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Wissenschaftliche Beiträge

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English as the Language of Law and the 2005 Swiss Law Bibliography

Nedim Peter Vogt/Jens Drolshammer | *Englisch wird unbestreitbar immer mehr zur internationalen Verkehrssprache im staatenübergreifenden Geschäftsverkehr, und damit auch zur internationalen Sprache des Rechts und der Juristinnen und Juristen. Bei internationalen Rechtsgeschäften besteht sehr oft die Freiheit der Wahl eines bestimmten nationalen Rechts, das für die Rechtsbeziehung gelten soll. Schweizer Recht hat wegen seiner Prägnanz, Ausgewogenheit und Liberalität gute Karten und wird oft gewählt. Voraussetzung ist jedoch, dass es dieses Recht und Informationen über dieses Recht auf Englisch – und in einem guten, verlässlichen Englisch – gibt.*¹

«Fools are those, who loose control of language first and then their Kingdom.»²

«Until three years ago, I was against English. Today, I am not against it, but I am not for it either.»³

Summary

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1 The Anglo-Internationalization of Law

English has become the lingua franca not only of international trade and international relations in general, but also for almost all legal practitioners dealing with cross-border legal transactions and international legal issues. The internationalization of both business activities and dispute resolution has been accompanied by the internationalization of lawyers (Vagts 1997, 248) who now regularly advise clients with regard to international business transactions and the resolution of related disputes (Willem/Calkoen 1997, 54–55). Major law firms headquartered in London and New York have become worldwide networking enterprises with partners in major offices around the globe (Böhlhoff 1997, 34). English law firms, and to a lesser extent American

firms, have emerged as the early leaders in this globalization trend (Noel 1997, 183, 185 and 190). The continuing Anglo-Internationalization of business in general, particularly in the practice of commercial law, has had such an impact over the last two decades that it is unlikely to change in the near future. Improvements in communications, the liberalization of financial and currency regulations and the waning significance of language barriers, together with the widespread adoption of English as the world language of business, will invariably further the process of the Anglo-Internationalization of all business, financial, commercial and thus, legal activities. Anglo-Internationalization seems to be an accurate description of what is happening to the legal profession and the international practice of law not only in continental Europe, but also throughout a shrinking world. This may have led to pose the question «Is law an Anglo-American affair?» (Noel 1997, 199)

2 Law Follows the Language

Law follows the language, and language often carries the law, or as the nursery rhyme would say: «Law piggy-backs the language.» (Vogt 2003)

In today's legal world, it appears that form (language) is increasingly governing substance (law). This is also demonstrated in the process of translation in that the very essence of the Anglo-American terminology through which legal concepts of i.e. French law are expressed in English takes on a life of its own that is driven by Anglo-American perceptions and legal concepts.

Once a legal concept such as «breach of contract» is introduced – by translation or otherwise – into the legal lexicon of e.g. one of the continental European legal systems, the notion of how «breach» is perceived in the Anglo-American legal system gradually affects the way in which «breach» is viewed under the applicable substantive (continental European) law.⁴

Lawyers who have a better mastery of the language of the potentially applicable law naturally tend to apply the legal concepts of such law that they either know best and/or feel would better serve their clients' interests.

3 Lex Mercatoria

Procedure has already been privatized (through arbitration) and we are now witnessing that the law as such (the actual substance of law) is also being privatized by what is commonly referred to as *lex mercatoria* and – as it has been alleged – its Creeping Codification (Berger 1999, 200 et seq.). This again

is largely an English language-driven development, and therefore dominated by Anglo-American legal concepts.

The internationalization of legal practice has, however, not brought about a comparable internationalization of substantive legal developments as such (Von Mehren 2001, 1215–1224); the predominant use of English as a legal language continues to blur the conceptual and institutional differences between the various legal systems and legal cultures of the world. Unfortunately, this blurring has been accompanied by a decline in comparative law (Markesinis 2003, 35 et seq.) and international law as teaching and professional subjects in the Anglo-American world (Stiefel/Maxeiner 1997, 23 et seq.).

4 English as the Language of Law?

It would be wrong to argue that the dominance of English in professional matters exclusively expresses a tendency towards Anglo-Americanization. The need for English goes way beyond dealing with this Anglo-American challenge.

The substantial effect of the Americanization, even hegemonization, of the commercial world by the United States has generated some concern in the global (legal) community. On a more general level, this issue has been addressed by Christian Mair (2002, 159–170) in an essay. In this essay, Christian Mair pits an exploitation theory against a grassroots theory in an effort to account for the widespread adoption of English in the commercial world. He summarizes these theories by the following table:

	Political Value of English	Chief Cause for Post World War II Spread	English is the language of ...	English . . .	Chief Beneficiary of "global English"	Evidence for view proposed
Exploitation Model	Imperialist language	Organized/centralized language planning following Anglo-American master plan	Anglo-American capital interests	Is a language that conveys an Anglo-Saxon Western World view Transforms recipient societies (usually for the worse)	British and American capital interests	Historical analyses pointing out open and hidden continuities; evaluation of official statements of policy; and expert opinion (EFL, professionals, writers, etc.)
Grass roots Model	Post-imperial language	Demand-driven; decentralized rational choices by individuals and groups	Modernization and globalization	Is an ideologically neutral lingua franca Is transformed by recipient societies (rise of New Englishes)	Usually some segments of local users	Strictly chronic and descriptive sociometric analysis

Internationalization has brought with it the need to have English as the lingua franca among the many different members of the legal profession and with the Anglo-Internationalization of law, a new phenomenon has arisen: English as the Language of Law. (Drolshammer/Vogt 2003)

5 The Internationalization of the Practice of Law

Addressing cross-border or multi-jurisdictional legal issues is likely to require not only an understanding of the civil law system, but also of the Anglo-American common law system. While these two widespread bodies of law share numerous similarities, many of the approaches to legal issues differ fundamentally and are an indication of what is often called «the difference between two legal cultures.»

It appears, however, that in many areas the differences are overemphasized and the similarities often neglected. For instance, the commonplace observation describing Anglo-American law as being case law, and civil law as being codified is, if at all, only a rough rule of thumb. For years now, the observation can be made that Anglo-American law is increasingly codified, whilst civil law increasingly relies on case law.

Notions like the International Practice of Law and the International Lawyer are also a clear indication of the changing role of the use of the English language in the legal professions outside the Anglo-American world.

An interesting new perspective in this context is that a country's legal system, its legal profession and the capability of its international practitioners to deal with international transactions and cross-border litigation have all become key factors in assessing the political and economical relevance of a country. Thus, as English has become the language of law, particularly in the areas of business and commercial law, the ability of a country and its legal community to effectively communicate in English the varying aspects of its legal system to the global (legal) community has become a prerequisite for participation in the ongoing competition between different national legal systems.

6 Swiss Law is still of Relevance in an International Context

Swiss law has always had an impact on foreign legislation and has been a preferred choice of law in international contractual agreements and cross-border transactions. There are clear indications that the choice of Swiss law or of Swiss jurisdiction occurs with a high degree of frequency in areas

varying from sales contracts, service agreements, construction (turn-key) contracts, telecom service agreements, sporting event broadcasting agreements, sponsoring agreements, personal service contracts regarding artists and athletes, joint ventures and shareholders' agreements to matrimonial property, inheritance law and estate planning.

Not only have a large number of multinationals chosen Switzerland as the jurisdiction to incorporate their headquarters for their worldwide or regional operations, but many of the big international professional firms have chosen Swiss private law vehicles to structure their international organizations. Nowadays, a large number of international sports organizations are incorporated in Swiss vehicles. In addition, the international deregulation of telecommunications has led to a multiplicity of private telecom organizations being incorporated under Swiss law or entering into agreements that are governed by Swiss law.

Switzerland continues to hold a worldwide reputation as one of the leading jurisdictions for international arbitration and great efforts have been made to foster and further this position by organizations like the Association Suisse pour l'Arbitrage (ASA).

7 English Language Access to Domestic Law

The advent of English as the Language of Law within the context of the Anglo-Internationalization of the practice of law has made it necessary that the advantages and qualities of a national legal system need to be continuously communicated in English in order to make a legal system and its underlying law accessible to the international practitioner.

For example in Holland, Austria, Switzerland, Germany and Denmark, lawyers and legal professionals have continuously attempted to provide comprehensive English translations of their respective domestic laws to the English speaking legal community.

In addition, many Continental European lawyers (in practice and in academia) have published a large number of country reports in English for the express purpose of providing their colleagues in the international legal community with a better understanding of issues of their national law which are of relevance to the international practice of law.

On the whole however, efforts made by private or governmental entities to publish important new laws and statutes in English must be furthered. One of the first steps taken in the process of translating national laws and statutes into English should be the creation of a unified thesaurus that

formulates the base vocabulary for such translations. Equipped with such a reference tool, a certain unity and compatibility of the translations of the various laws and statutes would be provided for.

It appears that communication of the content of a national law to the global (legal) community is quickly becoming a necessity for any country that hopes to maintain the competitiveness of its legal system in times of a continuous Anglo-Internationalization of the practice of law. It is therefore essential for every country and its (international) legal practitioners not only to ensure that its internal laws and regulations reflect the developments of a globalized world, but also that a country's relevant (national) statutes, laws and regulations are accessible in English.

8 The 2005 Swiss Law Bibliography (Drolshammer/Vogt 2005)

The origins of this undertaking – the first attempt to publish a bibliography of English language materials on Swiss law – did lay in our own efforts to efficiently locate and gather a steadily increasing amount of publications and information on Swiss law in English. The principal aim of the Swiss Law Bibliography was to make Swiss laws and the Swiss legal system more readily accessible to the large English speaking legal community.

English has become the lingua franca not only of international trade and international relations in general, but also of almost all cross-border legal transactions and international legal issues relating to dispute resolution.

Given this situation the first bibliography of English language materials on Swiss law did not only attempt to provide for a better access to Swiss law in general, but also to make it easier to access English language materials in cases where Swiss law has been chosen as the governing law or where Switzerland has been selected as the jurisdiction for litigation or a venue for arbitration.

The Swiss Law Bibliography lists: (i) Swiss laws, statutes and ordinances translated into English, (ii) English language materials on Swiss law (books, commentaries, treatises, law journal articles, reports, conference papers etc.), and (iii) internet links relating to English sources on Swiss law on the web. It is a compilation of information from various sources, such as library catalogues in the U.S. and in Europe, lecturers, faculty members, deans, directors of law institutes and institutes for comparative law from various countries and in various legal systems, members of the Swiss Bar association (SAV) and Swiss members of the International Bar Association (IBA), the Association Internationale des Jeunes Avocats (AIJA), the Union Internationale des Avocats (UIA), the Association Suisse pour l'Arbitrage (ASA), members of the Swiss Association of Corporate Counsels, the Swiss Stock Exchange (SWX), members of Swiss

auditing firms, trust companies and fiduciaries, legal departments of Swiss banks and Swiss insurance companies, the Australian-Swiss, the UK-Swiss and the US-Swiss Chambers of Commerce, the Swiss Institute of Certified Accountants and Tax Consultants and other organizations and individuals.

First, in 1999, and then for a second time in 2001, a questionnaire was sent out to the above-mentioned organizations and individuals requesting that they forward onto us any articles, books, treatises etc. in English, that they may have written, published or catalogued that pertain to Swiss law. The very positive response to our request for assistance generated a considerable amount of additional bibliographical information.

The 2005 Swiss Law Bibliography was completed in late fall 2004. The project of creating a comprehensive Swiss Law Bibliography however is a continuous work in progress.

9 Defending Your Own: The Necessity of Communication in English

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

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

I, Vogt, wrote in Festschrift für Peter Forstmoser (Vogt 2003, 807–808):

Das schweizerische Recht hat sich zu einer Rechtsordnung entwickelt, welche insgesamt durch ihre Prägnanz, Ausgewogenheit und Liberalität Vorbildcharakter beanspruchen darf. Damit wurde sie insbesondere auch für ausländische Vertragsparteien zur Rechtsordnung des Vertrauens, somit zu einer bevorzugten Rechtsordnung.

Um diese Position zu bewahren, muss die Schweiz sich nun auch um eine kontinuierliche Kommunikation bemühen, die diese Vorzüge und Qualitäten vermittelt, und zwar auch in englischer Sprache, der lingua franca der Juristen. Die englischsprachige Kommunikation über eines unserer wertvollsten Wirtschaftsgüter, nämlich unserer Rechtsordnung, müssen wir nicht nur fördern sondern wir müssen sie auch kontrollieren, da es auf deren Qualität entscheidend ankommt. Nur so lässt sich unsere Rechtsordnung in ihrer Einzigartigkeit bewahren und gleichzeitig auch unser Selbstverständnis und die Verständlich-

keit für den ausländischen Benützer und Beobachter fördern und erhalten. Erst wenn man das schweizerische Recht in der lingua franca der Juristen – dem Englisch – gut zu kommunizieren vermag, kann sich das schweizerische Recht überhaupt der Herausforderung der sich konkurrenzierenden Rechtsordnungen stellen.

Pflege und Bewahrung, Weiterentwicklung und Sorgfalt im Umgang mit der eigenen vielfältigen Rechtskultur und mit der eigenen Sprache ist nicht Gegensatz zur Notwendigkeit und Beherrschung der sorgfältigen Kommunikation unseres Rechts in der lingua franca der Juristen, dem Englischen. Das Englische ist auch nicht der Feind unseres eigenen Rechts, sondern wird vielmehr zu dessen Vermittler im internationalen Verhältnis.

Wer der schweizerischen Rechtsordnung ihre vollständige und umfassende Kommunikation durch die lingua franca der Juristen, dem Englischen, versagt, entzieht ihr auf internationaler Ebene die Sprache und lässt sie in die Provinzialität versinken. Das darf nicht geschehen.

10 Remaining Well Positioned in the International Competition amongst Legal Systems

In order to remain well positioned in the international competition amongst legal systems, we, Drolshammer/Vogt, proposed the following in 2003:

- *Swiss law statutes and regulations should not only be translated into English, but guidelines should be laid down for their effective communication. Translation and communication apart, legal English should be classified as an official language. As part of these communication efforts, agencies of the Federal Government, which work in an international context, should issue public statements and decisions in English. Accessibility to the Swiss legal system in legal English would be vastly improved by including parts of the legal system in state-of-the-art information technology. On top of the predominance of the Anglo-Saxon professions, the predominance of the medialization, partially Anglo-American controlled, which has a direct effect on this area, has to be taken into account.*
- *The Swiss National Fund and Pro Helvetia should sponsor special English language publications on behalf of the Swiss legal system and actively participate in its distribution and marketing. The farreaching effort to refocus the image of Switzerland in the Anglo-Saxon world through the project «Presence Suisse», should include texts in legal English on Swiss law, since the quality and worldwide recognition of the Swiss law and legal system are an important competitive factor contributing to the recognition of the country on an international level. It is counterproductive and dangerously detrimental to Switzerland and the Swiss legal system to suggest, as has been done by a high-ranking bureaucrat of the Swiss Federal Administration as late as in 2001, that the translation and communication of Swiss law should be left to non-Swiss publishers and organizations.*

- *An intensive international marketing policy for the distribution of Swiss legal literature in English should be pursued by Swiss publishers in cooperation with publishers specializing in International and Anglo-American law.*
- *A Bibliography on English materials and on Swiss law is now available (Vogt/Drolshammer, 2005) but should be continuously up-dated and made accessible on the Internet.*
- *Swiss law schools should encourage selective teaching in English and academic publications in English at seminar, master-, Ph.D.- and habilitation thesis levels.*

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Notes

- 1 Siehe auch in diesem Heft, S. 360 «Schweizer Bundesrecht auf Englisch», eine Mitteilung über die Änderung der Organisationsverordnung der Bundeskanzlei vom 5. Mai 1999.
- 2 Mulberry, Travels, 112.
- 3 High ranking (and now retired) bureaucrat in the Swiss federal civil service machinery in a meeting in Berne in 2001, discussing the possibilities of making Swiss statutes and ordinances available in English.
- 4 Fascinating distortions can e.g. be observed with regard to the absorption of the Anglo-American concept of trust by civil law systems, see Vogt (1999, 1 et seq.).

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Résumé

Il est indéniable que l'anglais est devenu la langue de contact dans les rapports internationaux et, par voie de conséquence, également la langue internationale dans le domaine du droit et entre les juristes. Dans les rapports juridiques internationaux, il est fréquent que les partenaires puissent librement décider du droit national qui s'appliquera à leurs relations juridiques. Le droit suisse est apprécié en raison de sa précision et de son caractère équilibré et libéral et, de ce fait, il est souvent choisi comme référence. Cela présuppose cependant que ce droit et les informations qui le concernent existent aussi dans une version en langue anglaise, de bonne qualité et fiable.