1978)

Lester Ross, "Force Majeure and Related Doctrines of Excuse in Contract Law of the People's Republic of China", 5 *Journal of Chinese Law* 58 (1991)

Petar Sarcevic (ed), *International Contracts and Conflict of Laws, A Collection of Essays*, London: Graham & Trotman/Martinus Nijhoff (1990)

J. Toshio Sawada, *Subsequent Conduct and Supervening Events*, Tokyo: University of Tokyo Press, and Ann Arbor: University of Michigan Law School (1968)

Kenzo Takayanagi, "A Century of Innovation: The Development of Japanese Law, 1868-1961" in *Law in Japan: The Legal Order in a Changing Society*, Arthur Taylor von Mehren (ed), Cambridge: Harvard University Press (1963)

J.C. Smith & David N. Weisstub, *The Western Idea of Law*, London: Butterworths (1983)

Alan Watson, *Legal Transplants - An Approach to Comparative Law*, Edinburgh: Scottish Academic Press (1974)

Michael K. Young, "Dispute Resolution in Japan: Patterns, Trends, and Developments", *Legal Aspects of Doing Business with Japan 1985*, Isaac Shapiro (Chairman), New York: Practising Law Institute (1985)

Yu Xingzhong, "Legal Pragmatism in the People's Republic of China", 3 *Journal of Chinese Law* 29 (1989)

Liang Zhiping, "Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture", 3 *Journal of Chinese Law* 55 (1989)

III. CHAPTER THREE - THE BARRIERS POSED BY LANGUAGE

Albert C. Baugh, *A History of the English Language*, Second Edition, London: Routledge & Kegan Paul Ltd. (1957)

Ruth Benedict, *The Chrysanthemum and the Sword, Patterns of Japanese Culture*, Boston: Houghton Mifflin Company, (1946)

Vicki L. Beyer & Keld Conradsen, "Translating Japanese Legal Documents into English: A Short Course" in *Translation and the Law*, Marshall Morris (ed), Amsterdam: John Benjamins Publishing Company (1995)

Margaret M. Bryant, *English in the Law Courts, The Part that Articles, Prepositions, and Conjunctions Play in Legal Decisions*, New York: Rederick Ungar Publishing Co. (1962)

Veda R. Charrow & Myra K. Erhardt, *Clear & Effective Legal Writing*, Boston: Little, Brown and Company (1986)

L.J. Mark Cooray, *Changing the Language of the Law, The Sri Lankan Experience*, Quebec: Les Presses De L'Universite Laval (1985)

David Crystal & Derek Davy, *Investigating English Style*, Bloomington: Indiana University Press (1969)

Brenda Danet, "Language in the Legal Process", 14 *Law & Society Review* 445 (1980)

Rene David & John E.C. Brierley, *Major Legal Systems in the World Today, An Introduction to the Comparative Study of Law*, London: Stevens & Sons (1968)

Oliver Farrar Emerson, *The History of the English Language*, New York: The Macmillan Company (1935)

Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective" in *Local Knowledge, Further Essays in Interpretative Anthropology*, New York: Basic Books, Inc., Publishers (1983)

John Gibbons (ed), *Language and the Law*, London: Longman (1994)

Peter Goodrich, "Law and Language: An Historical and Critical Introduction", 11 *Journal of Law and Society* 173 (1984)

Risto Hiltunen, *Chapters on Legal English, Aspects Past and Present of the Language of the Law*, Helsinki: Suomalainen Tiedeakatemia (1990)

Sir William Holdsworth, *A History of English Law*, Volumes II, III, IV, V, VI London: Methuen & Co. Ltd. (1935 - 1945)

Bernard S. Jackson, *Semiotics and Legal Theory*, London: Routledge & Kegan Paul (1985)

----------, "On Scholarly Developments in Legal Semiotics", 3 *Ratio Juris* 415 (1990)

Dennis R. Klinck, *The Word of the Law*, Ottawa: Carleton University Press (1992)

David Mellinkoff, *The Language of the Law*, Boston: Little, Brown and Company (1963)

Marshall Morris (ed), *Translation and the Law*, Amsterdam: John Benjamins Publishing Company (1995)

L.M. Myers, *The Roots of Modern English*, Boston: Little, Brown and Company (1966)

David Nelken, "Law as Communication: Constituting the Field" in *Law as Communication*, David Nelken (ed), Aldershot: Dartmouth (1996)

----------, "Can There be a Sociology of Legal Meaning" in *Law as Communication*, David Nelken (ed), Aldershot: Dartmouth (1996)

Yosiyuki Noda, *Introduction to Japanese Law*, University of Tokyo Press (1976)

Gerhard Obenaus, "The Legal Translator as Information Broker", in *Translation and the Law*, Marshall Morris (ed), Amsterdam: John Benjamins Publishing Company (1995)

Parviz Owsia, *Formation of Contract, A Comparative Study under English, French, Islamic and Iranian Law*, London: Graham & Trotman (1993)

V.J. Peyton, *The History of the English Language* (1771) (reproduced in 1970 by The Scolar Press Limited, Menston,England)

Frederick A. Philbrick, *Language and the Law, The Semantics of Forensic English*, New York: The Macmillan Company (1951)

Sir Frederick Pollock & Frederic William Maitland, *The History of English Law*, Second Edition, Volumes I and II (1898) (reissued in 1968 by Cambridge University Press)

Theodore F. T. Plucknett, *A Concise History of the Common Law*, Fifth Edition, London: Butterworth & Co. (Publishers) Ltd. (1956)

Susan Sarcevic, *New Approach to Legal Translation*, The Hague: Kluwer Law International (1997)

Amber Lee Smith, "Foreign Law in Translation: Problems and Sources" in *Introduction to Foreign Legal Systems*, Richard A. Danner & Marie-Louise H. Bernal (eds), New York: Oceana

Publications, Inc. (1994)

Brian Z. Tamanaha, *Understanding Law in Micronesia, An Interpretive Approach to Transplanted Law*, Leiden: E.J. Brill (1993)

UNIDROIT *Principles of International Commercial Contracts*, Rome (1994)

Alan Watson, *Legal Transplants An Approach to Comparative Law*, Edinburgh: Scottish Academic Press (1974)

Maurice Wolf, "Special Issues and Problems Affecting International Joint Ventures in Emerging Nations" in *International Joint Ventures*, Washington, D.C.: Federal Publications Inc. (1993)

George E. Woodbine, "The Language of English Law", XVIII *Speculum, A Journal of Mediaeval Studies* 395 (1943)

IV. CHAPTER FOUR - THE IMPACT OF CULTURAL, LEGAL AND LINGUISTIC DIFFERENCES ON ACTUAL INTERNATIONAL COMMERCIAL CONTRACTS

John H. Barton, "Implications of International Legal Integration for Law Teaching" in *Law and Technology in the Pacific Community*, Philip S.C. Lewis (ed), Boulder: Westview Press (1994)

John Barton & Susan Jordan, "The International Legal Community in the Pacific Basin" in *Law and Technology in the Pacific Community*, Philip S.C. Lewis (ed), Boulder: Westview Press (1994)

Michael Harris Bond, "Cross-Cultural Issues in Managing the Organization: The Case of Hong Kong" on the Internet at http://hoshi.cic.sfu.ca/forum/bond.html (1990)

Thomas F. Clasen, *International Agency and Distribution Agreements, Analysis and Forms*, Butterworth Legal Publishers (1992)

Wilfred M. Estey, *Legal Opinions in Commercial Transactions*, Second Edition, Toronto: Butterworths (1997)

Eric A. Feldman, "Patients' Rights, Citizens' Movements and Japanese Legal Culture" in *Comparing Legal Cultures*, David Nelken (ed), Aldershot, England: Dartmouth Publishing Company Limited (1997)

David Flint, Robert Pritchard & Thomas Chiu, "Constitutional and Legislative Safeguards for FDI: A Comparative Review Utilizing Australia and China" in *Economic Development, Foreign Investment and the Law*, Robert Pritchard (ed), London: Kluwer Law International and International Bar Association (1996)

Lawrence M. Friedman & Harry N. Scheiber (eds), *Legal Culture and the Legal Profession*, Westview Press, A Division of Harper Collins Publishers (1996)

Lawrence M. Friedman, "Are We a Litigious People?" in Friedman & Scheiber (eds) (1996)

Volkmar Gessner, "Global Legal Interaction and Legal Cultures", 7 *Ratio Juris* 132 (July 1994)

Aleksandar Goldstajn, "Reflections on the Structure of the Modern Law of International Trade" in *International Contracts and Conflicts of Laws, A Collection of Essays*, Petar Sarcevic (ed), London: Graham & Trotman/Martinus Nijhoff (1990)

Anna M. Han, "Technology Licensing to China: The Influence of Culture", 19 *Hastings International and Comparative Law Review* 629 (1996)

Norbert Horn (ed), *Adaptation and Renegotiation of Contracts in International Trade and Finance*, Deventer, The Netherlands: Kluwer (1985)

International Joint Ventures, Course Manual, Washington, D.C.: Federal Publications Inc. (1993)

P. Anthony McArthur, "Joint Ventures in Japan" in 1985 U.B.C. Conference - *Canadian Perspectives on Japanese Law*

P. Sarcevic & P. Volken, *International Contracts and Payments*, London: Graham & Trotman/Martinus Nijhoff (1991)

Zenichi Shishido, "Joint Ventures between Enterprises from Countries of Different Economic and Political Systems" in *Japanese Reports for the XIIIth International Congress of Comparative Law* (Montreal, August 19-24, 1990), Tokyo: International Center for Comparative Law and Politics (1991)

Richard Steers, "Culture and Communication Patterns in Korean Firms" on the Internet at http://hoshi.cic.sfu.ca/forum/weiss.html (1992)

Stella Ting-Toomey, "Cross-Cultural Face-Negotiation: An Analytical Overview" on the Internet at http://hoshi.cic.sfu.ca/forum/ting-too.html (1992)

Dr. Rosalie Tung, "Business Negotiations with the Koreans: a Cross-Cultural Perspective" on the Internet at http://hoshi.cic.sfu.ca/forum/tung.html (1990)

Stephen Weiss, "Negotiations with the Pacific Rim: Cross-Cultural Challenges and Strategies" on the Internet at http://hoshi.cic.sfu.ca/forum/weiss.html (1992)

V. CONCLUSION

John H. Barton, "Implications of International Legal Integration for Law Teaching" in *Law and Technology in the Pacific Community*, Philip S.C. Lewis (ed), Boulder: Westview Press (1994)

Richard C. Breeden, "The Globalization of Law and Business in the 1990's", 28 *Wake Forest Law Review* 509 (1993)

Jennifer Corrin Care & Susan Farran, "Law in the Pacific: Implications of Jurisdictional, Cultural and Ethnic Diversity for the Teaching of Law, 31 *The Law Teacher* 283 (1997)

Masaji Chiba, "Legal Pluralism in Mind: A Non-Western View" in *Legal Polycentricity: Consequences of Pluralism in Law*, Hanne Petersen and Henrik Zahle (eds), Aldershot, England: Dartmouth Publishing Company Limited (1995)

Roger Cotterrell, "The Concept of Legal Culture" in *Comparing Legal Cultures*, David Nelken (ed), (1997)

Lawrence M. Friedman & Harry N. Scheiber (eds), *Legal Culture and the Legal Profession*, Westview Press, A Division of Harper Collins Publishers (1996)

Lawrence M. Friedman, "Law, Legal Institutions, and Economic Development" in *Law and Technology in the Pacific Community*, Philip S.C. Lewis (ed), Boulder: Westview Press (1994)

----------, "The Concept of Legal Culture: A Reply" in David Nelken (ed), (1997)

Volkmar Gessner, "Global Legal Interaction and Legal Cultures", 7 *Ratio Juris* 132 (1994)

Marc Galanter, "The Assault on Civil Justice: The Anti-Lawyer Dimension" in Friedman & Scheiber (eds) (1996)

David Goldberg & Elspeth Attwooll, "Legal Orders, Systemic Relationships and Cultural Characteristics: Towards Spectral Jurisprudence" in *Studies in Legal Systems: Mixed and Mixing*, Esin Orucu, Elspeth Attwooll & Sean Coyle (eds), The Hague: Kluwer Law International (1996)

David Nelken (ed), *Comparing Legal Cultures*, Aldershot, England: Dartmouth Publishing Company Limited (1997)

Peter Roorda, "The Internationalization of the Practice of Law", 28 *Wake Forest Law Review* 141 (1993)

Franz Wieacker, "Foundations of European Legal Culture", 38 *The American Journal of Comparative Law* 1 (1990)

Wolfgang Wiegand, "Americanization of Law: Reception or Convergence" in Friedman & Scheiber (eds) (1996)

APPENDIX A-1
INTERNATIONAL SALES REPRESENTATION AGREEMENT

THIS AGREEMENT is made as of this _____ day of _____, _____, by and between _____, a (type of business organization) organized and existing under the laws of _____ (jurisdiction) with its principal offices in _____ (the COMPANY), and _____, a _____ (type of business organization) organized and existing under the laws of _____ (jurisdiction) with its principal offices in _____ (the REPRESENTATIVE).

Recitals

A. The COMPANY is engaged in the business of selling _____ _____ and desires that the sale and use of such products be actively and diligently promoted in _____ _____; and

B. The REPRESENTATIVE desires to actively and diligently promote the sale and use of such products in _____.

Covenants

In consideration of the mutual covenants and agreements contained herein, and the mutual benefits to be derived herefrom, the parties, intending to be legally bound, hereby covenant and agree as follows:

Article I. Definitions

1.1 Agreement. The term "AGREEMENT" when used herein means this document and any annex, exhibit, attachment, schedule, addendum, or modification hereto, unless the context otherwise indicates.

1.2 Customer. The term "CUSTOMER(S)" when used herein means any purchaser of PRODUCTS.[1]

1.3 Net Sales Price. The term "NET SALES PRICE" when used herein means the price at which the PRODUCTS are actually sold by the COMPANY, exclusive of transportation and packing costs, insurance, duties, taxes and other governmental charges, commercial, trade and cash discounts or commissions, returns, and adjustments or allowances actually granted by the COMPANY.

1.4 Products. The term "PRODUCTS" when used herein means those products of the COMPANY that are specifically identified on Exhibit A hereto[2] as modified from time to time by the COMPANY in writing.[3]

1.5 Confidential Information. The term "CONFIDENTIAL INFORMATION" when used herein means and includes all know-how, designs, drawings, specifications, catalogs, data sheets, sales and technical bulletins, service manuals, mechanical diagrams and all other information, whether or not reduced to writing,

1. The scope of the agency may be restricted by excluding certain customers or by designating only selected customers. *See* the discussion contained in Section 11.4.3 of the text. *See also* antitrust issues in Sections 6.2.3(d) and 6.3.3(d) of the text.
2. *See* Section 11.4.1 of the text for a discussion of the manner in which the contract products are defined.
3. The unilateral right on the part of the principal to modify the list of PRODUCTS from time to time may render the AGREEMENT void for lack of mutuality in certain jurisdictions.

an authorized representative of the COMPANY, and (2) in sales and promotional materials provided such materials have been previously approved by the COMPANY. The REPRESENTATIVE shall not register any of the COMPANY'S trademarks or any mark or name closely resembling them.

6.4 Protection of Proprietary Rights. The REPRESENTATIVE agrees to cooperate with and assist the COMPANY, at the COMPANY'S expense, in the protection of trademarks, patents, or copyrights owned by or licensed to the COMPANY, and shall inform the COMPANY immediately of any infringements or other improper action with respect to such trademarks, patents, or copyrights that shall come to the attention of the REPRESENTATIVE.

Article VII. Term and Termination

7.1 Term.[23] Unless terminated as provided in Section 7.2 below or by mutual written consent of the parties, this AGREEMENT shall continue in full force and effect for an initial term expiring _____ (_____) year(s) after the date hereof. Thereafter, this AGREEMENT may be renewed only upon the written AGREEMENT of both parties.[24]

7.2 Termination. This AGREEMENT may be terminated prior to expiration of the initial or any renewal term, as provided in Section 7.1 above, by prior written notice to the other party as follows:

A. By either party, in the event the other party should fail to perform any of its obligations hereunder and should fail to remedy such nonperformance within

23. The language contained in the sample form contemplates a definite-term agreement. *See* Sections 5.5.1 and 5.5.3 or the text for a discussion of definite- and indefinite-term agreements. When an indefinite term is contemplated, the following language may be utilized:

> **7.1 Term.** Unless terminated as provided in Section 7.2 below, this AGREEMENT shall continue in full force and effect until either party provides the other with not less than _____ (_____) day's written notice of its intention to terminate this AGREEMENT.

24. To the extent the AGREEMENT is to be renewed automatically on the expiration of the initial term unless expressly terminated by either party, the following provision should be substituted for Section 7.1:

> **7.1 Term.** Unless terminated as provided in Section 7.2 below or by mutual written consent of the parties, this AGREEMENT shall continue in full force and effect for an initial term expiring _____ (_____) year(s) after the date hereof and thereafter shall be automatically renewed for successive _____-year terms unless terminated by either party by written notice to the other at least _____ (_____) days prior to the expiration of the initial or any renewal term hereof.

See Sections 5.5.2 and 11.11 of text regarding automatic renewal provisions.

_____ (_____) calendar days after receiving written demand therefor;[25]

B. By either party, effective immediately, if the other party should become the subject of any voluntary or involuntary bankruptcy, receivership, or other insolvency proceeding or make an assignment or other arrangement for the benefit of its creditors, or if such other party should be nationalized or have any of its material assets expropriated;

C. By the COMPANY, effective immediately, if the REPRESENTATIVE should attempt to sell, assign, delegate or transfer any of its rights and obligations under this AGREEMENT without having obtained the COMPANY'S prior written consent thereto, or if there should occur any material change in the management, ownership, control, sales personnel, sales and marketing capability, or financial condition of the REPRESENTATIVE;

D. By the COMPANY, effective immediately, if any required governmental approval or registration of this AGREEMENT or of the REPRESENTATIVE is not obtained within ninety (90) days following the execution hereof or if any law or regulation should be adopted or in effect in the TERRITORY that would restrict the COMPANY'S termination rights or otherwise invalidate any provisions hereof;

E. By the COMPANY, effective immediately, if the REPRESENTATIVE should violate the terms of Section 2.7 above;

F. By the COMPANY, effective immediately, in accordance with provisions of Sections 4.5, 4.11 and 4.12;

G. By the COMPANY, effective immediately, if the REPRESENTATIVE knowingly makes any false or untrue statements or representations to the COMPANY herein or in the performance of its obligations hereunder; and

H. By either party, without cause, on _____ (_____) days' prior written notice to the other party.[26]

7.3 Rights of Parties on Termination. The following provisions apply upon the termination or expiration of this AGREEMENT.

25. The parties may want to provide for immediate termination in the event that the same offense is committed by one party more than once. In this case, Section 7.2 can be expanded as follows:

> . . . after receiving written demand therefor; provided, however, that upon a second breach of the same obligation by such party, the other party hereto may forthwith terminate this AGREEMENT upon notice to the breaching party.

26. Although it is unusual in the case of a definite term agreement to allow the parties to terminate the AGREEMENT without cause prior to the expiration of the term thereof, such termination would nevertheless be permitted in most cases if acceptable to both parties.

APPENDIX B

The ICC Model Commercial Agency Contract

International Chamber of Commerce

Model Form of International Agency Contract

ICC Commercial Agency Contract

Between:

_____

whose registered office is at:

_____

_____

(hereinafter called "the Principal")

and:

_____

whose registered office is at

_____

_____

(hereinafter called "the Agent")

it is agreed as follow:

Article 1 Territory and Products

1.1. The Principal appoints the Agent, who accepts, as his commercial agent to promote the sale of the products listed in Annex I, § 1 (hereinafter called "the Products") in the territory defined in Annex I, § 2 (hereinafter called "the Territory").

1.2. If the Principal decides to sell any other products in the Territory, he shall inform the Agent in order to discuss the possibility of including them within the Products defined under article 1.1. However, the above obligation to inform the Agent does not apply if, in consideration of the characteristics of the new products and the specialisation of the Agent, it is not to be to expected that such products may be represented by the Agent (e.g. products of a completely different range).

Article 2 Good faith and fair dealing

2.1. In carrying out their obligations under this agreement the parties will act in accordance with good faith and fair dealing.

2.2. The provisions of this agreement, as well as any statements made by the parties in connection with this agency relationship, shall be interpreted in good faith.

four months in advance. If the contract has lasted for more than five years, the period of notice will be of six months. The end of the period of notice must coincide with the end of a calendar month. The parties may agree in writing on longer periods of notice.

of receipt (e.g. registered mail with return receipt, special courier, telex), not less than four months before the date of expiry, by registered mail with return receipt. If the contract has lasted for more than five years, the period of notice will be of six months. The parties may agree in writing on longer periods of notice.

Article 19 Unfinished business

19.1. Orders transmitted by the Agent or received by the Principal from customers established in the Territory before the expiry or termination of this contract and which result in the conclusion of a contract of sale not more than six months after such expiration, shall entitle the Agent to commission.

19.2. No commission is due to the Agent for contracts of sale made on the basis of orders received after the expiry or termination of this contract, save if such transaction is mainly attributable to the Agent's efforts during the period covered by the agency contract and if the contract was entered into within a reasonable period after the expiry or termination of this contract. The Agent must however inform the Principal in writing, before the expiry or termination of this contract, of the pending negotiations which may give rise to commission under this paragraph.

Article 20 Earlier termination

20.1. Each party may terminate this contract with immediate effect, by notice given in writing by means of communication ensuring evidence and date of receipt (e.g. registered mail with return receipt, special courier, telex), in case of a substantial breach by the other party of the obligations arising out of the contract, or in case of exceptional circumstances justifying the earlier termination.

20.2. Any failure by a party to carry out all or part of his obligations under the contract resulting in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract, shall be considered as a substantial breach for the purpose of article 20.1., above. Circumstances in which it would be unreasonable to require the terminating party to continue to be bound by this contract shall be considered as exceptional circumstances for the purpose of article 20.1., above.

20.3 The parties hereby agree that the violation of the provisions under _____[19] of the present contract is to be considered in principle, unless the contrary is proved, as a substantial breach of the contract. Moreover, any violation of the contractual obligations may be considered as a substantial breach, if such violation is repeated notwithstanding a request by the other party to fulfil the contract obligations.

19 The parties may make reference here to those articles for which a breach is considered of particular importance. This may be the case for articles 5 (non-competition), 7.3. (Guaranteed minimum target: if agreed),11.2. (unauthorised registration of the Principal's trademarks by the Agent), 13.1. (grant of exclusivity by the Principal) and 15.1. (payment of commission to the Agent). It is recommended that the use of this article should be limited to essential situations only.

20.4. Furthermore, the parties agree that the following situations shall be considered as exceptional circumstances that justify the earlier termination by the other party: bankruptcy, moratorium, receivership, liquidation or any kind of composition between the debtor and the creditors, or any circumstances that are likely to affect substantially one party's ability to carry out his obligations under this contract.

20.5. If the parties have filled in Annex VII, the contract may also be terminated by the Principal with immediate effect in case of change of control, ownership and/or management of the agent-company, according to the provisions set forth in Annex VII.

20.6. If a party terminates the contract according to this article, but the arbitrators ascertain that the reasons put forward by that party did not justify the earlier termination, the termination will be effective, but the other party will be entitled to damages for the unjustified earlier termination. Such damages will be equal to the average commission for the period the contract would have lasted in case of normal termination, unless the damaged party proves that the actual damage is higher (or, respectively, the party having terminated the contract proves that the actual damage is lower). The above damages are in addition to the indemnity which may be due under article 21.

Article 21 Indemnity in case of termination

A.

21.1. The Agent shall be entitled to an indemnity ("goodwill indemnity") if and to the extent that:

a) he has brought the Principal new customers or has significantly increased the volume of business with existing customers and the Principal continues to derive substantial benefits from the business with such customers, and

b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the Agent on the business transacted with such customers.

21.2. The amount of the indemnity shall not exceed a figure equivalent to an indemnity for one year calculated from the Agent's average annual remuneration over the preceding five years and, if the contract

B.[20]

21.1. The Agent shall not be entitled to an indemnity for goodwill or similar compensation[21] ("goodwill indemnity") in case of termination of the contract. This provision does not limit the Agent's right to claim damages for breach of contract as far as the termination by the Principal amounts to such a breach, and is not already covered by article 20.6.

20 In some countries, such as EEC countries which have adopted the EEC directive or other countries with similar mandatory rules, alternative B would violate mandatory requirements.

21 This broad definition is meant to cover any compensation to be paid in case of contract termination independent from a breach of contract by the Principal, including payments which are not defined as an "indemnity", or "goodwill indemnity"; see above, § 3.2 of the Introduction.

3. Limitation of party autonomy by mandatory rules

With respect to the freedom to determine the content of the contract, in the first instance the Principles themselves contain provisions from which the parties may not derogate. See Art. 1.5.

Moreover, there are both public and private law rules of mandatory character enacted by States (e.g. anti-trust, exchange control or price laws; laws imposing special liability regimes or prohibiting grossly unfair contract terms, etc.), which may prevail over the rules contained in the Principles. See Art. 1.4.

ARTICLE 1.2

(No form required)

Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses.

COMMENT

1. Contracts as a rule not subject to formal requirements

This article states the principle that as a rule the conclusion of a contract is not subject to any requirement as to form. Although the article mentions only the requirement of writing, it may be extended to other requirements as to form. The rule also covers the subsequent modification or termination of a contract by agreement of the parties.

The principle, which is to be found in many, although not in all, legal systems, seems particularly appropriate in the context of international trade relationships where, thanks to modern means of communication, many transactions are concluded at great speed and are not paper-based.

The first sentence of the article takes into account the fact that some legal systems regard formal requirements as matters relating to substance, while others impose them for evidentiary purposes only. The second sentence is intended to make it clear that to the extent that the principle of freedom of form applies, it implies the admissibility of oral evidence in judicial proceedings.

2. Possible exceptions under the applicable law

The principle of freedom of form may of course be overridden by the applicable law. See Art. 1.4. National laws as well as international instruments may impose special requirements as to form with respect either to the contract as a whole or to individual terms (e.g. arbitration agreements; jurisdiction clauses).

3. Form requirements agreed by the parties

Moreover, the parties may themselves agree on a specific form for the conclusion, modification or termination of their contract. In this context see Arts. 2.13, 2.17 and 2.18.

ARTICLE 1.3

(Binding character of contract)

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.

COMMENT

1. The principle *pacta sunt servanda*

This article lays down another basic principle of contract law, that of *pacta sunt servanda*.

The binding character of a contractual agreement obviously presupposes that an agreement has actually been concluded by the parties and that the agreement reached is not affected by any ground of invalidity. The rules governing the conclusion of contractual agreements are laid down in Chapter 2 of the Principles, while the grounds of invalidity are dealt with in Chapter 3. Additional requirements for the valid conclusion of contracts may be found in the applicable national or international mandatory rules.

APPENDIX D

JOINT VENTURE AND PARTNERSHIP AGREEMENT

THIS JOINT VENTURE AND PARTNERSHIP AGREEMENT ("Agreement"), dated as of August 31, 1989, by and among ABC GROUP, INC. ("ABC"), a corporation organized under the laws of the State of Delaware, U.S.A., OY XYZ ("XYZ"), a joint stock company organized under the laws of the Republic of Finland, ABC NEWCO, a corporation organized under the laws of the State of Delaware, U.S.A., and XYZ NEWCO, a corporation organized under the laws of the State of Delaware, U.S.A.

WITNESSETH:

WHEREAS, XYZ is the owner of a certain vodka processing technology developed and patented by XYZ and currently used in commercial operations in Finland; and

WHEREAS, ABC and its affiliate DEF Incorporated are engaged in providing detailed economic, business, marketing and regulatory support services to spirits manufacturers and distributors in the United States; and

WHEREAS, XYZ desires aggressively to sell and market its vodka processing in recognition of its role as a worldwide leading manufacturer and distributor of quality vodkas and spirits; and

WHEREAS, XYZ and ABC have analyzed the vodka manufacturing and distribution market in the United States and Canada, and have studied the means and framework of capturing more than one-third of this market; and

WHEREAS, as a result of this analysis XYZ and ABC have concluded that they desire to form a joint venture partnership for

performance of this Agreement and the Services Agreement, and the transactions contemplated hereby and thereby, shall have been duly and validly taken by ABC and ABC Newco.

3.06.07. Export Approval. XYZ shall have received any approval or licenses from the government of the Republic of Finland that may be required in connection with the export of technology and products contemplated by this Agreement and the License Agreement.

Section 3.07. Waiver. XYZ and XYZ Newco may, at their sole discretion, waive fulfillment of any or all the conditions set forth in Section 3.06 of this Agreement.

ARTICLE IV

REPRESENTATIONS AND WARRANTIES

Section 4.01. XYZ and XYZ Newco. XYZ and XYZ Newco hereby jointly and severally represent and warrant to ABC and ABC Newco as follows, with effects as of the date of this Agreement and as of the Closing Date:

4.01.01. Organization and Standing. XYZ is a joint stock company duly organized, validly existing and in good sanding under the laws of Finland, and XYZ Newco is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. XYZ and XYZ Newco have all requisite corporate power and authority to execute, deliver and perform the provisions of this Agreement, the License Agreement and the transactions contemplated hereby and thereby.

4.01.02. Corporate Power. XYZ and XYZ Newco have all requisite corporate power (i) to carry on their respective businesses as they are now being conducted and to own and operate the properties and assets now owned and operated by them, and (ii) to carry out the provisions of this Agreement, the License Agreement and the transactions contemplated hereby and thereb .

4.01.03. Corporate Documents. True, current and complete copies of the Charter or Certificate of Incorporation and all amendments thereto, and of the By-laws and all amendments thereto of XYZ and XYZ Newco are set forth as Schedules 4.01.03a, 4.01.03b, 4.01.03c, and 4.01.03d, respectively, each of which has been delivered to ABC and ABC Newco.

4.01.04. Authorization. The execution and delivery of this Agreement and the License Agreement by XYZ and XYZ Newco, as applicable, and the consummation of the transactions contemplated hereby and thereby, will, as of the Closing Date, have been duly and validly authorized by all necessary corporate actions. This Agreement and the Licen e Agreement will consti ute valid and legally binding obligations f XYZ and, as applicabl , XYZ Newco, enforceable against such companies in accordance with their respective terms except as limited by applicable bankruptcy, insolvency, reorganization, moratorium or other laws of general application relating to or affecting enforcement of creditors' rights, and by general equitable principles.

4.01.05. Effect and this Agreement. Neither the execution and delivery of this Agreement and the License

Agreement nor the consummation of the transactions contemplated hereby and thereby nor compliance by XYZ and XYZ Newco with any of the provisions hereof and thereof will: (i) conflict with or result in a breach of any provision of their respective Charter, Certificate of Incorporation or By-Laws; (ii) violate, breach or, with the giving of notice or passage of time, constitute an event of default (or give rise to any right of termination, cancellation or acceleration) under any of the terms, conditions or provisions of any note, bond, mortgage, indenture, license, agreement or other instrument or obligation to which XYZ and/or XYZ Newco is a party, or by which XYZ and/or XYZ Newco or any material portion of their respective properties or assets may be bound, except for such violations, breaches or defaults (or rights of termination, cancellation or acceleration): (y) as to which requisite waivers or consents shall have been obtained by the Closing Date, or (z) which taken as a whole are not material to the business or financial condition of XYZ and/or XYZ Newco or any of their respective properties or assets.

4.01.06. Technology. XYZ is the owner of all right, title and interest in and to the Technology and has the right, power and authority to grant the Partnership a license in and to such Technology pursuant to the License Agreement. No trade secrets, inventions, licenses, copyrights, patents or patent applications embodied in the Technology (i) are being contested or infringed upon or (ii) would in the conduct of the business of the Partnership infringe upon or violate the United States or foreign

patents, trade secrets or copyrights of any other person, and XYZ has received no notice of such infringement.

4.01.07. Disclosure. No representation or warranty by XYZ or XYZ Newco in this Agreement or the Schedules provided pursuant to this Article IV contains or, as of the Closing Date, shall contain any untrue statement of a material fact or omits or, as of the Closing Date, will omit to state a material fact necessary to make the statements made therein, in light of the circumstances under which they were made, not misleading.

Section 4.02. ABC and ABC Newco. ABC and ABC Newco hereby jointly and severally represent and warrant to XYZ and XYZ Newco as follows, with effect as of the date of this Agreement and as of the Closing Date:

4.02.01. Organization and Standing. ABC and ABC Newco are corporations duly organized, validly existing and in good standing under the laws of the State of Delaware. ABC and ABC Newco have all requisite corporate power and authority to execute, deliver and perform the provisions of this Agreement, the Services Agreement and the transactions contemplated hereby and thereby.

4.02.02. Corporate Power. ABC and ABC Newco have all requisite corporate power (i) to carry on their respective businesses as they are now being conducted and to own and operate the properties and assets now owned and operated by them, and (ii) to carry out the provisions of this Agreement, the Service Agreement and the transactions contemplated hereby.

Section 12.02. ABC and ABC Newco

(a) Should any representation or warranty of ABC and ABC Newco in this Agreement be untrue, inaccurate or incomplete or prove to have been untrue, inaccurate or incomplete as of the Closing Date, ABC and ABC Newco shall indemnify and hold harmless XYZ and XYZ Newco from and against any and all liability, loss, damage, claim or reasonable expense (including attorneys' fees, defense costs and any amounts expended in the settlement of any claim) related thereto to the extent such claims exceed, in the aggregate, TEN THOUSAND DOLLARS (U.S. $10,000); provided, however, the claims of XYZ and XYZ Newco for indemnity or to be held harmless pursuant to this Subsection must be made no later than the second anniversary of the Closing Date.

(b) XYZ and XYZ Newco shall provide ABC and ABC Newco prompt written notice of any such claims and consult with it regarding appropriate disposition of any such claims made by third parties. XYZ and XYZ Newco shall control the defense of any such claim.

Section 12.03. Partnership Liabilities. If a Partner or any of its Affiliates shall, pursuant to express authorization of or approval by the Partners Committee, pay any amount on behalf or for the account of the Partnership with respect to any liability, obligation, undertaking, damage or claim for which the Partnership shall or may, pursuant to contract or applicable law, be liable or responsible, or with respect to making good any loss or damage sustained by, or paying any duty, cost, claim or damage incurred by, the Partnership, then the Partnership shall reimburse such

Partner or Affiliate for such amount as shall have been so paid by such Partner or Affiliate. If the Partnership shall fail fully to reimburse such paying Partner or Affiliate, ABC and ABC Newco, or XYZ and XYZ Newco, as the case may be, shall indemnify such paying Partner or Affiliate by paying to it an amount equal in the aggregate to its Percentage Interest of the excess of (i) the aggregate payments by such paying Partner or Affiliate in respect of such liability, loss, damage, cost, claim or expense over (ii) the aggregate reimbursement, if any, which such paying Partner or Affiliate shall have received from the Partnership in respect of such payments.

ARTICLE XIII

DISPUTES

Section 13.01. Negotiation. Any and all disputes, claims and controversies between the parties hereto or the Partners concerning the validity, interpretation, performance, termination or breach of this Agreement (other than disputes for which a party or Partner may choose to seek equitable relief pursuant to Section 11.08, herein), which cannot be resolved, shall be submitted within sixty (60) days after such dispute, claim or controversy arises to the Chief Executive Officer of ABC and the Chief Executive Officer of XYZ who shall meet with one another in person and endeavor to find an amicable settlement of such dispute within thirty (30) days (or such longer period as may be mutually agreed upon) of submission of the matter to them. If such dispute, claim or controversy has not been resolved by such Chief Executive

APPENDIX E

SHAREHOLDERS AGREEMENT

THIS AGREEMENT MADE this _____ day of _____, 1986

BETWEEN

- O.V. A.S., a company duly organized and existing under the laws of Turkey, (hereinafter referred to as "OV");

- A.E. A.S., a company duly organized and existing under the laws of Turkey, (hereinafter referred to as "AE");

- A.M.T. A.S., a company duly organized and existing under the laws of Turkey, (hereinafter referred to as "AMT");

of the one part; these three parties being sometimes hereinafter collectively referred to as the "Present Shareholders";

and

- B.T. Co., a company duly organized and existing under the laws of Sweden, (hereinafter referred to as "BT");

of the other part,

WITNESSES THAT WHEREAS:

- The Present Shareholders control more than ninety percent of the shares of B.M.S.T. A.S., a company duly organized and existing under the laws of Turkey, (hereinafter referred to as the "Company"); and

- The Present Shareholders have invited BT and BT has agreed to subscribe shares of the Company on the conditions hereinafter set forth;

NOW THEREFORE the parties, intending to be legally bound, have agreed as follows:

ARTICLE I - CONDITIONS PRECEDENT

1.01 This agreement is conditional upon the receipt by the parties hereto of the requisite approvals (on conditions acceptable to all parties hereto) required to be obtained under the laws of Turkey and the laws of Sweden on or before June 30, 1986 or by such later date as the parties may mutually agree. Such approvals include but may not be limited to the following:

(i) Turkey:

- the necessary consent of the proposed increase of capital and amendments of the Articles of Association as per paragraph 3.01 and Attachment 1 hereof;

- the necessary permission for BT's subscription of shares of the Company in accordance with paragraph 3.02;

- the necessary approval of the Amendment to the Agreement regarding License for Manufacture, Assembly and Sales and the Concessionaire

ARTICLE III - SHARE CAPITAL

3.01 The Company shall have an authorized capital of Turkish Lira Fifteen Billion (TL 15,000,000,000) divided into Fourteen Million Two Hundred and Eight Thousand (14,208,000) Ordinary Registered Shares of Class A of Turkish Lira Five Hundred (TL 500) each, Nine Million Seven Hundred and Ninety Two Thousand (9,792,000) Ordinary Bearer Shares of Class A of Turkish Lira Five Hundred (TL 500) each and Six Million (6,000,000) Ordinary Registered Shares of Class B of Turkish Lira Five Hundred (TL 500) each.

3.02 (a) The Company shall have an issued and paid-up capital of the sum of Turkish Lira Nine Billion Four Hundred and Sixty Million (9,460,000,000) divided into Three Million One Hundred and Twenty Eight Thousand (3,128,000) Ordinary Registered Shares of Class A of Turkish Lira Five Hundred (TL 500) each, Nine Million Seven Hundred and Ninety Two Thousand (9,792,000) Ordinary Bearer Shares of Class A of Turkish Lira Five Hundred (TL 500) each and Six Million (6,000,000) Ordinary Registered Shares of Class B of Turkish Lira Five Hundred (TL 500) each. Each party will within forty-five (45) days after the fulfillment of the conditons set forth in paragraph 1.01 make an unconditional application in writing to the Company for the allotment to that party (and in the case of the Present Shareholders certain Affiliates) for cash at par for the number of shares hereinafter set out of Turkish Lira Five Hundred (TL 500) each in the capital of the Company. Such shares shall be payable in full upon application and no party will withdraw any application so made:

(i) BT shall apply for the allotment of Six Million (6,000,000) Ordinary Registered Shares of Class B;

(ii) OV and Affiliates of OV shall apply for the allotment of One Million Four Hundred and Fifty Three Thousand Four Hundred and Forty (1,453,440) Ordinary Registered Shares and shall thereafter be the registered owners of One Million Five Hundred and Thirty Six Thousand Three Hundred and Eighty (1,536,380) Ordinary Registered Shares of Class A and of Four Million Two Hundred and Sixty Nine Thousand Two Hundred and Seventy Six (4,269,276) Ordinary Bearer Shares of Class A;

(iii) AE and Affiliates of AE shall apply for the allotment of Five Hundred and Two Thousand Seven Hundred and Twenty (502,720) Ordinary Registered Shares and shall thereafter be the registered owners of Five Hundred and Two Thousand Seven Hundred and Twenty (502,720) Ordinary Registered Shares of Class A and of Three Million Three Hundred and Six Thousand Five Hundred Sixty One (3,306,561) Ordinary Bearer Shares of Class A; and

(iv) AMT and Affiliates of AMT shall apply for the allotment of Nine Hundred and Sixty Three Thousand Eight Hundred and Forty (963,840) Ordinary Registered Shares and shall thereafter be the registered owners of One Million and Thirty One Thousand Seven Hundred (1,031,700) Ordinary Registered Shares of Class A and of One Million Nine Hundred and Thirty One Thousand Nine Hundred and Ninety Eight (1,931,998) Ordinary Bearer Shares of Class A.

(b) The application for allotment of shares as per above by BT is conditional upon BT having satisfied itself (i) that the warranties set forth in Article XIII have been met, (ii) that no preemption rights have been or will be exercised in respect of any of the shares to be alloted as per sub-paragraph (a) above, (iii) that the Amendments referred to in paragraph 14.01 have been executed by the Company, and (iv) that the Present Shareholders have applied and paid in full for the number of Ordinary Registered Shares of Class A referred to hereabove for each of them.

(c) Each of the parties hereto will take such steps as lie within its powers to ensure that the Company makes simultaneous allotment of the shares so applied for and each of such shares so alloted shall on allotment rank pari passu in all respects with the existing issued shares of the same Class of the Company.

3.03 Each of the parties hereto shall exercise its voting rights for the time being in the Company and take such steps as for the time being lies within its powers to procure that (save for the shares to be subscribed for pursuant to the provisions of this Agreement) any unissued shares of any Class in the capital of the Company shall before issue be offered for subscription in the first instance to such persons as at the date of the offer are registered as shareholders of the Company (irrespective of which Class their shares belong to) in proportion as nearly as practicable to the number of shares (irrespective of Class) held by each of them respectively.

3.04 Each of the Present Shareholders represents that any of its Affiliates at any time owning shares of the Company shall in all respects comply with the provisions of this Agreement applicable to the Present Shareholders and all shares owned by any such Affiliates shall in all respects be considered as owned by the Present Shareholders for the purpose of this Agreement.

3.05 The Present Shareholders and BT agree that all Bearer Shares of the Present Shareholders shall without delay be transformed into Ordinary Registered shares of Class A in compliance with and subject to the Turkish Commerical Code.

ARTICLE IV - BOARD OF DIRECTORS, GENERAL MEETINGS, AND MANAGEMENT

4.01 Unless otherwise mutually agreed during the term of this Agreement, the number of directors of the Company, (herein referred to as the "Board of Directors") shall be seven (7) or nine (9), as determined by the shareholders at the General Meeting, of which two (2) shall be elected by BT.

4.02 The Board of Directors shall elect one of its members to be the chairman and one of its members to be the vice-chairman of the Board of Directors. The chairman and the vice-chairman shall not have any casting or second vote at meetings with the Board of Directors or at General Meetings.

4.03 The right of appointment of Directors conferred on a party hereto shall include the right by that party to remove at any time from office such person appointed by that party as a Director and the right of that party at any time and from time to time to determine the period during which such person shall hold the office of Director.

4.04 The right of appointment, removal or determination of period of office of each Director shall be exercised in accordance with the Articles of Association and the Turkish Commercial Code.

4.05 Whenever for any reason a person ceases to be a Director, the party hereto which had designated him or would be entitled to designate him under this Article shall designate forthwith a substitute Director.

4.06 Where to give effect to all or any of the foregoing provisions of this

11.04 The offer made under paragraph 11.03 of this Article above shall remain open for acceptance for thirty (30) calendar days after the date of the offer and if any of the other parties shall within the said period of thirty (30) calendar days accept the offer by applying for all of the said shares, the Board of Directors shall allocate the said shares to such other party/ies; and the Company shall forthwith give notice of such allocation (hereinafter called an "allocation notice") to the vendor and to such other party/ies to whom the shares have been allocated and shall specify in such allocation notice the place and time (being not earlier than fourteen (14) and not later than thirty (30) calendar days after the date of the allocation notice) at which the sale of the shares so allocated shall be completed. In the event that more than one party hereto accepts the offer, the Board of Directors shall allocate the said shares to such parties in proportion as nearly as practicable to the number of shares held by each of them. The acceptance of the offer shall oblige the parties having accepted the offer to consummate the purchase at the place and time specified.

11.05 The vendor shall be bound to transfer the shares comprised in an allocation notice to the purchasers named therein at the time and place therein specified and, if he shall fail to do so, the Chairman of the Company or some other person appointed by the Board of Directors shall be deemed to have been appointed attorney of the vendor with full power to execute, complete and deliver, in the name and on behalf of the vendor, transfers of the shares to the purchasers thereof against payment of the price to the Company. On payment of the price to the Company, the purchasers shall be deemed to have obtained a good quittance for such payment and on execution and delivery of the transfer the purchasers shall be entitled to insist upon their names being entered in the Register as the holder by transfer of the shares. The Company shall forthwith pay the price into a separate bank account in the Company's name and shall hold such price in trust for the vendor. Any revocation of said appointment of the Board of Directors as attorney shall constitute a serious default of a substantial obligation for the purpose of paragraph 12.02.

11.06 In the event that the said shares are not accepted by any of the other parties upon the expiration of the period specified in paragraph 11.04, the vendor shall then be at liberty to transfer all, but not less than all, of the said shares, to any other person and at any price (not being less than the price specified in the offer under paragraph 11.03 of this Article), provided that such a sale is consummated within one hundred and twenty (120) days from the date of the notice by the Board of Directors of the offer pursuant to paragraph 11.03 of this Article, and provided further that such person, upon the request of the other parties hereto, accepts to become a party to this Agreement (with the same rights and obligations as the vendor party) as evidenced by its signing hereof before the consummation of the sale. In the event that the vendor does not so transfer such shares within such one hundred and twenty (120) day period, the right of the vendor to sell such shares pursuant to this paragraph 11.06 shall cease and the provisions of this Article XI shall again become operative.

11.07 In the event of any transfer by a party in compliance with this Article XI, the other parties shall be considered to have waived their rights under Article 6 of the Articles of Association.

ARTICLE XII - TERM OF AGREEMENT

12.01 This Agreement shall remain in force for so long as the Present Shareholders, or at least one of them, together with BT own shares which represent at least fifty (50) percent of the voting power of the Class A shares as well as the Class B shares of the Company, unless earlier

terminated with respect to a party in accordance with paragraphs 12.02, 12.03, or 12.04 of this Article XII.

12.02 Each party shall have the right to terminate this Agreement with respect to a party (the "defaulting party") with immediate effect by notice in writing to the defaulting party and the other parties with reference to this paragraph 12.02 in the event that:

(i) the defaulting party shall be in serious default of any of its substantial obligations under this Agreement and shall have failed to make good such default within thirty (30) calendar days after having been required to do so by the party terminating the Agreement hereunder (the "terminating party"); or

(ii) the defaulting party is declared bankrupt, suspends its payments, makes a composition with its creditors or otherwise is found to be insolvent.

12.03 In the event that a party should cease to be a shareholder in the Company pursuant to the provisions of paragraphs 11.03 through 11.06 of Article XI, the Agreement shall immediately terminate with respect to such a party and the Director(s) appointed by such party shall immediately resign.

12.04 This Agreement shall automatically terminate upon the dissolution, liquidation or bankruptcy of the Company.

12.05 In case one or several of the parties terminate(s) this Agreement in accordance with paragraph 12.02, the non-defaulting parties shall have the right to purchase the defaulting party's shares in the Company. The purchase price for the said shares shall in such case be the lower of the fair market price or the par value of those shares. The provisions of paragraphs 11.04 and 11.05 shall apply mutatis mutandis to purchases under this paragraph 12.05.

ARTICLE XIII - WARRANTIES

13.01 The Present Shareholders hereby jointly and severally warrant BT:

(i) that the balance sheet and profit and loss account of the Company as of December 31, 1985 as audited by the Company's auditors (Attachment 2) represent fairly the financial positions and results of operations of the Company as of the said date and for the period covered and have been prepared in accordance with accounting principles and practices generally accepted in Turkey, which principles and practices have been consistently applied; certain facts have been disclosed in writing to BT relating hereto;

(ii) that the Company has no material liabilities, fixed or contingent (other than contingent severence indemnity payments), and has not guaranteed to pay or partially pay any material liabilities of a third party or accepted a similar undertaking other than those reflected in the said balance sheet, and has not incurred or guaranteed any material liabilities after December 31, 1985 other than liabilities incurred or guaranteed in the ordinary course of business which liabilities have not materially adversely affected the financial condition of the Company;

(iii) that as per the date of BT's application for allotment of shares as per paragraph 3.02 the net book value of the Company shall not be less than TL Four point Seven Billion and the results of operations of the Company since December 31, 1985 shall not show a loss greater than TL point Five Billion such net book value and results being

hereto shall not be liable for failures or delays in performing their reasonable obligations hereunder arising from strikes, lockouts or labour disputes or from any cause beyond their control, including but not limited to acts of God, acts of civil or military authority, fires, epidemics, governmental restrictions, wars, riots, earthquakes, storms, and floods and in the event of any such delay, the time for any party's performance shall be extended for a period equal to the time lost by reason of the delay.

ARTICLE XVIII - TRANSFER OR ASSIGNMENT

18.01 The parties shall not transfer or assign all or any of their rights, obligations or benefits hereunder to any third party or parties.

ARTICLE XIX - MISCELLANEOUS

19.01 Each of the parties hereto hereby represents to the others that the execution and delivery of this Agreement and the performance thereof will not contravene or constitute a default under its constitution, by-laws or any other agreement, instrument or other form of commitment to which any party hereto is also bound.

19.02 No failure or delay on the part of any party hereto in exercising any power or right hereunder shall operate as a waiver thereof nor shall any single or partial exercise of such right or power preclude any other or further exercise of any other right or power hereunder.

19.03 In the event of any conflict between the terms of this Agreement and the Articles of Association, the terms of this Agreement shall as between the parties hereto prevail and the parties shall forthwith cause such necessary alterations be made to the Articles of Association as are required so to resolve such conflict.

19.04 Each of the parties agree that in all matters concerning the Company for which it shall be called upon to exercise its rights to vote, either as a shareholder or as a Director, such rights shall be exercised in good faith in every case and in conformity with the specific provisions and spirit of this Agreement.

19.05 For the purposes of this Agreement, an "Affiliate" shall be deemed to be (i) any company or other entity which is controlled, directly or indirectly, by a party hereto, and (ii) any person, company or other entity which controls, directly or indirectly, a party hereto, and (iii) any company or other entity which is, directly or indirectly, under common control with a party hereto. By "is controlled", "controls", or "under control" shall be understood as denoting a control of more than fifty (50) percent of the voting power.

ARTICLE XX - NOTICES

20.01 All notices, requests, demands or other communications under this Agreement or in connection therewith shall be given or made in writing and shall be given by prepaid registered airmail or by cable or telex authenticated by answer-back code and in any event addressed to the party to which such notice is to be given at the address of such party written below or to its cable or telex address, as may be applicable, or, in the event of any change of any such address, at such other address. Any notice despatched in conformity with this Article shall be deemed to have been effected at the time at which the same is received by the party to

APPENDIX F

(from Vicki L. Beyer and Keld Conradsen, "Translating Japanese Legal Documents into English: A Short Course" in *Translation and the Law*, Marshall Morris (ed) Amsterdam: John Benjamins Publishing Company (1995) at 161)

Management Agreement

B Company, Inc. (hereafter "B") and A Company (hereafter "A") hereby enter into this management agreement as follows.

Article 1

A hereby commissions the following matters to B, who acknowledges that it has been entrusted with these matters.

1. Market research, real estate transaction introductions and all matters related to said transactions in Australia.
2. The business of rental of property owned by A in Australia and acting as agent in the business of managing said property; and
3. All business incidental to the above items 1 and 2 and any matters A may, from time to time, entrust to B.

Article 2

Regarding B's performance of its obligations hereunder, A may, from time to time, request explanation or a progress report. Whenever B has completed any business matter described in Article 1 above, it shall notify A of the results thereof.