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Globalisation and Law

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IN AN ESSAY on the aftermath of the destruction of the World Trade Centre in New York City, the political scientist, David Held, wrote:

> In our world, it is not only the violent exception that links people together across borders; the very nature of everyday problems and processes joins people in multiple ways. From the movement of ideas and cultural artifacts to the fundamental issues raised by genetic engineering, from the conditions of financial stability to environmental degradation, the fate and fortunes of each of us are thoroughly intertwined.[1]

Four months later on 1 January 2002, the Euro became the common currency of most of Europe. Whether one was in Spain, Greece, Belgium or Germany, one would reach into one's wallet for the same money. Nearly 300 million people were using a currency that had replaced drachmas, francs, pesetas and marks.

Two events that are emotionally and materially quite distinct, yet their ramifications will be felt around the world for a long time. They encapsulate some of the positive and negative aspects of globalisation. A common currency provides for transparency in exchanges: differentials in the price of a Volkswagen Golf in Spain and the Netherlands become readily apparent. One no longer needs the *Economist's* Big Mac index to calculate relative affordability. Tourists do not have to wonder whether they are losing out on exchange rate conversion.

Although good things can flow from globalisation, the potential for suffering is omnipresent and rising. Transnational currencies such as the dollar, pound sterling or Euro give uncosted advantages to their host states, allowing them to inflate domestic debt at the expense of developing nations. Countries relying on primary resources such as minerals or agriculture are rarely able to set prices that embody *their* ideal value of the products. The futures and commodity exchanges in Chicago and London determine those for them. Only countries or national corporations with the power to form a monopoly (eg DeBeers and diamonds) or a cartel (eg OPEC and oil) that make possible a high margin of rent in their prices are safe from the vagaries of the world markets. The kinds of economic differences found between the US and Argentina or Mali are potentially serious stimuli to violence and other illegal activities like the drug trade, human trafficking and money laundering.

[1] D. Held, 'Violence and Justice in a Global Age' in *After Sep. 11: Perspectives from the Social Sciences* (http://www.ssrc.org/sept11/essays/held.htm, 2001).

Intergovernmental institutions designed to sponsor global economic harmony—the World Bank and the International Monetary Fund—have frequently promoted the liberalisation of economies without counting the social cost of diminishing their welfare states. Even the flurry of activity by the G8 countries to encourage debt reduction in poor countries, with the help of the Jubilee campaign, has stuttered to a standstill.

Globalisation is, therefore, a diverse set of processes including the economic, cultural, social and political. We cannot make it go away, nor can we drive it in a particular direction. Those commentators who argue that the 'Washington consensus' determines the fate of the world, even in the crudest of Marxist terms, are being over-deterministic. Globalisation can take us in unexpected directions as well as the obvious. Rich countries are as successful in importing alien diseases (eg Ebola) as they are in importing exotic cuisines. While it is difficult to pin down globalisation like a specimen insect, we can typify it in a number of ways. Following Held and his colleagues,[2] I will describe three variants: hyperglobalisers, sceptics, and transformationalists. I will then give three examples of global activity where globalisation is making a significant contribution. These are the development of capital markets work by international law firms and investment banks; the emergence of a global insolvency market; and the response of legal education to these phenomena. The examples will illustrate how law is implicated in globalisation. To understand this, however, my characterisation of law will be eclectic and pluralistic in that I will be considering state law at one extreme and social norms at the other.

1. THE CHARACTER OF GLOBALISATION

The hyperglobalisers are exemplified by the consultants McKinsey who advise governments and corporations on their strategic aims. Their Tokyo partner, Kenichi Ohmae, is the apostle of the borderless world where the nation-state is no longer relevant for the advance of corporate capitalism.[3] We can think of the automobile manufacturers (Ford, General Motors), Coca Cola, and McDonalds. The process of hyperglobalisation is progressive, unilinear and inexorable. Opponents of globalisation (sceptics) argue against this position, countering the hyperbole of globalisation with statistics demonstrating the failure of global economic integration, suggesting at best a move towards regionalisation has occurred and that globalisation is a myth.[4] Whereas hyperglobalisation postulates that its progressive agenda will lead to radical change for the benefit of all,

[2] D. Held et. al., *Global Transformations: Politics, Economics and Culture* (Cambridge Polity Press 1999).

[3] K. Ohmae, *The Borderless World* (London Fontana 1991) and *The End of the Nation State* (New York The Free Press 1995).

[4] P. Hirst and G. Thompson, *Globalisation in Question: The International Economy and the Possibilities of Governance* (Cambridge Polity Press 1996); and see J. Gray, 'The Era of Globalisation is Over' (Sep. 24, 2001) *New Statesman* at 25.

north and south, sceptism sees internationalisation accentuating the differences between north and south. The third perspective of globalisation, transformationalism, recognises the contingency of action and the historicity of structure as enabling and constraining globalisation.[5] While transformationalism accepts great change is taking place in the economy, politics and culture, the degree to which it is happening is yet unknown and the redistribution of resources in the world is still unequal with some getting richer and some areas becoming marginalised.[6] The nation state is able to continue claims to power and authority but they are limited more and more by the emergence of stronger supranational forms of governance, such as the European Union and the World Trade Organisation. Ultimately, the destination of globalisation—if one exists—is unknown. Whichever perspective is chosen, each represents a threat to homeostasis and each can be shown to function within very loose normative structures.

Globalisation is not entirely anarchic but nor is it tightly rule-bound. The law of globalisation is almost a new *lex mercatoria* only partially dependent on state authority for its legitimacy or its disputing systems.[7] Global law is derived from a number of sources, among the most popular is contract—private ordering—the drafting of agreements. Contract is able to enmesh states as parties to an agreement without the protection of sovereign immunity. Contract can transcend national boundaries more easily than international law is capable of doing. It is at the level of private ordering that difference is resolved into a document that circumvents the contingencies of jurisdictional conflict. Private ordering emerges away from the centre, as Teubner argues, '. . . *global law will grow mainly from the social peripheries, not from the political centres of nation-states and international institutions*'.[8] Global law is a *malleable law* made by professionals during the construction of deals.[9] Without this malleability, global law could hardly come into being: it would be brittle and weak, under constant disputation. Yet malleable law is remarkably successful in constituting the global legal order.[10]

[5] A. Giddens, *The Consequences of Modernity* (Cambridge Polity Press 1990).

[6] Held et. al., *supra* n. 2 at 8.

[7] Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order.* (Chicago University of Chicago Press 1996); G. Teubner, '"Global Bukowina": Legal Pluralism in the World Society' in Teubner, G. (ed) *Global Law Without A State* (Aldershot Dartmouth 1997).

[8] Teubner, *supra* n. 7 at 7. Note that social periphery here needs to be interpreted broadly, since the major international financial institutions are hardly peripheral.

[9] In some cases this is referred to as soft law, which it is not, as it depends on New York and English law for its legitimation. Soft law operates in contexts where there is no governing law. See, eg J. Flood and E. Skordaki, 'Normative Bricolage: Informal Rule-Making by Accountants and Lawyers in Mega-Insolvencies' in Teubner, *supra* n. 7, where soft law operates in international insolvency.

[10] The rule of law is usually held up as the defining element of civilised society. Under malleable law, however, the rule of law often has a harsher, more rugged character. The following anecdote demonstrates. During the closing of a major deal of an acquisition of a company by another, the documentation was continuously being changed and redrafted. The directors of the selling company

In the next part, an example of private ordering is portrayed. Capital markets is one of the fastest growing forms of financial activity in the world.[11]

2. CAPITAL MARKETS: RAISING MONEY AROUND THE WORLD

At the end of 1999, the managing directors (the former partners) of Goldman Sachs received remuneration packages to the order of about $10 million each.[12] Most of it was reward for being the top financial adviser and underwriter in the world, being in the biggest deals such as advising Vodafone in its takeover of Mannesman, producing a telecommunications company worth £225 billion.[13] Capital markets work is high value service with enormous premiums for those who do it.

The fifty years following World War II constituted a key expansion period for global capital. Foreign direct investment grew, the Eurodollar market increased global capital liquidity, and immense political change ushered in a wave of privatisations as states sloughed off their possessions—state industries, utilities and service providers. The market rather than the state was to reign.[14] The 1980s 'Big Bang' in the UK enabled the global banks, especially those in the US, to establish investment banks free from constricting regulation. For the American banks, the Glass-Steagall Act had corseted their activities by preventing the simultaneous engagement of commercial and investment banking.[15] Stock broking changed, as brokers and jobbers merged and the stock exchange rules were relaxed, outlawing cartels. Although the recession of the late 1980s and early 1990s constrained growth for some time, as shown by the rise in insolvency statistics, global investment rose inexorably, as demonstrated by the increases in foreign direct investment flows (FDI).[16] In the last 15 years of the twentieth century, the progress of the economy has altered, in that boom and slump can co-exist in different parts of the world. Thus, at the end of the century while the US was economically triumphant, the Asian tigers were limping

came to their lawyers' office in the City of London expecting to sign the documents, close the deal and depart celebrating their new riches. On arrival they were placed in a conference room and told they would have to wait while the last few wrinkles were ironed out. Seventy-two hours later they were released from their confinement when the documents were finally agreed between the lawyers. The lawyers couldn't let the directors leave the office because they knew they wouldn't return, so they held them until they could sign. There was nothing the directors could do but comply. They were under the force of the rule of law.

[11] B. de S. Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York Routledge 1995) at 275. Santos calls this type 'globalized localism' and 'localized globalism'.

[12] A. Garfield, 'High-flying Goldman Sees Wage Bill Double to $8.7bn' *The Independent* 22 Dec. 1999 at 13.

[13] D. Gow, 'Now Vodafone Wants Net Alliances' *The Guardian* 5 Feb. 2000 at 32.

[14] A. Gamble, *The Free Economy and the Strong State*, 2nd ed. (Basingstoke Macmillan 1994).

[15] S. Finch et. al., 'Replacing the Depression's Final Legacy' (2000) 9 *International Financial Law Review*.

[16] Held et. al., *supra* n. 2 at 249.

in a field of thorns. In order to recapture their ferocity, the Asian economies have begun to produce their own big bangs.[17] One other feature of this period ought to be mentioned and that is the growth in regulatory institutions in the global economy. The most assertive has been the Securities and Exchange Commission (SEC), which now appears to be seeking the role of global regulator. During the 1980s the SEC was dealing with various insider trading scandals, including the savings and loans industry and the manipulation of the junk bond market (high yield debt) created by Michael Milken and which subsequently crashed in 1989 causing the downfall of Drexel Burnham Lambert a year later.[18] During the 1990s the junk bond, now high-yield debt market, recovered and was legitimised.[19] The global economy, with the success of the GATT Uruguay Round, has now a transnational watchdog and dispute arbiter in the World Trade Organisation.

In other ways, the SEC has begun to reduce the barriers to American markets for foreign investors by easing its disclosure requirements.[20] Taking regulatory manoeuvres into account during the economic activity of the last 50 years, capital markets work has boomed. For example, 'the six largest mergers/acquisitions in 1998 totalled over $300 billion and were funded by a combination of equity and debt issues'.[21] Hodgart also notes that 'the six largest auto manufacturers [in 1999] are reported as having a "strategic acquisitions war chest" totalling in excess of $100 billion'.[22]

Capital markets work involves gaining access to finance in markets throughout the world. This may be through issues of stock, bonds, securitization of debt or loans,[23] depositary receipt programmes, initial public offerings (IPOs), or privatisations. The last 20 years have shown bankers' and lawyers' ingenuity in developing new forms of financing and means of packaging them. Demands for creativity have risen as the equities market globalised and diverse jurisdictions' requirements had to be co-ordinated in strategic ways. If we compare debt markets with equities markets the difference becomes apparent: trading in debt markets requires less research and availability of information, relies on high quality borrowers with less concern about the underlying credit, and therefore was able

[17] R. Mannix, 'Foreign Investors Snap Up Korean Bargains' (2000) 9 *International Financial Law Review* at 28–33 and N. Kinami, *The Japanese Big Bang* (London Freshfields 1998).

[18] J. B. Stewart, *Den of Thieves* (New York Simon & Schuster 1991). Drexel Burnham Lambert, and Milken, underwrote 60% of the junk bond market in the second half of the 1980s. See C. Sheldon and T. Abbondante, 'Great Expectations: HighYield Debt in European Leveraged Acquisition Finance' in *US Capital Markets Report* (London Euromoney 1999).

[19] Sheldon and Abbondante, *ibid.*

[20] E. Kamman and A. Covello, 'New SEC Disclosure Rules for Non US Companies' in *US Capital Markets Report* (London Euromoney 1999). See also H. Laurence, 'Spawning the SEC' in (1999) 6 *Indiana Journal of Global Legal Studies* at 647.

[21] A. Hodgart, 'Introduction' in *IFLR Review of the Year: Capital Markets Forum 1999* (London Euromoney 1999) at 6.

[22] *Ibid.*

[23] For example, see M. Lewis, *Liar's Poker* (London Coronet Books 1989) at 97 *passim*. In *Liar's Poker* Lewis describes the creation of the mortgage bond market by Salomon Brothers.

to internationalise more rapidly. This is where the reduction of mistrust plays a big role. Information deficits are greater in equities markets where borrowers are a more diverse group than in debt markets and the accuracy and integrity of legal drafting becomes paramount.[24] One final point should be made here: most of these transactions are undertaken in New York state law and/or English law as the primary overarching legal categories because this is where the money is. As a result these two legal systems have become de facto global legal systems (see also Globalising Legal Education below). However, much of the detailed work of capital markets has to take account of local conditions and is therefore done in local laws which could be Irish, French, Thai, etc. Therefore, we have a set of primary and secondary legal systems that have to be co-ordinated. This is performed by lawyers who employ the creativity of drafting—agreements, contracts, undertakings—to capture the myriad qualities of the global *lex mercatoria*.

The best way to illuminate capital markets work is through case studies of capital markets work in action. The example below shows law firms, investment banks and intergovernmental organisations working in concert.

3. CASE STUDY: TELELOMUNIKACJA POLSKA S.A.

TPSA, a Polish telecoms operator, was one of the largest privatisation initial public offerings (IPOs) undertaken in Central and Eastern Europe at $920 million, as the Polish government sold a 15 per cent share in this company. Because of the essentially risky nature of enterprises in Eastern Europe, the European Bank of Reconstruction and Development (EBRD) often takes a stake in the enterprise—in this case $75.5 million—to shore up confidence. The consortium that won the deal was a partnership of Goldman Sachs and Schroders, advised by Baker & McKenzie as lead counsel. Before the launch of the issue Goldman Sachs pulled out of the deal, arousing speculation that the deal was dead. It still went ahead and attracted $1.5 billion from international investors, that is, it was two and a half times oversubscribed. Baker & McKenzie prepared the offering and provided opinions for the securities regulators. All was done within a very tight timetable, but the task was anything but simple. For example, the due diligence was vast with the company spread all over Poland. Lawyers were sent to all parts of the company and country; the final report was over 4,000 pages long. Without a thorough due diligence—a type of intensive legal audit—a deal such as this would not be feasible. It requires lawyers to check inventory to ensure it is real, to check contracts actually exist. The lawyers have to pore over every document within the company that commits the business in any way. Only large law firms have the capacity to mount a due diligence campaign of this magnitude.

[24] F. Neate (ed). 'World-Wide Public Offerings of Securities: British Gas' in *The Developing Global Securities Market* (London Graham & Trotman 1987) at 8–15.

Seventy five per cent of the offer was in the form of global depositary receipts listed in London. The documentation required to complete an IPO of this sort runs into the thousands of pages, many of which must be signed and countersigned by the various parties at the appropriate times with the correct seals. The law firms not only have to draft the documents but ensure they are co-ordinated with the timing requirements of the regulators in the US, UK, Poland, etc. Moreover, the lawyers must synchronise the requirements of the different legal regimes, eg that legal and beneficial interests can actually be separated, that legal concepts subsisting in one legal jurisdiction (eg floating charge) can be interpreted in those where they do not exist. Nothing is worse, but it happens, for lawyers to discover that some documents have been erroneously prepared or that a security cannot be perfected after the money has begun to be drawn down. Retrospective repair tasks can mean financial and legal exposure for lawyers and clients alike with potentially irremediable prospects depending on local legal requirements.

The US law firm of White & Case advised the State Treasury of Poland, and TPSA was advised by the US law firm of Hunton & Williams. Even though the bulk of the issue was listed in London, the majority of the legal work was carried out by American law firms. The difference between TPSA and other privatizations in the region was that instead of finding an outside investor partner first, revising the finance and corporate governance, then moving to an IPO, TPSA went for the IPO first, and then sought a partner. Without the due diligence work by the lawyers for the consortium, the deal would have been impossible.

This case does demonstrate the importance of international institutions in enabling emerging markets to participate in global capital markets. Of interest though, is that the World Bank has been criticised for aiding countries that could themselves borrow funds in the capital markets. US Treasury Secretary, Lawrence Summers, said, 'Lending in (emerging market) countries should be confined to the areas where they can increase total financing capacity', adding that sometimes the bank's lending can 'crowd out private sector finance'.[25] However, these institutions are able to help develop legal and regulatory structures in emerging markets that facilitate the growth of free markets, the rule of law, and a linkage to capital markets. Indeed, the general counsel for the European Bank of Reconstruction and Development (EBRD) said:

> The EBRD's mandate is to foster the transition towards market economies in the countries of the Former Soviet Union and Central and Eastern Europe, and to promote private and entrepreneurial initiative . . . Recognising fully the importance to sustainable economic development of stable 'rules of the game' and the establishment and continued strengthening of law administration and enforcement institutions, the EBRD has embarked on the provision of legal technical assistance to its countries of operation that will foster the transition process.[26]

[25] Reuters, 'US Calls for World Bank Reform' (http://www.altavista.co.uk/content/reu_news_article jsp?category=business&id=0) 2000.

[26] J. Taylor, 'New Laws, New Lawyers and the EBRD' (1996) 24 *International Business Lawyer* at 98.

To reinforce its point, the EBRD has carried out legal audits on its constituent jurisdictions to determine the receptivity of the legal system to investment.

In the next section, we examine how insolvency, a paradigmatic local activity, has evolved into a globalised business. The rise of the multinational company has meant that global solutions are now being sought for transnational corporate meltdowns.

4. TRANSNATIONAL INSOLVENCY

Much insolvency or bankruptcy work is done informally, that is, without court intervention. This type of work is known as restructuring or 'turnarounds'. Companies usually do not want to signal to others—their investors, creditors, customers—that they are in financial trouble, so they go to great efforts to hide or to disguise the problems they encounter. The UK has had a long tradition of assisting companies on the verge of insolvency, a tradition known as the 'London Approach'. It is a prime example of where the global and local intersect.

The London Approach is a fairly arcane procedure,[27] which dates back mainly to the mid-1970s.[28] Kent calls it 'a means of reducing mistrust'.[29] Smith graphically describes the inception of the London Approach:

> The origins of the London Approach can be traced back to the recession of the mid-1970s. This was the first serious interruption to world economic growth since 1945. We at the Bank of England (at least those of us with as many grey hairs as me) remember it most for the secondary banks' crisis and for the launching by the Bank [of England] of the so-called lifeboat. This was the first bank support operation that the Bank of England had had to organize, but, in the context of the London Approach, it was an influential forerunner of the Bank's later involvement in workouts for non-financial companies.[30]

It was the switch from financial to non-financial contexts that set the Bank of England on a new path towards corporate rescue. But the path meandered among only the big, major corporates; it circumvented small and mid-sized companies. Smith explains how the Bank of England became involved:

> The mid-1970s saw an increasing number of non-financial companies encountering severe financial problems. Burmah Oil . . . was a notable example, highlighted by the suddenness with which the crisis blew up and the need for some very prompt action—on that occasion by the Bank of England itself. There was very little experience of organizing workouts in those days; we were not used to major companies coming to their bankers and saying that, unless they were given more liquidity immediately, they

[27] C. Bird, 'The London Approach' (1996) 12 *Insolvency Law & Practice* at 87–89.

[28] R. Floyd, 'Corporate Recovery: "The London Approach"' (1995) 11 *Insolvency Law & Practice* at 82.

[29] P. Kent, 'The London Approach: Lessons From Recent Years' (1994) Feb. *Insolvency Bulletin* at 7.

[30] M. Smith, 'The London Approach' (paper presented to Wilde Sapte Seminar London 1992) at 2.

> would have to stop trading. In particular, we had hardly any experience of arranging support operations for companies which had obtained finance from a wide range of banks and other sources, a trend which had just taken hold in the early 1970s. These were the beginnings of what came to be called multi-bank support operations. My predecessors at the Bank in the late 1970s identified a need to co-ordinate discussions among the banks with loans outstanding to a company in difficulty. This usually meant the Bank taking the initiative in convening meetings of banks and, on occasions, other interested parties to help secure collective agreement to a refinancing package.[31]

The Bank of England thus had as its motive 'not want[ing] companies to be placed in receivership or liquidation unnecessarily for wider economic reasons; we wanted viable jobs and productive capacity to be preserved'.[32] During the recession of the late 1980s and early 1990s the Bank of England was involved in about 150 workouts.[33]

Its current incarnation stems from a circular the Bank of England helped to draft, which was distributed by the British Bankers Association in 1990. The London Approach has no formal status in law, nor does it constitute a set of rules. At best it is a set of principles which contains as its objective

> to provide a flexible framework whereby Banks can continue to extend support to companies in financial difficulty, pending agreement as to the way forward [which] may include the provision of additional short term liquidity.[34]

The London Approach only applies to major corporates. Or, as Pointon characterizes it:

> The final major flaw that I see is that the London Approach is only really appropriate for large situations, therefore the number of cases handled using this process is relatively small. Indeed, it has been said that only those who have borrowed vast sums receive the benefits of such treatment.[35]

The London Approach has four phases. First, there is a standstill covering all debt owed. All bank lenders must give unanimous support. In this stage the banks often have extremely limited information about the debtor's true financial position, thus emphasising the notion of trust as an essential component of rescue. Second, the banks send in investigating accountants who would not be the company's auditors. Third, the lead bank negotiates with the other banks—which can be as few as six or as many as 106—to provide a new facility for the company. This is a difficult and tense period. It is also one where the 'majority banks', ie those with the most exposure, may take decisions that will bind all banks. Pointon describes this phase:

[31] *Ibid.*, at 2–3.

[32] *Ibid.*, at 3.

[33] P. Kent, 'Trading And Investing In Distressed Debt' (paper presented to Euroforum Conference London 1994).

[34] F. Pointon, 'London Approach: A Look At Its Applications And Its Alternatives' (1994, March) *Insolvency Bulletin.* at 5.

[35] *Ibid.*, at 7–8.

> To give an idea of the complexity of arrangements, many major groups have multinational subsidiaries in as many as 20 countries. Funding of these groups is frequently through syndicates with 30 or more banks who all need to agree with the proposed restructure. These banks are often in differing financial positions; some may be secured, for example, and may come from countries with different business cultures and differing perceptions of the ways in which situations should be dealt with. As a result of these complexities there has been one case where the legal documents needed to be redrafted 17 times. Problems such as this can make achievement of final agreement very expensive in legal terms.[36]

In the final phase, according to Pointon, 'the corporate has a new operating and financial structure which should allow it to prosper. Naturally, the Banks and their appointed accountants will, however, monitor on-going progress closely'.[37]

A key role in a London Approach workout is assigned to the lead bank. It will coordinate the rescue and have the task of bringing it to fruition. Smith remarks that a lead bank has:

> to perform a difficult balancing act; it must, for example, provide firm but not overbearing leadership. It must also be a good communicator; one of the most frequent complaints we receive at the Bank of England is that a lead bank has failed to provide banks with information which they regard as essential for the decisions that they are being asked to make. A lead bank is tempting disaster if it takes, albeit probably inadvertently, the views of banks for granted. It must, in other words, be sensitive to the circumstances of individual banks however small or where they come from. Above all, a lead bank needs to be flexible; it must be able to respond to the unexpected and know when to give ground in difficult discussions.[38]

The London Approach is expensive to implement. A successful workout could cost £6 million over its life. A banker put it this way:

> Let's, for example, take a small company, a typical mid-corporate, with three bankers, poor management, lousy at forecasting, with annual sales of £10 million, borrowings of £4.5 million, owns its own factory and some machinery, has a mortgage debenture to one and a charge to another. This wouldn't be any good for a London Approach. There's no meat on the bone, there's no value, nothing to play with, all the assets are secured.

There are two other factors that help make the London Approach unique. The whole process takes place outside the glare of publicity. One banker said the last thing he wanted to see was the unsecured creditors jumping out at the news. The cloak of secrecy also helps the banks work together rather than in competition with each other. This is especially so in the meetings where the workouts are structured. These meetings are delicately negotiated, contingent affairs rife with bluff and double bluff.

[36] F. Pointon, 'London Approach: A Look At Its Applications And Its Alternatives' (1994, March) *Insolvency Bulletin*. at 7.

[37] *Ibid.*

[38] Smith, *supra* n. 30 at 7–8.

The risk of rescue is also negotiated between the banks. A workout specialist said:

> Everyone must share the pain equally. Sometimes its not the same and we have various matrices we use to make it equitable. You sit around the table with the other banks and you say if we liquidate the business you will get fifty cents in the dollar. Is there anyone who wants to take that? Everyone says no, but one or two say we can't take this or that. They've said they don't want the fifty cents, so it's a matter of moving them to one of the other scenarios. You have to run different scenarios for restructuring plans—worst-case scenario, second worst case, best case, etcetera. You don't know if it'll work since it's all guesswork. We run the scenarios over one year, three years, 12 years to see what it will look like.

In difficult moments the Bank of England is able to step in to 'ease' the process. Kent declares:

> The Bank of England's role in workouts is part missionary, part peacemaker. As missionary, we advocate the London Approach as a basis for constructive cooperation regarding a customer's cash flow crisis. As peacemaker, we try to help banks resolve those differences which threaten to undermine an attempted workout.[39]

He has further followed that view: 'I have always made clear that our interest is not as a supervisor or "regulator" of the market'.[40] Another banker believed the Bank of England was useful:

> It is good for dealing with bank regulators in other countries. If you have seventy banks in a team and one, say, a Spanish bank, hasn't signed on then the Bank of England can talk to the Spanish bank regulator, and say we've got a major restructuring going on here and sixty nine banks have signed on but yours hasn't. Why not? And very often it's because the bank doesn't know about it. They might send a relatively junior official who has to pass recommendations up to his seniors and depending on how quickly they get passed, it can screw up or work well. The Bank of England can make it move up the hierarchy quickly. The Bank could also make rumbling noises about bank licence renewals, but they don't control foreign banks.

One official at the Bank of England commented that this was not how he viewed the role of the Bank:

> Our role is one of peacemaker, that is, not passive but quite active . . . We know the core group of bankers well and the main players are always in contact with each other. We are invited in. A bank calls me and says there may be a workout coming up, and that might be enough—that call—to bring everyone into line. We have no sanctions, although we have all sorts of relationships with banks and companies. Some companies are so big; they borrow in their own names. Indeed, they have better credit ratings than their banks. So we do have considerable authority. In a workout it may be worth going along with the majority because they will be in a similar situation again soon. If a bank is prepared to cooperate in a workout now, it will be to its advantage next time.

[39] Kent, *supra* n. 29 at 5.
[40] Kent, *supra* n. 33 at 5.

On the whole, bankers (and lawyers) are strongly opposed to the thought of a statutory basis for the London Approach.[41] It would run counter to its philosophy. Many thought that parliamentary draftsmen would be incapable of understanding the minutiae of the London Approach and so it was best left in the hands of those who knew how to do it.

To the bankers and lawyers involved in the London Approach its genius lies in the informality and the infinite flexibility with which it can be moulded and shaped.

In the final section of this chapter, we turn to legal education, something that has not typically been thought of in global terms. But with the global reach of the international law firms and the impact of the World Bank, legal education has to accept that a parochial outlook is insufficient.

5. GLOBALISING LEGAL EDUCATION

The relationship between globalisation and the field of law is reflexive: as the economy expands and integrates, its need for regulation also grows; the economy demands particular kinds of law and law thereby shapes the economy. The relatively small numbers of players in the global law field means that there is a paucity of formal educational skills at large, and so the result is that much of the craft of lawyering for the global order is learned through apprenticeship with elites rather than through academic routes, following Samuel Butler who wrote, 'An art can only be learned in the workshop of those who are winning their bread by it'. Formal educational institutions subsequently came late to these challenges. The first to do so were the major business schools in Europe and the US. Legal education has, however, been slow and inadequate in its response.[42]

Elite status is reinforced by the open recognition of many consumers of law and lawyers that of all the legal regimes in the world only two are of consequence in transnational work, namely, English law and New York state law (see Capital Markets above). Thus the number of potential law schools able to supply graduates capable of doing legal work at this level is small. Other jurisdictions are significant, of course, but they are dominated by this Western duopoly. I have shown elsewhere that international business lawyers often define themselves by three attributes:

> a mastery of the English language, which is the common language of international business and finance; an ability to draft contracts, more in the prolix Anglo-Saxon style rather than in the concise continental way; and an understanding of private

[41] City of London Law Society 'Corporate Restructuring and the London Approach' (unpublished paper 1996) at 2.

[42] Cf. J. Flood, 'Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice' (1996) 3 *International Journal of the Legal Profession* at 169–214.

> dispute resolution systems, such as arbitration. On occasion a fourth requisite is claimed, namely, admission to another jurisdiction, notably the New York bar.[43]

The key here is that the prototypical international business lawyer can operate in any system of law provided the conditions above are met. This is reinforced by advertisements for lawyers in the major financial institutions. The European Bank for Reconstruction and Development, for example, advertised for counsel with the following characteristics:

> **Education:** graduate law degree from a leading university required; post-graduate degree from a leading university in another country desirable; **Work Experience:** at least four years international lending, investment or project/asset finance experience in a leading international law firm or the legal department of a leading international bank or other financial institution required; **Skills:** excellent legal drafting in English required; evidence of good negotiating skills desirable; **Languages:** excellent spoken communication in English required; fluency in a language other than English, preferably a central or eastern European language, desirable.[44]

Have certain dominant educational institutions become gatekeepers for a global corps of leaders? Let me give a taste of how this may be perceived by others. At the 1995 International Bar Conference in Paris during a session on the globalisation of the legal profession, an East African delegate remonstrated with the UK and US members who were talking of the dominance of their respective laws and professions in the global marketplace as synonymous with globalisation. The delegate resented bodies such as the International Monetary Fund coming to third world countries and issuing edicts on the appropriate measures to modernise their economies. What galled him particularly was the way in which the IMF ignored local professionals, preferring instead to work with UK and US law firms. The delegate warned that if such bodies refused to acknowledge the contributions that local professionals could make, then foreign advisers would find themselves excluded from practising in these countries. They had to learn to work in partnership with locals. This intervention was met with silence.

In an attempt to discern law schools' responses to globalisation I analysed the prospectuses of a set of the top law schools in the US and the UK. I was interested in the kind and quantity of international courses offered and, more importantly, whether there was an explicit embrace of globalisation within courses or elsewhere. As long ago as 1991 it was argued that law schools should not just introduce courses with international dimensions, but should in fact internationalize the entire curriculum because internationalisation/globalisation had begun to infuse all aspects of life. Business schools have already faced this. For example, Duke University's Fuqua School of Business offers an MBA via the internet and short residential classes in places as far apart as Salzburg, Shanghai and Sao Paulo. I adopted these indices as proxies for the law school response to a perceived need for legal development in the way that the EBRD general counsel was

[43] *Ibid.*, at 190.

[44] Source: *Economist*, 25 January 1997 at 129.

mentioning above. In comparing legal education in the US and UK it is essential to bear in mind that in the former law is a graduate degree whereas in the latter it is part of the undergraduate curriculum. To compensate for that I have mainly examined graduate prospectuses in the UK and ordinary American law school catalogues. I believe this can be justified by the fact that most international institutions, eg World Bank and EBRD, demand a graduate degree as the minimum qualification for entry. Many American law schools also offer the LL.M. degree, partly as a way of upgrading J.D. degrees from lower-rank schools for US students, and partly as a way of inducting foreign students into US law. Both American and British universities actively market their degrees to overseas students who bring in lucrative amounts of tuition fees.

In the UK the top law schools are clustered in the 'golden triangle' of Oxford, Cambridge and London. Each offers a taught one-year, self-contained, graduate degree, usually the LL.M. Of the three London is unusual in that six separate law schools combine their efforts to produce a London-wide programme of graduate study with many more courses than either Oxford or Cambridge. Table 1 shows the proportions of international courses.

TABLE 1
International Graduate Courses at Top UK Law Schools

Name and Degree	Total Graduate Courses	International Courses
Cambridge—LL.M.	28	8 (28%)
London—LL.M.	142	60 (42%)
Oxford—B.C.L.	24	6 (25%)

Oxford and Cambridge have not capitalised on the international/global market in a substantive way, although their brand names are recognised everywhere. International courses comprise about one quarter of their law courses. London, however, has close to a half of its LL.M. courses focussed on international themes.

The American situation is quite different. For purposes of comparison I selected the four top national law schools, namely, Harvard, Yale, Columbia, and Chicago, which offer the J.D. degree, and separated out the proportions of their international courses. See Table 2.

TABLE 2
International Courses at Top US Law Schools

Name and Degree	Total Courses	International Courses
Chicago—J.D	155	22 (14%)
Columbia—J.D.	265	37 (14%)
Harvard—J.D.	249	48 (19%)
Yale—J.D.	110	11 (10%)

In absolute terms the numbers of courses provided are greater than in the UK, with the exception of London. Despite the greater numbers, in percentage terms American schools offer fewer courses than their British counterparts. The real difference lies in the approach of the schools. Oxford and Cambridge offer a traditional array of courses along the lines of private and public international law, with perhaps alternative courses on international dispute resolution. London has internationalised a bigger range of courses; eg labour law, environmental law, energy law, investment law. The addition of SOAS to the London law schools also provides courses on topics, such as Chinese and Japanese law, African and Islamic law. While it is possible to concentrate on particular areas of study in the London LL.M., the courses are distributed quite widely through the London law schools.

In this respect the delivery of international courses in the US law schools is probably more highly developed, especially at Harvard and Columbia. For example, Columbia organises its courses under various rubrics—eg corporate and securities law, human rights, international, foreign and comparative law. Within the latter group there are courses on international economic law (GATT and WTO), Russia and the CIS, cross-border legal transactions, and specialist courses on aspects of Japanese, Korean, Latin-American and East European law. This is bolstered by centres that specialise in some of these areas, such as the Parker School of Foreign and Comparative Law, the Center for Japanese Legal Studies, and the Center for Chinese Legal Studies. Finally, the intellectual stature of these schools is underpinned by journals that produce and disseminate knowledge. Columbia, for example, has, out of a total of 11 in-house journals, at least four concerned with international matters, namely, the *American Journal of International Arbitration*, the *Columbia Journal of Transnational Law*, the *Journal of Chinese Law*, and the *Journal of East European Law*.

Reasons for the differences are not difficult to find. UK universities usually have highly bureaucratised systems of course delivery. Introducing a new course is a long-term project, often involving validation by others than the instructor. American law schools are largely autonomous units within the university structure and have a much more flexible response to the organisation of law courses. There is considerable room for experiment. For example, at Harvard the ongoing O.J. Simpson criminal trial became the basis for a criminal evidence course.

American law schools are, in a sense, terminal institutions. That is, the award of the J.D. degree permits the holder to sit the bar examination and begin practice. In the UK a law degree enables one to apply for a vocational law course, not to practise. Furthermore, American law professors are generally paid more than other professors in the university, which has the effect of enhancing their status. They also retain stronger links with key practitioners, often giving them adjunct faculty status. For example, in the international, foreign and comparative law curriculum at Columbia four courses are taught by adjunct faculty: three by attorneys with major New York law firms; one is jointly taught

between a law firm partner and a senior counsel to the Chase Manhattan Bank; and one by the chief counsel to the World Bank.

Most law schools tackle the problems of globalisation by running courses or graduate degrees specialising in the area. One law school has attempted to mark itself as a global law school. New York University Law School has created a 'global law school program' which has been supported by $75 million in donations. It has three main aims: to create a global faculty of 20 law professors from around the world who will teach in conjunction with NYU faculty; to endow 20 full scholarships for overseas graduate students; and to support research through a centre on property and innovation in a global economy.[45] The visiting faculty are predominantly UK, German, and Japanese, representing the more powerful interests in the world. There is one from Egypt, representing both the Arab and African interests, although he teaches in Switzerland.

This is the most explicit form of merchandising yet by a law school, and one with imperial ambitions, when it says,

> As the processes of transformation and globalization unfold, law is playing and increasingly will play a critical role; indeed, the success of the emerging global community will depend in large part upon the integration and accommodation of disparate traditions through law. American law and its lawyers are playing a pivotal role: the United States has developed the world's most elaborate legal system; our Constitution is an obvious model for compacts governing the relationship of governments to their citizens; and American commercial law is providing the reference point as others develop their own legal regimes.[46]

Although this single instance cannot be taken as a general trend in legal education, it is, I believe, indicative of a burgeoning commercialisation of legal education. NYU has developed a 'super-niche' through co-opting globalisation as its motif (in contrast to its well-known niche tax LL.M. programme). Most others, whether British or American, have relied on the adjective international rather than global. It is a transition that business schools have already undergone.

The role of the global law school as presented here is one that will export American legal ideas and concepts throughout the world, especially in the emerging markets. In some ways it is a backwards step from what is already being done by law firms and other international institutions. For example, Gordon *et. al.* argue that a significant role of international institutions like the IMF is to offer 'technical assistance' by transplanting basic, so-called 'neutral' laws, eg tax and budget laws, to countries that either do not have them or possess inferior versions of them.[47] These are evidently not value-neutral exercises

[45] 'The Global Law School Program', *NYU: The Law School Magazine* (1995, Special Issue) at 5–6.

[46] *Ibid.*, at 5.

[47] R. Gordon, et. al. '"Technical Assistance" and the Globalization of Black Letter Law: the Good, the Bad, and the Ugly' (paper presented at the Law and Society Association Meeting Glasgow Scotland 1996).

in legal technical assistance; amongst other things, tax and budget laws exercise a considerable impact on social welfare programmes, which might have far-reaching consequences for a developing country. No account is taken of the adverse impact of Western values on such countries. This is evident in the IMF's own words when it writes:

> Much [technical legal] assistance was to members with economies in transition from central planning that are seeking advice to establish an appropriate legal framework for a sound fiscal structure, modern financial sector institutions, and market-oriented financial transactions. Often the assistance to these countries involved revision of legislation passed early in the transition period that has since proved inadequate . . . The department helped to build capacity among local officials both through the discussions involved in giving advice and by conducting courses and seminars. . . .[48]

This kind of development is being taken further as the United Nations attempts to establish a global accounting qualification through the intergovernmental working group on International Standards of Accounting and Reporting (ISAR), 'ISAR hopes a global qualification will provide a 'benchmark' which will be used by developing countries to reduce 'the education gap' with the developed world.

The stated purpose is to enhance local professionals and place them in fair competition with Western accountants. It is also a means of imposing a Western view on the manner in which accounts should be done.[49]

Perhaps the last point to be made here, although not insignificant, is that the elite law schools are key credentialing institutions that feed candidates to the major law firms, international NGOs and big corporations.

6. CONCLUSION

I have suggested the relationship between globalisation and the field of law is reflexive. Although transnational legal work deals with the 'big picture', it requires an intensive attention to detail in legal documentation. Lawyers, especially those in the large law firms have to develop facilities to feel comfortable in a number of legal regimes and either have their offices throughout the world or have a set of alliances that allows them to call on expertise whenever they need it. Global lawyering cannot be parochial: it has to evolve at both the local law level and the meta-law level, which attempts to integrate and to co-ordinate the localisms. But it is more than that. We are now seeing potential moves towards convergence with the push to global regulation, the adoption of model legal codes, eg UNCITRAL. The large law firms are in the vanguard and are the ones most likely to benefit from these moves. They have access to the widest spread of legal resources and expertise, they possess the largest amount of legal

[48] *IMF, Annual Report 1996.* (Washington DC International Monetary Fund 1997) at150.
[49] 'UN to Develop International Qualifications' (1996, Sep.) 5921 *The Accountant.*

technology, they have strong connections with governments and international governmental organisations, and they can commandeer the greatest number of highly trained entrants from the elite law schools. The close ties that evolve in these contexts act as barriers to entry for many outside. How then do they prove their bona fides in order to join?

I believe this raises a number of questions that we are only just beginning to consider. Is globalisation a new name for modernisation with its imperialist connotations? Are we seeing domination through a particularly Western mode of law discourse, a deterritorialisation of law? Does globalisation mean that the global and local coexist or are the tensions too great? Can ideas of economy and justice co-exist or are they antagonistic to each other? Are the great international organisations promoting economic discourse at the expense of discourses on community, ethics and justice?

The examples provided in this chapter are meant to stimulate further thinking on globalisation and law—whether it be in the field of international business transactions, crime in the international arena or human rights. As lawyers we have an obligation to think about these issues and formulate the means, and the theories for dealing with them.