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ABATING THE BOUNDS OF COMMERCE: A QUANTITATIVE ANALYSIS OF TRANSNATIONAL CONTRACT FORMATION

by

Cynthia A. Brown* and David T. Ackerman**

INTRODUCTION

The gateway for engaging in business across political borders is arguably wider now than ever before in world history. Though in and of itself foreign trade is certainly not a recent development, as the 21st Century progresses it can be said that expansion in foreign trade is writing a new chapter in the long evolution of international commerce. Among the subplots of the new chapter are growth and inclusion, the unquestionable progeny of the removal of trade barriers, growth of multi-national corporations, and, of course, technological advancements that have led to almost incomprehensible innovations in transportation and communications. The title of foreign trade’s new chapter is globalization. It, quite literally, promises a world of opportunities not available in the past, along with challenges unlike those previously experienced.

Globalization promotes goodwill among different countries; offers consumers competitive pricing on a broader array of products and services; and reduces the adverse impact of interruptions in the supply of raw materials. By stimulating cross-border relationships, the effects of globalization extend throughout all sectors of the economy. International collaborations abound, and the world reaps the benefits of alliances in agriculture, engineering, medicine, scientific research, banking, transportation, the arts, and more.

A hallmark of a global economy, as well as a point of controversy, is the increased inter-relation and integration of national economies. Improved worker migration relieves shortfalls in labor pools. Companies enjoy more investment opportunities and access to much wider markets, including a significantly larger base of customers and suppliers. For many commercial enterprises globalization also boosts greater specialization in the goods or services offered and a corresponding reduction in costs required to produce those goods and services.

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The United States is certainly experiencing the spread of a global economy; the country has witnessed significant growth in foreign trade over the last decade. According to the U.S. Census Bureau Foreign Trade Division, the nation's official source for import and export statistics, America's imports and exports in goods and services in 2014 combined for almost 5.2 trillion dollars. This amount translates into a 49 percent increase from 2009, which reported over 3.5 trillion dollars, and an increase of greater than 100 percent from 1999, reporting just over 2 trillion dollars.

More often than not, each dollar spent in global trade is memorialized, directly or indirectly, through some form of a written agreement involving parties originating in different foreign jurisdictions. For American business interests, this means contracting with at least one foreign entity whose home nation may impose its own rules and regulations that are likely to contradict American legal mandates. While domestic contracts are sufficiently complex in their own right, transnational agreements pose potentially greater challenges with complexities that swell as the participating number of jurisdictions increase. Though technology may have contributed greatly to simplifying a firm's entry into the global arena, generally speaking, the legal considerations of international contracting continue to present an overwhelmingly complicated undertaking. Relationships require competent agreements that are enforceable across geographic, economic and political borders; the creation of such compacts requires legal draftsmen skilled in the artistry of cross-border contract design.

Surprisingly little empirical data is available to inform the legal community of the ways attorneys from different countries address contract design for their clients engaged in cross-border transactions. This study focuses on the approaches adopted by lawyers tasked with crafting contracts to be employed by parties from more than one nation. The research reported here concerns inquiries into whether any consistency exists between attorneys from

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2 Id.

3 Id.

4 See, e.g., P.D.V. MARSH, CONTRACT NEGOTIATION HANDBOOK (3d ed. 2001).
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different countries, practice sectors (academic, government, corporate and private), and legal traditions (civil, common, and mixed), considering choice of law, enforcement of contract provisions, and inclusion of preventative measures within international contracts.

Part I provides a brief background including significant treaties and conventions that influence the creation and enforcement of transnational contracting procedures worldwide. Whereas there are many additional agreements currently in effect throughout the world, those mentioned herein are believed by the authors to be the most relevant to the research. Part II reviews previous work contributing to the body of knowledge of international contracting. Part III is a presentation of the current study and includes discussion of the research design, study sample, methodology and results. Finally, Part IV provides a brief analysis of the implications of the study and its results.

I. BACKGROUND INFORMATION

Traditionally, embracing all promises that the law will compel, a contract is often defined as “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” In one respect, the institution of contract law is comprised of the principal mechanisms for enhancing the security, reducing the uncertainty and improving cooperation of the bargaining parties within business transactions in market economies. Concerns of the parties to an agreement, regarding the performance of their counterparts is, indeed, what makes the enforceable nature of the bargain a key component contributing to a promise’s status as a “contract.” In other words, something with power greater than the parties exists to offer enhanced security, reduced uncertainty and improved cooperation through its abilities to enforce the parties’ promises for them in the case that one or both fail to perform as agreed. Commonly, it is the “state” or “sovereign” through its legal system that possesses the necessary authority to compel the parties to perform – to honor each’s respective bargain.

Certainly, there are transactions that fall within the self-enforcing range or are enforceable through reputational sanctions. “An agreement is said to be self-enforcing when the threat by either party no longer to deal with the other is sufficient in and of itself to induce performance.” Those, however, are beyond the scope of this article. Rather, we are addressing those agreements drafted with the knowledge, if not the intent, that the sovereign power of a nation state would prove sufficient to enforce performance of the commercial agreement.

In the case of the United States, a nation state heralding from a common law tradition, we enjoy a well-developed body of contract law. Recognized at the federal level and

5 BLACK’S LAW DICTIONARY 365 (9th ed. 2009).
8 Id.
at the individual state levels, both statutory and case law provide guiding beacons to bargaining parties and attorneys alike as they negotiate agreements within their respective, albeit domestic, American jurisdictions. Attorneys in the United States rely on legally developed controls and the courts' ability to apply interpretation and compel performance when drafting contracts, which ultimately produce reasonably implied expectations for the contracting parties.

To the contrary, an international commercial contract is an agreement between firms or individuals of different nations, creating obligations that are enforceable or otherwise recognizable by law; the recurring question being, which nation's law applies? A major difference between contracts subject solely to the laws within American jurisdictions and those subject to interpretations of other nations is the security offered by a well-established standard of enforcement and interpretation is too often absent as a guiding force in international contract disputes.

A. International Trade Agreements

Recognizing the benefits of greater legal cooperation in promoting increased transnational business, the World's industrialized countries have joined to create a variety of assemblages and to draft numerous agreements that give global commerce a foundation on which to build. This is an ambitious undertaking, considering the legal system of every nation in the world has developed in a way unique to that state. Herodotus said, "[i]f someone were to put a proposition before men bidding them choose, after examination, the best customs in the world, each nation would certainly select its own." The collective wisdom of world leaders over the past fifty years has allowed each country to maintain its identity, while evolving global commerce and conflict resolution. Whereas the treaties and conventions mentioned herein are applicable to many international contracts, in depth attention is beyond the focus of this study. However, it is helpful to draw attention to their existence and, perhaps, their import for international commercial agreements.

The United Nations Commission on International Trade Law (UNCITRAL) is a commission established in 1966, by the United Nations (UN) with the intention of creating a vehicle to bridge the gap between the disparities in various governing national laws. This body is made up of sixty UN members elected by the General Assembly and is structured to

14 A commission is defined by Black's Law Dictionary as, "a body of persons acting under lawful authority to perform certain public services." BLACK'S LAW DICTIONARY, supra note 17, at 365.
15 UNCITRAL should be active, inter alia, in "promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade [and] collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade." G.A. Res. 2205 (XXI), at 100 (Dec. 17, 1966), http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement.
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be representative of the World’s various geographic, economic, and legal regions. In 1980, the United Nations Convention on Contracts for the International Sale of Goods (CISG), also known as the Sales Convention was established under the UNCITRAL umbrella. The CISG became effective in 1988, and established a body of commercial law for international transactions. It operates very similar to the way the Uniform Commercial Code establishes commercial law for domestic transactions in the United States. The CISG currently is in effect in countries that account for over two-thirds of the World’s trade.

Originally completed in 1947, the General Agreement on Tariffs and Trade (GATT), was enforced beginning in 1948. Among the many political and economic facets, “the GATT system includes an international legal system with rules, a mechanism for interpreting those rules, and a procedure for resolving disputes under them.” The GATT rules are designed to work in conjunction with a nation’s laws, not against them. “When, say, India conforms to GATT schedules for tariff and quota reduction, it opens its markets to an increased flow of foreign goods and removes the barriers that formerly relegated foreign trading firms to a distinctly uncompetitive position.” GATT’s overlaying theme promotes compliance as a necessity and in the best interest of all members to better ensure equal opportunity under the law.

17 A convention is defined as, “an agreement or compact, especially one among nations.” BLACK’S LAW DICTIONARY, supra note 17, at 380.
19 See JAMES R. SILKENAT, supra note 36.
21 Originally drafted by twenty-three nations, including the United States, the GATT treaty became effective in 1947 with the signing of the Protocol of Provisional Application. WORLD TRADE ORG., UNDERSTANDING THE WTO: BASICS, THE URUGUAY ROUND, https://www.wto.org/english/trade_e/whatis_e/tif_e/fact5_e.htm [hereinafter THE URUGUAY ROUND] (last visited Jan. 2, 2016); see also RICHARD SCHAFFER ET AL., supra note 34. “Although GATT 1947 was never ratified by the U.S. Congress as a treaty, it has consistently been accepted as binding legal obligation of the United States under international law. Until January 1, 1995, the GATT agreement was administered by The GATT, a multilateral trading organization based in Geneva, Switzerland, composed of countries that were signatories to the GATT agreement.” Id. at 289.
22 Id.
The GATT can be largely defined by its two most important agreements, the Uruguay Round and the formation of the World Trade Organization (WTO). 26 Existing between 1986 and 1994, the Uruguay Round negotiations focused on tariff reductions, agricultural trade, and the trade of banking and finance services. 27

Uruguay Round concluded with an agreement that sets minimum standards for intellectual property rights (IPR) enshrined in the Trade Related Aspects of Intellectual Property Rights (TRIPs). National patents are among the many legal instruments this agreement covers, with the agreement resulting in a higher standard of protection for all countries. 28

The WTO, however, is the modern replacement for the original GATT organization. "The organization became the WTO in 1995, 146 current members." 29 Amongst the many roles of the WTO is a provision providing for a forum for the settlement of trade disputes between nations. 30 Additionally, the Geneva, Switzerland based organization gives countries a neutral forum to resolve alleged unfair trade practices committed by a fellow member. 31 "The GATT/WTO is a set of self-enforcing agreements: member countries enforce trading partners' commitments embodied in the agreements by challenging...through formal dispute settlement." 32

No discussion about international law would be complete without the inclusion of The Hague Conference on Private International Law (The Hague). Representing seventy-nine nation states, the European Union, and spanning every continent, "the ultimate goal of the Organization is to work for a world in which, despite the differences between legal systems, persons - individuals as well as companies - can enjoy a high degree of legal security." 33 The issues addressed by The Hague include, but are not limited to, the jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments. 34 Although created in 1893, The Hague did not become a permanent inter-governmental organization until 1955. 35

26 Id.
27 See The Uruguay Round, supra note 40.
30 "Above all, it's a negotiating forum....Essentially, the WTO is a place where member governments go, to try to sort out the trade problems they face with each other. The first step is to talk. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations." World Trade Org., UNDERSTATING THE WTO: BASICS, WHAT IS THE WORLD TRADE ORGANIZATION, https://www.wto.org/english/dhwhwto_e/whatis_e/tif_e/factl_e.htm (last visited Jan. 2, 2016).
32 Chad P. Bown, Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement 5 (2009).
34 Id.
35 The Hague Justice Portal, supra note 53.
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As with the ICC, the WTO, and many other organizations, The Hague is governed by its members. 36

For the purposes of this study, the research emphasis is on international contract formation and dispute resolution arising out of alleged contract breach. The treaties and organizations mentioned above, among others, have paved the way for a variety of private dispute resolution options in the international arena. All the same, a collection of agreements and conventions would be useless without a method of enforcement should a breach of terms occur.

B. Arbitration of International Agreements

Arbitration is largely held as the leading forum for private international alternative dispute resolution. 37 The New York Convention of 1958, arguably the most important agreement addressing international arbitration, "went a long way toward ensuring that arbitration agreements are respected and that arbitral awards are easily enforceable." 38 The New York Convention in simplistic terms states that each contracting state will recognize arbitration agreements reduced to writing, refuse to allow litigation once arbitration proceedings have been initiated, and enforce foreign arbitral awards. 39 In January 1998, the International Chamber of Commerce (ICC) adopted rules for its International Court of Arbitration. 40 This body acts as a dispute resolution option for anyone who adds the appropriate dispute resolution clause to a contract. 41 The enforcement provision of the contract falls under the guidelines of the New York Convention of 1958, but as with the other arbitration forums the ICC does not directly enforce arbitral awards. 42

In terms of enforcing arbitral awards under the New York Convention, the ICC provides information that pinpoints how the enforcement of awards is executed in various countries. 43 To emphasize the complex nature of arbitral enforcement, the sections of the report pertaining to Argentina and The Peoples Republic of China are highlighted herein. In Argentina it is important to be cognizant that the country is a "federal state comprising 23 provinces and the Autonomous City of Buenos Aires. The Argentine Congress...passes legislation applicable in all Argentine jurisdictions." 44 However the report also notes

36 Id.
38 Id. at 274.
41 Id. at 3.
42 Id.
43 Id.
“Argentine jurisdiction has its own legislation on arbitration (a procedural matter) applied by its own judiciary. In 2001, a national arbitration statute was submitted to the Congress, which took no action.”

Argentina is in stark contrast to the Peoples Republic of China, which has a centralized system for the recognition and execution of arbitral awards. The report notes that to enforce arbitral awards the “competent court is the Intermediate People’s Court at the domicile of the party against whom the enforcement is requested or at the place where the property to be enforced against is located.” Although systems and procedures are in place to govern in the instance of a foreign award, “it is also unclear how the courts will treat an award rendered by a foreign arbitration institution, where the place of arbitration is in China.”

The report further warns that “[i]t is to be expected that such award[s] will not be recognized on grounds of a violation of Chinese law, which implicitly only allows Chinese arbitration institutions to conduct arbitration in China.”

Argentina and The Peoples Republic of China serve as contrasting examples of complexity, but the vast differences between these two manufacturing giants serves to further illustrate the potential complications that challenge an attorney addressing today’s transnational transactions.

A similar alternative dispute institution to the ICC is the London Court of International Arbitration (LCIA) based in Great Britain. Dating to 1883, it offers mediation and arbitration services.

Although over 47 percent of the arbitrations handled by the LCIA are for amounts of 5 million dollars (USD) or less (20% ≤ $1 million), the LCIA proves a viable dispute resolution option for business enterprises of varied sizes.

45 Id.
47 New York Convention Awards, supra note 64. See also Interpretation on Application of the Arbitration law of the People’s Republic of China (promulgated by the Sup. People’s Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 12. Other sources of law applicable to arbitration award enforcement noted in the article include: (i) Arbitration Law of the PRC, adopted at the Ninth Meeting of the Standing Committee of the Eighth National People’s Congress on 31 Aug. 1994, promulgated by Order No. 31 of the President of the People’s Republic of China on 31 Aug. 1994 and effective as of 1 Sept. 1995; (ii) Civil Procedure Law of the PRC, adopted on 9 Apr. 1991 at the Fourth Session of the 7th National People’s Congress, revised by the 30th Session of the Standing Committee of the 10th National People’s Congress on 28 Oct. 2007 and effective as of 1 Apr. 2008; (iii) Contract Law of the PRC adopted at the 2nd Session of the 9th National People’s Congress on 15 Mar. 1999 and effective from 1 Oct. 1999; (iv) Other laws of the National People’s Congress or its Standing Committee, which include specific provisions on arbitration; and (v) Judicial Interpretations, Regulations, Opinions and Notices issued by the Supreme People’s Court (‘SPC’). Id.
48 Id.
49 Id.
51 Id.
C. Conventions Do Not Fill All the Gaps

Elements necessary to render an agreement legally binding in the international arena developed over time in countries of both the civil and common law traditions. As one would expect, these elements can differ greatly depending on locale. The United States, with a common law tradition, requires that a valid contract contain an offer and an acceptance of material terms based on mutual assent, supported by legally sufficient consideration, of a legal purpose or nature, by those with competency under the law; derived from statute or by precedent, the absence of any one of those elements results in a void contract. By comparison, as in the civil law tradition, the CSIG offers rules governing contract formation, and the rights and obligations of the seller and the buyer. It does not, however, govern the interpretation of the validity of a contract; that duty is left to the individual state or nation.

An additional key issue is one of natural language. The method of establishing the controlling language of a contract is a highly debated issue. Language clauses have developed that attempt to solve discrepancies. For example “this agreement shall be executed in both the English and the Spanish language. The English and Spanish texts shall both be valid, provided that in the event of any discrepancy and the resolution of a dispute the English text shall prevail.” Yet, critics of language clauses propose that by drafting a contract in multiple languages the cost of litigation increases; primarily because interpreters are needed and in some cases because the translations provided by the court-appointed translators differ from the translation in the written draft. The variable of a court-appointed translator leaves much in terms of control of the interpretation and drafting of the contract. Finally, it is important to note that even with all of the strides made through treaties and resolution, culture and custom continue to play a tremendous role in the formation, interpretation, and enforcement of contracts.

52 See generally C. CHATTERJEE, NEGOTIATING TECHNIQUES IN INTERNATIONAL COMMERCIAL CONTRACTS (2000).
54 Id.
55 See JANSSSEN & MEYER, supra note 39.
57 See DOCTUER EN DRIOT & LY, supra note 74.
58 See DOCTUER EN DRIOT & LY, supra note 74.
59 DOCTUER EN DRIOT & LY, supra note 74.
60 Id.
II. PREVIOUS STUDIES

Research similar to that presented here has not been reported, although empirical studies addressing contract issues are prevalent.61 Launching a variety of studies examining different facets of international contracting, the International Association for Contract and Commercial Management (known herein as IACCM) is a non-profit membership organization that supports innovation and collaboration in meeting the demands of today’s global trading relationships and practices.62 IACCM has approximately twenty-thousand members worldwide from one-hundred and thirty countries, whose membership includes corporate executives, legal practitioners, and representatives from around half of the global 500.63

In one IACCM study, International Contracting – Market Comparisons,64 “participants across a wide range of industries and regions, assessed the relative ease of doing business in almost 50 of the world’s major markets.”65 The study’s participants possessed direct experience negotiating in countries foreign to their own and were asked to rate their experiences.66


63 Id.

64 International Contracting – Market Comparisons, IACCM (July 20, 2010), http://www2.iaccm.com/resources/?id=3593. The survey included 221 responses and had three major purposes:

For the overseas negotiator: the findings will assist in anticipating some of the risks and issues they need to address or overcome. Of course, it may even mean they decide against a market entry at all.

For the domestic negotiator, the survey offers insight to external perceptions of their country and equips them to think about how they may address[s] the fears that their counterpart may have in doing business with them.

For government agencies, the findings represent an agenda for improvement. Id.

65 Id. at 3.

66 Id.
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The goal of [the IACCM] study was to look at the relative ease of doing business - broadly from a contracting and negotiations perspective. We were trying to understand the primary risk characteristics associated with doing business in major trading nations. We undertook the study by going out to our members who are engaged in international negotiations and contract management. All the members approached had direct contracting and negotiations experience and the study was based upon their experiences - not their prejudices or ideas. We approached 4000 negotiation and contract members of the association through sending out a web based survey. We weren't only looking at the general ranking of a country's relative ease or difficulty to trade with, we also required them to benchmark against nine specific criteria - such as business culture, problems with payment and challenges with legal systems or regulations.67

The IACCM survey results indicate that the three countries easiest to do business with are Canada, Singapore, and Australia.68 Nations in Africa rounded out the bottom three along with China and Saudi Arabia.69 The findings are significant in that they show a statistical risk assessment for different industries in various countries around the world. "For the negotiator the study is an excellent checklist that they [sic] should consider if they [sic] look at the commercial risk, opportunity and options of doing business in different countries."70

As previously mentioned, language and translation is a point of contention between professionals in drafting transnational agreements. In 2009, the IACCM released the results from its translation survey, aimed at determining the "practices and processes global organizations are using to manage their template and document translations."71 The results revealed that when applicable, all practice sectors (commercial, public, and government) of the sampled population overwhelmingly contract in local languages.72 Interestingly, in all populations except what IACCM designated Asia Pacific, the typical practice is to use either third-party translation providers, or a combination of internal and external resources.73 The study concluded by citing comments made by participants. One such comment elaborated on a best practice employed by the participant's company. The participant was quoted as saying, "We are in a global business and many of our customers are also international companies. Generally, we can use English for all regions. The only exception is sometimes we need to use local languages as mandated by governments or local law."74 An additional sugestion from an another participant included:

67 Interview with Tim Cummins, CEO, IACCM (June 2010) (on file with author).
68 Supra note 56.
69 Id.
70 Id. at 18.
71 Translation Survey, IACCM, (2009), http://www.iaccm.com/members/research/. The survey was conducted in October 2009 and drew input from 148 participants across a wide range of industries and regions. The goal of the study was to identify the best practices related to document translations. The demographics reported were region, industry, and company revenue Id.
72 Id.
73 Id.
74 Id. at 6.
We employ contracting staff (centrally) who are fluent in the languages of the countries in which we have local offices. Whenever translation services are provided by an external (local) lawyer, we also run an internal check for consistency with the firm’s other contracts and for the appropriate level of formality (particularly important in languages like Japanese where it is possible to say the same thing in many different ways according to the formality of the relationship).  

In another comment, on point with the nature of the research included herein, it is explained that “foreign language contracts will always be a concern. We have had internal personnel fluent responsible for negotiations in many instances; however, in instances where a non-native or native fluency speaker is unavailable, we have asked that contracts be negotiated in English and that the English language version control.”

Lastly, in 2007, IACCM published findings from its study, International Contracting: Best Practices in Structure and Legal Review. This study’s findings demonstrated “that a majority [of respondents] undertake international business in three forms – country-to-country export (76%); multi-country supply agreements (single source of supply, to multiple customer locations) (58%); and regional / global agreements covering multiple locations for both customer and supplier (80%).” The results also showed that 25 percent of the respondents benefit from a central legal team that reviews and approves international contracts on behalf of all locations. “This 25% has dispute resolution based on arbitration/mediation using the laws of the headquarters country.” The overall conclusion of this study is that central decision making has a clear, positive impact on cycle times for establishing contract terms. As a closing point, it is worthy to note that this study reported:

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71 Id.
76 Id. at 7.
77 See generally INT’L CONT.: BEST PRACTICES IN STRUCTURE AND LEGAL REV., (2007), http://www.iaccm.com/members/research/. The survey was undertaken in May 2007, and obtained data from one hundred major corporations. This included forty-six corporations representing international sales contracts, thirty-two representing international procurement contracts, and twenty-two providing data for both. The report explores a number of practices, with particular focus on Law Department policies, and the effect these have on cycle times. Although not defined in the report, a cycle time is defined by businessdictionary.com as the period required to complete a function, job, or task from start to finish. The report also highlights five practices that appear to generate faster cycle times. Id.
78 Id. at 2. Additionally it should be noted that the primary focus was on the structure of the third type, regional/global agreements, because those contracts are of the greatest complexity and contain the longest delays. Id.
79 Id. at 4.
80 Id.
81 Id. It should be noted that the survey does not address whether the impact on implementation is positive or negative. The study also remarks that “some of the drive towards centralization reflects the growing consolidation of global procurement organizations, equipped with standard tools and systems that enable full electronic contracting and ordering.” Id.
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58% of [its] respondents use arbitration / mediation as their preferred method of dispute resolution, with 16% using the laws of a third party country. Of those who regularly use litigation as the basis for dispute resolution, the largest group insist on litigation occurring in their headquarters country under that country’s laws (clearly seeking home turf advantage). Just 16% typically specify that litigation will occur in the country where the dispute occurs, using local law.  

These statistics address an important issue, namely what methods of dispute resolution are preferred in practice by today’s attorneys drafting international contracts as it relates to the time required to complete a business transaction.

The information obtained by the aforementioned studies is invaluable; however, none of the studies address the cognitive process upon which an attorney relies to make decisions while drafting cross-border agreements, nor do they address any particularities within specific demographic groups. The studies above provide evidence of which countries are perceived as the more difficult with which to negotiate, by what procedure translations are conducted, and procedural matters as a function of transaction completion time. The studies available, in general, are void of data that would be informative as to international counsel’s propensities toward certain contacting behaviors. Meg Kinnear, Secretary-General of the International Centre for the Settlement of Investment Disputes (ICSID) at the World Bank, acknowledged a dearth of information that might provide attorneys guidance or insight concerning the tendencies or predisposition of international attorneys regarding a focus on contract construction.  

Therein lies the need for the study at bar and how it contrasts from earlier studies.

III. THE EMPIRICAL MEASUREMENT OF CONTRACT DESIGN

A. Initial Investigation

Commencing with the identification of issues commonly appearing in the design and employment of international contracts, the initial investigation first confirmed that international agreements, like contracts drafted for use solely within the United States, seem to present topics of concern that occur repeatedly. We identified recurring questions within the larger context of cross-border contract design by analyzing research that addresses transnational contract formation, reviewing law review and law journal articles discussing transnational contract formation, and undertaking both telephonic and face-to-face interviews.

The participating attorneys—experienced and well-versed in creating and litigating international transactional agreements—employed drafting approaches that varied greatly, as did their individual concerns regarding contract formation. By way of example, a telephone

82 Id. at 5.
83 Telephone Interview with Meg Kinnear, Sec’y Gen. of the ICSID, World Bank (July 20, 2010).
84 See generally DOCTEUR EN DRIOT & LY, supra note 74 (discussing the continuing work of the Working Group on International Contracts. This group has published studies analyzing the main types of clauses appearing in international contracts since 1975, and “over the years...offer[s] a reasonably complete image of how an international contract is or should be drafted.”).
interview with the Secretary-General of the International Centre for the Settlement of Investment Disputes at the World Bank highlighted problems arising from the failure of legal counsel to appreciate local politics. Specifically, the interviewee pinpointed issues concerning the extensive role of politics in international transactions, and more particularly, the lack of counsels’ “sense of the political scene...or how the local politics work administratively.”

An interview with a Senior Partner of Harris & Moure, PLLC and co-contributor of chinalawblog.com supplies an additional example. The attorney-blogger emphasized the need for uniformity. An advocate of uniformity within a contract, “[i]n most cases I advise my clients to keep the language, and choice of law of the contract consistent with the place it will be arbitrated.” Elaborating further, he offered, “[i]n China, contracts written in English are translated by a court translator into Chinese. I for one am not going to rest a case on a translation I have no control over, if I can help it.”

This uniformity approach potentially conflicts with the opinions of Professor Steven Salbu who advocates what he refers to as collaborative drafting. Salbu provides, “[d]ual-language contract development is likely to mitigate power disparities in the negotiation of terms. When...developed through the proposals of each parent and formulated in the language to which that parent is accustomed, neither parent has the advantage of presenting potentially skewed terms on its home turf.”


The International Centre for Settlement of Investment Disputes (ICSID) is one of the five intergovernmental organizations that make up the World Bank Group. It was established in 1966 by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the Convention). To date, 143 countries have ratified the Convention and become ICSID members. Id. at 1.

86 Telephone Interview with Meg Kinnear, supra note 106.
87 Telephone Interview with Dan Harris, Senior Partner, Harris & Moure (Apr. 22, 2010).
88 Id.
89 Telephone Interview with Dan Harris, supra note 112.
90 Id.
91 Steven R. Salbu, Parental Coordination and Conflict in International Joint Ventures: The Use of Contract to Address Legal, Linguistic, and Cultural Concerns, 43 CASE W. RES. L. REV. 1233, 1250 (1993) (discussing the importance of the collaborative drafting of international agreements).
92 Id.
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In yet another example, a Partner at Foley & Lardner, LLP drew attention to legal counsels’ overall lack of understanding of the risk associated with transnational ventures. He suggests,

[m]any companies look to be penny wise and pound foolish, not recognizing the economic consequences of not sufficiently exploring form or risk management issues...The next opportunity these issues are addressed is when a problem arises, and for smaller companies looking to globalize it could be too late by then.

These examples provide context as well as study components that emphasize conflict and disagreement among lawyers practicing in the international arena. Notwithstanding the variety of responses, a pattern emerged allowing us to divide the matters into topics, which created the greatest contention from the study’s overall perspective of international contract design, implementation, and subsequent enforcement. We categorized all of the components identified into five separate topics, including (1) choice of law, (2) enforcement, (3) preventative measures, (4) cultural concerns, and (5) cost benefits. With each topic serving as a guide, we then devised questions that address the value counsel place on each topic and measure that value in relationship to each of the other topics.

B. Quantitative Procedure

1. Participants

The participants for this study consisted of two groups: attorneys actively practicing in the area of international contracts and related transactional procedures and attorneys who are not engaged in the active practice of law, but who are teaching, researching, writing, consulting or otherwise working in the area of international contracts and related transactional procedures. Data was gathered from 178 participants, which included lawyers who resided in twenty-six countries and were representative of five self-reported races. Varying in age, work experience, nationality, education, and background, participants consisted of attorneys spanning 14 different native languages and 43 specific areas of legal concentration. The socio-demographics assessed included gender, race, predominant areas of practice, firm size, areas of legal concentration, first (native) language, country of current residence, country of origin, current position, number of years at current position, number of years licensed as an attorney, and levels of education completed.

93 Interview with Robert Q. Lee, Partner, Foley & Lardner, LLP in Orlando, Fla. (Mar. 19, 2010).
94 Id.
95 Id.
96 The term “practice area” is more generally known in the United States as “practice sector.” However, since the scope of this study is global in nature, the researcher decided to use “practice area” which favors International English as opposed to U.S. spoken English.
2. Instruments

The authors crafted the survey instrument specifically for this study. The research design employs cross-sectional data aimed at empirically measuring the perception of legal practitioners and academics concerning international contract law, contract formation and dispute resolution, including specifics related to choice of law, cost benefits, preventative measures, cultural issues and contract enforcement. The measure consists of twenty-two statements that assess the value participants' place on various categories within international contract construction. The questionnaire uses twenty-one four-point Likert-type responses, and an ordinal response question for participants to rank the five aforementioned categories (choice of law, enforcement, preventative measures, cultural concerns, and cost benefits) in order of importance.

The authors created the survey items with the intention of ranking each of the five identified categories of international contract drafting; however, no statistical evaluations were performed, such as a factor analysis or measures of internal consistency, that confirm how items load on to these assumed sub-factors of international contract law. For instance, the item “A Contract should be drafted in the same language as the country hosting the decision making body,” was categorized under Choice of Law. In contrast, the statement “I prefer arbitration over mediation as an alternative dispute resolution choice in my international contracts,” is placed in the category of Preventative Measures. The category Enforcement encompasses items addressing concerns surrounding breach of contract; for example, the statement “I prefer to arbitrate in a forum where it may be easier to obtain a decision resolving a contractual dispute but more difficult to collect a judgment.” Cultural Concerns indicate items accounting for traditions and customs as they relate to international contracting, for instance the statement “Face-to-face dealings with representatives of foreign entities are vital to successful contract negotiations.” Finally, the category of cost-benefit analysis focuses on the influence cost exerts on contract design as indicated by the statement, “When drafting a contract with an international party, exchange rate risk should be a priority over the language a contract is drafted in.”

97 The final survey instrument resulted, in part, from a pilot test that included two participants. Participant One was a Caucasian female originally from Germany, but currently residing in France. She holds a Ph.D. and has been a licensed attorney for three to five years. International law and contracts are her predominant areas of practice. Participant Two was a Caucasian male originally from and currently residing in the State of Florida in the United States. A licensed attorney for eighteen to twenty years, he also holds an LL.M. degree and currently teaches subjects related to international law. Each participant is trained and practices in different legal systems, specifically common law and civil law traditions.
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3. Procedure

The system used to distribute the questionnaire was SurveyGizmo. SurveyGizmo is a web-based computerized self-administered questionnaire (CSAQ). The questionnaire was made available electronically to the participants to enhance accessibility and convenience. Primary distribution of the CSAQ to the sample population was accomplished through professional organizations. The professional organizations targeted for this study are comprised of lawyers dedicated to international law, international contracts and international business, including the International Association for Contract and Commercial Management, the International Law Association, the International Chamber of Commerce, the British Institute of International and Comparative Law, the International Bar Association, the Hong Kong Bar Association, and the International Trade Center. In addition to the aforementioned professional organizations, contacts also included the International Law Committees of the states of Florida, New York, California, and Louisiana. Using the options available in SurveyGizmo, separate and unique hyper-links were distributed to each entity that included the name of the survey and the individual professional organization.

Recruitment procedures included direct communication with law professors of applicable specialty. Research specialty and practice focus of the staff and faculty were conducted to determine applicable candidates, and e-mail communication was transmitted to the applicable emails listed on the respective law school websites. Additional communications were sent to members of the private sector, chosen at random through research and referral. E-mail addresses for those individuals were obtained either through referral or from the corresponding entity's website. Finally, recruitment was solicited by English speaking attorneys in the Peoples Republic of China, via telephonic conversations with previously identified English-speaking attorneys.
C. Results and Quantitative Analysis

A series of mixed-design factorial analyses of variance (ANOVA) were used to determine if relationships exist between (a) the categories presented and legal traditions and (b) categories and practice sectors. Post hoc pairwise comparisons were used to determine which groups differed from each other for significant ANOVAs. The Greenhouse-Geisser correction was used when the assumption of sphericity was violated.

1. Hypothesis I

The initial model tested the hypothesis that attorneys from different legal traditions differed in their perceptions of the importance or relevance of issues of international contract design.

A mixed-design ANOVA was run to assess the between-subject effects comparing attorneys from different legal traditions and within-subject effects comparing the importance of five identified issues of disputed international contract practices. This analysis showed no significant interaction between the contract categories and legal traditions ($F(5.44, 141.54) = .281$, $p = .934$). Therefore, attorneys were consistent in their concerns for contract law regardless of their legal tradition. A graphical representation of the results separated by legal tradition are located in Table 1.

<table>
<thead>
<tr>
<th>Legal Tradition</th>
<th>Mean Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Law</td>
<td>2.5</td>
</tr>
<tr>
<td>Common Law</td>
<td>2.3</td>
</tr>
<tr>
<td>Mixed</td>
<td>2.2</td>
</tr>
</tbody>
</table>

Table 1: Category Comparison: Legal Tradition

http://scholarlycommons.law.hofstra.edu/jibl/vol15/iss2/5
However, there were differences in the level of preference and importance that attorneys placed on each issue of international contract design, \( F(2.72, 141.54) = 3.453, p = .022 \). Least Significant Difference pairwise comparisons, indicated that cultural concerns \( (M = 2.278) \) were less important when designing international contracts than preventative measures \( (M = 2.57) \), enforcement \( (M = 2.672) \), and cost benefit analysis \( (M = 2.618), p < .05 \). A graphical representation of the importance placed on the categories by the entire population are located in Table 2.

<table>
<thead>
<tr>
<th>Category</th>
<th>Mean Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Choice of Law</td>
<td>2.586</td>
</tr>
<tr>
<td>Preventative Measures</td>
<td>2.566</td>
</tr>
<tr>
<td>Enforcement</td>
<td>2.672</td>
</tr>
<tr>
<td>Cultural Concerns</td>
<td>2.278</td>
</tr>
<tr>
<td>Cost Benefit</td>
<td>2.618</td>
</tr>
</tbody>
</table>

There were no differences between legal traditions in terms of the importance of contract law as a whole \( F(2, 52) = .277, p = .759 \). Therefore, attorneys participating in the study were consistent in their overall approach to contract law regardless of their legal tradition.

2. Hypothesis II

The second hypothesis asserted that attorneys from different practice sectors differed in their preferences on which issues were most important in international contract design. Because several attorneys practiced in more than one sector, three comparisons were made comparing one of three sectors (private, academic, and government) to the other two sectors. Attorneys working in the private sector showed no statistical difference in the way they indorsed the concerns for international contracts when compared to attorneys in the other sectors, \( F(2.80, 148.29) = 1.088, p = .354 \). The result for the main effect of contract categories is described in the previous section for Hypothesis I. \(^9^9\) Likewise, the perceptions of lawyers in private practice were no different from those in other sectors with respect to their overall views on contract law \( F(1, 53) = .180, p = .673 \).

\(^9^9\) See supra Section III.C.1.
The second model for Hypothesis II tested the interaction between the contract categories and whether or not attorneys were in academia. Attorneys working in academia show no statistical difference in the way they indorse the categories when compared to attorneys in the other sectors, $F(2.76, 146.29) = .053, p = .979$. Similarly, the perceptions of lawyer participants in academia were no different from those in other sectors with respect to their overall views on contract law ($F (1, 53) = .268, p = .607$).

The final model tested the interaction between the contract categories and whether or not the attorney was in a government position. Attorneys working in government show no statistical difference in the way they indorse the categories when compared to attorneys in the other sectors, $F(2.76, 146.08) = 1.762, p = .161$. Likewise, those in government practice were no different from those in other sectors with respect to their overall views on contract law ($F (1, 53) = .044, p = .834$). Therefore, the results indicate that attorneys participating in the study shared perceptions that were consistent in their overall approach to contract law regardless of their practice sector.

IV. IMPLICATIONS

The primary objective of this study is to aid American businesses as they seek to expand globally and to improve their efforts to fully maximize their international opportunities. By providing attorneys with empirical observations previously unavailable, the study results may help facilitate improved negotiation and drafting of transnational contracts. The authors hope that the findings from this study contribute to the gap currently existing between assumptions and reality in the realm of international contract formation. To that end, the following provides implications for the research findings as well as suggestions for future consideration.

The study indicates that the participating attorneys attribute less significance to cultural concerns in comparison to other procedural considerations. This result, in and of itself, fails to provide meaningful clarification concerning the purported need for enhanced cultural competencies; however, attorneys' lack of attention to cultural particularities in the contracting process is indicative of an exposed failing that could have significant impact on the effectiveness and ultimate success of their contracting efforts.99 As revealed in post-survey interviews, attention to cultural-specific influences in transnational contracting may help attorneys better prepare for and avoid issues that, though not substantive or procedural in nature, have the potential of derailing contract negotiations just the same.100 A second finding presents somewhat unexpected implications. Initially, one assumption was that the procedural differences between the various legal traditions (i.e., civil law versus common law) would generate vastly different approaches to contract design for international contracts. To the contrary, however, the study revealed that attorneys from different legal traditions express similar perspectives when addressing the importance of the


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Study's examined categories of international contract design. For example, a survey completed by a French attorney, educated within the civil law tradition, indicates that he places similar significance upon choice of law as does someone from a common law tradition, like that of the United States. Findings from the different practice sectors (private, academia, and government) are consistent. This result is particularly significant when one considers the preparation time expended in negotiating international contracts.

Study results based on the limited participation indicate that at least one of the previously identified assumptions about international contract practices may prove unsubstantiated. International arbitration is justifiably recognized as a leading method for resolving disputes in the international arena, but arbitration is often depicted as the dispute resolution of choice. Our results highlight that nearly half (or 44.9 percent of the study's respondents) either strongly disagree or are inclined to disagree with using arbitration as their preferred means of dispute resolution. Designing a contract with the presumption that arbitration will be the best dispute resolution method could be problematic if an attorney's assumptions about arbitration are not confirmed when dealing with a co-counsel, a counterpart or counsel-opposite in a foreign nation.

Further study is warranted into the preferred means of alternative dispute resolution in various countries and areas of concentration. It may very well be that the different cultures adopt preferable alternative dispute resolution approaches based, in part, on the area's cultural and historical ideologies. Thus, marrying cultural awareness and alternative dispute resolution programs could produce an exponentially beneficial impact for the bar.

An additional widely debated topic centers around what is the best practice for determining the language in which a contract is drafted. The study results suggest that the practice of expending significant monies on drafting international contracts in multiple languages may be unnecessary. According to the findings, 91.9 percent of respondents either strongly agree, or are inclined to agree that English is their preferred contract language. Based on previously mentioned interviews, this statistic is not indicative of Russia or China which require enforceable contracts to be written in their respective languages. Knowing, however, that English is a preferred contract language could save significant expenditures by obviating the need to draft multiple-language documents, interpret foreign languages and incur expenses related to having language experts assist in editing resulting contracts. Having a common preferred contract language assists in other realms as well, like negotiations and contract enforcement. Given the study's findings that indicate English is the preferred contract language, it may be possible to launch international efforts through multinational organizations to adopt English as a universal contract language. If successful, the results could prove to have a direct, beneficial, long-term impact on the American economy.

CONCLUSION

If this research accomplishes a single item, we suggest that it is to highlight the need for further discussion and additional research. While this study points to inconsistencies among accepted and preferred practices, this is but one area ripe for further investigation. As globalization continues to advance, the need for competent enforceable commercial agreements grows exponentially. By addressing perceived and actual shortcomings in the design and crafting of international commercial agreements we can help reduce resistance to entry into the global market and contribute to the improvement of transnational commerce.