Skills for Future International Commercial Lawyers

A proposal for a skills-based course in the Chinese mainland context

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Abstract

This thesis identifies skills that are important for Chinese lawyers in international commercial practice (ICP lawyers). It demonstrates a unique understanding of the needs of Chinese international commercial lawyers (ICP lawyers) in their cultural and educational context. It makes recommendations for a new evidence-based JM curriculum which will assist Chinese lawyers to compete with their Anglo-American peers.

The need for international commercial legal services in China is critical to its economic development. The Chinese JM is not effective for skills or designed for international commercial practice. Transplanting a course such as the JD or PCLL will not solve this, particularly in relation to skills, English competence and the fact that the 'legal profession' is a comparatively recent phenomenon in China. ICP lawyers more often act as lawmakers rather than law interpreters. Therefore, skills are their main tools in navigating international commercial legal tasks.

Overall, a constructivist, experiential learning approach, allowing students to explore and to practise skills, is most suitable for skills learning in this context.

An interpretive phenomenological approach was taken, allowing participants to speak for themselves. The data was grouped into themes for the purposes of analysis. Investigation was by questionnaires to Chinese and non-Chinese ICP lawyers, interviews with Chinese ICP lawyers, and with people involved in education.

Analysis led to key themes: what 'international commercial practice' is; collaboration; languages and communication (including English as a *lingua franca*) and creativity. Cultural awareness and becoming an international commercial lawyer were pervasive.

The thesis used this data to design a new skills-based, experiential learning curriculum. Future research could investigate whether similar gaps exist in other countries where the legal profession is emerging, but where policy is towards increased international trade.

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All errors and misunderstandings are my own.

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Contents

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Glossary

AI	Artificial Intelligence
BPTC	Bar Professional Training Course (England and Wales)
CPE	Common Professional Examination (England and Wales)
CUHK	The Chinese University of Hong Kong
EU	European Union
GDL	Graduate Diploma in Law (England and Wales)
GLS	Global Lawyering Skills Program, McGeorge University (USA)
HKU	The University of Hong Kong
ICC	International Chamber of Commerce
ICP LAWYER	A lawyer working in international commercial practice
IELTS	International English Language Testing System
JD	Juris Doctor
JM	Juris Master (China)
LLB	Bachelor of Laws
LLM	Master of Laws
LPC	Legal Practice Course (England and Wales)
NJE	National Judicial Examination (China)
NVIVO	qualitative data analysis software
PBL	problem based learning
PCLL	Postgraduate Certificate in Laws (Hong Kong)
PRC	People's Republic of China
QLD	Qualifying Law Degree (England and Wales)
QLTS	Qualified Lawyers Transfer Scheme (England and Wales)
STL	School of Transnational Law, Peking University (China)
UN	United Nations
WTO	World Trade Organisation

Chapter 1: Introduction

We're going to Malta. Or we're going to try.

--- Captain Mason[1]

To me, starting this project is like implementing a plan to travel to wonderland. I do not know how wonderful the place may be and whether I am capable of finding a way to reach the destination. I may not even know for sure whether a real destination exists or if it is just a figment of my imagination. The only thing I am sure about is that once I depart, that is the direction I am heading in.

Aim, objectives and research questions

The aim of this thesis is to identify the skills that are important for Chinese lawyers in international commercial practice (ICP lawyers) and make recommendations for changes to legal education at masters level in the Chinese mainland context.

The objectives of this thesis are:

1. to identify the skills needed in international commercial practice by reference to existing competence frameworks and by questionnaires and interviews of practitioners (see Chapters 2, 3, 5, 6, 7, 8, 9 and 10);
2. to identify a range of methods of teaching and assessing skills by reference to the literature and observation in both legal and non-legal contexts (see Chapters 4, 5, 6 and 11);

[1] This quotation comes from a display window of the War Museum in Valletta which presents stories about the Siege of Malta (1940-1942) during World War II.

3. to synthesise findings into a model that represents the skills necessary for Chinese ICP lawyers with recommendations for ways in which they can be taught (see Chapter 11 and 12).

These objectives will enable the project to answer the following research questions:

1. Are there any differences between the work of local commercial lawyers and the service tasks of ICP lawyers? (see Chapters 7, 8, 9 and 10)?
2. What are the skills that will be important for Chinese lawyers in international work? (see Chapters 7, 8, 9 and 10)?
3. How can they be learned effectively? (see Chapters 4 and 11)?
4. How can institutions or teachers facilitate such learning? (see Chapters 3, 4, 11 and 12)?
5. What are the implications for the Juris Master (JM.)[2] in China? Can a new model of the JM. prepare students for the skills they need for international commercial work? (see Chapter 3, 11 and 12)?
6. What should the final outcomes of learning/teaching be? (see Chapter 4, 11 and 12)?
7. What kind of formative/summative assessment is appropriate for such outcomes? (see Chapter 4 and 11)?

To achieve the objectives and answer the questions above, the research project was designed from a pragmatic viewpoint (Creswell 2013, pp. 10–11) and designed to include some elements of quantitative analysis, but to be primarily a qualitative study (see Chapters 5 and 6).

[2] The JM is a Masters level legal education programme in China which is named after the American J.D. and is designed for cultivating practice-ready lawyers. More detail is provided in Chapter 3.

Structure of the thesis

This thesis explains the research project in six parts: Introduction, Background, Methodology and Methods, Data Analysis and Reporting, Curriculum for ICP lawyers, and Conclusions and Recommendations. How this then breaks down further into individual chapters is set out in Figure 1 below:

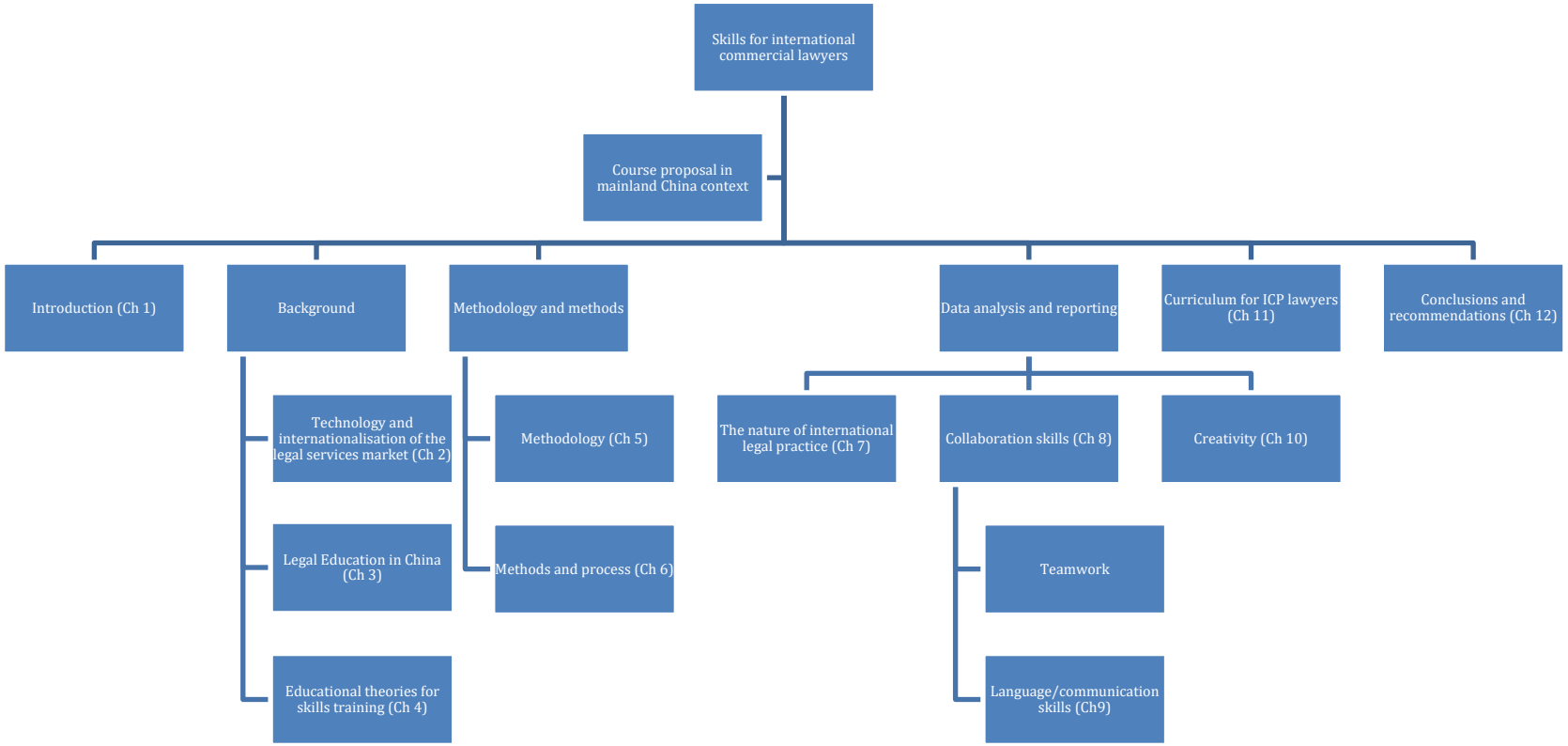

Figure 1 Structure of the thesis

The first part, Chapter 1, gives a basic introduction to the whole thesis. It explains why the project was started and how the thesis is structured and explains the reason why the project focuses on professional-led legal education rather than academic legal education.

The second part contains three chapters which together explain the background of the project, namely Chapter 2 (technology and the internationalisation of the commercial legal services market), Chapter 3 (legal education in China) and Chapter 4 (educational theories relating to skills training). Largely based on literature, this part aims to explain the current situation of Chinese legal education and why ICP lawyers are the targeted group for this thesis (Chapters 2 and 3). Chapter 3 explains where skills training should be situated. Additionally, this part also explores the educational theories available for skills training in the context of legal education (Chapter 4).

The third part describes the methodology (Chapter 5), methods selection and research design and approach to analysis (Chapter 6) that underpin the research project.

The fourth part (Chapter 7 to 10) analyses the data and reports the findings of the research. Chapter 7, therefore, opens up the discussion by exploring the nature of international commercial practice for lawyers. It illuminates the complexity of international commercial practice and the wide range of knowledge that may be required (Chapter 7). However, Chapter 7 ultimately concludes that the focus going forward needs to be upon skills and therefore the discussion then shifts to focus on transferable legal skills (Chapter 8, 9 and 10) rather than knowledge identification. Chapter 11 reinforces the findings discussed in Chapters 7-10 by designing an entry route for future international commercial practising lawyers (ICP lawyers).

Chapter 12 is both the final part and the final chapter, which completes the thesis by giving a conclusion and making some recommendations for policy and future research.

The chapters can, therefore, be mapped against the research objectives and questions as follows:

Chapter	Research Objective	Research Questions
1	N/A	N/A
2	1	N/A
3	1	4 and 5
4	1	4, 6, and 7
5	1 and 2	1, 2, 3, 4, 5, and 6
6	1 and 2	1, 2, 3, 4, 5, and 6
7	1	1 and 2
8	1	1 and 2
9	1	1 and 2
10	1	1 and 2
11	2 and 3	3, 4, 5, 6, and 7
12	3	4, 5, and 6

Table 1 Research objectives and questions mapped against chapters

As expressed in the thesis title, this project concerns the skills needed for ICP lawyers. It goes on to design a proposal for a course to equip intending ICP lawyers in the Chinese mainland context with those skills. Thus, this thesis starts by discussing the future of the legal profession, in order to begin the process of identifying what skills might be needed going forward.

Chapter 2: Technology and Internationalisation of the Commercial Legal Services Market

The first thing we do, let's kill all the lawyers

---William Shakespeare

The quotation above suggests that some people at least might question the value of lawyers. Nowadays, one reason for that might be that some people believe that technology will eventually replace lawyers. However, this chapter will argue that lawyers are, and will remain, necessary and valuable.

Introduction

For the reasons discussed in Chapter 3, this thesis is led by the needs of practising lawyers. When anyone designs a course for future lawyers, future trends in legal services should be considered from the outset, in order to avoid making suggestions that are likely to prove outdated either immediately or in the near future. Asked to rank a list of areas of knowledge and skills for their current importance, Chinese and non-Chinese lawyers in the questionnaires carried out for this thesis ranked them as set out in Table 2.

Which knowledge or skills do you think are the most useful ones for international commercial lawyers?

Ranking by Chinese lawyers N = 25	Comparative ranking by Non-Chinese lawyers N = 12
1. Languages (especially English)	2
2. Communication skills (both oral and in writing e.g. interviewing, negotiation, advocacy, writing correspondence)	3
3. Teamwork skills (both working as team leader and member)	10
4. Analytical and problem-solving skills	1
5. Legal knowledge of international commercial activities	5
6. Intercultural skills (understanding cultural differences and dealing properly with individuals from different cultural backgrounds)	6
7. Drafting legal document	4
8. Researching	8
9. Knowledge of non-law subjects relating to international commercial legal services	7
10. Creativity	9

Table 2 Skills ranking by ICP lawyers

Some of these will continue to be important, some may become more important and some may become less important due to the impact of technological developments. Very few respondents, however, added suggestions for additional areas that were not in the list, suggesting that the list represents a reasonable

picture of the knowledge and skills used in international commercial practice. Chinese lawyers added:

- "networking, business development";
- "communication skill to client on Chinese part" and
- "personal connection network".

Non-Chinese lawyers added:

- "Knowledge of international frameworks and jurisdictions, e.g., EU, ICC, arbitration/dispute resolution bodies for trade, intellectual property, etc.";
- "International negotiations";
- "Good knowledge of English is fundamental. Knowledge of other languages is an advantage but not essential.";
- "Knowledge of English is dependent on where you practise. But yes knowledge of language in the jurisdiction you practise is very important";
- "Analytical and problem - solving skills and creativity for me are connected. You have to be creative to solve a problem. I put creativity on 2 because for me, in a way, it is duplication of analytical and problem-solving skills. As to researching, well ... you have to be prepared, how long it takes is less important (researching is basic skill you need to work; I assume that the better it is faster you will find what you are looking for)".

Although the questionnaire did not ask specifically whether the knowledge required was of common law or civil law systems, during the course of interviews, the significance of common law approaches in international commercial practice became clearer.

The rationale for choosing the topics in this list is explained below in Table 6. However, these results do indicate that both Chinese and non-Chinese lawyers saw languages and communication as important (at positions 1, 2 and 3) and placed knowledge lower (at positions 5, 7 and 9). Both groups placed inter-cultural skills at position 6 and creativity towards the bottom of the list. The most significant difference is that Chinese lawyers found teamwork skills (described as collaboration in this thesis) far more useful than the non-Chinese lawyers did. The

implications of this difference, which may be related to the fact that the Chinese lawyers might be from bigger firms, is explored in Chapter 8 at Tables 14 and 15.

Participants may have had slightly different interpretations of what was meant by 'creativity'. For example, as evident from the quotation above, one participant at least associated creativity with analytical and problem-solving skills, which is interesting given that the latter was positioned much higher than creativity overall by both groups. Creativity is discussed in more depth in Chapter 10.

As it explained in Chapter 6 at Table 8, the key skills that emerged as important in this thesis are collaboration, language, communication and creativity. These skills are explored in detail in Chapters 8, 9 and 10.

Because the continued value of human lawyers has been questioned by the development of technology, the first section of this chapter will seek to convince the reader that whatever the foreseeable future may hold, this does not spell the end for human lawyers. The following section of this chapter will then put forward arguments in favour of a prediction that more and more lawyers across the globe will become ICP lawyers in the future, as a result of the development of technology and also due to driving factors from both the demand and supply sides. Finally, because this thesis focuses on Chinese lawyers, the final section will explain how the general trend to internationalisation and commercialisation is distinctively applicable in the Chinese legal services market.

Will robots replace lawyers?

With the development of information technology, there are different perspectives emerging on the future of the legal services market. Some (Susskind 2008, 2015, Flaherty 2016) believe that basic and routine legal work will be replaced by advanced technology in the future legal services market. For example, Watson is a technology platform developed by IBM "that uses natural language processing and machine learning to reveal insights from large amounts of unstructured data" (IBM Corp. 2014). This belief, where it is held, leads to an instinctive fear on the part of some lawyers that they may lose their jobs because of the developments in technology (Weiss 2015, p. 1). Fisher (2013), a feature editor at *New Scientist,* on

the other hand, places greater emphasis on the transition opportunities presented by new technologies, rather than the complete replacement of lawyers. He perceives that laws and the legal community will have the opportunity to reform in response to advances in technology and so jobs for lawyers may change rather than be entirely lost. This includes the idea that the very existence of robots undertaking legal roles will create distinct legal issues that require human intervention to resolve. For instance, who should be responsible for a tort when the tortfeasor is a robot, say if the robot publicly disclosed someone's private information? Therefore, he warns that people will need good lawyers rather than no lawyers within a world "awash with robots, teleports and self-driving cars" (Fisher 2013, p. 40). However, the role those lawyers perform and the skillset they need in order to perform it may be somewhat different from today.

To consider whether artificial intelligence (AI) is replacing human lawyers, the first consideration is whether the technology is advanced enough itself. Recently, Remus and Levy (2015) undertook research to examine the contribution and limitations of the recent most advanced technology in supporting or replacing human lawyers in lawyering tasks. These tasks included document and case management, document review, document preparation, legal research and reasoning, interpersonal communication and interaction, and courtroom appearance. They concluded that most of the structured and repetitive information process involved in performing these tasks either has been automated or can be automated in the near future. However, for unstructured and opaque information processing, technology, at least in its current form, may have less capability to affect the jobs of human lawyers (Remus and Levy 2015, p. 48). Take document preparation tasks for example. This category of activity can be further divided into two subcategories: document drafting and legal writing. Document drafting in this context should be understood to mean producing legal documents such as memoranda and contracts to reflect the intentions and agreement of the parties, that usually have structured templates for the drafter to follow. Legal writing, on the other hand, is more unstructured as it includes producing written work, such as letters of advice, to explain the application of the law to a certain factual situation (Remus and Levy 2015, pp. 18–21). As it may already be largely based on structured templates and precedents, it may be argued

that document drafting may be replaced by automated systems such as LegalZoom (Legalzoom.com, Inc 2016). LegalZoom is not a law firm, but it provides some legal document drafting services by generating legal documents via an automated system which responds to specific answers from the clients provided via an online system. However, legal writing, which encompasses advice, explanation, opinion, or recommendations about possible legal rights, remedies, defences, options, selection of forms or strategies, has been excluded by LegalZoom (Legalzoom.com, Inc 2016) on the basis either that it cannot be accommodated within the current limitations of the automated system or that it is not permitted within current regulation of legal services in the USA, or both.

Likewise, courtroom appearances, which are mainly about court room advocacy, are also quite different from other tasks. Appearances in court are currently far from being automated and not only because of existing restrictions on who may represent clients in court. Arguably, a more fundamental reason than regulatory restrictions is that effective advocacy demands emotional engagement with the decision-maker which cannot presently be supplied by an automated service (Remus and Levy 2015, p. 29). Therefore, not only courtroom advocacy, but also most of the tasks that require interaction with other human beings, such as communication, negotiation and advising clients are far from being automated by technology (Remus and Levy 2015, pp. 31–32).

However, the argument does not end there. On the one hand, as discussed above, the capacity of technology to undertake more than routine legal work is limited by the nature of current technology itself. On the other hand, however, it may be argued that the reason why technology is currently so limited in the legal area is not just because of the limitations of technology per se. It is also due to the limitations of traditional legal reasoning which may be inhibiting the extent to which lawyers are willing and able to look at the law in new ways, in order then to advance technology to the point where it is able to perform more complex legal tasks (Aikenhead 1996). This limitation contains two elements: one concerns legal reasoning and different ways of understanding, and the other is connected with tacit knowledge. In relation to legal reasoning, Sunstain (2001) argues that legal reasoning is such a complicated thing, that AI is not able to do it. However, there

are people who believe that one day AI will develop this capacity (Bench-Capon et al. 2012). Traditionally, there are two approaches to legal reasoning; one is formalism, which focuses on regulation as rule-based reasoning, the other is pragmatism, which originated in individual cases as case-based reasoning (Yu 2005, p. 123). Each already has its own artificial intelligence platform; for the former, Expert System[3] and for the latter, one used by Ashley (1991) called HYPO. However, neither of these has proved to be capable of providing a guaranteed accurate legal solution to client problems (Yu 2005). There is a new development in legal reasoning, defeasible (non-monotonic[4]) reasoning which suggests a trustworthy result can be reached through dialogues (Pollock 1987, 1992, 2001, Gabbay and Smets 2013). Accordingly, a new system called OSCAR, invented by John Rollock (a philosopher), uses defeasible reasoning which has evolved from a monotonic logic approach to a non-monotonic logic approach.

In addition to basic legal reasoning, AI can also conduct and support legal skills such as legal research, collaborative decision making (Karacapilidis and Papadias 2001), and risk management (Leidner and Schilder 2010). However, as this thesis focuses on the skills of which AI is not, at least currently, capable, therefore, the skills that AI is currently carrying out will not be further discussed.

Although the developments in AI will no doubt lead to significant improvements over time, there remains a further challenge in substituting software for a human lawyer, which is the second element of legal understanding, tacit knowledge (the concept will be explained and further discussed in Chapter 4) which is related to

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[3] Discussed by Richard Susskind in 1987 (Susskind 1987). A new one was introduced in 2014: NEOTA.

[4] Monotonic logic can be either inductive or deductive, from individual to general or from general to individual. The key is that the logic goes from one direction to the other. Non-monotonic logic is quite the opposite, it is open to all possibilities. For example (given by Yu (2005)), if A said: "Most economists cannot write a poem. Rob is an economist. Therefore, he may not be able to write a poem." If we accept the first two facts, the result is true in monotonic logic.

However, non-monotonic logic, is open to more possibilities. An example is if B said: "No, Rob is an exception. I've read his poem before, it is great!" C then said: "Well, I've read his poem, too. I don't think it is anything special, not in rhyme at all". B answered: "That's your personal opinion! I am a professor in literature and have published several books on poetry review. I can tell you that it is not the key for a good poem to be in rhyme. I believe most of the poetry critics will agree with me about Rob's poem". Although non-monotonic logic is quite popular at present, especially in the AI area, it has been criticised as "based on a confusion of proof-theoretic with epistemological issues" (Israel 1980, p. 99).

understanding. There are many differences between the human brain and an AI system. One of them is the controlling system. For the human brain, the controlling process of our action is unconscious, only when we learn or practise new things and actions or change something routinely, is new learning introduced through conscious intention (Eagleman 2016, pp. 85–89). This can be contrasted with AI, where all activity and "learning" is "conscious" work through the process designed by the creators of the AI and not much difference would appear even if the AI keeps doing the same task again and again. Therefore, basically, the human brain and AI are moving in opposite directions to each other. The synapses of the human brain reach their peak at the age of two or three and then shrink to a smaller size, but with stronger links between the links afterwards (Eagleman 2016, p. 9). Consequently, for a human lawyer, there is an ongoing process of development and improvement that enables them to master tasks and thus progress from novice to expert. However, an AI system, which is created by human beings for a specific purpose, will struggle to improve or diversify after its initial creation. Consequently, it may be said that the human brain is designed for improvement, creativity and diversity, whereas AI is designed for a specific purpose. Moreover, much of what expert lawyers do is tacit, in the sense that they "know more than [they] can say" (Polanyi 1983, p. 4). If that is the case, it may not be possible to convert the processes used by expert lawyers into a computer program. Studies attempting to identify "expert heuristics" with this in mind in the 1980s were unsuccessful:

> "[n]o matter how much more work was done in computer simulation and operations research, and no matter how sophisticated the rules and procedures became, such analytic abstractions would never allow the computer to attain expertise."
>
> (Dreyfus and Dreyfus 1986, p. 10)

In the 1990s, however, some people argued that AI was capable of using expert heuristics "in the course of infrared spectra interpretation and the implementation of the programming language PROLOG" (Andreev and Argirov 1995, p. 447). Therefore, there is a possibility that if lawyers increase their

engagement level with technology, it may become possible in time to convert what is currently tacit into information that is explicit enough to be taught not just to junior lawyers, but converted into computer programs.

However, the truth is that such computer programs are not supposed to work independently from human lawyers but under the supervision of, and with frequent updating from, human lawyers. Therefore, the current role of AI is in supporting the human lawyers' work or collaborating with them. Take document review for example, where the available technology has already advanced from simple 'keyword searching' to a more accurate and effective 'continuous active learning' model (Remus and Levy 2015, p. 16). However, such accuracy and effectiveness comes from the supervision and collaboration of expert human lawyers. In the continuous active learning model, a supervising lawyer starts with keyword searching to select an initial seed set of documents. The lawyer marks each of the documents as relevant or irrelevant, with the software then being used again, this time to extract a set of linguistic features from those documents which were marked as relevant. Such linguistic features can then be used as independent variables in a statistical model designed to predict whether a document is relevant or not. The supervising lawyer can test the statistical model by using it to classify another set of documents and to adjust the misclassified documents to the seed set for reformulating the instructions within the software. This process continues until the result satisfies the supervising lawyer. The 'continuous active learning' approach still needs experienced lawyers who understand the case, the document sets that can be used by the software, and the variety of available predictive technologies used both to classify a training sample and to train the system. Moreover, although the movement is effective in discovery practice, it is far less effective in other aspects where structured and unstructured tasks are combined together, such as due diligence (Remus and Levy 2015, p. 18) or tasks where creativity is required. Therefore, besides the legal tasks that AI is not capable of performing, many complex tasks that AI is already apparently performing, it is only able to do so because of the assistance and interventions by human lawyers. Therefore, as Susskind (1987, 2008, 2013) argues, there will be "new" law jobs because of technology. For example, there may be legal knowledge engineers, who are talented lawyers in organising and modelling large number of complex legal

materials and processes to analyse, distil, and then capture the law as standard working practices that can be embodied in computer systems (Susskind 2013, p. 111).

Therefore, it is not necessarily the case that legal tasks must be performed by AI alone or by human lawyers alone; rather, they may work together. Human lawyers may be able to assist in developing AI systems that are able to handle more complex tasks on behalf of the lawyers, possibly even including direct interaction with clients. For example, Watson is a computer system built by IBM as a question answering system. The creators of Watson argue that it can communicate with people in natural human languages instead of forcing people to learn technology languages. It can also read documents in context rather than merely as separate words and can update the unstructured documents through the internet itself. Nevertheless, we might need to ask liability and ethics questions. Who is responsible for the bad advice that robots may give and should we have the AI systems apply the same ethical rules as human lawyers (Blackman 2013, pp. 1–2)?

Even though all the issues mentioned above may be resolved over time, the last barrier for AI systems to replace human lawyers will be the value of law. It may be argued that the core value of law is to maintain and protect the interests of citizens of a society (Mayson 2013, p. 2), which consists principally of human beings, both in terms of their short-term and their long-term interests.[5] No matter how efficient the AI systems may be, at present they should best be regarded as still being simply tools for the benefit of human beings. Therefore, it is argued, it is inappropriate for human beings to entrust the value of law to AI systems. It is possible that one day AI systems will have rights of their own, and an ability to argue for their own interests against those of human beings. Until then, human lawyers will be needed for creative work tasks such as creating new models for completing legal transactions, such as happens in some international commercial transactions (discussed in Chapter 10) and importantly for dealing with other human beings and their emotions. For example, when a foreign merchant goes to another jurisdiction to buy a piece of land to set up a factory, as far as the merchant

[5] There may be a few exceptions such as laws relating to animal protection which may be interpreted as being principally for the benefit of animals themselves.

is concerned, buying the land is a transaction undertaken to gain a profit. However, for those who live on the land, selling the land may also mean giving up the home they have lived in for a long time and to which they are emotionally attached. Therefore, there is a probability that human lawyers with the emotional intelligence to engage with the client's concerns at parting with their land may be more acceptable to them than an AI system which may lack that emotional intelligence and seek to complete the transaction purely as a standard legal process. Moreover, even when AI systems are treated as having equal rights and capability with human beings, it will still be the responsibility and the right of human beings to negotiate the law on humanity's behalf with AI systems.

In conclusion, the position at present can be summarised by the titles of two reports by John Markoff, a technology reporter for the *New York Times*: "Expensive lawyers may be replaced by cheaper software" (Markoff 2011, p. 1) in simple and routine tasks but "not so fast"(Markoff 2016, p. 1). With the development of technology, although the percentage of simple and routine work done by human lawyers inevitably decreases, the need for lawyers to undertake complex and unstructured tasks may increase. Therefore, this thesis will argue that this is not "the end of lawyers" (Susskind 2008) but a transition to greater emotional engagement and more creative tasks for lawyers to do.

The effects of advances in technology: internationalisation and commercialisation

Although it is unlikely that technology will replace human lawyers' jobs entirely, nonetheless, it is unreasonable to ignore the significant changes that technological developments may bring to law and lawyers, particularly in international commercial work. Besides the brand new types of jobs (described above) that may arise with the development of technology, traditional legal services tasks have also been transformed in scale. As long-distance communication becomes more and more effortless over time as a result of the development of technology, information can be shared simultaneously over long distances. This, in time, extends the reach of human beings' activities from local to international.

Concurrently, it also increases the frequency of people working internationally, in this thesis, in the context of legal services.

Although advanced technology is changing the way legal services are provided and supports the possibility of expanding legal services from the local market to the international market, this does not mean that internationalisation is a process that is coherent across different countries and that it develops evenly in each legal sector (Zouridis et al. 2012, p. 335).

On the contrary, internationalisation has occurred in different ways, at different speeds and to different depths in different countries (Zouridis et al. 2012, Russell 2014). According to Zouridis (2012, p. 334), there are concerns about internationalisation of law, and about private governance regimes. However, this does not mean the law issued by public authorities is withering away, but rather that it now represents 'blocks' of law which individuals may choose by using choice of law clauses in the international commercial law context (Alvarez 2012, p. 26). This trend, to some extent, provides the basis for international commercial law to grow much faster than other legal sectors such as criminal or civil law (Zouridis et al. 2012, pp. 333–334) because commercial law is inclined to be concerned more about individual interests rather than the public good in a specific society which matches the need for freedom in law-making which private governance regimes may support.

On the other hand, because local public authorities may reserve power to protect the public interest of their own societies or, alternatively, provide greater choices to international legal actors, in order to benefit from the freedom of choices given by the local authorities as well as minimising uncertainty when local authorities choose to protect the local public interest, ICP lawyers may need to think more about risk management skills such as political risks and cultural risks. Risk management is discussed as a pervasive aspect of the data in this thesis, notably in Chapter 8.

Based on the two trends described above, Zouridis (2012, p. 335) provides four scenarios exploring the effect of a) either trend reversing, b) both reversing or c) both continuing. If they both continue, the landscape of the global legal environment will become a decentralised transnational network involving a large

range of legal actors (legal internet). If they both reverse, then the picture will be one where national or regional sovereignty regains priority powers (legal border). If internationalisation continues while the private governance regimes reverse, then the world will emerge into a new constitutional order on the global level similar to the one we have in countries or local jurisdictions (global constitution). The final scenario (legal tribes) suggests that the world will break into small communities with relatively little contact and coordination and a weaker role for state governments.

It is possible, but even more chaotic, that all these four possibilities may happen in the future in sequence or that each of them could occur in different regions concurrently. For example, it is possible that the private governance regime and internationalisation will both keep on growing in one or several jurisdictions until they threaten the power of public authorities. Zouridis posits that there will then be 'wars' between the two and each of them may win several 'battles' depending on the balance of power in a certain time and area. In such cases, the legal landscape will be shared between a global constitution and individual legal tribes. For example, in 2014, 51 jurisdictions signed the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information under Common Reporting Standard (CRS). This is the first ever multilateral competent authority agreement to exchange information and by November 2016, the number of signatories increased to 87 (Organisation for Economic Co-operation and Development n.d.) This may be seen as akin to a declaration of war upon corporations and individuals who evade their tax duty. Once those two groups reach a balance point, they will have to share power in two different systems to govern different legal sectors or areas, which amounts to something similar to the legal internet.

Although this thesis is not able to predict the future exactly, one thing appears certain, which is that the legal landscape will not remain the same as it is now. Moreover, internationalisation may not be separated from commercialisation, as there is a strong willingness of people to enjoy the variety of consumer products for daily life and benefit from being more productive with highly specialised tools which are generated from international trade (Broda and Weinstein 2006, p. 576).

Conversely, whenever and wherever commercialisation occurs, internationalisation may follow as a result of the same incentives. Therefore, in some of the possible future scenarios, it is evident that ICP lawyers may play bigger roles, as they do in the legal internet and legal tribes examples.

In the context of this thesis, then, it is important to understand how these factors might operate in the Chinese context.

International commercial legal services will lead Chinese legal professional development

The history of the Chinese legal profession

Lack of tradition of legal services

Before 1840, China was an agricultural imperial society with strong government, few commercial activities and no modern industry. At that time, Confucianism[6] was the mainstream culture in the society (Keay 2009).

Confucians developed their hierarchy over time and focused on encouraging people to do good things rather than punishing them for doing bad things. Confucian principles were sometimes given precedence over positivist law.[7] In such a context, law was considered a tool of last resort and was more concerned with criminal punishment; it was not considered to be the most substantial part of traditional Chinese society. Consequently, the traditional Chinese approach to law did not require a clearly separated legal system and so legal functions were combined with administrative tasks and performed largely by local magistrates. The expectation was that a competent magistrate should administer effectively so that local people could live contentedly in their own station. If so, crime should be rare; people should live politely and with no arguments between them. Therefore,

[6] Confucianism was a social philosophical theory created by Master Kong, who was born in 551BC in a noble family in a baronial kingdom called Lu, where the core value of goodness and requirement of accomplishment of the Zhou Dynasty were maintained at the time that the Zhou Dynasty was collapsing (Wei 2014).

[7] "春秋断狱" is a phrase that expresses that local magistrates or the authorities similar to the Highest Court today in China use the Confucian classic "春秋"(Kong 2016) to decide criminal cases.

a competent magistrate should have few cases to deal with. Even if there was a case, he should give a wise judgment so as to reduce further crime and disputes. Therefore, non-litigation was encouraged and being wary of litigation was the attitude of traditional Chinese culture. This cultural attitude remained the same even after the powers of the administrative and the judiciary were separated from each other to form different departments.[8]

For a very long time, judges were considered to be public servants and indeed this is still largely the case in modern China. Prior to 2001, it was common in China to become, say, a judge,[9] a prosecutor or an attorney[10] without having obtained a law degree and this is still normal at present (He 2005a, p. 87, Clark 2008, p. 837). This may be particularly problematic if, for example, judicial appointments are perceived to be political appointments. This in turn has led to concerns being expressed around the impact of those without a legal education on judicial independence (Woo and Wang 2005, p. 924);the status of law as a profession (He 2005b, pp. 141–142, Zhao and Hu 2012, p. 342) and the autonomy of the profession.

Further, judges were expected to undertake an active investigation in order to find the evidence and reach a wise judgment. Faced with such an assertive judges' role, lawyers had few rights in supporting their clients and some may argue that not much has changed over time (Clark 2008). In fact, in the data collected for this thesis from non-Chinese lawyers, there were some suggestions that foreign lawyers perceived Chinese lawyers to have a lack of assertiveness (see Table 3).

[8] There were separate institutions for judicial tasks in China at the central government level traditionally, but not at the local level. In modern China, the separation is at the implementation level (courts are independent from local government) but may not be to the same extent as the separation of powers argued by Montesquieu. This is because the courts' powers are limited in structural ways such as being supervised by procurators.

[9] In China, graduates can choose to be trained as a judge from the outset of their legal career. However, this may be different in a common law system.

[10] In this thesis, a Chinese lawyer working in a law firm is an 'attorney'. Consequently all the Chinese questionnaire and interview participants were attorneys.

"Have you ever worked with Chinese lawyers? If yes, do you think they work in different ways?" (N=12)			
	No	**Yes without comments**	**Yes/No with comments**
Number of participants or comments	5	2	Yes and no very similar way to lawyers worldwide
			Yes but not professionally as instructors or agents. Yes they work in different ways but I would find it difficult to put my finger on it.
			Yes. Some of them (e.g. more deferential when dealing with patent examiners, rather than pursuing the strongest rights for my client). We choose to work with the ones who seem to have the best understanding of what we want.
			Yes, they are very methodical in their work.
			I have not worked with Chinese lawyers. I spend some time in China, so I expect that they would work in different way. I would expect significant cultural based differences.

Table 3 Non-Chinese lawyers' assessment of Chinese lawyers

For example, the right for lawyers to meet their clients freely in jail and to review and have copies of documents held by the prosecutors are still problematic in the area of criminal law. Such a tradition of lack of intervention also appeared in the data about commercial law areas affecting ICP lawyers' work when the clients are Chinese:

> "I think, in fact, the biggest challenge is educating your clients. Because one of the reasons is the legal market is competitive. And secondly, the clients are not familiar with the [social] legal area. Therefore, the first thing we need to do is setting up a smooth communication system, so that [the clients] will not hide things from us. Secondly, for those Chinese clients, to have them pay the fees in time is also a big problem. The third thing is the balance of legal services and fees, how can you make your clients feel your legal services are worthy, and make them wish [to pay the money]. I feel this is very difficult, and need to spend a lot of effort in educating them."[11]

Nevertheless, with the development of the economy and society, attitudes towards lawyers are changing.

The commercialisation and internationalisation movement in China

In 1978, China started a new policy called Reform and Open-up (Chen 2011, p. 54). This meant that China would reform the inner economic structure from a planned economic system to a market economic system and open up to the outside world. This may seem to allow commercialisation inside the borders and to start internationalisation outside the borders. The reforms are reflected through four amendments to the Constitution of the People's Republic of China (National

[11] Interview of Participant 2. The original conversation in Chinese was "我觉得最大的挑战其实是来自于对客户的培养。因为现在第一是市场竞争也比较激烈，第二是客户对于社会法律这一块不是很了解，所以我们要先给他建立出第一是跟我们沟通，跟我们不要藏着掖着的这种交流习惯。其次对于国内的客户，他们按时支付律师费也是一个比较大的问题。第三就是在律师服务和律师费的平衡把握上，你怎么样第一要让客户觉得你的服务物有所值；第二要让他付律师费是不是心甘情愿。我觉得这个是挺难的事情，这都需要花很大的精力去做培养的。"

People's Congress 1988, 1993, 1999, 2004). There are two basic changes shown by these amendments to the Chinese Constitution; one is that private ownership has been taken seriously; individuals are allowed to own a business that produced goods rather than only be permitted to own goods for their private consumption. Now, private businesses are encouraged to a certain level and state-owned companies have independent decision making rights about their operation rather than following the planned instructions from the government. The other change is that a market-led economy has replaced a monopoly planned economy. These changes have facilitated trading in China, using the logic expressed above, so that there are more profitable businesses, which results in a greater need for commercial legal services in society. Therefore, although as mentioned above there was not originally a separate legal system in China, because the need for law was mostly about sanctions (criminal law and administrative law), the need for private law and commercial law expands the scope of law in China, accordingly, it provides a space for a separate legal profession to exist in Chinese society. Consequently, it is foreseeable that the need for the legal profession will grow in alignment with the development of the Chinese economy.

Further, the Reform and Open-up policy also allows opening to the outside world. This started with attracting foreign capital in the southern part of the country, specifically a very small village close to Hong Kong. This village, Shenzhen, has now grown into a modern city. Therefore, even the internationalisation movement in China originated from the need to have commercial connections with the outside world (Kleinberg 1990, p. 1).

An increase in commercialisation inside China's own borders will generate an increase in the need for a legal services market supported by local commercial lawyers. Internationalisation outside those borders may give rise to a need for Chinese international lawyers, more specifically, as discussed above, ICP lawyers. It may be argued that because the policy involves *both* commercialisation and internationalism, in China, both have happened *simultaneously* from the 1980s, rather than in sequence, and thus the need for local commercial lawyers and ICP lawyers should grow at the same speed. However, the reality is that international commercial legal services are developing more quickly and urgently (and will

continue to do so in the foreseeable future) than domestic commercial services. To understand the reasons, the following sections will first explain the two main drivers for the internationalisation and commercialisation of legal services, namely clients' demand and profession-led.

Drivers of internationalisation and commercialisation of legal services

Lawyers will, of course, follow their clients (clients' demand). Consequently, as trade expands, diversifies and internationalises, there is a driver for lawyers to undertake more work, move into new areas of work and undertake international work. If a client begins to operate on an international level, the law firm is under pressure to follow the client or risk losing them to a firm which is able to provide legal services in other jurisdictions or globally. Therefore, the imperative to satisfy the needs of existing clients may provide the original motivation for lawyers to move from their home jurisdictions to provide international legal services. Client-led development explains the phenomenon that led some big international law firms to "[scale] back dramatically after foreign investment dropped off in the wake of the global financial crisis" (Lin 2015, p. 1). Therefore, it is obvious that such client-led development depends on the growth of the economy. Nonetheless, this can work either by following the clients out to another jurisdiction (outbound) or by attracting foreign clients who want to invest in the home country (inbound). However, the latter approach may need further explanation to distinguish it from profession-led development (which will be discussed below). This latter approach to client-led development still relates to inbound transactions because, the lawyers do not go out of their home jurisdiction to actively attract clients (e.g. by setting up a new office in a host jurisdiction or even a representative office or by routinely advertising in another jurisdiction). Such a view was shared by a Chinese lawyer in the data collected for this thesis who actually thought it is not really feasible for lawyers to expand their business abroad without existing clients' demand:

> "… because previously those European law firms and American law firms that came to China were based on the movement of European and American capital. Nowadays, [we should follow] Chinese capital, as the background that Chinese capital and

> Chinese clients are moving to foreign markets, you move with the clients, in such sense, there will be a legal service market that exists [for you]. If you go abroad to expand a local [legal services] business in a [foreign market], I personally think it is really hard."[12]

In fact, given the current dominance of the New York[13] and London stock exchanges, it is likely that Chinese firms wishing to attract substantial international capital investment may seek a listing on one or both of those exchanges in order to access that capital more easily. Traditionally, Hong Kong, was the most important financial centre at the international level in China. However, its position is recently challenged by another Chinese city, Shang Hai, in the Mainland arena[14]. However, both are currently operating on a much smaller scale than the New York and London Stock Exchanges, which continue to dominate the international financial markets (Z/Yen Group and China Development Institute 2017, p. 4).

As well as wishing to keep their existing clients, it should not be surprising to learn that lawyers may also be interested in expanding their business by obtaining new clients when the situation allows. This may also work both inbound and outbound for new clients. They may do this by actively seeking to attract foreign clients to their existing offices for local legal services in the lawyer's home jurisdiction (inbound).[15] They may also try to offer home country clients legal services in foreign countries (outbound). In order to do this, they may establish new offices in other countries or establish referral arrangements with firms in those other

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[12] Interview of Participant 1. The original conversation in Chinese was "……，因为当初欧美律所来中国发展主要是依托欧美资本来中国发展。现在的话投资中国资本，背景情况是中国资本、中国客户去到那边，那你跟着你的客户走，那么才有法律服务的市场在。不然的话你纯去开拓当地的业务，我个人感觉比较困难吧。"

[13] There are 90 Chinese companies listed in NYSE and NASDAQ, the list is available at http://topforeignstocks.com/foreign-adrs-list/the-full-list-of-chinese-adrs/.

[14] The Mayor of Shang Hai, Xiong Yang, announced that, by the time of 2020, Shang Hai will be basically completed as an international financial centre according to the international status of RMB and economic strength of China. The full statement was in Chinese available at http://zhuanti.cebnet.com.cn/20150626/101203527.html.

[15] Open a representative office in the foreign jurisdiction.

countries. For example, some Anglo-American firms who have been involved in mergers and acquisitions with Chinese firms hope the Chinese partners "will soon send work throughout the network as Chinese companies begin expanding and investing overseas in ever greater numbers" (Lin 2015, p. 1).

In reality, client-led and professional-led drivers are not mutually exclusive and may also operate in sequence. For example, although the initial motivation for international law firms to expand their services into foreign markets may be to serve the needs of their home country clients, once they have entered the foreign countries, they may then seek to expand their service to clients from the foreign country (Boussebaa and Faulconbridge 2016, p. 106). There is evidence that this happens in China, at least, as shown in the following quotation of a Chinese lawyer:

> "… Because Anglo-American law firms are simple [with an established global structure that can make the process simple], you don't need [a name of a Chinese law firm], one law firm [Anglo-American law firm] can solve all the issues, even Chinese domestic [legal services], we can provide them… "[16]

The implications of the way in which international legal services are organised within and between law firms is significant, for the purposes of this thesis, to the question of collaboration between lawyers, which is discussed in Chapter 8.

However, saying that there are changes to China's economy that provide this space for the development of the legal profession in China is far from saying that a mature legal profession already exists. What distinguishes a legal profession, like any other profession, from other occupations, are core elements, for example, its qualification framework and a code of conduct which may be said to represent a social contract with the rest of society as an important aspect of professional ethics (Khurana and Nohria 2008, p. 75). This is intended to guarantee at least a minimum level of positive effort on behalf of the client. It is also intended to

[16]Interview of Participant 3. The original conversation in Chinese was "因为英美所很简单，不用（中国律所名称）了，一家可以帮你解决，中国国内的那个也无所谓，我就可以帮你解决。"

guarantee competence (Svensson 2006, p. 586) in the quality of work done. The ethical requirements are the basis of trust in the profession but are not discussed in detail here because they are not the focus of the thesis. Competence, particularly in the context of legal skills identified for ICP lawyers, is the focus of this thesis and will be discussed further in Chapter 4.

The standard of competence expected may vary from society to society, and may also advance over time. This may be as a result of competition both internally between individual professionals or individual law firms and externally between traditional law firms and new participants from industries outside legal services (e.g. services offered by ABS in England, and in China by accountancy firms as multinational services firms (Clayton 2016)). Accordingly, the content of legal education (for professional purposes) needs to be reshaped when the standard of competence for lawyers grows higher.

As vocational legal education may be designed to develop the competencies of a newly qualified lawyer;[17] what is then demanded by employers may also be influenced expressly or impliedly by the number of law graduates.[18] In China, the latter element may be the most influential. For example, in a 30 year period, the number of law graduates in China actually increased 100 times (Tian and Li 2009, pp. 331–338) and this will be discussed further in Chapter 3. Therefore, employers had a large number of graduates from whom they could select, enabling them in fact to select only the highest achieving graduates. However, as a result of this rapid expansion, not all graduates are of equal quality. There has been a large increase in numbers attending university, and this may have had an adverse effect on staff: student ratios and the quality of staff available to teach the students to an

[17] This is perhaps only a theoretical assumption, because in many countries, legal education and regulation for the profession is authorised by separate institutions or departments which may not agree. For example, in mainland China, legal education is mainly authorised by the Educational Ministry which has nothing to do with the All Lawyers Association (the regulator of the lawyers) and the qualification standards are set by the Justice Ministry. The Justice Ministry issues the certificate that students have passed the NJE. The lawyers' regulator is responsible, under the Ministry, for CPD, issuing licences to become a trainee and issuing qualified lawyer licences.

[18] Express change may involve a change in the qualification regulations which is designed to limit the number of lawyers. Implied change may occur when the number of jobs overall is less than the number of graduates so that firms can afford to select the most desirable candidates (e.g. a trainee lawyer in China). Implied change may also occur if individual firms are not offering as many opportunities as there are students who wish to work for those particular firms.

acceptable standard. It may also have had an effect on the aim of teaching in the law schools, as the new law schools may be less clear about whether they are preparing students for a professional or an academic career. In terms of careers, this thesis argues that the growth in opportunities will be in the profession, rather than the academy. Consequently, a way in which students can distinguish themselves in a competitive professional job market where many appear to have the same academic credentials, is by developing key legal skills before they enter the profession. Unfortunately, because the reform of the legal system in China is not yet complete (The Supreme People's Court of the People's Republic of China 2015) the role of the legal profession in Chinese society is not yet certain. In such circumstances it is too early to predict in detail what kind of skills should be learned in law schools for *local* legal services.

According to a document from relevant departments of the Chinese central government, Chinese society is in need of two kinds of practice-ready law graduates, one is intending international lawyers especially ICP lawyers and the other is intending lawyers who may work in rural areas (Ministry of Education of the People's Republic of China and Central Committee of Political and Legislative Affairs 2011). At the beginning of the document, it also emphasises that the urgent needs are practice-ready legal talent rather than legal academics. This document can be considered as an official response to the problems that exist in Chinese legal education (discussed in Chapter 3) and an acknowledgement of the importance of vocational legal education especially to address the urgent need for more ICP lawyers.

Although the document seeks to encourage universities to address the problem of insufficient lawyers in rural areas, this cannot be solved by the legal education institutions alone. In order to solve the problem, it is necessary to address the wider human resources issues that currently constrain the ability to attract and retain legal talents in the rural areas. Not only that, cultivating local practice-ready legal talent is at present, beyond the control of legal education institutions because the role of the legal profession in China is, as described above, still in an emerging stage and far from mature at the moment. The main obstacles are the lack of demand for legal services traditionally, and the ambiguity of the separate roles of

judges, prosecutors and lawyers. Without an acceptable concept of an independent role for lawyers in Chinese society, legal education institutions may never satisfy the needs of society.

In contrast, with rapid economic development, the need for legal support for international transactions is increasing steadily. Moreover, such legal support is not based on a single jurisdiction but an international market, therefore, Chinese ICP lawyers, as new players, are important. They imitate and learn from the leading law firms and lawyers which are Anglo-American law firms and lawyers (discussed in Chapter 7). They may do this because of the lack of local models, which is a result, to a large extent, of the lack of a tradition in legal services in China. This is an important factor and is discussed in detail in the next section. It is ironic, therefore, that it may be easier to determine a practice-ready curriculum for Chinese ICP lawyers, than for Chinese local lawyers.

International commercial services are more important for the professional group than other legal sectors

In China, there is, however, an additional reason for lawyers to wish to move into international work, beyond the traditional restraints of the domestic legal services market. As Chinese culture is traditionally wary of litigation (Ge 1996, p. 123), the local legal market remains small-scale. Moreover, because of the unique experience of economic development in China, where small businesses were established without clear allocation of ownership, businessmen found that they must use different ways to control their risks rather than rely on legal protection that might be too expensive to them (Ling 2015, p. 475). Consequently, they have little need or incentive to use lawyers, and the local legal services market remains small. These characteristics of the local Chinese business sector, therefore, do not provide much scope for an individual lawyer or firm to expand their practice. Although the overall economic and business infrastructure of the country is changing (Ling 2015, p. 481), it is not necessarily feasible or desirable for entrepreneurial lawyers to wait for such changes to reach maturity. Instead, it may be quicker, and simpler, for them to move outside the Chinese context, to the international market.

There is a growing appetite for Chinese legal professions to enter into the international commercial legal services market with the growth of inbound and outbound commercial transactions[19] in and with China (UK Trade & Investment and China-Britain Business Council 2011). Inbound cases are the cases where a foreign client or investor comes into the home jurisdiction of the lawyer, so that the key features of the transaction will be mainly governed by the home jurisdiction. In outbound cases, *per contra*, the client and lawyer are outside the jurisdiction, seeking legal support from the host jurisdiction. However, this does not mean Chinese lawyers share the same views about who should be their clients. For example, in the interviews with Chinese ICP lawyers carried out for this thesis, one of them said:

> "… Generally speaking, we do the outbound transactions mainly for the Chinese clients, Chinese market is big enough. Actually, there are still a large proportion of [international commercial legal services], especially outbound acquisition and investment for those big central government owned enterprises, are provided by foreign law firms, especially Anglo-American law firms, I should say normally Anglo-American law firms…"[20]

However, another lawyer was much more ambitious:

> "In 2009, in Bristol and Birmingham, I gave three presentations, we co-operate with local law firms and business committees, they invited some British businessmen, who were interested in Chinese investment and having transactions with China. I gave presentations, mainly about the legal environment of finding investment in China, the result was very good… this year…in Springfield, US, … but we are competitive with foreign

[19] The phrase 'Inbound' commercial transaction as used in this thesis occurs when foreign individuals or entities come to the jurisdiction where the lawyers work as local lawyers and 'outbound' is vice versa.

[20] Interview of Participant 3. The original conversation in Chinese was "……通常来说我们做这些走出去的项目，主要还是为中国的客户服务。中国市场已经足够大了，现在其实在中国还有相当大一部分的比例，特别是大的央企在境外的收购和投资，这些项目是委托外国律师事务所来做的，特别是英美所，应该说基本上是英美所，是委托他们来做的……"

> lawyers, …, those foreign clients can find us directly, we can handle the whole process, if our legal English is good enough, if our intercultural communication capability is strong enough, then we don't need to share the fee with foreign lawyers…"[21]

Consequently, there is a dilemma for China because it is still not at the stage where it may be claimed that Chinese lawyers have a mature role in the local society, but there is an urgent need to support Chinese international investment outside China. Therefore, it is the time for Chinese legal educators to think seriously about how to train Chinese ICP lawyers.

Moreover, although lawyers do have opportunities to expand their business abroad, they are selective in selecting the approaches to do so. Conventionally, lawyers follow their clients' needs when they decide to open offices abroad (Maister 2006, p. 1) rather than trying to conquer the world on their own. The impetus for and process of the expansion shapes international legal services practice. Therefore, the following section will discuss the drivers from both demand and supply sides to help to provide a background for discussion of the skills that individual lawyers will need to develop to work effectively in this context in the future.

The benefits of economic development

As discussed above, the legal services market shows a disposition towards internationalisation and commercialisation. From the perspective of economic development, such movement is unavoidable. Engel's law[22] explains that the higher the standard of living, the smaller the proportion of expenditure on basic needs, although this does not mean that the absolute expenditure on basic needs

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[21] Interview of Participant 4 "……2009 年，在英国的 Bristol 和 Birmingham，做过三场讲座，是跟当地律师事务所和商会合作，他们组织一些英国商人，对中国投资和贸易感兴趣的，来请我讲座，主要讲 legal environment of finding investment in China，其实这个效果就非常好……今年……Springfield，美国密苏里州的 Springfield 的商会，也做了个小的 presentation，那个非常小，只有半个小时不到…但我们做的是和外国律师竞争，你们这些外国客户可以直接找中国律师，我们就全部给你搞定了，如果我们的法律英语水平足够高，如果我们跨文化交流的能力非常强的话，就不需要外国律师分一杯羹了……"

[22] Engel's law states the decreasing functional relationship between the households' income and expenditure proportion on food. The Engel coefficient is used to measure the living standard of a certain group, when the proportion of income spent on food takes account less from the total, the higher the standard of living becomes.

will shrink (Chai and Moneta 2012, pp. 654–655). As a result, the focus of expenditure shifts from basic needs to higher-level needs and this reflects the growing wealth of a society. Engel's law has been supported by various researchers over time and across countries (Houthakker 1957, Seale and Regmi 2006, Kaus 2013), as a theory that supports our understanding of households collectively in a society, rather than individual households (Kaus 2013). It may be argued that Engel's law can also be used to understand the development and growth of the legal services market as individuals, businesses and government must decide how to spend their money and on what kind of legal services.

According to Mayson (2013, p. 2), legal services that focus upon protecting the public interest may be regarded as an aspect of 'basic needs'. On the other hand, legal services that focus on supporting the commercial arena can be seen as going beyond basic needs, and are thus an aspect of 'higher-level needs'. Therefore, as societies develop and prosper, there will be an increase in spending on higher-level legal services, such as international and commercial legal services. It is argued that at some point in time, the speed of such increase will exceed any growth in basic legal needs, to the extent that the international and commercial legal services market will become dominant. An example of this is the development of the global value chain, promoted by the World Bank as a way in which developing economies can expand (The World Bank 2015a). Therefore, such a movement is unavoidable and should not be considered an abandonment of lawyers' role in relation to the public interest in the light of Engel's law.

Developments in legal practice shaping the legal skills needed, including technological advances

This thesis is about skills. Developments in legal practice influence the skills that are needed.

First of all, technological developments have already changed the ways in which lawyers communicate, which in turn has led to a changing emphasis in respect of the skills that lawyers may need for legal practice (Russell 2014, pp. 230–232). For example, the development of technology now allows people to share

information with each other easily and simultaneously over long distances, but the methods of communication used to achieve this have moved from face-to-face to voice call and video call. When communications are largely face-to-face, people have a more obvious need to consider etiquette and the way in which people on the other side behave, including non-verbal communication. When this work is done through technology, such as talking to a client on the phone or communicating through emails, many details such as body language are either lost entirely or else appear in different ways. Therefore, the extent to which an individual needs certain skills, such as non-verbal communication skills, may diminish, or else those skills will need to be refined in order to function effectively in the new, technology-rich environment. However, the need for other skills may become correspondingly more important, as the individual becomes necessarily more reliant on them. For example, modern methods of communication may increase the requirement for strong oral skills, as well as specific aspects of interpreting those aspects of body language that remain visible, such as facial expression. As a key skill, communication is discussed below in Chapter 9.

Where, as described above in the discussion of internationalisation, there are many communities or tribes, it will be important for ICP lawyers to have collaboration and communication skills which will be discussed further later and Chapter 8 and 9. In addition, as it is impossible for the lawyers to know everything about every community, the skills of collaboration will grow more significant than others. Finally, even in those scenarios suggesting that states and local authorities will regain their predominant position, so that those skills may not be as important as in other scenarios, lawyers still need to communicate with clients and collaborate with other professions at a local level.

Furthermore, advances in technology may also transform the environment in which lawyers work. For example, technology enables lawyers to work collaboratively with colleagues in other countries and this may facilitate changes in the structure of law firms to become bigger multinational organisations or smaller loose groupings of specialists, in both cases collaborating through technology across national borders. Therefore, lawyers may need a different skillset or be able to adapt their skillset to accommodate the unique environment

and varying needs of different types of law firms. The question of collaboration is discussed further below in Chapter 8.

A strong skillset is not just relevant to the individual, but also impacts upon the development plans of the organisation. Even though technological advances provide a solid basis for lawyers to expand their business abroad, there are still other factors which may limit their ambitions. As one of the major sectors of trade in services (World Trade Organization 2015), legal services have something in common with all services trade, namely that "bilateral trust and contract enforcement, networks, labour market regulations and variables denoting technology of communication have a higher impact on services trade than on goods trade" (Lennon 2009, p. i). Therefore, while the development of technology can positively support the business, for example, in relation to the ease and speed of communication, at present it has little direct impact on such matters as trust and contract enforcement, labour market regulations and networks, where human engagement remains important. In a cross-border situation, it is hard for a lawyer who does not speak the local language and understands little of the local culture to win the trust of the local clients (communicating with foreign clients). This is because winning such bilateral trust is a complex matter which not only takes time and effort, but is determined by many other things, including the collaborative networks of the lawyer and the client. The importance of being able to establish trust in collaboration through communication not only with other lawyers but also with clients, is demonstrated in the data collected for this thesis (see Chapter 8). For example, one of the Chinese interview participants said:

> "…Clients will not come to me from nothing, normally based on previous experience. Sometimes, trust is not something I can win by a single activity. It emerges through an accumulating process. [The defining factors] include the individual lawyer, the brand of the law firm, your specialisation, not something I can get when and where I want it…"[23]

[23] Interview of Participant 1. The original conversation in Chinese was "……客户不是说一下子从天上掉下来的，之前有很大的基础在。有时候信任不是说我想要专门去建立信任，都是要经过一个积累才能建立信任的。包括律师个人，包括律所的品牌，包括你的业务，不是说我想建立信任就能建立信任的 ……".

A particular challenge for lawyers in working across borders is that, unlike many other professional services industries, lawyers not only need to be qualified to practise legally in their own jurisdiction (labour market regulation), but achieving those qualifications is normally a laborious process. As there is a lack of general recognition of legal qualifications to practise across different jurisdictions (Jones 2013, pp. 51, 66) for the foreseeable future, lawyers will remain qualified within specific jurisdictions rather than being able to obtain a transnational, global qualification that enables them to practise anywhere. In particular, national qualification frameworks such as the Chinese system may offer little or nothing in the way of international legal practice.

However, as will be argued in this thesis, international commercial practice actually has very definite and distinct requirements that cannot be met by a qualification framework that focuses exclusively on the requirements of domestic practice. Although some qualification frameworks may permit a degree of personalisation, for example via the selection of optional modules, a newly qualified lawyer working in international commercial law will have broadly the same knowledge and skills as a new qualified lawyer working on purely domestic matters. This is supported by Maurizio Maiano, an Italian lawyer in one of the McGeorge Law School interviews that supplement the data collected for this thesis:

> "…it doesn't exist, 'international lawyer', first of all. So, it is bold enough to start and this is my view at least that unlike other professions, lawyer is really tied to a certain location, jurisdiction, definitely it's a jurisdiction in the sense and that legal competence is fundamental…"[24]

Therefore, in order to overcome all the obstacles mentioned above: communicating over distance through technology; collaborating with colleagues on an international basis; building trust relationships with clients on an

[24] Interview conducted by McGeorge Law School.

international basis,[25] lawyers will need additional knowledge and skills apart from what they have learned for a single jurisdiction. For example, they will need to understand the relevant law at both a local and international level and conflicts of laws (the detail will be discussed in Chapter 7). Further, because clients and colleagues may come from various countries, lawyers may need a skillset that equips them to collaborate effectively with people across cultures and may also need high level foreign language skills to facilitate communication. However, the skills they need and their relative importance may vary from task to task.

Therefore, there are still some substantial obstacles that may impede lawyers in pursuing plans for international expansion, notwithstanding solid support from technological advances.

Conclusion

This chapter has argued that technology will not, in the short term, replace human lawyers in the key areas of legal skills such as collaboration and creativity. The positive news to human lawyers is that there will be new areas in which they can work. This is not simply a reference to delivery of legal services through technology and Susskind's "new jobs", but also to new areas of law to add to those that have already emerged such as the law of trading on the internet and cybercrime. This includes, as described above, the question of liability for the activity of AI systems ('robot lawyers') themselves. Moreover, the most advanced 'continuous active learning' model indicates a possibility that AI will keep on learning from human experts to improve its accuracy and capability of operating information. Therefore, human lawyers will work with AI rather than leave the area entirely.

[25] All of the assumptions used above are based on the fact that the influencing factors will not change substantially themselves. However, over time, the cultures of different countries may merge with each other; people may build networks largely via the internet and labour market regulations may be revised. If those basic factors change, the influence of such obstacles will grow weaker and weaker until they vanish.

Significantly for this thesis, however, the advanced technology changes the environment of legal practice and brings the possibility of internationalisation or globalisation of legal practice and legal education. The chapter has argued that internationalisation in the provision of legal services has a number of drivers but is inevitable, particularly in commercial work. Basically, there are two perspectives for commercial drivers towards internationalisation, one is the demand of clients and the other is the needs of lawyers to develop their business. This leads to specific challenges for ICP lawyers in collaborating through technology and internationally and in building trust with and communicating with clients on an international basis. In the specific context of Chinese lawyers, it has concluded that international legal practice will be one of the legal sectors that leads development of the Chinese legal area linked to rapid economic development in China and the limitations of development of the local legal culture and structural reform.

In order to investigate how these newly emphasised skills might be supported in the educational context, however, it is first necessary to consider the history and current state of legal education in China. This is covered in the chapter which follows.

Chapter 3: Legal Education in China

Introduction

As has been discussed in the preceding chapter, the internationalisation of legal practice is most likely to become one of the new trends for future legal practice in some jurisdictions. Considering the recent economic development in China, ICP lawyers are increasingly needed in China. However, legal education for international legal practice is still underdeveloped in terms of what is needed to drive or support this oncoming new trend.

China has four jurisdictions: the mainland, Hong Kong, Macao and Taiwan. This project is designed to address the problems that exist in mainland China and focuses on the reform needs of legal education in it. However, there is a question whether mainland China, therefore, could simply import the legal education system operating in other jurisdictions both within or beyond China and thus resolve the problems in its current system and position mainland Chinese lawyers to thrive in the international commercial legal service market? To answer this question necessitates a comparative view of different legal vocational education programmes across jurisdictions. However, first of all, it is important for the reader to understand the nature of vocational legal education and how such programmes operate in the mainland.

The division of academic and vocational legal education

From a global perspective, both within and beyond the Chinese context, there is a continuous questioning about the purpose of legal education: should its focus be theoretical, should it be vocational or should it try to be both (Smits 2013, Flood 2015)? Generally speaking, many law schools are under pressure to move away from a theoretical study of law towards the direction of legal practice (vocational

legal education) to produce practice-ready law graduates (Stuart and Vance 2013) because "… there has nearly always been pressure, varying in intensity at different periods, to make university education more obviously useful and vocational" (Twining 1997, p. 65).

Twining uses two examples to explain the dichotomy of the purposes of legal education; first, Pericles, who received a liberal education to enable him to become a "lawgiver, the enlightened policy-maker, the wise judge" (Twining 1997, p. 64), and second, a plumber, who is a "competent technician" (Twining 1997, p. 64) armed with specific knowledge of the law and certain skills. Although it is not actually Twining's stated purpose to describe any lawyer as being uniquely academic or uniquely a practitioner, he nonetheless argues that university law schools face the dilemma of trying to reconcile the conflicting pressures of being both practically useful and also embracing the spirit of "tak[e][ing] a pride in being useless" (Twining 1997, p. 65). However, considering the situation in the Chinese context, as explained in the next section, there is an urgent call for vocational legal education for ICP lawyers rather than for an academic one.

Legal education system in the mainland

The current Chinese legal education system ranges from technical schools to PhD education level. It also covers full time, part time, continuing education and remote education. This research focuses on practising lawyers, and according to Article 5 of Chinese Lawyers' Act (Standing Committee of the National People's Congress 2012) and Article 15 of Measures for the Implementation of the National Judicial Examination (2008 Revision)(Ministry of Justice of People's Republic of China 2008), a qualified lawyer must at least hold a bachelor degree (exceptions are allowed in certain areas). The PhD is a research degree with a focus principally on a scholarly approach to law; it is not designed to support entry into legal practice. Therefore, for the purposes of this research, the legal education system to be explored is that which encompasses courses delivered at bachelor and masters level in universities and colleges, but not PhDs.

At the bachelor level in China, law students should study 14 core courses[26] in law for four years; all these courses are knowledge-based courses (Higher Education Department of Ministry of Education of PRC 2012, p. 67). At masters level, two programmes are available: Traditional Master in Law (LLM) which is an academic study of law (in most institutions nowadays for two years, but some institutions retain the traditional course duration of three years) and a practice-oriented Juris Master (JM) introduced in 1996 by the Academic Degree Committee of the State Council to cultivate applied legal talent (Huo 2008, p. 24).

It is the JM which is intended to function as a vocational course, similar to the Postgraduate Certificate in Laws (PCLL) in Hong Kong or Legal Practice Course (LPC) or Bar Professional Training Course (BPTC) in England and Wales. In such an educational system, it is unlikely that law students at the bachelor level will develop their legal skills from their study of the substantive courses in Chinese universities. However, there are still three ways (moot court, professional placement and legal clinic) for them to get a taste of skills learning during their bachelor degree, if they have the opportunity. In reality, few law schools include a moot court as a core course or even as an optional course (Yu and Gao 2008, pp. 88–89). Moreover, even where it is included, moot court activity, in the context of Chinese legal education, is more likely to take the form of a showcase or mooting competition, designed for the entertainment of an audience rather than as a learning experience for the students taking part. For example, some moot court events have the lines for each role fully scripted and the verdict or judgments have also been written down in advance (Cheng 2008, p. 2). The involvement of the students, therefore, is confined to performing the roles as written, and any learning that derives from their participation will be extremely limited. A more widely used approach is that of professional placement,[27] which is compulsory at

[26] The 14 core courses are jurisprudence, constitution, administration law and administration litigation, criminal law, criminal litigation, civil law, intellectual property law, commercial law, civil litigation, international law, international private law, international economic law, environmental and resources law, labour law and social security law.

[27] Placement may mean quite different things in different contexts. Here, placement is a compulsory stage at the end of the bachelor course. Students are supervised by supervisors in the workplace. Placement can be arranged by the universities or students can arrange it themselves with the permission of the universities. By the end of the placement, the supervisors should give a

the end of the bachelor programme and lasts from one to three months. However, because students are quite busy with finding jobs, writing their final thesis, or applying for a place on a masters' degree course in that period, it is questionable whether they have sufficient time to devote to the placement to benefit fully from it. Moreover, the practice departments offering that placement do not usually trust the students' capability and do not have time to train them properly. They therefore tend to allocate irrelevant or meaningless tasks to the placement students, thus meaning that the placement is not the valuable learning experience that the student might have hoped for (Yang 2016, p. 106).

Another place where students may have an opportunity to taste skills training is in a legal clinic, which was introduced to China with the support of the American Ford Foundation. However, places in the legal clinic are limited and so this opportunity cannot be offered to most of the students. Even in the leading law schools, such as Peking University, the legal clinic can only cover 20% of the student population (Su 2008, p. 31). Therefore, there remains little opportunity for the development of skills during the bachelor degree. Consequently, the JM. is not only the prescribed vocational legal educational programme, but also the only stage at present where all students have the opportunity, time and energy to focus on skills.

The JM programme

The JM is supposed to produce practice-ready legal graduates by including skills training and it does indeed contain some skills elements. Unfortunately, however, it has not served the purpose well (Zhu 2008, Lin and Li 2010, Long 2014). One piece of evidence for this is that, instead of becoming the mainstream course for legal education as expected (Huo 2008), in fact, graduates of the JM are suffering discrimination in the employment market (Su 2008, p. 31). More recently, an investigation was conducted in Beijing on nine institutions offering JM

general comment and mark on the placement for the students they have supervised and such mark will appear on the transcript of the students. The placement can be a paid or unpaid process.

programmes (Xu and Tian 2014) which shows that the JM programme has not focused on professional needs as expected.

The contents of the course (see Table 4 and discussion below) are poorly designed, the human resources and facilities are not allocated appropriately, the placement stage is not managed effectively, and there is discrimination against LLB graduates[28] at the administration level. To understand the problems with the JM in its current form, there are two key issues that need to be explored. One issue is the competitive position of the JM in relation to the traditional LLM and the other issue is that there are problems in the recruitment process, curriculum design and pedagogy of the JM. This is particularly significant as some LLM places are government-funded, but the JM is entirely self-funded by students.

The JM competes with the LLM

As discussed above, the traditional LLM serves different purposes from the JM Therefore we would expect it to attract students with different career expectations. Consequently, LLM graduates may be expected to pursue an academic career route, whereas JM graduates may be expected to go into legal practice.

However, in reality, the National Judicial Exam (NJE) is the entrance exam for qualifying lawyers, judges, and prosecutors, and it is open to all people who hold a bachelor degree in any subject.[29] Therefore, although only the JM has as its focus the preparation of students for legal practice, this does not prevent LLM graduates from entering the legal profession because they are still entitled to attempt the NJE.

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[28] The basic reason for this may be that the JM did not recruit LLB students until 2009, therefore, L.LB graduates normally do not apply for the JM unless they think they are not going to have opportunities to obtain a place on the LLM. Further, many law schools have LLB graduates who failed to obtain a place on an LLM programme in their JM programme.

[29] This situation is expected to be reformed shortly in 2017. After the reform, non-law graduates at the bachelor level will be required to have an LLM or JM degree to be entitled to sit the NJE and the name of the exam will also change to include other legal practitioners such as arbitrators. However, even after the reform, the JM will not be a required course for qualification.

A search of the Ministry of Justice website does not disclose data around what percentage of NJE candidates undertook a JM compared with a traditional LLM. No specific data could be found on other relevant websites either e.g. the University of Peking Law School website. Moreover, as the exam is currently available to JM, LLM and even non-law graduates, it is not possible to take the headline exam candidate figures (438,000 in September 2016 (Xinhua 2016, p. 1)) and extrapolate from this how many students were drawn from the JM and how many from the LLM. It is not possible, therefore, to state precisely the scale of competition that might exist between the two. However, the exam is clearly available to all these students on an equal footing and therefore it may be assumed that a proportion of traditional LLM students may, therefore, choose to attempt it.

It is interesting to note that the pass rate for the NJE is around 7% each year, according to the Ministry of Justice. However, because it is not possible to find out whether JM students perform better or worse than other students in the examination, it is not possible to use the pass rate to measure the effectiveness of the JM. Further, some students take the examination before they start the JM.

Apart from the six-month JM placement and some skills training classes, information on university websites suggests there is not very much difference between the curricula of JM and LLM courses as both focus largely upon legal knowledge. Moreover, while a traditional LLM will focus upon a narrow area of legal knowledge, studied in depth, the number of legal knowledge courses on the JM appears to encourage breadth rather than depth. It is possible that future employers may prefer depth over breadth. Therefore, for a student choosing between the two, there may be little about the JM that makes it appear to be distinctive or beneficial. Other reasons why this focus upon legal knowledge may be problematic for the JM will be discussed below when comparing it with practice focused courses in other jurisdictions.

Therefore, it would be useful now to go on to make that comparison.

Comparison with the JD, LPC, BPTC and PCLL

From the perspective of the content of the JM, the problems that exist actually arise from the outset when the candidates are chosen and then persist through the delivery of the course. It is useful here to compare the JM with courses from other countries.

Entrance exam

Although the JM is named after the American JD, it is quite different from the JD and these changes begin at the application stage. An applicant for a JD who holds a non-law bachelor degree must take the Law School Admission Test (LSAT) which is a "standard measure of acquired reading and verbal reasoning skills that law schools can use as one of several factors in assessing applicants" (LSAC 2016, p. 1). However, for the JM, the applicants may be either law graduates with an LLB or non-law graduates from other subjects.[30]

There are two stages of exam for candidates to take before entering the JM. At the first stage, there is a general entrance exam for all JM candidates for any law school. The content of the exam is focused upon substantive law, with the addition of politics and a foreign language test. The candidates for the JM must take both a Basic legal knowledge exam (criminal law and civil law) and a Mixed legal knowledge exam (jurisprudence, constitutional law and legal history).

In the following stage, law schools interview some candidates and ultimately recruit students with the highest scores combined from the general exam and interviews.[31] Therefore, for the majority, the Chinese JM admission process expects students already to have the independent learning skills they need in order to learn law and in fact to have learned substantive law by some means before they enter the law school.[32] It is odd to test the candidates' understanding

[30] Between 2000-2009, the candidates for the JM had to be non-law graduates.

[31] There is an exception that for Peking University—Transnational Law School, the JM for law graduates is three years and four years for non-law graduates. This unique course will be discussed later in more detail.

[32] It is said that there are slight differences in the content of the exams between the law graduates and the non-law graduates. The difference is that for the non-law graduates the exam only tests rote knowledge of what the law says but law graduates are tested more on their legal analysis. It has not, however, been possible to find a formal reference which confirms this view.

of substantive law before their formal study of law, unless the intended course is mainly a self-study course.

Ironically, the JM students may really need a high quality of independent learning skills to succeed on the JM in any event, as regardless of whether or not it is a self-study course, it is poorly planned both in the knowledge and the practice elements (Lin and Li 2010). In terms of their purpose, both the US JD and the JM aim to produce practical talents rather than academic ones, although there are differences between the two legal systems. The US JD is for intending practising lawyers only but the JM is available not only to intending practising lawyers, but also to intending judges and prosecutors.

Besides the US JD and the JM, there are also programmes elsewhere that aim to train lawyers, for example, the LPC, BPTC, and the PCLL. Therefore, to understand the possible problems and potential of the JM, the following sections will compare the JM with these programmes.

For the LPC, applicants should have finished the academic stage which

> "is achieved by either a university degree in law or a university degree in a different subject and completing the Common Professional Examination (CPE) sometimes also referred to as the Graduate Diploma in Law (GDL)"
>
> (Solicitors Regulation Authority 2014, para. 4).

Individual providers have the ability to stipulate additional, specific entry requirements. For example, Nottingham Law School requires a 2.2 at the academic stage and an overall score of 6.5 in the IELTS test, when students are international (Nottingham Law School 2014). Similarly, for the BPTC, applicants

> "must have completed the academic requirements".[33] Typically this would entail gaining a minimum of a 2:2 in their qualifying

[33] A qualifying law degree (QLD); or a degree in any other subject, supplemented by the CPE; an approved GDL course.

> law degree, or a 2:2 in a non-law degree and a pass in the Graduate Diploma in Law and being fluent in English which means a minimum score of 7.5 for each section of the IELTS academic test; or a minimum score of 73 in each part of the Pearson Test of English (academic)… "[34]
>
> (Bar Standards Board 2016, para. 3)

In Hong Kong, a Standing Committee on Legal Education and Training was set up in 2005 to monitor the law schools, and it set the requirement for an IELTS test 7 as the minimum requirement for admission to any PCLL courses providers in Hong Kong (The Standing Committee on Legal Education and Training 2006, sec. A 5(b)iv). For applicants to the PCLL of Hong Kong University,[35] the minimum overall band score for the IELTS test has been 7 since academic year 2002-03 (Young 2005, p. 50). Practising law in Chinese did not actually attract the official attention of the committee until 2010 (The Standing Committee on Legal Education and Training 2010). Since then, there has been a focus on bilingualism in Hong Kong legal education.

Except for the JM, all the other four programmes require a certain level of English language skills because their language of instruction is English. English is also required at the first stage of the JM entrance test. However, it is not a substantial requirement although it is one of the compulsory courses, as the JM is taught in Chinese. However, there is one exception, Peking University, Transnational Law School (STL) uses the US LSAT for applicants for US JDs and requires interviews after the general exam. They also test English listening comprehension at the second stage as the course is taught bilingually. STL claims to be the only law school that combines a JM and an American JD together in the mainland area (Peking University 2015). Therefore, the STL admission process for this course is seeking to identify candidates who have a strong basic learning capability and established English language skills which will help them to learn law in both Chinese and English. As discussed in Chapter 9, English is the *lingua franca* for

[34] Individual providers may have higher or additional requirements.

[35] There are three law schools in Hong Kong authorised to offer qualifying law degrees and vocational courses: the Department of Law of the University of Hong Kong; the School of Law, City University of Hong Kong; and the Chinese University of Hong Kong (CUHK) Faculty of Law.

international commercial legal services. It seems that except for STL, most of the JM programmes provided in mainland China are not effective from the language perspective in terms of their ability to produce good quality intending ICP lawyers.

Curriculum content

Knowledge element

The three-year US JD covers all the law subjects, but is essentially knowledge based, albeit with some legal skills such as "legal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context" (American Bar Association 2016, p. 15). However, the JM is a three-year course for non-law graduates (three-year JM) and a two-year course for law graduates (two-year JM). According to *The Guidance for Juris Master Training* (Academic Degrees Committee of the State Council 2006) and Notice of the Guidance for Full Time Professional Master Education (Academic Degrees Committee of the State Council 2009), both three-year and two-year JMs contain two parts, knowledge learning and practice training.

For the three-year JM, part one is knowledge-based study which aims to deliver the basic knowledge of law that is taught at bachelor level to non-law graduates. There are three kinds of courses available in this part, compulsory, recommended elective, and self-decided elective courses. Compulsory (32 credits) and recommended elective courses (13 credits) (as listed in Table 4) are subjects listed by the Academic Degrees Committee and the self-decided elective courses (8 credits) are open to individual law schools to decide. In terms of the knowledge courses, there are only 10 compulsory courses, compared with the L.LB as discussed above, where there are 14 core law courses at bachelor level on the JM, commercial law, international economic law, international private law, and intellectual property law are not classed as core courses, but are instead only recommended elective courses (see Table 4).

For the two-year JM (Academic Degrees Committee of the State Council 2009), there are only compulsory courses (27 credits) and self-decided elective courses

(10 credits).[36] For the compulsory courses, although the subjects of law are nearly the same as for the three-year course (the only difference is administrative law for the two-year JM and administrative law and litigation for the three-year JM, see Table 4), the language used in describing the law subjects is slightly different. For the two-year JM, all the law subjects are described as theoretical fields of jurisprudence, which is the expression used in the traditional LLM (but each LLM normally focuses on one legal field only, for example, LLM in Civil Law). However, for the three-year JM, only the names of the law subjects are listed, just the same as for the LLB. Therefore, arguably, for the knowledge part of the course, the three-year JM aims to work as a supplement, or alternative to, the legal knowledge taught at bachelor level. However, for the two-year JM, because the students have already studied these subjects before, it aims to further their knowledge of those subjects, at a higher level.

Nonetheless, these inferences are not expressed in the two documents that set out the course requirements (Academic Degrees Committee of the State Council 2006, 2009), nor are the levels of such knowledge expressly articulated. Consequently, if one considers the fact that the students have already been tested on their knowledge of five law subjects (mentioned above) listed as compulsory courses in both the two-year and three-year JM, it is natural to question whether there are overlaps with the LLB and whether the J. students are re-learning what they should already know (five law subjects for three-year JM students and all compulsory subjects for the two-year JM). Additionally, professional ethics, which is compulsory for two-year JM students (it is listed in the practical part of the two-year JM, but because it is knowledge-based learning, therefore, discussed in this section), is only listed as a recommended elective for the three-year JM. Therefore, arguably, when space in the curriculum is limited, professional ethics is considered to be less important than the knowledge of 10 subjective law areas and the practical experience and skills elements listed as core courses.

In conclusion, from the perspective of the relationship between knowledge and skills, all five programmes have put knowledge learning first, either within the

[36] From the allocation of credits, it is obvious that law schools have more space to design their specific parts of the two-year JM than of the three-year JM in the knowledge section.

programme (JM, JD), or largely outside the programme (LPC, BPTC, PCLL). The problem for the JM is that it does not distinguish itself sufficiently from the LLB (in the two-year JM) in order to avoid largely repeating knowledge that LLB students should already have gained during their earlier studies.

Practical part

In Part two of the JM, both two-year and three-year JM students learn to draft legal documents (including contract drafting, company articles, indictments, defences, application for arbitrations, judgments, and verdict etc.) in the classroom and this course should be taught by judges, prosecutor, or lawyers respectively (Academic Degrees Committee of the State Council 2006, 2009). However, practitioners are likely to be employed only as part-time teachers so the staff who design and deliver the JM are otherwise broadly the same as those who have long taught the LLM i.e. they have an academic background in law, but not a practitioner background. They may not be able to design and deliver a practice based course effectively because they themselves do not have enough experience of legal practice.

The course includes moot court practice. This involves three kinds of moot courts: criminal, civil and administrative; and three roles are available: judges, prosecutors, and lawyers. Moot court practice is managed by a law teacher and supervised by judges, prosecutors, and lawyers. Students also negotiate and practise both in a moot court and legal practice departments as a professional placement.

For the three-year JM, the placement is two to three weeks learning in the workplace under the supervision of a legal professional, and for the two-year JM, it should last at least six months, with similar supervision (see Table 4). The placement may be paid, but normally it is unpaid. In order to become qualified attorneys, prosecutors or judges, JM graduates are also required to pass the NJE. As discussed above, people who hold only a bachelor degree are eligible to sit the exam. This examination tests politics and 14 law subjects via a range of

assessment styles, including multiple choice questions, short form questions and answers or other written responses such as case analysis.

After completing the examination and all other course requirements, graduates must also complete a one year internship. For lawyers, this will be in a law firm. It may be unpaid. There are no requirements for the breadth of experience or the learning achieved by the intern during the period.

Therefore, although the JM began as an imitation of the JD, to the extent that it focuses on creating practice-ready lawyers, the JM should be considered more similar to the LPC or BPTC, or the PCLL of Hong Kong, especially for candidates who already hold an L.LB. The features of the JM, the US JD, the LPC or BPTC of England and Wales and the PCLL of Hong Kong are shown in Table 4 below. All four programmes are practice-led courses. Although the JD is largely knowledge based and the LPC, BPTC and PCLL are skills based, the purpose of these four is ostensibly to generate practising lawyers, although the LPC, BPTC and PCLL are for candidates who already have law degrees. The JM is additionally complex at this point because its graduates may become judges or prosecutors as well as practising lawyers. Although the JM is supposed to prepare students for practice with practical legal skills, this purpose cannot be achieved through the current Chinese system of loosely planned placement and internships.

	JM (non-law graduates)	JM (law graduates)	US JD	LPC	BPTC	PCLL
Purpose	Profession	Profession	Profession	Profession	Profession	Profession(Law Society of Hong Kong 2007)
Direction	Knowledge + practical skills	Knowledge + practical skills	Knowledge based	Skills based	Skills based	Skills based
Level and the nature of applicants	Masters for non-law graduates	Masters for law graduates	Masters for non-law graduates	Broadly masters for law and non-law graduates	Masters for law and non-law graduates	Masters for law and non-law graduates
Compulsory to relevant legal qualification	No	No	Yes	Yes (exceptions apply)	Yes (exceptions apply)	Yes (exceptions apply)
Period	3 years (full time)	2 years (full time)	3 years (full time)	1 year (full time)	1 year (full time)	1 year (full time)
	General (not specific for attorney)	General (not specific for attorney)	General (for attorney)	General (for solicitor)	General (for barrister)	General (for both solicitor and barrister)
Knowledge subjects (where these are taught experientially they may involve skills)	Compulsory: 1. Jurisprudence 2. Chinese Legal History 3. Constitution 4. Civil Law 5. Criminal Law 6. Criminal Litigation 7. Civil Litigation 8. Administrative Law and Litigation 9. Economic Law 10. International Law Recommended elective course: 1. Foreign Legal History	Compulsory: 1. Jurisprudence 2. Chinese Legal History 3. Constitution 4. Civil Law 5. Criminal Law 6. Criminal Litigation 7. Civil law litigation 8. Administration law 9. Economic law 10. International law 11. Professional ethics	Substantive law and procedures	1. Professional Conduct and Regulation 2. Wills and Administration of Estates 3. Taxation 4. Business Law and Practice 5. Litigation 6. Property Law and Practice 7. Three vocational electives	1. Civil Litigation, Evidence and Remedies 2. Criminal Litigation, Evidence and Sentencing 3. Professional Ethics 4. Resolution of Disputes Out of Court	1. Property law practice 2. Wills and estate management 3. Criminal litigation practice (including advocacy) 4. Civil litigation practice (including advocacy) 5. Commercial and corporate law practice 6. Professional conduct (including e.g. client care and

	JM (non-law graduates)	JM (law graduates)	US JD	LPC	BPTC	PCLL
	2. Commercial Law 3. International Economic Law 4. International Private Law 5. Intellectual Property Law 6. Environment and Resources Law 7. Professional Ethics 8. Legal Methods					professional self-development) 7. Trust and office accounts and financial management 8. Client care 9. Revenue practice
Skills subjects	1. Legal drafting 2. Moot courts 3. Negotiation	1. Legal drafting 2. Moot court 3. Negotiation	1. Legal analysis and reasoning 2. Legal research 3. Problem-solving 4. written and oral communication in the legal context	1. Legal Research 2. Writing and drafting 3. Interviewing and advising 4. Advocacy	1 Advocacy 2 Opinion writing 3 Drafting 4 Conference skills	Advocacy
Placement included as part of the course	2-3 weeks in courts, Procuratorates, or law firms	At least 6 months in Courts, Procuratorates, Legal Aid Agencies, Notaries, or other judicial practical departments, or legal departments of the government, or legal departments of enterprises	No formal requirement other than at least six credit hours of experiential learning, which may be a (ABA Section of Legal Education and Admissions to the Bar 2015a).	The period of recognised training may sometimes overlap with the LPC, especially in a part-time LPC, but it is not normally included as part of the course.	The pupillage is not normally included as part of the course. Pro bono work may be used as an optional subject and court visits are expected.	The pupillage or training contract is not normally included as part of the course.

Table 4 The JM compared with the JD, BPTC, LPC and PCLL

In the LPC,[37] however, more skills are taught than on the JM:

> "…interviewing and advising, advocacy, research skills and writing and drafting…. So all of those different skills are examined, perhaps in different ways, but what we're looking for is, and why those skills are chosen, is to give them transferable skills as well as good legal skills for their first day in a solicitors' office. So for any job that they do, interviewing is almost essential part, a) they've got to be able to interview themselves first but also to give interviews; research, most of the jobs that they go into will involve some form of research and writing and drafting are absolutely essential skills for any position that they may undertake, whether it's legal or not. So that's why those are chosen…They look at the course and they look and see what skills should be taught and what a student who's done the LPC should be competent of doing when they first go into the solicitors' office having done the course. So those skills were chosen for us in inverted commas. But we would still choose those probably if we were given a free rein. So do other law schools choose the same ones? Yes, they do. Because they are dictated by the SRA that they have to teach those skills and they have to show there are competences in those skills that are being taught…"[38]

For international commercial legal practice, as described in Chapter 7, collaboration and creativity are core additional skills, in addition to the skills already taught by the LPC. Although the conventional list of LPC practice skills is as set out in Table 4 above, negotiation was originally part of the course, but has been removed from the LPC, such that the development of this skill now occurs in the training contract. There are two possible reasons for this change, one being that negotiation may be more important to senior lawyers rather than novice lawyers, and therefore, it is safe to defer it to a later stage. Alternatively, negotiation may be considered difficult to teach in the classroom where it is difficult to expose inexperienced students to the range of realistic simulations that would be necessary for them to become confident in this skill. This thesis accepts

[37] There might be changes in the coming future e.g. SRA Training for Tomorrow initiative. Similarly, Future Bar Training may involve changes to the BPTC.

[38] Interview of Participant 5.

that both of these reasons may be legitimate and therefore emphasises broader communication skills rather than specifically negotiation (Chapter 9).

The PCLL, LPC, and BPTC, therefore, represent vocational courses specifically designed to prepare students for legal practice, though there are obvious differences in the potential destination of those students (the PCLL being for both intending solicitors and barristers, the LPC for intending solicitors and the BPTC for intending barristers) and this necessarily produces variation in curriculum content and skills focus.

Although it is also intended to prepare students for legal practice, the JM does not emphasise skills in the same way and there may be historical reasons for this. Su (2008), the previous Dean of Peking University Law School argues that legal skills are not a high priority for Chinese practising lawyers who may ultimately employ graduates and that they are more concerned with whether a student has graduated from a highly regarded institution and has good academic credentials than whether they have developed key legal skills. There appears to be an assumption that a student with a strong academic record will be better placed than a weaker performing student to adapt to legal practice quickly and effectively, which presumably includes developing their skillset 'on the job'. Therefore, Su (2008, p. 33) argues that it is understandable that students may ignore or spend less time on the development of practical skills, however useful this might ultimately be, because it is not an effective investment of their time and energy when it is their academic credentials that are most likely to secure their future employment. According to Su (2008, p. 37), this is particularly the case given that some niche skills may only be valuable to a limited number of firms, so if students invest time and energy in the development of skills at all, it is likely to be in those that will be useful in all law firms. Moreover, students may not yet have secured a job with a particular law firm, or may still be considering entering, say, the judiciary rather than private practice, where a broader skillset may be more valuable. It is not difficult to understand this, because there is a very short history of practising lawyers in China. Therefore, the requirements for being a practising lawyer are still emerging. As one of the Chinese participants in the data collected for this project, who had been a judge, commented:

> "...this was not a prominent problem before, because the legal services provided by lawyers were relatively simple, they just did some litigation tasks. For drafting, the court had certain formats, [lawyers] just need to fill in the forms provided. Even if you are not a lawyer, courts would provide you with a form of claim form/indictment. The name of the plaintiff, the name of the defendant, what was the fact, what is your claim and why. Then that's it. Therefore, our vocational education did not play an important role. However, nowadays [many] Chinese lawyers are providing huge commercial legal services, then the problem appears. For a claim form/indictment, a law graduate may learn easily with some simple guidance: plaintiff, defendant, claim, because you have breached the contract. However, if I say there are some international sales of goods transactions, you need to draft an international contract, you may be confused, not knowing what is the first sentence and what is the second, this is because of a lack of vocational education"[39]

As indicated above, however, none of the vocational courses, including the JM, have a specific focus on skills for international practice. This, it is argued, may now be a priority for legal skills training in China.

Skills training is important for Chinese ICP lawyers

As discussed in the previous chapter, international commercial legal services will be one of the leading drivers that will shape the future for Chinese lawyers. In the current international legal service market, Anglo-American law firms are actually in the leading position, with the result that young lawyers without an Anglo-American legal education experience may find it difficult to obtain employment

[39] Interview of Participant 6, the original conversation was in Chinese "……过去这个问题不突出，因为过去律师的业务也相对比较单一，不就是去法院打官司吗，至于什么材料怎么写，法院有现成的，按格式填就完了。你不是律师，法院也有起诉书，你往后填吧，原告叫什么，被告叫什么，事实和理由写上就可以了。所以我们的职业化教育不突出。但是现在中国的律师都做比较大的商业教育，这个问题一下就出来了。你写一个起诉书，可能一个法学院毕业的学生简单指导几句按照这个模式就可以写个起诉书，原告是谁、被告是谁、要求什么、理由是你违约了。但是现在让你说我这儿有一个国际货物买卖的东西，你给我起草一个合同，你一下就迷失了，不知道这个合同头一句写什么，第二句写什么，这就是职业教育比较缺失。"

(Flood 2013, p. 1094). The route to becoming a qualified lawyer in the US varies from state to state, but most of the states require that students obtain a JD[40] and then pass the local bar exam (National Conference of Bar Examiners et al. 2016). In England and Wales, to become a solicitor, a typical student will obtain an LLB or GDL/CPE before undertaking the LPC. They will then need to complete a period of recognised training before they can qualify. To become a barrister, a student will typically obtain an LLB or GDL/CPE and then complete the BPTC and a pupillage in order to qualify.[41] As discussed above, in China, to qualify as a lawyer, an individual only needs to obtain a bachelor degree in any subject in order to be entitled to sit the NJE. Compared with the USA and England and Wales, therefore, at present it is not actually necessary in China to study Law on a formal basis in order to qualify as a lawyer, although some changes are proposed (Xinhua 2016). Therefore, compared with a lawyer who has qualified via the systems of either the USA or England and Wales, with their vocational elements, a Chinese lawyer may lack relevant legal skills training.

An individual student may attempt to address this problem for themselves by attending a law school in the USA or in England and Wales. However, apart from the expense and logistical issues around studying abroad, which may not be a viable option for many students, it appears that having a legal education background from Anglo-American law schools is insufficient by itself in any event to position those students who originally came from outside English-speaking and common law system countries to become competitive job seekers in the US legal services market (Silver 2012).

This is important because securing a job in the US legal services market may in turn enhance their chances of entering the wider international legal services market because US law firms are one of the key players in the international commercial legal services market. With the exception of some regulatory impediments mentioned by Silver (2012, pp. 2414–2432), simply securing a job in the US legal services market may do no more than create a cohort of students

[40] Some states accept US LLM graduates to sit the bar exam as well.

[41] These are only the main routes to qualifying in England through the formal education system. There are many alternatives to each stage.

from various non-US backgrounds who share common characteristics with each other, but are still not able to use Anglo-American law in the same way as local students or students from similar backgrounds to local students. This is probably a result of their different earlier legal educational experiences, notably in relation to skills. Compared with US law students, Chinese law students are good at knowledge memorisation, but they are weak in intellectual skills such as critical thinking and constructing persuasive arguments (Ryan et al. 2013, p. 307). As discussed above, there is a big gap in skills training in the Chinese legal education system. By contrast, as described above, English qualified lawyers have skills training in the vocational stage of their education.

If Chinese lawyers want to compete with Anglo-American lawyers in the international commercial legal market, therefore, they cannot look to study abroad as a convenient mechanism for equipping themselves to compete. Instead, it is necessary to reform the legal education system in China itself. Specifically, it should be reformed such that students will receive legal skills training somewhere in the Chinese legal education system. China cannot expect to rely on students pursuing study abroad to obtain their skills training. It is argued, therefore, that skills training should be added into the Chinese legal education system and as the JM is designed for cultivating practical talent, it is suggested that such skills training should be located in the JM programme in some universities.[42] However, some may argue that the most appropriate place for skills training is in the workplace, and this is discussed in the next section.

The place for legal skills training

There are two places in which an experiential learning model for intending ICP lawyers could be delivered, one is the workplace, the other is the classroom.

[42] The revised JM may not be suitable for all universities. The JM is a practice-led programme, therefore, for those who want to focus on pure academic careers, this is not a programme for them to be involved in. Further, because the JM is for practical needs, one practical truth is all the providers should be cost-effective. For all universities to have the same or a similar curriculum, may never be cost-effective.

Learning international commercial practice skills entirely in the workplace?

As Su (2008, p. 31) argues, at present, in China, it is not an effective choice for law schools to focus on specific skills, as skills training needs more teaching staff and equipment for meaningful facilitation. He further argues that it is also not an effective choice for law students because different law firms may need a different skills set and the students themselves may ultimately follow a different career path to private practice, such as becoming a judge or prosecutor (Su 2008, p. 33). Therefore, at present, skills are assumed to be learned in the workplace, either via a placement or in a permanent job. However, there are problems around the internship and the placement currently used with the JM which must raise questions about how far they really do support the development of skills. The two weeks (three-year JM) to six months (two-year JM) placement, when added to the one year internship, approaches a similar length to that of the period of recognised training in England and Wales which lasts two years. However, while the placement is organised and supported by the university, it is too short to help a learner in the context of international tasks, where the learner may need some time to settle down in the international environment rather than the local environment they have been used to. The internship provides more time, but is so loosely organised that it cannot be guaranteed to support development of the competences needed for international commercial practice.

It is also not possible to guarantee that placement students or interns can be placed in firms that undertake international commercial practice. Further, international commercial practice is such a new phenomenon in China that the expertise to mentor in the workplace is very limited. This is demonstrated by the four-year government initiative in place from 2013, called Leading Talent of Foreign-Related Lawyers. A revised JM course however, would be more able to draw on expertise, including expertise from specialists outside China.

Law firms as competitors in providing legal education

The idea that skills are best developed by 'doing the job' rather than by formal education is not universally accepted. During the course of this project the researcher came across a large law firm which provides legal training and formal courses at masters level and above in Spain to other lawyers. The course manager participated in one of the research interviews described in Chapter 6 and indicated that they are proposing to introduce courses at bachelor level as well. This, he said, began as a matter of goodwill on the part of one of their partners to pay back to society. However, if that is the sole basis on which law firms are likely to enter the legal field, it is unlikely that they will ever become competitors for the legal education institutions. A key reason for this will be that most of the lawyers are too busy to devote time rather than money to the education of future lawyers. To set up and then deliver a sophisticated legal education system for students outside the firm's staff or client base is, clearly, a very time consuming project and lawyers are known (Russell 2014, pp. 229–230) to work very long hours.

However, if such courses are provided to potential staff of the firm, a large law firm could nevertheless benefit. The courses can be tailored to the needs of the firm and used as a means of selecting the most appropriate graduates for recruitment. The course might operate as a 'long interview', allowing the firm to be in in a better situation to make the best choices in recruitment.

This law firm also provides legal training to external groups. This can be effective advertisement for the firm. For example, they provide legal training for foreign lawyers, which means that the lawyers who had training experience there would be likely to contact them if they need legal support in Spain if they do not have previous or other existing contacts in Spain. Finally, the law firm also benefits financially. This firm charged about £327 for each week of tuition fee on a particular course. As they do not need to invest in additional infrastructure, such as buildings, this is profitable for them.

However, a law firm does not need to take on all the responsibility for legal education. It could work in partnership with a legal education specialist instead.

Law firms as partners for law schools?

Although it seems large law firms could benefit from setting up a legal education system themselves, this is unlikely ever to become the mainstream. As the mobility of lawyers increases (Galanter and Henderson 2008, Chambliss 2010), considerable investment in training of new starters is less attractive if those new employees then leave. Another reason is, as mentioned above, that the pressure on the time of practising lawyers prevents them taking a very active role in delivering formal education.

However, there are examples of successful partnership between lawyers and law firms in delivering formal legal education. Clearly it is possible for a law firm to second some of its staff to teach on a course, judge competitions or act as a moot judge. For some practitioners, this may provide a welcome break from the stress of practice. However, in China, this may not be feasible, as law firms are in an early stage of development and may be more focused on developing their business than the sustainability of the legal profession in the long term. As with the JM, practitioners may only be able to work part-time and are therefore limited in what they contribute to the course. However, the Chinese government is planning to develop an exchange scheme for law school staff and practitioner but this is still at a very early stage its scope is very limited and the results are not yet known.

Another approach is for a law firm to work with an institution to create a course that it jointly delivered. Some large City law firms in the UK have arrangements for 'bespoke LPCs', for their own trainees. These courses use the firm's documents and may be partly taught or designed by the firm's staff (Faulconbridge 2011). There is no evidence so far that this approach is being tried, or considered, in China. It may, however, when future trends in higher education are considered, become a target towards which China can move.

The future of legal education

As discussed by Smits (2013, pp. 57–58), there are three main drivers that shape the law curriculum and teaching method in any given country. These three drivers

include the position of universities, the requirements of legal practice and the expectations that the society may have of the lawyers.

There are also three factors which will constrain the reality of what can be achieved. One is the admission criteria for law students, another is the capability of law schools as teaching institutions as a group and the third is the funding that is available for each individual law school to enable them to put in place the most advanced teaching facilities.

Growth in higher education in China

In China, these three factors have been principally affected by the extraordinary development of higher education institutions both in number and scale over the decades in China. Trow argues that there is a trend, at least in the USA, for entry to higher education to change from a privilege to a right, and became an obligation when higher education institutions began to offer places for about 15% to 50% of the age grade respectively (Trow 1973, p. 7).

This trend is also apparent in China, but more recently. In 1998, an economist known as "the father of enrolment enlargement of higher education" in China, Min Tang, wrote a letter to the central government suggesting double the enrolment scale of higher education to boost Chinese economic development (Zeng 2003, p. 81). He actually had chosen an excellent time to make this suggestion and because of that, his suggestion finally led to an over-enlargement which continued for 13 years. When the enlargement took place in 1999, the Education Ministry planned to double the figure of current students in higher education in 11 years to 2010 and the enrolment rate of the age grade was raised to almost 15% (Ministry of Education of the People's Republic of China 1998, para. 4).

However, the truth is that by 2001, the proportion of bachelor students in all disciplines had increased by 105.2% and the enrolment rate had grown to 13. 3% of the age group. Moreover, there were 67 new private universities and more than 100 state universities have been set up or upgraded from colleges or polytechnic schools (Shang Hai Research Center for Education and Science Development 2002, pp. 6, 8). Such artificial prosperity disguised the potential risk that the source of

students would become less and less in the future because of the lower and lower birth rate resulting from the One-Child policy introduced in the 1980s. At the beginning of the 21st century, there were already some empty schools in the rural areas (Zhu and Zhang 2005, p. 9).

As far as law degrees were concerned, there was an artificial demand encouraged by the prediction of an increasing demand for lawyers and a belief that being a lawyer was a decent job in the 21st century. Many top students wanted to enter a law school. Therefore, many universities expanded the number of law students they enrolled and many universities that had not previously offered law degrees now set up new law schools as well.

However, the reality that it was not easy to find a job shattered some of these dreams. According to the latest figures, graduates of Chinese law schools in 2015 had the lowest employment rate (87.9%) of all graduates (Mycos Institue 2016, p. 16) and such a challenging situation is not a one off event; the available data indicates that the problem in underemployment of law school graduates started as far back as 2002 and the discipline has had the lowest rate of graduate employment of all disciplines for which data is published each year since 2005 (Zhang 2008, p. 209). Moreover, 32% of the law graduates who had managed to secure graduate level jobs were employed in non-legal work (Mycos Institue 2016, pp. 50–52) In terms of the relationship between the subject studied at university and how far this is then used in the workplace, this places law below other disciplines.

One of the consequences of this situation is that Chinese legal education has been the subject of strong criticism for not meeting the needs of legal practice (Ding 2010, Xu 2010, Zhao and Hu 2012)

Supply and demand in higher education

Trow (1973, p. 1) labelled the shift as elite to mass. However, this thesis will avoid using these labels because these labels deliver implied assumptions that either the quality of universities has fallen from a high level to a low level, or at least that their graduates do. Without a doubt, some people in society may "tak[e] a pride in

being useless" (Twining 1997, p. 65), but others should have the equal right to take a pride in being useful.

It is clear that, if more places are available, and more easily available, there may be a larger number of unmotivated students. For instance, some unmotivated students may have a low level of academic orientation and commitment because they see their study only as a means to obtain a decent job. International students who experience language difficulty, cultural isolation and homesickness may not respond effectively to the existing pedagogy of traditional higher education (Biggs and Tang 2011, pp. 4–5). Intending ICP lawyers will need to challenge their previous assumptions and therefore they may also experience similar emotions, for example in the form of culture shock. Therefore, a more supportive and encouraging pedagogy than the traditional pedagogy may be needed for them.

However, it is argued that a more useful description of this trend is from a narrow and, in the case of China, government-controlled, range of choice at a small number of institutions to opportunities for institutions to become more diverse and offer different kinds of course. This might allow some institutions to, for example, move away from an academic focus to a more practice-based focus.

However, competition may in fact lead institutions to offer courses that are very similar to each other, because there is a recruitment risk in being seen to be too different. Where they are increased places, even if the number of traditional legal jobs has not increased, there is a problem of supply and demand.

For example, in England, more places have been offered to students by law schools than there are job opportunities available to them (Susskind 2013, p. xiv). According to the law of value which was introduced by Marx (2012) in 1846-1847, the exchange value (market price) of a certain product fluctuates around the value (labour + cost) of the product according to the supply and demand relationship. When the supply is less than the demand, the market price will be higher than the value, and *vice versa*. Similarly, when the market price is much higher than the value, the group of suppliers (i.e. universities) of the product (law graduates) will develop and grow, as the original suppliers want to gain more profit and more suppliers will come into the market to share the profit. When the supply grows

without parallel increase in demand (traditional legal jobs), the market price will decrease and the supply will reduce accordingly with the possibility of devaluation of the products (both the employability of the graduates and the desirability of going to law school).

In the case of law, this problem is increased because law schools have a greater capability to increase numbers for a comparatively small increase in funding, than other disciplines, at least if they concentrate on delivering academic law. Given the constraints of requirements to increase numbers, it is possible, therefore, that law schools will only teach the basic knowledge and skills that law graduates need when they first enter legal practice and will either not seek, or not be able to advance their students beyond this. The constraints of delivering 14 core courses at bachelor level have, however led to some suggestions that should be possible to diversify within the LLB, which might suggests there is an increased willingness to diversify. In the case of international commercial practice, it is argued that China has a clearly increased demand and economic need and that, if a university is willing to take the risk and to diversify, a specific course designed to meet that demand goes some way to address the problem of oversupply and is, at present, more important than changing the LLB curriculum. As the course is focused on international aspects, it is also important to understand trends in addressing international topics in legal education, and this is covered in the next section.

International legal education practice

This thesis uses the word 'internationalisation' as an umbrella term. However, in the context of legal education, Chesterman (2008, pp. 60–65) divided international legal education into three stages.

In the first stage, which Chesterman calls the "internationalisation" stage, only a small number of lawyers are involved in mediating disputes between jurisdictions or determining which jurisdiction applies. Educational institutions would therefore focus on training students for practice within one jurisdiction (Internationalisation).

At the "transnationalisation" stage, lawyers travel more frequently than in the internationalisation stage, there is a need to manage cross-jurisdiction tasks seamlessly, but the significant part of legal services remains jurisdiction-based. So law schools develop cross-jurisdiction collaborations between law schools including exchange programmes.

In the final stage, lawyers experience "globalisation". In a truly globalised legal services market, double-degree programmes are developed in order to educate lawyers to be "residents" rather than "tourists" in new jurisdictions.

Although this three-stage summary illustrates the fact that legal education at the globalisation level will arm the law students with a deeper understanding of another jurisdiction from former levels, it has not addressed the argument that the nature of internationalisation, transnationalisation or globalisation are multi-lateral activities rather than bilateral. For example, imagine a Chinese investor who sets up a company in British Virgin Islands for tax reasons and then builds a factory in Vietnam to take advantage of the low cost base, but the products are then sold in several European countries for a good price. In this case, the investor may need to go to several different lawyers separately if they have been educated in double-degree programmes. However, the reality is, most of the time, the investor will prefer to go to just one law firm with one lawyer as the main consultant. The main consultant may then find that he is handling some cases that go beyond the knowledge or skills that he obtained from his double-degree programmes. It is important, therefore, to consider what law schools can do to prepare their students for such cases which go beyond Chesterman's three stage model.

To address such challenges, the researcher has been able to identify only two programmes in the world. These are described below.

McGeorge School of Law model

One of the programmes that concerns international commercial lawyering skills is the Intercultural Legal Competence Programme of the McGeorge School of Law of the University of the Pacific. This intercultural legal competence programme

aims to improve the lawyer's ability to deal with clients from different nations and cultures and to handle disputes and transactions involving different legal systems. This programme is based on two meetings (Gevurtz 2013, p. 64) and it is implemented within two sub-programmes, the Global Lawyering Skills Program (DeJarnatt and Dejarnatt 2011, p. 31) and the Inter-American Program.

The Global Lawyering Skills (GLS) Program, as part of a JD, lasts two years over four semesters. The first year is filled with case analysis, objective and persuasive legal writing, oral reports, client interviewing, counselling, communications and professional correspondence etc. The following year is more in-depth instruction on persuasive written and oral advocacy, legal research, both domestic and international, client-counselling, professional communication, and mediation, and an introduction to settlement negotiation and contract drafting. The second year involves a campus-wide moot court competition before local judges and practitioners as well. The whole programme is international focused, the students are exposed to international and comparative law and they are prepared to use international as well as domestic sources to provide legal services. Although their website specifically identifies that international graduate students from McGeorge's international LLM are invited to give presentations on their countries' legal systems to the GLS students and highlights the promotion of cultural awareness as a benefit of these presentations, it is not clear to what extent the skills activities in the GLS involve interaction with people from other cultures and languages and, in particular, with Chinese lawyers or students. Consequently, it is not clear how the international law elements of the curriculum integrate with the skills, or whether the key skills of collaboration and creativity identified in this thesis, are included.

Lawwithoutwalls model

This initiative was introduced in 2011 by the University of Miami. It is based on teamwork and cultural awareness and lasts over a three-month period. All the players (mentors and students) are divided into several groups and each team has five mentors (one academic, two practitioners, one corporate and one entrepreneur) with two to five students. Each team works on one topic through

the following steps: KickOff (two days), Virtual Dynamic Teaming (three months) and ConPosium (two days). The activities take place in different universities all over the world each year. This programme is not a degree programme. It is not only cross-cultural but also multi-disciplinary including law, business, technology and innovation. As indicated in Chapter 2, international collaboration of this kind may increasingly be needed in international legal practice.

The McGeorge School of Law model is a more formal education programme compared to the Lawwithoutwalls model. However, it is clearly designed from a US perspective, which is understandable, as it is the product of a US law school and is part of a JD. Although there is much to learn from the Anglo-American approach, the complete model may be too US-focused to transplant to another jurisdiction. It also focuses on one aspect of international practice: cultural awareness. On the contrary, Lawwithoutwalls appears to go beyond Chesterman's bilateral concept of globalisation and more clearly seeks to promote the development of skills in collaboration, cultural competence and creativity.

International elements in Chinese legal education

Moving specifically into the Chinese context, international elements exist in three levels of the legal education system: at bachelor level, masters level, and the continuing education level. All types of international legal education mentioned by Chesterman can be found in Mainland China. For example, Peking University School of Transnational Law (2015) provides a JM/JD dual degree programme (globalization stage) and a collaboration programme with Hong Kong University in the summers. China University of Political Science and Law (Office of International Cooperation and Exchange of China University of Political Science and Law University 2017) exchanges students with Dalhousie University in Canada (transnationalisation stage). According to the requirements of the Higher Education Department of Ministry of Education of People's Republic of China (2012, p. 67) discussed before, law students shall have international law, international private law and international economic law as core courses in the bachelor programme (internationalisation stage). In addition, the

Lawwithoutwalls model is also involved as Peking University School of Transnational Law is also a partner in it.

For the purposes of this project, and making an exception for the continuing education level, there are several kinds of international curricula in existence. These may be categorised into three types:

Hong Kong University Model

As indicated later in this chapter, Hong Kong has a unique background of international culture and a transnational economic context. Therefore, it is not surprising to find that Hong Kong University, which has one of the leading law schools in the world, has developed an advanced system to prepare their students to deal with international legal affairs. Hong Kong University has set up a number of joint programmes with various jurisdictions (USA, Canada, Switzerland, Mainland China) at different levels (including the LLB, LLM and JD). This may be considered to be an example of the globalisation approach to cultivating ICP lawyers. It is spread across various jurisdictions but is not multidisciplinary.

Peking University School of Transnational Law

This is the only independent law school for educating transnational lawyers in China. It provides a joint degree programme (JM/JD) which lasts for four years. The students graduate with a Chinese JM and a US JD degree at the same time. This is a joint programme similar to that described above for Hong Kong University. The law school is also one of the partners in Lawwithoutwalls. However, the fact that it is a double degree with a JD suggests that it may be particularly influenced by US law and culture rather than being truly globalised. Because the students need to master at least 33 subjects covering both Chinese law and US law in a four year period and because of the influence of the JD model, it may also be more limited in terms of the amount of skills teaching in the curriculum.

Beijing Foreign Studies University

This is the first foreign language university in China and it offers the most foreign language programmes of any university in China. Its law school was established in 2001 and granted permission to provide LLM programmes in 2006. Its students are required to have excellent English language skills and the school also expects them to have equally good foreign language skills as the language students. The school uses legal text books in original English versions for both English-teaching courses and bilingual courses at the bachelor level. However, because of the tight core course requirements for law courses regulated by the Ministry of Higher Education, the university found that there was not enough space for them to train the students properly to work in the international legal market at the bachelor level. Therefore, they set up an international law course as an LLM from 2006.

The Hong Kong University model may be considered as an example of the globalisation way of cultivating ICP lawyers while the Lawwithoutwalls model may be considered as a newly developing method which represents a stage beyond globalisation. The Peking University School of Transnational Law represents the most advanced method in China at present although it is also only an example of a bilateral globalisation approach and may not be especially skills-based. Beijing Foreign Studies University is still seeking a suitable model. As we will see in later chapters, however, its focus on English language skills may be significant.

Distinguished Legal Talents Training Programme

More recently, the Ministry of Education and Committee of Political and Legislative Affairs of the Central Committee of the Communist Party of China (2011) issued a 10-year framework for a Distinguished Legal Talents Training Programme for applied and multi-disciplinary legal talents. The document setting out the framework mentioned cultivating international legal talents was mentioned as the key breakthrough. At the end of 2012, 58 universities had been selected as pioneers to implement this training programme and 22 of them were specialised in cultivating international legal talents (Office of the Ministry of Education and Central Political and Legal Committee Office 2012, p. 1).

Additionally, on a short-term basis, the Ministry of Justice of the PRC and the All China Lawyers Association started the Leading Talent of Foreign-Related Lawyers programme, referred to above, aiming to cultivate 300 leading international lawyers including ICP lawyers all over China within four years (Li 2013).

Both the short-term and the long-term programme benefit from unsustainable high quality support from the central government of China. However, the training on the short-term basis is not sustainable in the long term and the responsibility of the long-term programme is to find out how to cultivate competent ICP lawyers on basis that can be reproduced elsewhere. Before any such reproducible way can be found, the question of what is missing for cultivating competent ICP lawyers in the current Chinese legal education system remains a question in need of answering.

Can a transplant solve the problems?

As discussed above, there are some more advanced vocational courses than the JM, for example, JD, LPC, BPTC and PCLL. The question therefore arises, whether any of these could simply be transplanted into the mainland. The most obvious candidates for this would courses from Hong Kong, Macao or Taiwan. It is, however, argued that this is not appropriate.

Firstly, mainland China, Macao and Taiwan belong to the civil law system, whereas Hong Kong belongs to the common law system. For historical and political reasons, mainland China and Taiwan have been cut off from each other since 1949. This thesis does not discuss the Taiwan legal system because there is at present, little legal influence of one system on the other and more importantly, there is little influence from each other in the international commercial area

Secondly, Macao is a "small economy" (Macao Government 2014, p. 1) and largely based on gambling (Barboza 2007, p. 1) and tourism. Therefore, its core role is entertainment services rather than providing financial and legal services. Compared with Hong Kong, which is "the world's 8th largest trading economy, with mainland China as its most significant trading partner" (Hong Kong Government

2014, p. 1), Macao's legal education system has far less relevance for mainland China in the international commercial legal services context.

Finally, however, the PCLL of Hong Kong might be considered the most obvious candidate for a transplant. However, Hong Kong is the only common law jurisdiction in China. For historical reasons, it has strong links with Britain, which hosts one of the leading forces of the international legal services market at the present. Considering the unique nature of Hong Kong, it is necessary to consider whether the PCLL of Hong Kong has solved the issues of the lack in formal legal skills training in mainland China (discussed earlier in this chapter), as far as ICP lawyers are concerned.

Legal education in Hong Kong

The skills-based vocational course for professional legal education in Hong Kong is the PCLL which is offered by these three law schools. The PCLL is undertaken by both intending solicitors and barristers, although Hong Kong retains a division between these two legal professions, similar to the division that exists in England and Wales. Entrants to the PCLL, in a similar way to England and Wales, study academic law as an undergraduate degree (LLB), although some JD courses are offered by law schools in Hong Kong as a substitute for the LLB for those students who have a first degree in some discipline other than law, but who now wish to pursue a career in law.

In 2001, Redmond and Roper, who were appointed by the Hong Kong government as independent overseas education specialists, published their report, *Legal Education and Training in Hong Kong: Preliminary Review* (Redmond-Roper Report).[43] This was an important milestone in the history of Hong Kong's legal education which led to a series of reforms afterwards and had a fundamental effect on the PCLL (Wu 2003, p. 153). For example, the Redmond-Roper Report criticised the previous PCLL as "particularly at HKU (Hong Kong University), … primarily an

[43] The Standing Committee on Legal Education and Training is conducting a new comprehensive study on legal education and training in Hong Kong from 2015 (the 'Woo Review'). The information is available at its official website: http://www.sclet.gov.hk/eng/pdf/cone.pdf.

additional year of law studies-with a distinct academic emphasis"(Redmond and Roper 2001, p. 326). After the Report, HKU reformed their PCLL to become more skills-based training, by folding back the substantive law subjects into the LLB (the original three-year LLB was extended to four years) and training their teachers by inviting skills-training experts from England and Australia (Wu 2003). Consequently, and in contrast with the mainland, there has been an emphasis on skills in Hong Kong legal education for some time. Therefore, the question is whether the skills taught in the PCLL are the core skills needed for ICP lawyers.

As will be identified in Chapters 7 and 9 below, communication is a key skill for ICP lawyers. As will be discussed in Chapter 9, increasingly this means communication in English. Before 1974, English "was by practice the sole language used for all official matters within all three [sectors] (executive, judicial and legislative)" (Dickson and Cumming 1996, p. 41) in Hong Kong. Although English and Chinese have been declared co-official languages since 1974 by Official Language Ordinance, the use of Chinese in official circles continues to grow slowly and before 1997 its use had never been equal to English (Dickson and Cumming 1996, Poon 2004). Therefore, it is not surprising to find that "most commercial agreements in Hong Kong which were drafted by lawyers are in English", especially for "transactions involving an international element"(Young 2005, p. 48). The language of instruction of the PCLL is English.. Therefore, from the perspective of language skills, the PCLL is suitable for ICP lawyers. However, this does not mean there are no problems in training skills in English in Hong Kong (the details of which will be discussed in Chapter 9). By contrast, however, the use of English is much less developed in the mainland, and this therefore would cause a problem if the PCLL in its existing form was simply to be transplanted.

Besides the language of instruction, the skills that are taught by the PCLL are not specifically designed for generating ICP lawyers, but for intending local qualified Hong Kong solicitors and barristers. Therefore, the PCLL does not cover the core skills for lawyers working internationally. For example, HKU teaches legal research and writing, document drafting and analysis, problem-solving, advocacy, professional ethics, and analysis of company accounts (Department of Professional and Legal Education 2016, p. 1). CUHK covers professional practice,

commercial practice, civil litigation practice, criminal litigation practice and property and probate. All this content is based on local substantial law. Further, between them, the providers also offer a range of elective modules, including alternative dispute resolution, China Practice, Conference skills and opinion writing, corporate finance, lending and finance, trial advocacy, writing and drafting commercial documents, writing and drafting commercial documents (in Chinese), writing and drafting litigation documents, and writing and drafting litigation documents (in Chinese)(The Chinese University of Hong Kong 2016). The list of electives contains only a very limited number of commercially focused choices. Moreover, elective modules will typically only run in any given year if sufficient students request to study them. As commercial practice grows, of course, then demand should be high. However, the mere fact that these modules remain elective, rather than core, modules, indicates that the development of lawyers for international commercial practice is not currently a key focus of the PCLL. As will be discussed in Chapters 8 and 10, the legal skills that this thesis emphasises are collaboration and creativity for ICP lawyers, which are not covered by the PCLL course.

Consequently, simply trying to transplant the whole of the PCLL into the mainland will not achieve the objectives of this project. Something specifically designed for people with a mainland background and which is also very specifically focused on international commercial practice is, it is suggested, required.

Conclusion

This chapter has described the structure of legal education in mainland China, identifying the division between academic and professional legal education. Professional legal education was selected as the focus for this thesis because it is missing or, at best, under-developed in Chinese legal education at present. The JM course, which is intended to prepare students for practice, was compared with other vocational courses. This comparison shows that practical skills are more well-established in courses such as the LPC, BPTC or PCLL. This gap cannot, it was argued, be addressed simply by sending Chinese students to study abroad or by

transplanting another course, for example, the PCLL, into the mainland. It has been argued that, given the background of Chinese lawyers, and the tradition of Chinese legal education, it is important to include these skills in a course designed to function in China.

In the current Chinese context it is easier to identify the skills needed to work internationally than it is to identify the skills needed to work locally. This is because lawyers' role in society varies not only according to differences in the nature of the law of a jurisdiction but also from society to society. For example, in America, the legal profession is established as important in society, however, in China, they are only a growing profession. Therefore, both the knowledge and the skills may be needed quite differently in different societies. Consequently, the skills for lawyers dealing with local law should be generated from the Chinese legal environment rather than transplanted directly from any other society. Given the situation discussed in Chapter 2 the Chinese legal system is still in an emerging stage in a content where reform is frequent and future reforms are expected. Consequently, it is too early to identify the exact role of lawyers in Chinese society not to mention the skills they need.

By contrast, ICP lawyers are dealing with global law, international laws or local law in more than one jurisdiction (as explained in Chapter 7). Therefore, although each lawyer needs to know their own local laws, as described in Chapter 7 when working in the international area, the skills they need are similar, wherever they come from. As Anglo-American lawyers are dominant in the current international commercial legal market they are, it is suggested, appropriate examples for Chinese ICP lawyers to learn from. Therefore, it will be easier for China to learn from Anglo-American ways of teaching lawyering skills in the international commercial area rather than inventing them. A number of interviewees for this thesis were selected because they had expertise in the Anglo-American approaches. However, this learning must then be adapted to the culture and background of Chinese students rather than being transplanted without considering the differences in the legal and cultural background of the different societies. Some of these differences, were indicated by the skills that are relevant to international commercial practice that were identified by the Chinese

interviewees, including the traditional tasks of research and drafting, but also communication (in English) and collaboration.

The approach to internationalisation in legal education has been examined by reference to Chesterman's three stages of development and a number of examples from outside and inside China. It is argued that none of these examples completely answers the skills needs of intending ICP lawyers because they are extra-curricula (Lawithoutwalls); double degrees that represent in-depth study of a single other jurisdiction (which may also involve Americanisation of the Chinese legal education system) (Hong Kong University, Peking University); from a very specific US perspective (McGeorge) or focused on language skills (Beijing Foreign Studies University). The Distinguished Legal Talents programme is partly designed to address some of the needs of Chinese lawyers working internationally, but it is a new programme that has not yet been evaluated and may not be sustainable in the long term.

Consequently, this thesis proposes a new curriculum that is both evidence- and theory-based. In the next chapter, therefore, the learning of skills is discussed in the context of educational theory.

Chapter 4: Educational Theories Relating to Skills Training

Introduction

To discuss education in any circumstances, teaching and learning are unavoidable elements that must be considered. The words 'teaching' and 'learning' may be regarded by some people as being one and the same (Malik 2009, p. 76), as they are aiming towards common results. However, they are also dialectically opposed, as teaching is focused on the teacher whereas learning emphasises the student. As previous chapters have explained, this thesis will focus on the development of legal skills for Chinese intending ICP lawyers. This chapter will first discuss educational theories specifically for skills learning and will argue that a student-centred approach will be the most effective. In addition, considering that the focus of this thesis is on Chinese students, there is a cultural element (Bruner 2009, pp. 159–168) that cannot be ignored. As Chinese students are, as described in Chapter 3, accustomed to teacher-centred, knowledge-focused curricula and teaching, moving them into a more student-centred, skills-based environment will be challenging. The implications of this on the focus and design of any revised JM course will, therefore, also be explored.

Following a discussion of general education theories, this section will then explore learning theories that focus upon a shift in basic skills training from workplace to classroom. This is critical as such theories concern the process by which students develop their knowledge or skills, including how far skills that are used in the legal work environment may be effectively developed outside of that environment i.e. in the classroom.

Finally, theories related to assessment criteria need to be considered. Generally, there are three approaches for skills-based legal education: outcome/competence; capability; and holistic models (Webb 1996, pp. 33–34) Before discussing these in

detail, however, it is important to consider the context in which education takes place. In the context of skills for legal practice, this may be the workplace or the classroom.

Education Contexts

Some people may argue that the workplace, rather than the classroom, is the best place to learn skills. This could involve either formal courses or informal learning on the job. Chapter 3 discussed the extent to which law firms might be prepared to offer formal skills-based courses to their employees or to others and acknowledged that this was likely to be limited. However, even if the employer does not offer a course, employees will be involved in informal learning in the workplace. People may educate themselves by trial and error if they do not have the opportunity to go to school for formal education. However, this does not seem to be a feasible option for legal education. In modern life, such an entirely self-educated approach without formally recognised qualifications is very rare and unlikely to happen in the legal services context, particularly as legal professionals are normally required to qualify through specific routes according to relevant law. For example, as described in Chapter 3, according to Chinese law, lawyers nowadays must usually hold a bachelor degree at least.[44] However, aside from self-education, lawyers may learn legal knowledge and skills both in the workplace and in law schools.

However, in the context of skills learning, where a learner may learn from observation of more skilled colleagues or teachers, the place where learning takes place is significant. Contextual theories focus more on the immediate physical and social environment that affects learning rather than the inner process of information selecting and storing (Ormrod 2015, pp. 175–176). The contextual theories are mostly based on Vygotsky's (1962) work. Vygotsky studied what kind

[44] A law degree is not exclusively required at the moment in China. However, there are recent proposals which will required lawyers to hold a law degree in future and accordingly, there are changes being implemented in the National Judicial Exam to reflect this (the NJE is the common qualification exam for judges, prosecutors and attorneys).

of tasks can be fulfilled if a child assists or works with adults in the "zone of proximal development" (Chaikli 2003, p. 39) by comparison with the tasks he is capable of finishing on his own. This approach can often be seen in informal workplace learning settings.

As discussed in Chapter 3, at least in the Chinese context for intending ICP lawyers, it is argued that it is better that legal skills are taught in law schools rather than the workplace. The process of formal education in law school may, therefore, be portrayed as Figure 2. This formal education starts from teaching and learning in the classroom and is then tested by formative assessment. In a classroom context, this sequence can be planned; can provide safe spaces to experiment, and can be guaranteed for every learner. It can also be planned to cover the whole curriculum, including topics that may not naturally arise in the workplace for every individual. This may not be the case in the workplace. After the formative assessment, teachers will give feedback to the students to improve their knowledge or skill specifically for their individual needs. Therefore, this stage of teaching and learning is based on better understanding of the weakness of the students and the requirements of the course. Classroom teachers are better placed to give such feedback consistently than mentors in the workplace who have less understanding of education and who have other pressures on their time. Finally, summative assessment is used in the classroom to check whether students have met the competency they are required to have for the specific course. Competence-approaches, as a specific response to defining the skills needed for legal practice, are discussed towards the end of this chapter.

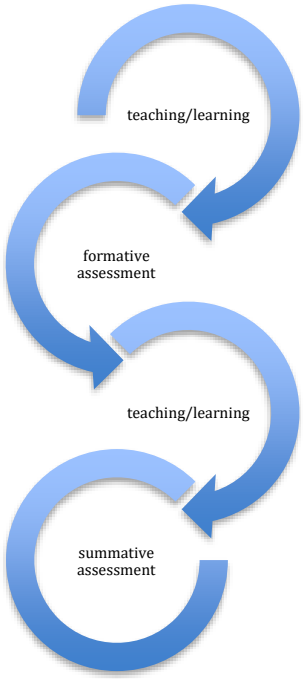

Figure 2 The process of formal education in law schools

Specifically, as stated in Chapter 3, skills education for ICP lawyers in China is mainly at the stage of informal education in the workplace.

As described both in Chapter 2 and Chapter 3, there is a growing market for international legal services for Chinese lawyers and this provides the impetus for the proposed for a revised JM course. Considering, first of all, the increasing market, it is argued that it will benefit all stakeholders if the knowledge and skills needed for international commercial practice are brought into the formal education system, as this provides a formal route for students to become ICP lawyers and may encourage them to do so. For clients, the more international legal services are provided in the market the better service and price they will get. For law firms, there is a clear benefit as they may wish to recruit new lawyers prepared for international commercial practice from university, rather than having to train them entirely by themselves.

Although the model in Figure 2 shows a basic outline for the sequence of activity in a legal skills classroom, in order to design an appropriate course for students who wish to become ICP lawyers, it is essential to determine the content of the course, and this is informed by the findings of the data analysis set out in Chapters

7, 8, 9 and 10. It is also clearly essential to identify which educational theory or theories should be used to support it. This, therefore, requires a discussion of the different kinds of learning theory.

Learning theories

The German philosopher Wilhelm Windelband introduced the terms 'nomothetic' and 'idiographic' in 1894 (Lamiell 1998, p. 23) . Here, 'nomothetic' and 'idiographic' are used to categorise learning theories: nomothetic learning theories are teacher-centred theories that tend to generalise the rule of learning that may apply to all learners; idiographic learning theories, on the other hand, are student-centred theories that concern the different styles of individual learners. Therefore, this section briefly introduces relevant nomothetic learning theories: behaviourism, cognitivism and social cognitivism. It then moves on to consider idiographic learning theories: constructivism and experiential learning.

Nomothetic learning theories

Contemporary nomothetic learning theories are developed from two large families: behaviourism and cognitivism (Bigge and Shermis 2004, p. 44).

Behaviourism

Behaviourist approaches, which study the measurable behaviours of individual learners, emerged in the early 1900s and were generally agreed to have arisen because of the scientific development after the Enlightenment (Jarvis et al. 2003, p. 7). It is not easy to define behaviourism, as its meaning varies from theorist to theorist and also grows richer over time. For instance, Watson (1925)was the first person who used the term 'behaviourism' although his idea of behaviourism did not include the inner mind as being of relevance to the learning process. Skinner (1953), however, another influential behaviourist, acknowledged the importance of the inner mind to learning, although he did not study it himself. Nevertheless, it

is still possible to summarise what behaviourist approaches are, since they share some common attributes.

First, most of the behaviourism studies were based on the premise that human beings learn things in the same way as, or at least similarly to, other species. Therefore, most of the behaviourists studied behaviours of animals rather than mankind directly. For example, Pavlov used dogs (Pavlov 2003) and Thorndike studied cats (Thorndike 1898). An exception is provided by Watson and Rayner, who studied a small child (Watson and Rayner 1920).

Secondly, behaviourist approaches are focused more on empirical and measurable external performance learning outcomes or competence statements than on internal thinking. There is, therefore, an element of connection with the competence movement described below.

Thirdly, as a result of focusing on behaviour in performance, behaviourists traditionally believed that learning only occurs when a change in behaviour is observed. However, this concept has become less important over time as more and more behaviourists have included an inner mind element in their concept of learning. For instance, Bandura combined behaviourism and cognitivism together as social cognitive theory (discussed in detail below).

In addition to the common attributes mentioned above, behaviourist approaches are based on the idea of conditionings. These developed from classic conditioning to instrumental conditioning/operant conditioning. Classic conditioning was developed by Pavlov's famous dog study (Kalat 2016, p. 184) Pavlov realised that a dog salivated naturally when it was fed, but it would not salivate if it merely heard a metronome. He then implemented a pairing procedure in which he rang a metronome whenever he gave food to the dog. After a number of repeats of this pairing procedure, he rang the metronome without then giving food to the dog and found out that the dog would salivate on the sound of the metronome alone. Pavlov then classified the idea of stimuli to action into unconditioned stimuli and conditioned stimuli. Unconditioned stimuli (in this case, food) can cause an automatic unconditioned response (in this case, salivation) from the receiver. Conditioned stimuli (in this case, a metronome), on the other hand, cannot initially

elicit the intended response. However, if the conditioned stimuli precede the unconditioned stimuli for a period of time, the subject builds a new connection with the intended response, assisted by the unconditioned stimuli, and such responses are called conditioned responses (Kalat 2016, pp. 194–203) In a conventional educational context, therefore, students might be rewarded for good performance and punished for poor performance.

It may be difficult to use classic conditioning directly in legal skills teaching because classic conditioning will only work when there is an unconditioned stimulus. Unconditioned stimuli are stimuli that can cause a response naturally without having to be learned. Involuntary responses such as positive emotion and attitude may indirectly influence learning of legal skills: motivation is discussed below in Chapter 7and individual learning styles in this chapter. Legal skills themselves are, however, not involuntary responses but more voluntary responses to stimuli in the environment. Therefore, a behaviourist approach may be used to create confidence and strengthen the student's motivation for learning. For instance, Lee fears speaking English, his teacher can pair the oral task with a skill Lee does feel confident in, such as writing. The teacher may initially keep the oral task much smaller compared with the writing task, so that Lee feels confident about completing the whole task. The teacher may then gradually increase the amount of oral English involved over time, as Lee's confidence and sense of achievement grows, to support Lee in reaching a stage where he no longer fears speaking English.

In addition to the basic content of classic conditioning mentioned above, there are some details that merit closer examination. First, although in Pavlov's dog research, the conditioned response (salivating) is the same as the response provided with the unconditioned response, such a consistent result is not guaranteed in every circumstance. For instance, an electric shock may cause an unconditioned response including shrieking and jumping, but if someone has been conditioned to expect an electronic shock, their response may be significantly moderated, with an electric shock perhaps triggering only muscle tensing and activity cessation (Kalat 2016, p. 185). The fact that the conditioned response may be more measured than the unconditioned response in some circumstances can

be used by teachers to help students to recognise and manage their responses constructively. In the example of Lee, law teachers may be able to use behaviourist techniques to help him lose his fear of speaking English through repeated practice and thus be able to make progress in developing this skill, even though he may nevertheless still not like speaking English to the same extent that he likes writing.

Secondly, the more unfamiliar the conditioned stimuli to the receiver, the more rapidly there will be a result (Kalat 2016, p. 187) So, if Lee is unfamiliar with speaking English, he may be uncomfortable with doing so and unable to tell whether he is communicating effectively or not. If he is often told by the teacher that he has failed, and does not understand how to improve, speaking English will become connected to a feeling of failure. This connection will definitely increase his fear and reluctance to do it again. The last thing worth mentioning is that the conditioned response is not immutable and frozen; it may be strengthened by repeatedly pairing conditioned stimuli with unconditioned stimuli or decreased by repeatedly presenting conditioned stimuli without unconditioned stimuli (Kalat 2016, p. 186)

In his later work, Skinner (1938, 1992) developed classic conditioning further into the theory of operant conditioning, based on Thorndike's work about the law of effect. The law of effect states that behaviour is likely to be strengthened when it is followed by a pleasant outcome, and behaviour tends to decrease otherwise (McLeod 2007, p. 1) Unlike classic conditioning, operant conditioning focuses on shaping behaviour by reinforcement, via both positive and negative reinforcement, including rewards and punishment. Reinforcement can strengthen behaviour that is desired and *per contra* reduce undesired behaviour (Ormrod 2015, pp. 97–106) Positive reinforcement involves providing rewards for the desired behaviours to strengthen them. Negative reinforcement typically involves withdrawing privileges or using some other unpleasant method of reinforcement to strengthen the desired behaviours.

Operant conditioning is generally applied to all kinds of education and is very popular in schools. For example, teachers praise or give high marks to students who behave in the desired way, to strengthen such behaviours, and reprimand or give low marks otherwise.

Such reinforcement and punishment can also be used in teaching legal skills. In the case of Lee, for example, teachers may praise Lee when he can speak correctly in English for five minutes, so that he may feel encouraged and thus more willing attempt ten minutes next time. Reinforcement and punishment are easy to use, but to use them properly and effectively is a different story. First of all, teachers need to make sure that the methods of reinforcement they are using are reinforcing for the students. However, artificial reinforcement, like a marking system, does not effectively reinforce behaviour for every student. Therefore, finding out what is an effective reinforcement for each individual student will be a difficult task. Secondly, reinforcement may not work well if the task is beyond the capability of the students. Here, in Lee's case, if he has no idea how to pronounce English words is or what to think about when he prepares for the oral task, he may need help with the technique as well as encouragement. Finally, although punishment is useful to weaken or eliminate undesirable behaviour, however, if it has been over-used, the teacher or the school will be connected with punishment to that particular student as a conditioned stimulus. The student will be reluctant to meet the teacher or even fear going to school. Therefore, punishment should be used in a proper way and within proper margins.

Behaviourist approaches, as they relate to performance of actions, seem, therefore, to have some initial relevance for skills teaching. However, a purely stimulus approach is likely to be of limited value. Nevertheless, there seem to be some behaviourist elements in the area of competence, an area which is of growing significance in professional legal education, and which is discussed further below.

Cognitivism

By contrast with behaviourists, cognitivists contribute to the understanding of human learning by opening up the inner mind of the learners. According to Ormrod (2015, pp. 173–175) the main perspectives of cognitive theories are information processing theories, constructivism and contextual theories. Information processing theories which concern the process of people's perception, memory storage and memory retrieval. During the information process, attention

is crucial to select information that people perceive and that people store into memory (Reed 2013, p. 44). Information from the outside world goes into this inner system by perception and is first processed to sensory memory, which is a system between perception and memory. The information is then assumed to be stored as a short-term memory until it is finally passed on to long-term memory (Baddeley et al. 2014, p. 9). Retrieval is about recalling information from the memory when people need to use it. This is, therefore, relevant to the knowledge which underpins the use of skills.

Information processing theories may be applied to teach problem solving skills for ICP lawyers. Newell and Simon (1972) conducted research on simulating human problem solving behaviour in a computer system. They considered humans as information processing systems in the area of problem solving. In their research, they believed processing, programs, retrieval time, etc. were important elements for problem solving memory. Memories, both short-term and long-term were crucial to human beings' information processing capability. According to Reed (2013, p. vii) , cognition concerns not only problem solving skills but also expertise, creativity, decision-making skills and language skills. He discussed problem solving based on puzzle solving. He deliberately chose puzzles to classify the problems according to the skills needed to solve them. He stated that there were three kinds of problem, arrangement, inducing structure problems (which have a fixed logic that the solver must uncover) and transformation problems.

Transformation problems are problems with expressed goals. Problems in international commercial practice, are, it is suggested likely to involve transformation problems because clients often go to commercial lawyers with some goals. However, these goals may not be clear or may be misrepresented by the clients or misunderstood by the lawyers. These are problems with communication skills and language skills, which become of enormous significance in international commercial practice and are discussed further in Chapter 9.

However, problem solving skills for ICP lawyers will be much more complex than simply transformation problems. Even if a client is able to articulate goals, these goals may not be achievable or in the client's best interests. For example, in the researcher's own experience, a client who was investing in a programme in China,

presented a memo and a formal agreement for the programme and then asked how he could implement that memo and the agreement legally in China. However, after brief review, it appeared that the memo and agreement could not be legally valid according to Chinese law. Therefore, the first suggestion was how to amend them to be legally binding. In this case, the original goals are illegal and therefore unfeasible. Therefore, the goals had to be re-constructed and this required creativity on the part of the lawyer.

To sum up, behaviourism and cognitivism are both scientific approaches to the study of learning and both are based on the premise that people start from a neutral moral proclivity—not innately bad or innately good. It is possible to assume that behavourists believe that people are passive in learning by response while the cognitivists' assumption is that people positively interact with their environment (Bigge and Shermis 2004, p. 44) However, such an assumption may be inaccurate, as, even a behaviourist response is not completely passive. The main difference between the two is that behaviourism focuses on directly observable performance whereas cognitivism highlights the process of the inner mind.

If the behaviourist approaches are seen as approaches describing the stimuli derived from the environment and the response as the final outcome, then cognitivism provides the description of the process between stimuli to the outcome. In other words, it helps people understand how the response emerged.

Social Cognitive Theory

Combining behaviourism with cognitivism, is a theory called social cognitive theory which has developed from typical behaviourism to something that is more cognitivism-oriented. If traditional behaviourist approaches are summarised as trial and error, Bandura (1974) the originator of social cognitive theory, believes that people learn most of their behaviour through observation and imitation. He contends that stimuli-response theories may work for simple and intuitive behaviours but are not suitable for complex social behaviours. For example, two

problems in a simple stimulus-response approach are delayed imitation and the other is vicarious reinforcement (Ormrod 2011, p. 115).

Delayed imitation is about new behaviours that are learned by learners but are not demonstrated until a later occasion. Behaviourists may see this as a failure in learning if the demonstration is not carried out right after the modelling, however, Bandura argues that the behaviour can be kept in mind and displayed later.

Modelling may be a useful means to learn for ICP lawyers. When, for example, observing a senior lawyer or tutor, that learning may be tacit. However, different people may use the term 'tacit' with different meanings. For example, tacit knowledge could represent the professional knowledge that ICP lawyers may have, but which has not been explicitly taught and may not even be recognised by the ICP lawyers themselves (Hedesstrom and Whitley 2000, p. 50). Consequently, in such circumstances, identifying the tacit knowledge itself and choosing effective models for the students to follow will be a challenging topic for law teachers, particularly in a classroom setting. Moreover, persuading the models to show their behaviour in specific areas will be another difficult task for law teachers. However, the data in this project does, it is suggested, go some way to identifying the knowledge and more specifically the skills needed for international commercial practice from experienced practitioner models.

Additionally, social cognitive theory also concerns how self-efficacy and self-regulation are influential in human learning. Self-efficacy is the belief in one's own capability for finishing a specific task. Self-efficacy will affect students' behaviour in their choices of activities, goals, their effort and persistence, and ultimately their learning and achievement (Ormrod 2015, pp. 146–149). Generally speaking, as Bandura argues, students who have higher self-efficacy tend to set higher goals, exert more effort and be persistent longer than the students who have lower self-efficacy, provided their targets are not too high. Enhancing self-efficacy is a way law teachers can help their students improve their motivation for study or dealing with specific tasks and this could be related to the motivation to engage in international activities described in Chapter 7. Law teachers may consider factors such as previous successes and failures of individual students in specific tasks, the history of successes and failures of others on specific tasks, the current emotional

state of individual students and positive or negative messages from others to the students (Ormrod 2015, pp. 146–149) to predict the self-efficacy of students and help them to improve it.

In addition to self-efficacy, self-regulation is another factor that is emphasised by social cognitive theory. Five elements are mentioned by the social cognitive theorists: setting standards and goals of one's own, self-observation, self-evaluation, self-reaction and self-reflection (Ormrod 2015, p. 150) People normally set standards and goals for themselves, these standards and goals may be affected by observing models, afterwards learners normally observe their own activities and evaluate the actions by their own standards and goals. When their activities meet their standards and goals they may reinforce themselves by positive emotions otherwise they may punish themselves with negative ones. Finally, the key point of self-regulation is to critically examine such standards, goals, successes, failures, etc. and make adjustments where needed, which Bandura called self-reflection (Ormrod 2015, p. 151). This is strongly related to the element of reflection in experiential learning, discussed below.

In conclusion, learning theories are categorised as nomothetic and idiographic theories. From the nomothetic perspective, there are two main families of learning theories, behaviourism (Jarvis et al. 2003, pp. 24–31) and cognitivism (Jarvis et al. 2003, pp. 32–41) Although there is a link between behaviourism and competence approaches which seek to define how all lawyers behave, it is, it is argued, insufficient as a basis for skills learning for ICP lawyers as it places too much reliance on performance and similarity. Cognitivist theories explain the process of learning and may have some relevance to legal skills learning because they allow learned to reflect on and learn from performance. Social cognitive theory emphasises the people with whom learning takes place and is relevant to legal skills learning because of the element of imitation of models that can be involved in skills education. However, although some elements of these theories are useful in the design of a revised JM curriculum, they do not provide a complete picture. Consequently the idiographic theories, constructivism and experiential learning theory will be discussed in the next section.

Idiographic learning theories

Constructivism

Constructivism, is said to have been created by Jean Piaget in the 1950s-1960s (Fosnot 2005, p. 1). Constructivist theorists believe that learners do not simply passively absorb the information they encounter, but actively organise and make sense of it, largely, in unique, idiosyncratic ways (Ormrod 2015, p. 174). To be more specific, constructivists do not think "meaning can be passed on to learners via symbols and transmission" (Fosnot 2005, p. preface), and learners cannot "incorporate exact copies of teachers' understanding for their own use" (Fosnot 2005, p. preface). This idea has relevance for the learning of skills for international legal practice because it places emphasis on the individual learner, in this case, the individual practitioner, who takes responsibility for the creation of their own learning. An approach that lends itself both to a constructivist, student-centred approach, and to skills, is that of experiential learning.

Experiential learning

Experiential learning implies a spectrum of meanings rather than a single specific definition (Weil and McGill 1989, p. 3). The richness of meaning allows it to be called "an ideology in education" (Jarvis et al. 2003, p. 53) and it is a "holistic theory" (Kolb 2014, p. xxiv) applicable to various disciplines. Although experiential learning theory may have a range of meanings and be viewed from different perspectives, in the specific context of this thesis, the term 'experiential learning' should be understood to be an umbrella term that encompasses various complementary educational theories within it (such as behaviourism and the cognitive theories discussed above) rather than a stand-alone alternative to them (Miettinen 2000, p. 70). The basis of experiential learning is that students learn from an experience which we can consider to be akin to the stimulus (Boud and Miller 1996, p. 9) studied in behaviourism. This could be real life, or as a teaching method such as a clinic, or a simulation or role play and, in the teaching method context, will often be presented as a form of problem based learning (PBL). The experience that is gained from such an approach to teaching and learning has been

variously identified as concrete experience by Lewinians, impulse by Dewey, and concrete phenomenalism by Piaget (Kolb 2014, pp. 32–38). After the stimulus has occurred, then previous experience (memory) may be drawn upon to make an assessment of the new experience (stimulus), and what is consequently learned from the new experience operates to allow the learner to refine or make adjustments from the previous experience for the future. After this assessment and adjustment (reflective observation and abstract conceptualization according to Kolb), the students will "interpret and act" (Kolb 2014, p. 51) (response in behaviourism) based on the results of the previous process. Therefore, we can translate Kolb's experiential learning cycle as follows.

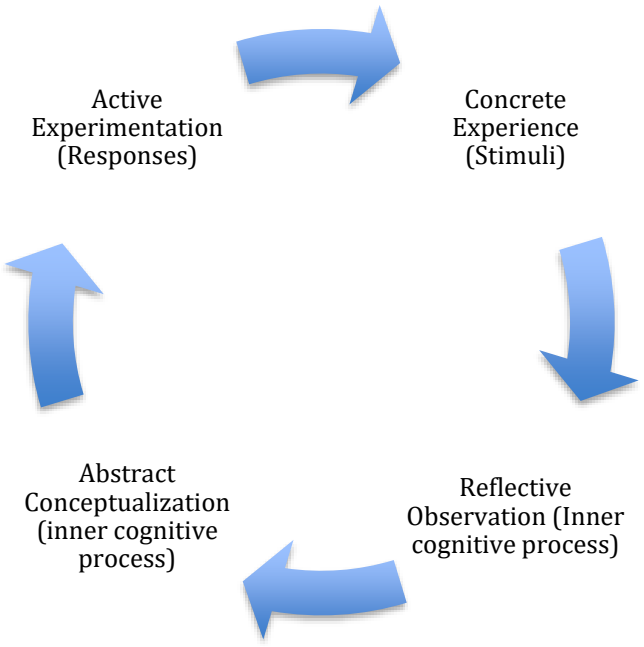

Figure 3 Kolb's learning cycle

There are two different aspects to experiential learning. The first aspect describes the theoretical basis of experiential learning, namely the idea that people learn from their immediate experiences in the surrounding environment, which is often discussed in terms of lifelong learning from daily lives (Fenwick 2004, pp. 25–27). In this aspect, experiential learning is related to contextual and social cognitive

theories which emphasise the learning environment. It is an underpinning process that students follow both actively and passively, which represents the nature of experiential learning. The second aspect relates to how experiential learning theory is implemented as "an educational technique" (Kolb 2014, p. xviii) in the classroom. In this aspect, experiential learning is a technique that educators and teachers can use to deliver knowledge and facilitate learning.

This dichotomy in experiential learning is derived from the belief of the Stoics (Sambursky 1959), a philosophy school of ancient Greece and Rome. Stoics believe that wisdom lies not in protest against how things are but in continuous attempts to understand the ways of the world through the logic of causality. There is a similar philosophy in China called Dao (Tao), which was initiated by Lao Zi (2008), in the same era as Confucianism (discussed in Chapter 2). Dao has not been the mainstream philosophy promoted by the government and formal education of Chinese society, but neither has it disappeared or been replaced by others. Rather it spread quietly over time into areas such as religion (Dao Jiao), politics (Governance by Inaction) and Kung Fu (Taiji Quan) and is popular among Chinese people in the context of introspection and metaphysics.[45] In terms of the spirit of the Stoics and Dao, we should first understand the nature of the learning process (the first aspect). Then we should identify the factors, and the dynamics of the factors, that can make a difference during the learning process. Finally we should construct a teaching technique (the second aspect) that creates the right environment in which the learning process will naturally lead the students towards professional competence. As Kolb expressed in his book, his "aim for experiential learning theory was to create a model for explaining how individuals learn" (Kolb 2014, p. 53). Consequently, the experiential learning cycle is aiming to represent something discovered by Kolb (the first aspect of experiential learning) rather than artificial techniques created by him (the second aspect of experiential learning). However, as well as enthusiastic followers of Kolb's theory, there are also critics of his experiential learning cycle (Seaman 2008) (the details are discussed in the later section about the omissions of Kolb's experiential

[45] The key difference between Stoicism and Dao is that Stoics focus on using causality to explain the continuum of the world, but Daoists focus on interrelation.

learning cycle). Therefore, before designing a whole course based on Kolb's experiential learning cycle, we need to reconsider whether it is a complete description of all the factors that affect how people learn.

This questioning starts from the very basis of the experiential learning theory: is all learning based on experience? This is an epistemological question relating, as discussed in Chapter 5, to the fundamental question of how we know what we know.

There are three relevant views regarding this question in relation to learning from experience. One is an empiricist view, represented by John Locke (Locke 2015, pp. 95–108), who believed people are born as a *tabula rasa*, their knowledge is gained entirely through experience from what they have received from sensations in the outside world and reflections on the processes of their own understandings. In the seventeenth and eighteenth century, there were three assumptions about the nature of the human mind. One was that human beings are born innately evil and corrupt (Ezell 1983, p. 140). By contrast, another argument was that people are born innately good and pure. The third possibility was that people are born as blanks and are extremely malleable (Ezell 1983, p. 140). Although the concept of using the *tabula rasa* as a metaphor for a newborn baby's mind is sometimes misguided (Duschinsky 2012, p. 509), this is still an encouraging assumption as it allows people to believe that if newborn babies are subsequently exposed to proper education, they can be both as morally good and intelligent as educators wish them to be.

Another view is rationalist, represented by René Descartes, who believed that human senses are unreliable, therefore, knowledge is not gained from experience but through rationale and logic (Descartes 2014). Therefore, there are at least arguably two contrasting ways in which people learn: *a posteriori* from experience and *a priori*, as a result of an inherent capacity for rationale and logic with which we were born and without any connection to experience other than being able to use language.

For example, a student could understand that people from another country behave differently either by experiencing the behaviour of people from another

country (*a posteriori*) or purely intellectually from a book or a lecture (*a priori*). Hume, however, combined both empiricist and rationalist approaches. Importantly in the context of experiential learning, he believed that without experience, rationale and logic can tell us nothing useful about the world (Hume 2007, p. 28).

There is another important distinction that is necessary to understand the development of experience in an epistemological way. This is the distinction between analytic statements and synthetic statements. An analytic statement is true by definition and self-contained whereas a synthetic statement is additional to the original concept and is dependent on experience in some way. For example, we know it is true that Chinese law is the governing law for Chinese citizens who live in China (analytic statement) because that is the commonly accepted definition of Chinese law. However, when the statement is 'Chinese law is the governing law for the transaction between A (an English citizen) and B (a Chinese citizen)' (synthetic statement), we cannot know the statement is true without also knowing details about the nature of the transaction, the intention of the parties and the mandatory provisions of both English law and Chinese law.

Before Kant (1982, pp. 41–43), Hume believed there were only two kinds of knowledge, analytic *a priori* statements and synthetic *a posteriori* statements. However, Kant thought that synthetic *a priori* statements also exist, which means that the knowledge contained in the statement is not true merely by definition, but rather it adds something more to the definition. At the same time, it shows the way that people apply innate concepts in order to understand things. The key concepts are set out below.

A posteriori	*A priori*	Predetermined conceptual schemes
Empiricist	Rationalist	Neither empiricist nor rationalist

People gain their knowledge through experience	People can gain knowledge through logic and rationale	People have some innate concepts
John Locke	Descartes	Immanuel Kant

Table 5 Comparison of Locke, Descartes and Kant

Empiricism and rationalism underpin Kolb's experiential learning theory when he argues that "learning is best conceived as a process, not in terms of outcomes" (Kolb 2014, p. 37) which emphasises the continuous connective nature of learning and learning outcomes rather than the final, isolated and separated results of learning themselves. The continuous nature is implied in both the learner's consciousness of experience and the experience of the learner. James has argued that people never have the same consciousness on two different days and "the principle of continuity of experience means that every experience both takes up something from those which have gone before and modifies in some way the quality of those which come after" (Dewey 2008, p. 35). This assumption leads to a fundamental question that if the experience is changing all the time, what does experience means in experiential learning theory for this thesis?

In Kolb's learning process in Figure 3, concrete experience is the "here-and-now" (Kolb 2014, p. 32) which is clearly a description of a sensory experience. However, if we only consider experience as something sensory, we are excluding memory as a source of experience and as a result, even a simple *a posteriori* justification cannot be made. For example, we might be able to observe and experience the behaviour of people in a particular country while we are actually there (sensory experience). However, we cannot recognise that people from one country behave differently from those of another country if we cannot engage our memory in recalling what the behaviours actually are in the other country. Therefore, given that this thesis argues for the importance of cultural awareness and intercultural skills in international commercial practice, it is perhaps more useful to include

external experience (sensory experience) and internal experience (largely memory) (Moon 2004, p. 23) in a curriculum for aspiring ICP lawyers.

However, in terms of the spirit of Stoicism and Daoism, we must also take into account the essential nature of individuals, which is unique to them and which will influence how and what they learn. For example, two different students may never achieve exactly the same outcomes as each other, even though they receive the same instruction and have the same educational facility. Supporting evidence for this may be found in many contexts. For instance, in the same class with the same teachers delivering the same lectures to different students, we will still see students achieving different marks from each other. For instance, student A may have better marks than student B in commercial law but student B may have a better rank than student A in criminal law. From an epistemological perspective, therefore, it is important to balance the two aspects of experiential learning.

According to Kant (1982, pp. 43–45), people do learn from the outside world through experience, but not exactly as the objective world is, but as shaped by their own understanding or through their own coloured glasses (innate concept). Therefore, to understand experiential learning theory fully, besides the inherent character of the experiential learning process in Figure 3, that should be generally useful for everyone, we also need to add in the course design, the elements of learning from individual perspectives (based on individual prior experience and beliefs) which refers to individual learning style or preference.

Individual learning style or preference

There are many elements that may be influential on learning from an individual perspective. For example, brain function, personality, the mode of thinking, sensory perception, socio-economic circumstances, family value, and prior educational experience. To simplify and make the influential elements manageable for this thesis, these elements are considered into two categories: one is strongly linked to biological capability (more rationalism than empiricism), which the one year revised JM course proposed in this thesis cannot change. The other is strongly linked to prior experience (more empiricism than rationalism),

which is the main content of the proposed revised JM course for intending Chinese ICP lawyers.

However, in a student-centred experiential learning course, even if biological capability cannot be changed, attention must be paid to the individual learner. This is particularly important in skills learning, where only the individual learner can perform the skills. JM students will be academically intelligent but they may need other kinds of intelligence for the purposes of international commercial practice. There have been many attempts to define intelligence. For example, in the late 19th century, Francis Galton examined hereditary lineages, and believed "intelligent persons would exhibit greater sensory acuity" (Gardner 2000, p. 2). Interestingly, the Chinese ancestors agreed with him. For example, traditionally, Chinese people describe good auditory sense as 耳 (ear) 聪 (adjective) and good visual sense as 目 (eye) 明 (adjective) and the two adjective words join together as 聪明 which means clever. However, Galton did not really find the right indices for intelligence measurement but only proved the possibility of measuring the intelligence level. Gradually, people realised that diversity exists not only at a vertical level (between low and high levels of intelligence) but also at a horizontal level (between different kinds of intelligence). Gardner states that there are several types of intelligence: linguistic intelligence (Gardner 2000, p. 41), logical-mathematical intelligence, musical intelligence, bodily-kinesthetic intelligence, spatial intelligence, interpersonal intelligence, intrapersonal intelligence (Gardner 2000, pp. 42–43), naturalist intelligence (Gardner 2000, pp. 48–52), spiritual intelligence (Gardner 2000, pp. 53–60), existential intelligence (Gardner 2000, pp. 60–64) and moral intelligence(Gardner 2000, pp. 67–77). Some of these, for example, linguistic intelligence, interpersonal and intrapersonal intelligence seem particularly useful for international commercial practice.

In addition, students with different kinds of intelligence may have different learning styles. There are many learning style instruments. For example, , the VARK survey (Leite et al. 2010, p. 325) attempts to measure biological capability. The, Four Style Type Learning Style Inventory (LSI) (Kolb 1983, pp. 67–73) attempts to measure learners' ability to learn from experience. However, Kolb (2014, pp. 143–151) has recently updated his learning style inventory from four

learning style types to nine learning style types: the initiating style (CE and AE), the experiencing style (CE), the imagining style (CE and AE), the reflecting style (RO), the analysing style (AC and RO), the thinking style (AC), the deciding style (AC and AE), the acting style (AE), and the balancing style (CE, RO, AC, and AE). These, however, still match his experiential learning process in Figure 3. The new instrument also embraces the possibility that people may shift from one style to another for different learning tasks, which is called learning flexibility (Kolb 2014, pp. 146–151). The earlier version has been approved by researchers (Hawk and Shah 2007, pp. 11–16) but it has not been possible to locate any research to date investigating the new model. The impact of different learning styles in a course for ICP lawyers is, therefore, significant.

However, some learning styles may not be consistent with experiential learning. Students may not like it for various reasons, for example, their home culture or personality makes them resistant to reflection on their own mistakes. Consequently it is suggested that, if an experiential learning approach is adopted, the teachers must make efforts to explain the approach to students and emphasise the need for open-mindedness about it. This needs the leadership and support of teachers and is described in Chapter 11, particularly in relation to filtering of students who are prepared to engage in this way of teaching.

Omissions from Kolb's experiential learning cycle

In addition to the reasons expressed above, experiential learning is selected for this thesis also because it is more suitable for teaching adults. One reason for this is that, as described above, experience implies both external (sensory) and internal experience. Adults have more internal experience (memory, knowledge) to reflect on, therefore, they should be able to use experiential learning as a technique more effectively than children. Because this thesis concerns a proposed course at masters level, the students are all adults. Therefore, experiential learning is selected as the most appropriate in both its first and second aspects. Although there are many reasons to choose Kolb's experiential learning approach for this thesis, as expressed above, it is also important to consider critiques of his

theory because there are some things that Kolb has omitted from his articulation of the experiential learning cycle.

Concrete experience stage

In term of an experiential learning course, the concrete experience is the activities that take place in the classroom. However, Kolb's cycle is based on an ideal assumption that "when human beings share an experience, they can share it fully" (Kolb 2014, p. 32). However, in reality, such sharing may be prevented by difficulty in expression or because the experience each individual person has is different. From the students' perspective, how much and what kind of experience they can receive from the course depends both on their biological limitations and their ability to apply their mental capacity to the experience they have had (Reed 2013, pp. 46–57). For example, Broadbent's filter model, Treisman's attenuation model and Deutsch-Norman memory selection model are all models which suggest that there is a biological bottleneck that prevents us consciously attending to all of our sensory input at the same time (Reed 2013, pp. 46–52). Further, based on the bottleneck theory, "capacity theories assumes there is a general limit on a person's capacity to perform mental work" (Reed 2013, p. 52) but that a person "has considerable control over how this limited capacity can be allocated to different activities"(Reed 2013, p. 53). Therefore, teachers should realise that the experience delivered by them may only be received in part by their students but do their best to help the students get the most out of the experience.

Moreover, as described above, the experience delivered by the course may also be affected by a student's previous experience[46]; how much they understand the

[46] This view is consistent with Wittgenstein's theories. For example, when a particular thing is discussed, it will be described as a general term (Wittgenstein 1978, p. 69). When we talk about international contract norms, we tend to describe them as if all jurisdictions may share the same norms in the same way. However, the situation can be very different even if we compare an English business man signing a contract with a Chinese business man in England with the situation when this English business man signs a contract with the same Chinese business man in China. By

purpose of the course[47] and their emotional response to the experience in the reflection stage (Moon 2004, p. 93). For example, a U.S. teacher may design a simulation of an international contract negotiation based on her experience of negotiations happened in the U.S.. An English student will bring to the simulation their experiences of English negotiations and a Chinese student will bring their experiences of Chinese negotiations. Other students may have no previous experience and base how they behave in the simulation on what they have seen in films or television. Therefore, there must, it is suggested, be a filter process before students take part in the concrete experience shown in Figure 3. This is where the teacher has a key role in controlling how students are prepared for the experience that will finally become a concrete experience on which reflection can follow.

Reflection stage

The reflection stage, in an experiential learning course, involves feedback from the tutors, as well as the students evaluating their performance, identifying what they have learned and making plans for the next stage. If students have only had one experience of a phenomenon, they may need considerable help in evaluating and identifying what to do differently in the next stage.

Another issue in the reflection and observation stage in Figure 3 is that, according to Moon (2004, p. 81), reflection is an intentional learning process that only occurs when the students are consciously doing it. In this sense, it is important to notice that "we cannot always adapt our thought processes to the strategies required by the task (intention)" (Reed 2013, p. 58). Evidence for this is found in the famous Stroop effect. The Stroop effect is the phenomenon found in an experiment carried out by John Ridley Stroop in 1935. The task of the experiment was "to name the

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analogy, therefore, what the teachers have in mind can be quite different from what their students ultimately understand through a passive lecture. A further example is given later in the paragraph.

[47] This is supported by Wittgenstein's latter work which focused more on the pragmatic function of language. Similar or the same languages may be used to express ideas for different purposes (Wittgenstein 2009, paras 5, 62, 69, 132). Therefore, a person is unable to understand fully without acknowledging the specific purpose that shapes the language.

colour in which a word is printed, ignoring the word itself" (MacLeod 2016, p. 1). The outcome of the experiment showed that people took more time to name the colour when the content of the word mismatched the ink it was printed in than when the content matched the ink colour. For example, people failed to see the blue ink in which the word 'red' was printed at the same speed as they could recognise the red ink in which the word 'red' was printed. The reason for the Stroop effect is that "skilled readers process the irrelevant word without consciousness or intent" (Besner et al. 1997, p. 221). This unconscious learning is, unlike deliberate reflection, an automatic learning process aligned to cognitivism. According to Hasher and Zacks (1979, p. 356) and their followers (Hartlage et al. 1993, p. 248), an automatic learning process is effortless and instructions, emotional states, and other simultaneous tasks have little interference with how such automatic process is carried out because it is done before people even notice the existence of the process. There are two ways to acquire such automatic learning processing. One is through extensive practice (Beilock et al. 2002) with intent. Expertise in a skill is developed in this way.

The other is the default setting of human beings, which is called 'incidental learning': the way in which people learn concepts such as frequency, spatial and temporal information (Reed 2013, pp. 59–61, 132). Both forms of automatic processing provide people with strength in finishing tasks more quickly and consistently than effortful (intentional) processing for routine tasks. However, as the Stroop effect shows, it may also inhibit more deliberate processing and, in particular, reflection when the task or experience contrasts with or is different from the routine.

In the context of this thesis, assumptions learned by students through automatic processing generated in their original culture through time (which can be considered as extensive practice) could distract the students or even prevent them understanding that in an international context cultural backgrounds may be different. This underpins other skills such as the ability to communicate and collaborate with those from other cultures. For example, Kate Baragona shared an early story of her legal career in one of the McGeorge Law School interviews:

> "…I was semi-American sent off to Siberia and I went off to negotiate. It was one of the first times I was going to be without a principle, so I was going to lead the negotiations. And I spent three days there negotiating, and I felt this is – I'm so good, everyone keeps nodding, everyone's, so I'm getting this done, just work at this, just going on our way, and everyone is nodding and nodding and I'm thinking, I must be brilliant, I'm just going away and got back to London, and I rolled everything up and sent it to the client's counterparts to the government, they rejected everything, because nodding meant we heard you, we don't agree, we heard you. But I thought I had terrific communication skills and everyone was seeing the brilliance of my proposal, I went back and it was three wasted days, I mean I had accomplished nothing in three days…" [48]

In this story, there is a behaviourist element: to Baragona, nodding as a stimulus automatically linked to the meaning 'Yes' because this is conventional in Baragona's original culture. However, her unquestioned assumptions based on what she had learned unconsciously prevented her from reaching the final result she wanted. However, the rejection of the counterparties motivated her to reflect on the clash of assumptions, leading her to learn from the experience.

Therefore, one of the aims of this thesis in designing a revised JM. course for intending ICP lawyers is to change such automatic processing by having students reflect on carefully designed classroom activities and free the students from the assumptions they learned in their original culture. According to Lewin (Burnes 2004, pp. 985–986), there are three steps for change to take place, unfreeze (step one), change (step two) and refreeze (step three). Although there are more sophisticated theories for changing at an organisational level (for example, John Kotter's 8-steps of change (Kotter 1996, pp. 33–145)), Lewin's suggestion is more suitable for this thesis because it represent the key steps needed to make change either at organisational level or for individuals.

Moreover, it is also necessary to bear in mind that learning by automatic processing is not wrong in itself. Further, what has been learned in this way may be quite correct for the situation and culture in which it has been learned.

[48] Interview conducted by McGeorge Law School.

Consequently and in a spirit of open-mindedness, the objective of a course design for ICP lawyers is not to undo what has been learned (as behaviourism suggests), but to add to it. Therefore, we need to unfreeze the original automatic learning process by making the students aware of the problems that have resulted from their previous automatic learning system, for example, their assumptions about other people's behaviour. The teacher should then encourage the change by showing more cases to motivate the students not to make assumptions automatically but to slow down and reflect. Then experiential learning environments can be used to allow students to practise to reinforce and see the implications of the change (for example have someone speaking other languages to answer the phone as part of a simulated transaction).

However, in order to embed changed behaviour, it is important to repeat the active experimentation stage and this is useful in, for example, developing expertise in a skill such as speaking a language. This leads, however, to consideration of the purpose of the learning and direction in which the experiential learning cycle should move.

Post-active experimentation stage

The whole learning process is a process of individual development, i.e., through the learning process, the students will continue to grow in knowledge and skills management and be able to move on to more and more complex experiences. Therefore, the experiential learning cycle cannot be a closed cycle but rather should be seen as a moving cycle (Cowan 2006, p. 54). Further, in the context of this thesis, the purpose of learning is becoming competent ICP lawyers (the direction of the learning cycle). This involves two elements, one is that the content of the learning should focus on international commercial legal tasks. However, as Rogers and Horrocks pointed out:

> "and it is not at all clear where these elements [learning goals, purposes, intentions, choice and decision-making] fit into the learning cycle"

(2010, p. 122).

The other element is the level of skill students can be expected to reach. The revised JM aims to allow students to reach a level of competence rather than a level of expertise. The distinction between competent lawyers and experts may be significant:

> "… one difference between business lawyers with four years' experience and business lawyers with more than fifteen years' experience is not only that the more expert lawyers… rapidly perceiv[e] patterns in problem situations and retriev[e] appropriate approaches to solutions. The more experienced lawyers also have a fundamentally different perception of the problem itself, a perception much more sensitive to the relationships between lawyer and client"
>
> (Blasi 1995, p. 395)

For experts, as Eraut points out, "most expert performance is ongoing and non-reflective" (Eraut 1994, p. 126) and is therefore an automatic process of the kind described above. However, students in the proposed course will be required to demonstrate competence to "recognize features of practical situations and to discriminate between them to carry out routine procedures under pressure and to plan ahead" (Eraut 1994, p. 125) intentionally and to be reflective. As the course is proposed to be a JM, student performance will also need to be assessed.

Assessment of outcomes and competences

From the discussion above, it can be seen that what seems most appropriate for a skills-based course for ICP lawyers is an experiential model, exposing students to experiences that will challenge what they have learned through automatic processes, and allowing them to practise skills, to reflect on their own performance and practise again. In this is it similar to the ABA's new prescriptions for experiential learning to be included in the JD:

> "To satisfy this requirement, a course must be primarily experiential in nature and must:
> (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;
> (ii) develop the concepts underlying the professional skills being taught;
> (iii) provide multiple opportunities for performance; and
> (iv) provide opportunities for self-evaluation."
>
> (ABA Section of Legal Education and Admissions to the Bar 2015b, p. 1)

Specific to legal skills education, outcome-led/competence, capability and holistic educational models (Webb 1996, pp. 33–39) are relevant and discussed below.

Outcomes and competences

Outcome-led approaches developed in the 1960s and 1970s in America. In 1975, Robert Mager used "instructional objectives" as a name for specific statements about observable outcomes (Kennedy 2007). However, instructional objectives later came to be considered a similar, but different concept, from learning outcomes. According to Harden (2002, p. 151), in comparison with instructional objectives, learning outcomes are more user-friendly and broadly-defined, integrate knowledge, skills and attitudes and, importantly, set out what is to be assessed at the end of the course, rather than the objectives at the beginning. Furthermore, learning outcomes may have different meanings for different people as well. They can be expressed quite simply as cause and effect:

> "Learning outcomes are statements that specify what learners will know or be able to do as a result of a learning activity. Outcomes are usually expressed as knowledge, skills, or attitudes."
>
> (American Association of Law Libraries n.d., p. 1)

Or is a more sophisticated way:

> "They are not values, beliefs, attitudes, or psychological states of mind. Instead, outcomes are what learners can actually do with what they know and have learned they are the tangible application of what has been learned. This means that outcomes are actions and performances that embody and reflect learner competence in using content, information, ideas, and tools successfully. Having learners do important things with what they know is a major step beyond knowing itself".
>
> (Spady 1995, p. 2)

Although there are different definitions of learning outcomes, they still share some common views: the focus of education should be the final outcomes of what students may achieve at the end of the curriculum rather than the content of teaching (Biggs and Tang 2011, p. 9) . Therefore, the outcomes must be expressible and assessable. A question for this project is, therefore to identify some of the learning outcomes for a course to develop ICP lawyers? A number of jurisdictions have developed lists of outcomes or competences for newly qualified lawyers (Federation of Law Societies of Canada 2012, Law Admissions Consultative Committee 2015, SRA 2015, BSB 2016). These are designed to articulate the knowledge, skills and attitudes that are necessary for 'day 1' competence in a domestic context. In addition to their use by professional bodies, some law firms use competency models to define the characteristics of the most effective and successful lawyers in the firm, and then use those models in the recruiting of new lawyers as well (Hamilton 2013, p. 6).

The overall outcome for a course for ICP lawyers is clearly that graduates should be competent ICP lawyers and capable of navigating legal problems in the international commercial context. In order to determine what knowledge, skills and attitudes contribute to that overall outcome, it is useful to consider both competence and capability models in more detail.

Competence and capability

'Competence' is a confusing word as its definition varies from time to time and article to article (Kennedy et al. 2006, p. 2). In its widest sense it may mean that a competent person is not professionally negligent, but is not yet an expert. Some examples of competence-led approaches, including those referred to above created by professional bodies, look very similar to learning outcomes but are used in a professional, work-based context.

From a critical point of view, competence-led approaches may focus too much on low-level procedures and features and lack cultivation and assessment of skills at a high-level such as critical thinking, judgment and evaluation (Atkins et al. 1993, pp. 46–50). Moreover, such approaches have also been criticised for ignoring the underlying process of how students become effective and reflective learners who can look back over their experience and break it into significant factors or improve their performance by using reflection (Maughan et al. 1995, pp. 265–275) and trying to evaluate students' by observable behaviours without asking whether students have any understanding of what they are doing (Barnett 1994, pp. 55–83).

What may be the most significant defect, particularly given the variety and breadth of international commercial practice for lawyers, is that competence-led approaches may be shaped in a dehumanised way by asking the students to fit standardised outcomes considered important to the curriculum designer or the professional regulator without any recognition of differences among the students. Others, however, argue that such defects may be avoided by paying careful attention to the drafting of the competences (Hager et al. 1994, p. 4) For example, competences could be developed that represent thinking and problem-solving processes, as well as processes of self-efficacy and reflection, as well as simple task based competences. In this way they become closer to the concept of capability.

Eraut defines capability as follows

> "[t]he usefulness of the capability construct for professional education lies in holding … [two meanings of the term "capability"] together in some kind of balance. In its first sense

> capability has a present orientation and refers to the capacity to perform the work of the profession: capability is both necessary for current performance and enables that performance. In its second sense, capability can be said to provide a basis for developing future competence, including the possession of the knowledge and skills deemed necessary for future professional work."
>
> (Eraut 1994, p208)

To sum up, capability asks students to be able to use what they have learnt to solve new problems and new situations. According to Webb (1996, pp. 36–38) capability approaches seek to integrate knowledge, skills and attitudes into an overall problem-solving methodology. Capability is not a total opposite or parallel approach to competence. It may be used to describe competence or merged with competence as well (Cheetham and Chivers 1996, 1998).

Holistic approaches

Additionally, capability approaches also share many common features with the holistic approach. Webb (1996, pp. 38–43) suggested that holism is a term that describes a way of structuring learning. The holistic approaches lead students to experience problems and organise them by focusing on the whole in relation to the intellectual parts, not just on each part separately. Webb (1996, p. 38) describes such approaches as 'socio-practical' models and stresses that the relationship between theory and practice is reflexive. This kind of approach, then, can be used to reduce the possible fracturing effect of individual, task based competences, by focusing on practice as a whole in a way that advocates experiential and reflective learning approaches. However, even though the holistic model approach is an advanced educational theory, it cannot be considered as perfect. For instance, Mackie (1989, pp. 15–22) criticised holistic approaches as being unstructured and suffering from a lack of precision in their objectives, compared to competency approaches.

ICP lawyers need, it is argued, to be able to deal with unstructured problems and can learn to do so in an experiential learning classroom. Therefore, to some extent,

experiential learning theory is a holistic approach and one that is, it is suggested, particularly useful for skills teaching. According to experiential learning theory, learning is considered as a process rather than an activity in terms of outcome. Further, "learning is a continuous process grounded in experience" (Kolb 2014, p. 38). Experiential learning theory is considered to be a theory for learning from doing (Maughan 1996, p. 67); therefore, it can be used as an umbrella theory for skills teaching for ICP lawyers.

Conclusion

This chapter has summarised the key schools of thought in education, focusing on the way in which each of them might have a part to play in the teaching of skills for students who intend to work in international commercial practice. Behaviourism, because it focuses on activity and performance, initially appears to be relevant to skills learning, and there are some aspects of stimulus-response that might be used in working with individual students on individual skills. However, it is inadequate on its own to prepare students for the sophistication and complexity of the activities involved in international commercial practice. It has concluded that because it focuses on ability to respond to change and to develop, a capability approach and, because it emphasises learning by doing, a constructivist experiential learning design are likely to be key to development of an effective course for students in this area.

As skills cannot be learned simply from delivery of information, they must be practised over and over again in order to achieve the desired level of competence. Although therefore there are elements of behaviourism in skills learning, where it is important to give students sufficient opportunities to practise the skill, it is argued that this is not enough in the complex context of international commercial practice. A constructivist approach is concerned with the process of learning and allows space for students to integrate their thinking and individual practice. Therefore, pure behaviourism will not be enough to achieve the goals of this research.

The chapter has, however, has noted the widespread use of competences to define the knowledge, skills and attitudes needed for domestic practice, and the extent to which these might be behaviourist in nature, or influenced by cognitivist and capability models.

Considering that this research is for a professional course and focuses on skills, the course should be led by a competency framework for ICP lawyers at the novice level. Therefore, the achievements of the course should be tested according to competence and outcome-led theories. Capability theory will also be involved, as students need to be able to be flexible in practice. Holistic theory is student centred and is suitable to be used during the learning/teaching process and at the formative assessment stage. However, no matter how different each single student is, they must be able to solve legal problems and be able to help their future clients to achieve their goals. Therefore, objective competency standards should be met as a final outcome.

This chapter has set the scene for the investigation, in this thesis, of the competences that might be required for international commercial practice and how students might be encouraged, in the classroom, to develop them. This leads to discussion, in the next chapter, of the qualitative elements of this project, designed to find out what skills are needed for international commercial practice.

Chapter 5: Methodology

Introduction

Based on the understanding that was presented in the background chapters (2-4), this chapter and the following chapter explain the underpinning reasoning behind this project both theoretically (methodology) and practically (methods).

Methodology is about the reasons for selecting a particular research 'recipe' (Clough and Nutbrown 2012, p. 25). It is a profound subject that not only can be used as a tool to support and explain different research studies, but is also an independent subject for research studies itself. For this project, methodology is used as a supporting tool to explain the reasoning and philosophical underpinning of the research. Therefore, this chapter does not cover all the concepts within methodology, but explains the worldview and methodology of the researcher that underpins this research and the reasons for selecting methods for data collection, processing and analysis. It does so through six commonly used concepts (ontology, epistemology, rhetoric, axiology, positivism and interpretivism). This chapter aims to make explicit the basic logic of the research, to facilitate readers' understanding of the strengths and limitations of this research. With such an understanding, the researcher or other readers will have a clearer picture of the conditions in which the findings can be applied and the ways in which this project could lead to future research and in making judgments as to whether the research outcome is trustworthy.

Generally, research projects are designed and undertaken using the two elements described above: methodology and research methods (Creswell 2013, p. 3). Methodology can be seen as philosophical world views that may be described as paradigms (Johannesson and Perjons 2014, Lincoln et al. 2017), transformative paradigms (Mertens 2008, p. 13), or a combination of ontology and epistemology (Crotty 1998, Gialdino 2009). Whichever description is used, such philosophical worldviews mean "a basic set of beliefs that guide (research) action" (Guba 1990,

p. 17). There are four perspectives to describe them: ontology, epistemology, axiology, and rhetoric. Ontology is concerned with reality and epistemology is more concerned with knowledge; axiology is about ethics; and rhetoric is about the way ideas are expressed. These four perspectives are connected with each other and show the underlying philosophical worldview of this research as a whole.

The research methods are the specific instruments that researchers use to collect data and information, such as interviews, questionnaires, ethnography, and observation (Denscombe 2014, p. 4). For any research, shown in Figure 4, there are three approaches (Creswell 2013, pp. 3–21) connecting the philosophical world views as the underlying theory (Slife and Williams 1995) and the research methods as practical instruments together: qualitative, quantitative and mixed methods approaches.

Figure 4 The Components of research

The key concepts from this diagram will now be explored in turn.

Ontology

Ontology is a philosophical stance concerning 'being' and 'reality' and may be viewed from both objective and subjective perspectives (O'Gorman and MacIntosh 2015, p. 55). From the objective perspective, which may be referred to as realism, ontology can be "thought of as looking at reality as made up of solid objects that can be measured and tested, and which exist even when we are not directly perceiving or experiencing them" (O'Gorman and MacIntosh 2015, p. 56). Realists believe that 'being' and 'reality' exist independently from human perception and behaviour (Clark 1998, Crossan 2003). They also consider that 'reality' is static, can be generalised and stands still without changing (Flaming 2004, p. 225). Therefore, ontological realism facilitates the positivist paradigm of research (Bilgrami 2002, p. 2), typically taking a quantitative approach.

On the other hand, ontological relativism "looks at reality as made up of the perceptions and interactions of living subjects" (O'Gorman and MacIntosh 2015, p. 56) from a subjective perspective. Relativists search for subjective meaning, rather than objective existence, and believe that there is no 'being' and 'reality' without a context (Crossan 2003, p. 52). 'Reality' may evolve from culture and experience, hence the relativists consider it as dynamic and transformative rather than static, although like the realists they also consider that it can be generalised (Crossan 2003, p. 52). Relativism supports a interpretivist research paradigm, normally using qualitative approaches (Bailey 1997, Clark 1998).

This project suggests a new legal curriculum, which will include training in key legal skills that are not addressed in the current curriculum, but which will be identified by this study as being essential for future ICP lawyers in China. The need for these legal skills is based on the reality that there is a dynamically and continually changing landscape of legal services in China (Chapter 2).

In order to identify what those new skills should be, the researcher needs to undertake an empirical inquiry in order to generate the necessary data. This particular research study will not generate valid data to answer the research questions if only historical and documentary research methods are employed because the increasing need for ICP lawyers is a new trend and still growing.

Therefore, very little relevant data currently exists for the researcher to follow or test.

Moreover, the researcher also needs to identify and comprehend the current and anticipated future needs and perceptions of key stakeholders. It is acknowledged that the perceptions of the individuals who participated in this study were necessarily subjective and so the data obtained reflects their diversity and their version of reality. Although some common factors may be shared, the nature of legal services and legal education systems varies from jurisdiction to jurisdiction. Therefore, it is essential to the validity of the recommendations made in this study for the unique context of key jurisdictions to be explored and taken into account. For example, Chapter 2 identifies that Anglo-American law firms are currently leading the ICP legal service markets. Therefore, in terms of the legal services market, ICP lawyers need to understand and be able to adapt to approaches that derive from common law systems. In Chapters 3 and 4 it is noted that in terms of the legal education system, English lawyers may have an advantage over their Chinese counterparts from the very beginning of their careers because they have typically received training in legal skills as part of their formal education.

In conclusion, from an ontological view, this project studied collective subjective perceptions both in legal practice and legal education areas from 2014 into the reasonably foreseeable future. Therefore, it is considered that a constructivist research paradigm using qualitative research methods, based on ontological relativism rather than ontological realism was the most suitable approach to take.

Epistemology

Epistemology is a philosophical stance describing the way in which we obtain valid knowledge (O'Gorman and MacIntosh 2015, p. 58). From a philosophical view, epistemology focuses on knowledge and the justification of belief (Audi 2002). Therefore, it can be used both for understanding the learning process generally and as a way of determining and justifying how the research should be conducted. This thesis discusses epistemology in the sense of learning theories in Chapter 4 and will also consider epistemology from the research perspective in

this section. In the context of research, epistemology "examines the relationship between knowledge and the researcher during discovery" (Killam 2013, p. Loc. 111). Sometimes, it is difficult to distinguish epistemology from methodology because both of them focus on 'how', but the biggest difference between the two may be said to be that 'epistemology' is a philosophical concept that can be applied to research as well as other kinds of learning activities, whereas 'methodology' is a practical concept regarding research alone (Killam 2013, p. loc. 105-110).

According to Lincoln et al (2017, pp. 109–131), epistemology is interrelated with ontology, in the sense that the researcher's epistemology is shaped by her ontological view of 'reality'. Therefore, realists, because they believe that 'reality' is context-free and can be objectively measured, are more likely to have an epistemology and methodology that enables them to maintain a distance from the researched subject matter in order to avoid, or at least minimise, any influence or intervention in the study by the researcher. In such a situation, the researcher will seek to conduct the research as an outsider, in order to study the subject matter in an objective way. In contrast, relativists, such as the researcher in this project, are more likely to conduct their research in a subjective way as an insider, in order to interact with the participants. In such a case, the researchers are co-creators of the findings with their participants (Killam 2013, p. Loc. 255-263).

There are some criteria for judging whether the researcher is an insider or outsider. For example, the researcher is an insider if he or she is a member of the social group or society being studied (Naples 1996) or he or she has *a priori* intimate knowledge of the group being studied (Hellawell 2006). On the other hand, if the researcher is neither a member of the group nor has any intimate knowledge of the researched groups, then she is likely to be an outsider. However, it should be acknowledged that the knowledge that the researcher has of the relevant profession will inform the design of the research instruments and the subsequent analysis of the data either consciously or subconsciously.

For this project, the researcher used interviews with the express intention of promoting dialogue and interaction with the participants. The researcher also has some prior knowledge of both Chinese lawyers and law teachers, who are the groups being studied. Therefore, the researcher is a relative insider.

Generally speaking, the research for this project has been conducted in a subjective way, in that the researcher brought her own knowledge and experience to the project, from the initial research design to the final data analysis, in order to understand what skills future ICP lawyers need to learn and how those skills can be learned effectively. However, as Greene (2014, pp. 3–4) argued, an insider researcher should both take advantage of the experience and knowledge that he or she has, but also be careful of the disadvantages of previous knowledge, in order to avoid bias.

One way to minimise bias is to design the research instruments in such a way as to permit the participants to maintain control of the dialogue. In the context of interviews, this may be achieved by the inclusion of open questions that permit the participant to decide what they perceive to be relevant in order to answer that question and also allow them to express their answer freely and in their own words. For example, in this project, the researcher started almost all the interviews with Chinese lawyers with an open and general question such as "what are the most significant challenges that you have encountered in international commercial practice?". The purpose of this was to minimise the influence of the researcher, and to collect the participant's perceptions alone. Further, the researcher not only obtained a single participant's perception by conducting interviews with individuals, but also some group interviews.

Such an approach, incorporating both individual and group interviews, can reduce the risk that the analysis is unduly influenced by a single insider's own perspectives. It also generates rich data that can be analysed to establish whether the data gathered in one interview is supported by comparable data gathered in another. Where data is inconsistent, the richness of interview dialogue may provide possible explanations for that inconsistency. Additionally, the researcher analysed her own data along with data collected by McGeorge Law School. Such a comparison provides the researcher with data that is free from her own bias (though of course it may be influenced by any bias from the researchers who originally collected it) and also offers the opportunity to check the validity and reliability of her data by exploring whether the two sets of data are comparable or not (and if not, why not).

Positivism vs. interpretivism

As discussed above, in the practice of research, a particular research study may not neatly fit a particular philosophical branch. For example, not all realists may, in fact, carry out their research as an absolute outsider. Therefore, it is useful to discuss other research paradigms in order to understand the research more fully. In this chapter, for clarity and simplicity, the research paradigms have been divided into two families: positivism and interpretivism. This division has been made because conventionally, these two are closely connected with quantitative and qualitative approaches respectively and thus can readily be attached to realism and relativism.

The positivism family includes post-positivist, positivist, or empirical science (Creswell 2013, pp. 7–8), adopting a natural scientific view. Positivism in a social sciences context typically involves a statistical approach based on a traditional scientific view in order to explain objective facts (Hasan 2014, p. 323). The positivist approach is that both solid objects and subjective perceptions can be considered as a 'thing' or a 'fact'. If a 'thing' or 'fact' appears frequently or on a large-scale in the data that has been obtained, then it is considered that the 'thing' or 'fact' can be regarded as an objective principle free of subjective judgments (Turner 2001, pp. 30–42). Therefore, positivism is based on a quantitative approach which seeks to avoid biases from moral judgment, cultural prejudice and political evaluation and offer outcomes that are strong in reliability and objectivity (Hasan, 2014, p. 323).

For this project, legal education for ICP lawyers is still in its infancy and it is, therefore, too early to see different models of ICP education which could be tested as variables in a positivist and quantitative experiment. Further, as the group of ICP lawyers is still growing and is, in some cases, difficult to identify as a single group (Russell 2014, p. 237), it is not possible to obtain a representative sample from which to generalise. Besides, a positivist and quantitative approach is weak in understanding the complexity and variability of changing social phenomena which may cover multiple disciplines and have different meanings in different

contexts (Hasan 2014, p. 321). Given that the landscape of legal education for ICP lawyers is growing and changing, it is more helpful to provide a detailed context that can guide predictions and assumptions in the future rather than simply testing an existing 'thing' or 'fact' which would limit the understanding gained to just a few variables that may become insignificant in the near future.

By contrast, the interpretivism family includes constructivist and interpretivist approaches, and is concerned with interpreting and understanding relationships in a comprehensive way (Saunders et al. 2015, pp. 140–141). Rather than avoiding the uncertainty that subjective perceptions may bring to a research project, interpretivism emphasises such differences in order to understand the interaction and uniqueness of the subject matter of the study (Saunders et al. 2015, pp. 140–141).

For this project, the skills that the future ICP lawyer needs to learn can be best described by present ICP lawyers with their working knowledge and experience. Therefore, interpretivism, which focuses on subjective components, is more suitable for this project than positivism. Further, this project aims to go beyond explaining cause and effect as merely scientific fact, by making recommendations to support future ICP lawyers during the formal educational stage. In particular, it is also seeking to identify what that support should be (specifically what skills should be learned) for ICP lawyers themselves and not a wider body of individuals. Hence, both in the data collection process and in the analysis process, the researcher took the time to understand the background of each interviewee (as described in Chapter 6) and has, in footnotes, shown the relevant background when quoting from transcripts throughout the thesis. This has led this relativist study into an empirical phenomenological approach "to obtain comprehensive descriptions that provide the basis for a reflective structural analysis that portrays the essences of the experience" (Moustakas 1994, p. 13).

Phenomenology

Phenomenology may be referred as a qualitative research approach or a philosophy (Creswell 2013, p. 14). As a philosophy, phenomenology focuses on

consciousness and the content of conscious experience such as perception and judgement (Balls 2008, Connelly 2010). Phenomenology also concerns experience as it is lived, not only the response to such experience (Connelly 2010, Munhall 2012). As a research approach, it is used in the area of "psychology, education, and in health care" (Connelly 2010, p. 127) and is "most useful when the task at hand is to understand an experience as it is understood by those who are having it" (Cohen et al. 2000, p. 3). The core aspect of the overall methodology for this project is phenomenology because it is based on the participants' perceptions and judgement, allowing the research to make a relativist exploration of the experience of international commercial legal practice and to use the researcher's perception and judgement to analyse those perceptions thematically and collate them into recommendations in Chapters 11 and 12.

For example, research Q1 and Q2 (research questions are in Chapter 1) concern the experiences of ICP lawyers about skills as they are used in practice and Q3 and Q4 involve the experience of students and teachers who deliver or participate in skills learning. Therefore, phenomenology is suitable for this project to understand the experience of these ICP lawyers and teachers and students.

'Phenomenology' may be used interchangeably with 'hermeneutics' (Koch 1995, Dowling 2004); but 'hermeneutics' is sometimes considered to be a subcategory of 'phenomenology', which is also referred to as 'interpretive phenomenology' (Wojnar and Swanson 2007, p. 174). Sometimes, these two concepts are considered to be parallel with each other as subcategories of qualitative approaches (Moustakas 1994, pp. 1–21). In this chapter, phenomenology will be considered as a research approach that encompasses within it three alternative approaches (Cohen and Omery 1994, pp. 136, 147–150): descriptive phenomenology, interpretive phenomenology (hermeneutics) and the Dutch (Utrecht) school of phenomenology (which combines the previous two).

Descriptive phenomenology originates from Husserl's work, and aims to maintain as much objectivity as possible. Hence a key feature of descriptive phenomenology is the concept of bracketing. Bracketing requires the researcher to 'bracket out' or set aside as far as possible any prejudices, biases, preconceptions and beliefs that the researcher may already have (Dowling 2007, p. 136) as these may affect the

study and prevent the researcher from identifying the essences of the phenomena being studied (Cohen and Omery 1994, p. 138).

Interpretive phenomenology, on the other hand, is based on Heidegger's development of the philosophy. Heidegger focused on the process of understanding the experience and rejected the notion of bracketing (McConnell-Henry et al. 2009, p. 8), believing that the researcher cannot completely separate objective description from his or her own perceptions. Consequently, the researcher's own experiences and perceptions will inevitably influence the design and conduct of the research, as well as the analysis and interpretation of data.

As described above, the researcher in this project is an insider. When carrying out this project, she already had some preconceptions that skills generally would be important, and this was the driver for the project in the first place (the interpretive element). However, the researcher sought to set aside any preconceptions about which specific skills might be important (the descriptive element). For example, when designing the research tools (discussed in the next chapter), such as the questionnaire, the researcher included a list of possible skills (the interpretive element) that was as comprehensive as possible so that while participants had the assistance of a list, that list did not constrain the selection they were able to make (the descriptive element). Consequently, the raw data was as free from bias as possible, and this led to some surprises in the analysis of the resulting data, for example, about the exact role of creativity, discussed in Chapter 10.

Generally speaking, at the stage of designing the project and collecting data, the approach is considered largely descriptive in allowing participants to describe their lived experiences. However, the data analysis is led by an interpretive approach. The method of analysis is described in Chapter 6.

In conclusion, this project uses a phenomenological approach to undertake an interpretivist research project based on a relativist ontology. This promotes the value of qualitative data such as contextual depth, which allows the researcher to see not only the appearance of existing facts but also the reasons behind them. This is crucial to the project, because if the researcher cannot understand the underlying reasons why certain skills are needed for ICP lawyers, then suggesting

any skills training in legal education for ICP lawyers will be no more than speculation.

Axiology

This is the theory of value. When it relates to human actions it is labelled 'ethics'; and when it concerns the physical attributes of objects, it is labelled 'aesthetics' (Edwards 1995, pp. 13, 16). In addition to ontology and epistemology, Heron and Reason (1997, p. 277) suggest that axiology should be a further factor that requires consideration when discussing research methodology. In a research project of this nature, where values in the sense of 'ethics' may be relevant, axiology may be taken to mean "what the researcher believes is valuable and ethical" (Killam 2013, p. loc 87). According to Killam, the axiology for interpretivists involves, "balanc[ing], viewpoints, rais[ing] awareness, develop[ing] community rapport" (Killam 2013, p. Loc 159). Applying this definition to this project, the researcher wishes to raise awareness within the Chinese legal education system and legal profession that there is a need for future ICP lawyers to receive training in certain skills. Further, the researcher's own values and ethical position indicates that ICP lawyers require more effective educational support, comparable with that available to lawyers working in other jurisdictions and other legal sectors, in order to balance both the need for career development of lawyers and also the need for legal services of the society in which they work.

Rhetoric

Rhetoric is about the tone of writing and the use of language. "Metadiscourse is used …to mark the direction and purpose of a text"(O'Gorman and MacIntosh 2015, p. 67). Good rhetoric is known as 'Euphemism' and poor rhetoric as 'Dysphemism'. In this chapter, rhetoric is discussed to further the discussion of the differences between positivism and interpretivism and as the philosophical basis for training in relation to ICP lawyers' intercultural communication.

As discussed before, the positivist approach is based on a realist ontology where the researcher believes that 'reality' is objective and independent from the person who undertakes the research. Therefore, the researcher seeks to research as an outsider without interacting with the 'reality'. However, as described above, followers of the interpretivist approach believe differently and conduct the research otherwise. According to Weber (2004), these conventionally expressed differences may not exist in reality, because

> "both [positivists and interpretivists] are concerned with trying to enhance their understanding of the world… Both also appreciate that they bring biases and prejudices to the research they undertake and that the research methods they use have strengths and weaknesses", although they "use a different genre to report their research".
>
> (Weber 2004, p. vi).

However, for Weber, the biggest difference between positivists and interpretivists is the different ways in which they describe their research. For example, the former may speak as little as possible about their personal perceptions and assumptions, but the latter will normally devote a lot of effort to explicating them at length.

It is hard to agree with Weber entirely, as the reason why the two describe their work differently in terms of 'rhetoric' is based on their different ontological beliefs and epistemological ways of conducting research. For example, the positivists believe that there should be a separation of the 'reality' from the researcher. Therefore, they will try their best to avoid their 'reality' being influenced by their perceptions and assumptions. Consequently, it is argued that it is not necessary for them to explain this at length, unless they have failed to avoid a personal bias and consider that this failure may affect the research outcome.

In contrast, the reason why interpretivists express their perceptions and assumptions in detail and in ways that might be rhetorically distinctive is because their audience may never fully understand their research unless they also

understand their perceptions and assumptions. Therefore, the rhetoric itself may furnish evidence for the audience to judge the nature of the research.

According to Aristotle (2012, p. loc. 273), good rhetoric should consider three elements: author, audience and message. In this thesis, while the researcher is a novice researcher supervised by an experienced supervisory team, she does, as described above, have pre-existing experience about Chinese legal education and international commercial legal practice. In terms of the audience, however, this thesis does not assume that readers have any special background in Chinese legal education or knowledge of international commercial legal practice. As such, the thesis is intended to be of use to anyone who has an interest in these subjects, irrespective of whether they have any pre-existing knowledge of them. Therefore, this thesis has three chapters in the background section, to explain why the author chose the topic and to help the audience to understand the author's perceptions and assumptions. The topic of rhetoric will be revisited in Chapter 9, as part of the data analysis, as the use of language is critical to the skills necessary for ICP lawyers. Rhetoric is also significant, of course, for the way in which the researcher explains her data analysis, findings and conclusions.

Conclusion

This project is a qualitative study about what legal skills are needed for ICP lawyers and how such legal skills can be effectively learned in the Chinese legal educational context. The research has been conducted using phenomenology as its methodology, and combining both descriptive and interpretive aspects of a phenomenological approach.

From a philosophical view, this project is based on a relativist ontology and the axiology of this project is linked to the researcher's desire to support the intending ICP lawyers for their future career. Rhetorically, this thesis explains the data in an interpretive way. The detailed design of this project and the actual process of data collection and analysis is explained in the following chapter.

Chapter 6: Methods and process

"What is rational is actual; and what is actual is rational"

-----Georg Wilhelm Friedrich Hegel

Introduction

In contrast with the previous chapters which have sought to explain the background to this research and have discussed theoretical views, this chapter focuses on the practical aspects of designing the research process . It describes the design of each of the research tools, namely the questionnaires and the interview investigations, including sampling and question design, as well as the process used in the interpretivist, qualitative analysis of the data.

The methods used in this project were a questionnaire administered to both Chinese and non-Chinese ICP lawyers, interviews with Chinese lawyers and others, and teaching observations. This chapter explains the design, administration, process and approach to analysis used with each of these research tools.

As Oppenheim (1992, p. 6) described, when a researcher chooses a particular instrument for research, elements such as appropriateness, validity and reliability should be considered. Hence, this chapter will explain the process relating to the methods from the choice of instrument to the process of analysis in light of these three elements.

The choice

When discussing appropriateness, both feasibility and ethical appropriateness are keys (Sapsford 2006, pp. 24, 34). At the outset of this research, instruments were chosen to explore the skills that were essential and important to ICP lawyers' work. Many different instruments were potentially available for collecting such

information. For example, it would be possible to use a questionnaire, interview, observation or case study. In terms of feasibility, a key consideration in deciding which instrument to use was the fact that only a few months could be taken up in carrying out the investigation, so the instrument that was ultimately chosen would need to be the most effective choice when operating within such a tight time constraint. Therefore, observation in the workplace by the researcher was not an appropriate choice as it might take more time than other instruments and, indeed, more time than was available, to cover the same range of information. However, it was feasible to carry out a small number of teaching observations.

Moreover, the more views collected from different lawyers, from different workplaces, the more useful the data to answering the research questions. Thus, a case study approach was not suitable as it normally covers one or a small number of cases and is more focused on the context in depth than collecting a larger number of views from various cases (Yin 2014, p. 18). Considering that the target participants with experience of international commercial legal work could live in any country (although the range of participants could be limited by the contacts of the researcher and her gatekeepers, they would mainly be lawyers working or resident within Britain or China, but this still covered a large geographical area), this presented challenges in terms of feasibility. Therefore, an electronic questionnaire was the most effective option to reach as many participants as possible during a limited period.

A questionnaire, therefore, appeared to be a more feasible choice. However, a questionnaire also has its limitations. For example, there are ethical considerations, in that it might be difficult to obtain answers to questions that a participant perceives to be sensitive or threatening in some way. By contrast with, for example, unstructured interviews, a questionnaire requires a large amount of careful planning as errors or omissions could arise, as could misunderstanding of the questions by the participants or of the answers by the researcher. Those misunderstandings could be because of cultural difference and differences in the participant's knowledge of the background to the research. Moreover, a questionnaire cannot be definitive on its own, as it asks for straightforward answers without context, therefore, those answers must be evaluated according

to the researcher's experience, common sense, and other information (Alreck and Settle 2003, pp. 8–9). In this case, that included the researcher's position as relative insider and as a relativist.

However, steps can be taken in order to mitigate the possible limitations with a questionnaire. For example, in this specific research project, questions that the researcher knew to be threatening or sensitive would not be asked. Compared with the time that would be spent on travelling all over the world for face-to-face interviews, a questionnaire approach still saved time even when time was spent on designing and executing the questionnaire.

The possibility of gaps appearing in the data during the initial analysis of the questionnaire results was addressed by providing for follow up interviews. Therefore, the questionnaires asked for the participants' contact details for follow-up interviews.

For ethical approval, the Nottingham Trent University Code of Practice for Research and the Nottingham Trent University Research Ethics Policy and Socio-Legal Studies Association's code of ethical practice (Webb et al. 2009) were applied. To ensure the research project met the ethical requirements, an Application Form for Ethical Approval of a Research Project was submitted to the College Research Ethics Committee (CREC) before any data collection took place. A draft of the questionnaire and the interview schedule was included in the form and approval was received on 6 June 2014.

Data collection started after the approval was received and all ethical protection methods described in the application form were strictly applied at every step in the process. Consequently, participants' rights were set out in writing at the beginning of the questionnaire. They were also told that they had the right to withdraw; how data would be stored and what it would be used for. This information was also provided to interviewees and participants in observations. In addition, all the participants are referenced anonymously in the thesis. A copy of the questionnaire appears in Appendix A.

The quality of the research

Arguments about reliability and validity in qualitative research

It is important to acknowledge that society develops and changes over time, such that in each era, society may focus on a different axiology. For example, since the industrial revolution, scientific methodology (positivist research) has been growing dramatically and has become dominant in the academic world (Small 2009, p. 7). Such dominance not only increases the number of quantitative research studies that are undertaken, but also influences the criteria employed when judging the value of qualitative studies. Therefore, it is argued that qualitative researchers also need to demonstrate the reliability and validity of their research, in order to persuade their audience to read and trust it (Lincoln and Guba 1985, pp. 290–291, Patton 2001, p. 53). Therefore, reliability has been redefined or categorised in different ways over time, to support both quantitative and qualitative research. For example, Robson (2016, pp. 104–105) and Yin (2014, p. 40) claim that there is a preference for analytic generalisation[49] over statistical generalisation for qualitative studies. However, there are still academics who insist that each research should be evaluated by criteria that are appropriate for its particular paradigm (Healy and Perry 2000). For example, qualitative researchers, can use credibility, neutrality or confirmability, consistency or dependability and applicability or transferability to discuss the quality of the research, depending on the main axiology that the researcher valued (Golafshani 2003, p. 601). The researcher's approach to reliability and validity in this project is set out below.

Reliability and validity

The basic definition of reliability used in this project is "the consistency of a measure of a concept" (Bryman and Bell 2011, p. 158), and the basic definition of

[49] Generalisation is similar to reliability. In statistical generalisation the researcher seeks to generalise from a representative sample to a population. However, in analytic generalization, the concern is about the ability to contribute to the expansion and generalisation of theory, which can help researchers to understand other similar cases, phenomena or situations (Cohen et al. 2011, pp. 294–295).

validity is "the issue of whether or not an indicator (or set of indicators) that is devised to gauge a concept really measures that concept" (Bryman and Bell 2011, p. 159).

Generally speaking, quantitative research may be considered to be more precise than qualitative research, as it is based on numerical measurements and so its reliability may be more easily demonstrated and replicated. Therefore, some might argue that quantitative research is more reliable than qualitative research most of the time.

It should be noted that concerns about the importance of consistency and hence reliability derive largely from quantitative research (Golafshani 2003, p. 599). Therefore, it is worth considering how far this should also be a concern for qualitative studies. As Joppe (2000, p. 1)expressed it, reliability is

> "…the extent to which results are consistent over time and an accurate representation of the total population under study is referred to as reliability and if the results of a study can be reproduced under a similar methodology, then the research instrument is considered to be reliable."

The researcher considers that it is inappropriate to use this criterion to measure the reliability and hence overall quality of qualitative research. As qualitative research is more focused on context, conditions and feelings, it may be regarded as being more valid than quantitative research. In the quantitative context, reliability is about the replicability of the measurement and validity concerns whether the researcher is actually measuring what he or she intended to measure. However, these meanings may be considered in appropriate in the qualitative research context. This is because qualitative research is able to investigate in greater depth than quantitative enquiries and because the quality of qualitative (in this case, interpretivist) research is based on the researcher's perceptions and assumptions. Therefore, even though the methodology and methods are the same, different researchers will generate different findings. The axiology of a qualitative study, therefore, is not the discovery of a global truth, but discovery of other

matters such as humanity, diversity and raising awareness about minorities. As described in Chapter 5, the researcher's axiology in this study is to raise awareness within the Chinese legal education system and legal profession that there is a need for future ICP lawyers to receive training in certain skills.

Questionnaires with lawyers

Questionnaire design

Reliability and validity were carefully considered at all stages from the design of the questionnaires to the conclusion of the data analysis. The design of the questionnaires covered a range of topics as set out in Table 6. They were designed to address research questions 1 and 2. The questionnaire for non-Chinese lawyers had one additional question which is reported in Chapter 2. This was added to obtain their views on the work practices of Chinese lawyers they have worked with. The question was asked as an open question "Have you ever worked with Chinese lawyers? If yes, do you think they work in different ways?". The reason for asking this question was to make sure that the thesis would not be constrained by a Chinese mind-set because the author is Chinese; the topic is about Chinese lawyers and the lawyers who participated in the later interviews were Chinese. This additional question was positioned part way through that version of the questionnaire, this being the logical place for it. Later questions, therefore, have a different question number from the version used with Chinese lawyers, for example Q10 on one questionnaire would be Q11 on the other. For convenience, where question numbers are cited in this thesis, these reflect the numbering within the questionnaire delivered to Chinese lawyers, with the obvious exception of specific references to the additional question given to non-Chinese lawyers. The version that appears in Appendix A is, however, the online version which, when downloaded only displays numbers for a limited selection of the questions. However, question numbers are allocated in this chapter for ease of discussion.

The column on the right of the table sets out the literature on which some questions were based.

	Q8	Q9, 11,13,15 and 17	Reference
1	Legal knowledge of international commercial activities	Fourteen items of knowledge of law and legal procedures (Q9)	(Ho 2012)
2	Knowledge of non-law subjects relating to international commercial legal services	N/A	"the ability to acquire knowledge and understanding from disciplines outside of law" (Twining 1989, p. vi)
3	Drafting legal document	N/A	Traditional DRAIN (drafting, research, advocacy, interviewing and negotiation) typology (Boon 1996, p. 105) (Federation of Law Societies of Canada 2012)
4	Researching	N/A	
5	Communication skills (both oral and in writing e.g. interviewing, negotiation, advocacy, writing correspondence)	Twelve items of oral and written communication skills (Q13)	
6	Languages (especially English)	Four items of oral and written communication skills in Q13	English is the basis of international business language (Evans 2013)
7	Intercultural skills (understanding cultural differences and dealing properly with individuals from different cultural background)	One item of oral and written communication skills in Q13; one item of collaboration skills in Q17	(Gevurtz 2013, pp. 65, 68)
8	Teamwork skills (both working as team leader and team member)	Thirteen items of collaboration (co-operation) skills (Q17)	(Rand 2012, Weinstein et al. 2013)
9	Analytical and problem-solving skills	Seven items of analytical skills (Q11)	(Twining 1989, Federation of Law Societies of Canada 2012)

	Q8	Q9, 11,13,15 and 17	Reference
10	Creativity	One item of analytical skills in Q11; two items of oral and written communication skills in Q13; three items of collaboration skills in Q17	(Menkel-Meadow 2001)
11	N/A	Personal management skills (Q15)	(Federation of Law Societies of Canada 2012, Solicitors Regulation Authority 2012)

Table 6 Design of the questionnaire

There are three methods of testing reliability (Jupp 2006, pp. 262–263). One is test-retest, that is delivering the same test to the same respondents on different occasions, to see if their responses remain consistent. Another method is using different wording to test the same variable. This can be tested on the same subjects at a different time or two groups of subjects at the same time. The last method involves using several items to measure different aspects of the same concept.

The first method was not feasible in this research as it would be impossible to ask the same respondents (busy professionals) to answer the same questionnaire twice, each time taking half an hour at least. The second method was used in the questionnaire design as an internal check in Q8 and Q9, Q11, Q13, Q15 and 17 (see Appendix A). Q8 asked for the ranking of knowledge and skills and Q9, Q11, Q13, Q15 and 17 asked for the importance of the majority of the knowledge and skills mentioned in Q8 in more detailed ways. The third method was used in Q9, Q11, Q13, Q15 and Q17. This proved particularly useful in examining the data on creativity reported in Chapter 10.

"Validity of measurement, validity of explanation and validity of generalisation" (Jupp 2006, p. 311) were three aspects taken into consideration. As shown in Table 6, literature was used to inform the content of the questions. In addition, a

survey conducted by the Federation of Law Societies of Canada (2012) was helpful in developing the questions so that they asked about both frequency and risk in relation to each area of knowledge or skill.

Validity of explanation (internal validity) concerns the accuracy of the explanation and conclusion (see Chapter 12) applied to the specific subjects or contexts that have been studied (Jupp 2006, pp. 311–315). This aspect of validity was achieved by asking questions directed to the aim of the study (explained above) and internal validity could also be tested against the results of in-depth interviews with those who were also participants in the questionnaire. On the other hand, the validity of generalisation (external validity) concerns the transferability of the answers to other people (population validity) and other contexts (ecological validity) (Jupp 2006, pp. 311–315). For this aspect, it was more important to have a purposively selected sample of participants with relevant knowledge than to attempt to secure a representative sample. For example, for the questionnaire delivered to Chinese lawyers, the sample was not representative in number, but was carefully selected to cover as many kinds of Chinese ICP lawyers as was feasible.

The questionnaire design took several months and was piloted in four rounds. The pilots were used to identify and eliminate major errors and keep the number of omissions as small as possible. The first run was tested on two lawyers with experience of international legal work and this pilot was about the content of the questionnaire. Feedback from the pilot indicated that the wording of certain questions was ambiguous and that the coverage was broader than it needed to be for a project that was focused upon skills.

Therefore, after the first test, the questionnaire was redrafted to address the ambiguities that had been identified and to focus on skills specifically rather than covering too many areas. The second to fourth runs were tested through online survey tools on the researcher's supervisors and friends with questionnaire design experience in order to select the most effective online questionnaire tool and further improve the wording. The criteria used in selecting an appropriate tool included whether the software was freely available, compatible across multiple devices and platforms, allowed multiple question formats (including

whether the questions on frequency and risk could be displayed side by side), could support numerical data analysis and allow cross-tabulation of data from for example, senior and junior lawyers. No single tool provided everything that the researcher wished. However, SurveyMoz was chosen because it was the one that allowed the crucial questions to be displayed side by side.

Further refinements were made in response to feedback from individuals participating in the pilots. The final test also involved a friend who had no legal background and little questionnaire research experience and the purpose was to ensure that the questionnaire was simple and straightforward so that even laypeople would understand it.

Both questionnaires had the same broad question sequence, although as mentioned earlier the version delivered to non-Chinese lawyers had an additional question. This sequence will be explained by reference to the final version for Chinese lawyers (attached as Appendix A). This was composed of two main parts. Part A (Q1) explained the aims and background of the research and gave notice of the rights of the participants and Part B was the main body (Q2~Q18).

Part B was further divided into two sections; questions seeking personal information about the participants (Q2~Q7) and requests for their opinion on the knowledge and skills needed for ICP lawyers (Q8~Q18). Six questions were asked in the first section. Q2 asked participants whether they would be prepared to participate in a follow up interview. Q3~Q7 were asked to obtain more detailed information about the participants' professional qualifications and experience. For example, Q3 asked about the place of qualification. An open box was used in this question, rather than a predetermined selection of choices, in order to capture unexpected possibilities, which was a distinct possibility given that some participants were qualified in more than one jurisdiction. For similar reasons, Q5 and Q6 also provided participants with open boxes, rather than a predetermined selection of choices.

Q4 asked about work experience and four options were given: under five years (including five), six to ten years, 11 to 20 years and more than 21 years. The choice of five years as the benchmark for independent practice was informed by two

pieces of evidence. First, Lewis (Lewis and Jiang 2003), an experienced American practitioner who has worked for a long time in China had given it as his own personal benchmark for lawyers' being ready to practise independently. Secondly, in England and Wales, according to Reg. 4 of SRA Practising Regulations 2011 and Rule 12 of SRA Practice Framework Rules, solicitors are not normally permitted to be a sole practitioner until they have been qualified for three years, following their training contract of two years. Consequently, five years seemed to be a reasonable working definition for readiness for independent practice.

The choice of 10 years represents 'expertise', both by reference to the literature on expertise development (Kellogg 2006, p. 398) and also by convention in China. The Chinese respondents to the questionnaire in particular would have been aware of this convention. The more than 21 years' extreme benchmark was calculated by reference to the establishment of the National Lawyers Exam (Replaced by the NJE in 2002) since 1986 (Xiong 1999, p. 17) The earliest entrants with that qualification had not been in practice for more than 27 years when the questionnaire was designed. Therefore, more than 21 years represented a reasonable estimate for the most experienced Chinese lawyers, which left 11~20 years in the middle.

From personal experience, the researcher was aware that female and male students behave differently. Therefore, Q7 was added in order to discover whether any differences would be apparent in the questionnaire data. In fact, no significant gender issues emerged from the data.

The second section of Part B had two subsections. In the first subsection, Q8 asked the participants to rank the ten suggested knowledge and skills groups. Q9, Q11, Q13, Q15 and 17asked about detailed items of legal knowledge and legal skills. These two subsections were used to support each other (the relationship between the two and relevant references are shown in Table 6).

The second subsection (Q9, 11, 13, 15 and 17) was drawn from two sources; (1) the Canadian national survey (Federation of Law Societies of Canada 2012), which was used to generate competence criteria for Canadian lawyers to enter legal practice and (2) the day one outcomes list for qualification of foreign lawyers as a

solicitor in England and Wales through the QLTS (Qualified Lawyers Transfer Scheme) that was current at the time the questionnaire was being designed. Some additional items were included that were specifically designed for lawyers working in an international commercial context. The Canadian national survey asked questions in three categories: knowledge, skills and tasks. However, because the research in this thesis is focused on skills and some elements of knowledge that underpin skills, the task-based questions in the Canadian survey were not used in the questionnaire for this research. A number of questions in the Canadian survey that focused upon knowledge referred to Canadian local laws and these were replaced by international commercial law subjects in the knowledge category for the questionnaire used in this research (Q9). Most of the ethics and professionalism items that appeared in the Canadian survey were not used, except for two items relating to analytical skills, one relating to personal management skills and one item relating to collaboration skills. This was because the questionnaire used in this project focused on the international commercial arena and participants were expected to be already qualified in at least one local jurisdiction, so that they had already been required to meet a certain standard of ethical behaviour. Questions from the Canadian survey that related to research skills were not used because there were considered to be no substantial differences between international legal work and local legal work in this regard. Therefore, research skills were listed in Q8 for ranking purposes, but not for further details. Client relationship management skills and practice management skills were merged together in a new category of personal management skills which was borrowed from the England and Wales day one outcomes. International commercial legal tasks have some unique features that involve some new elements of skills For example, international commercial legal tasks often take place in several countries, and as these countries may have quite different cultural backgrounds, ICP lawyers should be able to deal with such cultural differences (Gevurtz 2013, pp. 65, 68). Therefore, questions around intercultural skills were added to the questionnaire.

Another feature of international commercial legal tasks is their complexity, not only because of the cross-border aspects, but also because they may cover

different industries or professional areas. For example, a client may wish to purchase a business, which may ordinarily be a routine legal transaction. However, if the business they wish to purchase is established abroad, they will need to consider additional issues, for example, whether there is any security review required in the target country for this specific industry; and any tax issues. In such cases, normally lawyers work in teams to co-operate with other colleagues, lawyers from other countries or professionals from other areas (Rand 2012) such as IT people, or accountants. An argument in support of teaching all law students teamwork has been made in the US literature (Weinstein et al. 2013). Therefore, collaboration skills were included in the scope of the questionnaire.

Finally, as described in Chapter 7, because ICP lawyers are likely to work at the middle layer of the pyramid, lawyers may need to be creative to find new ways and solutions. The possibility of teaching creativity in legal education has already been suggested (Menkel-Meadow 2001, pp. 112–144). Hence, creativity is a skill worth considering in the international commercial context and questions were included to capture it.

Further, to ascertain the significance of the knowledge and skills covered in the questionnaire for ICP lawyers, two sub-questions were asked within each of Q9, Q11, Q13, Q15 and Q17, following the model used in the Canadian survey to investigate frequency and risk:

> How frequently, on average, do you use the knowledge/use the skill?
> 1=Never
> 2=Once a month or less
> 3=About once a week
> 4=About once a day
> 5=More than once a day
>
> How serious would the consequences be if a lawyer in your practice setting did not possess the knowledge/did not have the skill competency?
> 1=Not serious (no harm to the client or the lawyers' practice)
> 2=Minimally serious (causes inconvenience to the client or the lawyer's practice)

3=Moderately serious (negatively affects the client's interest or the lawyer's practice)
4=Highly serious (jeopardizes the client's interest or the lawyer's practice)

The reason for asking these two questions was that they explored two aspects of importance. A skill might be important because it was frequently used by the lawyers. In addition, a skill could also be important when improper performance leads to serious damage to clients.

Additionally, five questions (Q10, Q12, Q14, Q16, Q18) included open comment boxes to catch any elements that participants considered had been missed in the suggested items or to allow participants to explain anything that they were concerned that they might have misunderstood.

Sampling

In order to answer the research questions, the sample of participants for the questionnaires needed to have specific experience with international legal work.

The qualitative nature (as explained in Chapter 5) of this research means that the size of the sample did not need to be large. A target of 35 ICP lawyers (both Chinese and non-Chinese lawyers) was set at the beginning of the project. This figure was based on the considerations of both the purpose of the research and its feasibility. As Marshall (1996, p. 523) explained, there are three strategies for qualitative sample selecting; convenience sample selecting, judgement sample selecting (also labelled as purposive sample selecting) and theoretical sample selecting (mainly for grounded theory research to generate new theories). He further suggested that the research might benefit from a wide range of participants (maximum variation sample), outliers (deviant sample), participants who have specific experience (critical case sample), or participants with special expertise (key informant sample) and participants who may be potential gatekeepers for other potential candidates (snowball sample).

The sample in this study is a critical case sample. A maximum variation sample would definitely have been of benefit to the final results of the questionnaire, in order to transfer or generalise its results to future ICP lawyers as a group.

However, lawyers are normally very busy and charge their work by the hour, thus presenting challenges in securing a high level of participation in a questionnaire. Therefore, this investigation largely relied on asking existing contacts to complete the questionnaire and also asking them to become gatekeepers in order to secure participation from others. Therefore, the sample is also a convenience sample.

Gatekeepers were used to obtain access to participants. This can raise questions of power and bias in the data. In the discussion of each research method below, the use of gatekeepers will be described, together with the way in which problems of power and bias were addressed.

The researcher was able to take advantage of an official event for Chinese ICP lawyers to access most of the participants for the questionnaire delivered to Chinese lawyers, plus one that was an existing contact. The official event was a training event for a number of Chinese leading lawyers in the international legal services market. A colleague of the researcher who attended this event agreed to act as gatekeeper. Using this event, including the use of a gatekeeper, to secure participants created both strengths and weaknesses in this sample.

A clear benefit was that the lawyers attending the event came from all over China and thus the sample was more diverse than could have been obtained by approaching lawyers in just one or two big cities in China. This was particularly useful given that the scope of the project was Chinese ICP lawyers and was not focused upon particular regions. As will be seen in chapter 7, this has particular relevance to China because of differences in legal practice in different regions of China. Furthermore, the nature of the particular event meant that attendees were all involved in international legal services, albeit the extent of their international engagement was at different levels. This actually benefited the researcher who did not need to ask about their background one by one in order to check that all were ICP lawyers, which was necessary for the questionnaire. Lastly, all of them had been tested in their proficiency in English language skills by the organisers of the event before attending. Therefore, it had already been established that they all could speak fluent English and were able to understand the questions in the questionnaire, which were in English. This saved time as it was not necessary to provide any form of translation of the questionnaire and also avoided any

misunderstandings that might rise in any translation. In any event, the introduction to the project was given in Chinese, even though they were apparently fluent in English, to ensure that there could be no misunderstandings. Moreover, the researcher was there with them for two weeks, so they had plenty of opportunities to ask questions.

However, this situation also led to some disadvantages. One was that, in order to be selected to attend the event in the first place, the organisers had made it clear that these lawyers needed to have the potential to become leading lawyers, and also that they had to be willing and be available to attend the training. Consequently, as was ultimately confirmed by the data in the questionnaire, most of them were senior lawyers (11 – 20 years' experience, with one who had more than 21 years' experience) or were approaching senior status. This restricted the research as it did not include the voices of junior ICP lawyers or of lawyers who might be too busy to attend or not willing to attend, for example, those who were near their retirement. However, generally speaking, it may be argued that senior lawyers may have a better picture of what skills are significant to ICP lawyers than junior lawyers. In addition, as the researcher had very few direct personal contacts among senior lawyers or potential gatekeepers who might have been willing and able to assist, it would have been difficult to secure questionnaire responses from this number of senior lawyers by another route. Thus, this sample was more efficient than the researcher's initial plan to recruit participants through gatekeepers and contact them one by one individually. Ultimately, only one additional Chinese lawyer completed this questionnaire, and this individual was a personal contact of the researcher.

Another potential disadvantage was the use of a gatekeeper, which as mentioned above raises issues around power and bias, as well as concerns as to whether that individual will be in some way selective about who they approach. However, it was considered that this was a relatively low risk due to the fact that the gatekeeper was not in any position of authority or other influence in relation to the lawyers attending the event. They were typically more senior than the gatekeeper and, as stated above, all were senior lawyers or approaching senior status, which makes it less likely that they would be vulnerable to issues around power and bias. In

terms of whether or not the gatekeeper was selective, the researcher sought to mitigate this risk by agreeing in advance that the gatekeeper would introduce the researcher to the full body of attendees at the event, not a limited selection of them. An appropriate stage in the event was agreed with the gatekeeper, following careful consideration of the planned agenda for the event. The event had been planned to include a more informal session where attendees were introducing themselves to each other and where there was appropriate time available for those to complete the questionnaire who wished to do so. In order to ensure that no one felt pressured to complete the questionnaire at that time, or at all, the researcher made it clear that individuals were free to choose whether or not they wished to participate.

Thirty-three lawyers answered at least part of this questionnaire.

As far as the questionnaire for non-Chinese lawyers was concerned, it was important to reach practitioners in international commercial practice. A wide range of approaches was used.

First of all, the link to the questionnaire was sent, by the researcher or her supervisors, to gatekeepers in six British international law firms or law firms that undertake work with China specifically. These were selected on the basis either that supervisors had a connection or the firm was known to have connections with China. Colleagues within the law school with connections with international law firms were also invited to send the link to contacts.

An affinity group specifically targeted as being related to British and Chinese legal activity failed to respond to a request to circulate the questionnaire link.

However, another affinity group with at least 30,000 members (as at 5th February 2015) circulated the link to all its members.

The link was also sent to gatekeepers at an Israeli law firm, a Portuguese law firm, and a law society in Poland. It was placed on the Facebook page of a group of QLTS students. An unexpected opportunity arose for the researcher to meet delegates at a Sino-British business conference, one of whom completed the questionnaire.

As responses were anonymous, it is not known overall how many of the twelve non-Chinese lawyers were recruited through each of these routes.

The process of data collection

Shortly after the fourth piloting, the researcher attended the official event for Chinese ICP lawyers mentioned above. A brief introduction to the research was given in Chinese before individuals were asked to complete the questionnaire so that the participants could understand the context and have an opportunity to ask questions. The questionnaire had been designed to be completed online, but the Wi-Fi was not stable where the event took place. Therefore, the researcher printed out the questionnaire for participants to answer on hard copies. Some of them finished the questionnaire right there. Some were collected later both by the gatekeeper and the researcher. Two more responses were received two months later from the online questionnaire tool. One was completed by a contact who had not attended the event.

All the non-Chinese lawyers completed the questionnaire online. The twelve non-Chinese lawyers identified themselves as being from:

Brazil (one respondent);

Israel (one respondent);

Pakistan (one respondent);

Poland (three respondents);

Portugal (one respondent);

Sri Lanka (one respondent);

United Kingdom (four respondents).

Interviews with Chinese ICP lawyers

Design and process of the interviews

Interviews can be designed both with a careful structure or in a free style, unstructured way. Structured interviews aim to collect facts and test hypotheses; consequently it is important that each respondent is asked exactly the same questions and understands the questions in the same way, in order to ensure that

data is consistent (Edwards and Holland 2013, p. 3). This is useful in quantitative studies where, as discussed earlier, consistency is important.

On the other hand, unstructured interviews are used to explore new ideas, develop understandings and research new hypotheses. Therefore, the aim of unstructured questioning is to avoid asking leading questions which suggest a particular response to the interviewee and also to avoid restricting the interviewees' ability to respond freely in some way (Oppenheim 1992, p. 52). Free style interviews are suitable for a qualitative study where the researcher is interested in discovering a range of responses and does not need data to be in a form that lends itself to a strictly numerical analysis or testing of a hypothesis.

The interviews discussed in this chapter were designed to supplement the questionnaire completed by Chinese ICP lawyers which is described above. The main function was to explore the ideas of ICP lawyers and collect the opinions of the participants that had been missed in the questionnaire or to understand the context of their existing opinions. The interviews were unstructured, although they shared a common purpose and therefore all addressed research questions 1 and 2. In addition, some interviews, where there was time, or where interviewees had a particular perspective on them, also covered questions 3 and 4.

Although unstructured interviews are free-style, that does not mean there are no requirements for the interviewer. The interviewer should be familiar with the interview topic and be good at grasping the conceptual issues of producing knowledge via conversations (Kvale 1996, p. 13).

The interviews with the Chinese ICP lawyers were free style, unstructured, interviews, but the key purpose for the interviews was to find out which skills were important for the interviewees. In this case, the researcher had to bear in mind that there might still be some questions that should be asked of each participant. For example, two matrix questions: [50] "the most difficult challenge you have encountered in your professional life" and "the most substantial knowledge

[50] A matrix question is one which might be put in different ways or have different, or similar, meanings for different participants.

and/or skills needed for entering international commercial legal tasks" were asked of nearly all the interviewees.

In addition to the common purpose of each interview, each interview also aimed to explore the unique context and view of each participant. Therefore, other questions depended on their unique individual experience. For example, for a participant who had an educational background both in China and abroad, the researcher asked them about the difference between the two legal education systems. To be able to ask appropriate questions and follow up effectively on the responses, the researcher had already read literature about the international legal profession, international legal education and methodology (referred to in Chapters 2, 3, 4 and 5 above) before starting any interviews. Moreover, the researcher had spent one week with the potential interviewees to understand their strengths and specialisations.

The researcher also researched each interviewee's profile by, for example, looking at their profile on their firm's website, to help in asking the appropriate questions for each interviewee. For instance, one of the participants was an in-house lawyer, therefore, the researcher asked him about whether he would like to encourage young lawyers to be in-house at the beginning of their professional careers or not. For some specific topics, with which the researcher was not familiar, for example, WTO law, the researcher also searched the background to the topic and listed some potential questions in advance. Lastly, the researcher conducted a mock interview with one of her supervisors in order to practise the options and avoid major mistakes.

Although the original design was for questionnaires to be completed and analysed before interviewees were selected, in fact, because of the time pressure of the event at which the Chinese lawyers were recruited, the interviews were actually undertaken in parallel with the questionnaires and at the event itself. Interviewees were, therefore, selected from participants who had completed the hard copy questionnaire and who consented to an interview when returning the questionnaire or who, whether or not they had completed the questionnaire, volunteered to be interviewed at another point during the event.

Therefore, the interviews were not follow-up interviews as planned, but still in-depth unstructured interviews.

Sampling

As a result, fifteen lawyers agreed to participate in interviews. Nine of them were interviewed individually, six of them were interviewed in a group of two and a group of four.

These lawyers (including those interviewed in groups and individually) were from 11 different provinces of China; two from Beijing, two from Shanghai, two from Sichuan, two from Zhejiang and the rest from different provinces. One of them was chosen because he was a pioneer in WTO legal services in China. One of them was chosen because she was from an ethnic minority and she also had substantial training experience in the international legal service area. Two of them were selected because they were the youngest members in the group and both of them had an educational background abroad. One of them was selected because he was a member of one of the most influential law firms in China. One of them was selected because he was an in-house lawyer. The rest were chosen for convenience reasons and they were all senior partners or owners of their law firms. As it transpires, they were from a range of provinces in China, so the views expressed were not confined to single commercial centre. This was useful, as will be seen in Chapter 7, as the law in China and how it is practised can vary from province to province.

Interviews with non-Chinese ICP lawyers

This part of the raw data used in this project was not obtained first hand. The researcher used, with permission, the interviews done by McGeorge Law School, the US law school described in Chapter 3 which has done work to develop a lawyering skills course for ICP lawyers. The videos of interviews with seven

people were available on their website.[51] McGeorge Law School kindly gave permission to use these interviews as part of the data for this project (see email in Appendix F). The seven interviewees were all highly experienced lawyers or former judges in what McGeorge Law School calls 'intercultural legal practice'. They define this as "the ability of attorneys to deal with parties from different nations and cultures and to handle disputes and transactions involving different legal systems" (McGeorge School of Law n.d.). Consequently, the McGeorge data focuses on issues around cultural awareness. The aim of these semi-structured interviews was also to find out what kind of skills lawyers need in performing intercultural legal tasks. However, in the context of this thesis, it is not known how these interviewees were selected and contacted or the instructions that they were given. Nevertheless, for the purpose of this thesis, this data provides a useful addition to the data gathered specifically for this project because it includes cultural differences and skills for ICP lawyers and so assists with research question 1 and, in relation to cultural awareness, question 6. It also helps address research question 2 because, although the interviewees were not Chinese, it helps to provide a point of comparison

The interviews with teachers and students

In addition to questionnaires and interviews with practising lawyers, the initial project design also included interviews with law teachers and law students, and with non-law teachers and non-law students. This was designed to help answer research questions 4, 6 and 7. The purpose of carrying out interviews with law teachers and law students was to find out more about 1) the advantages and disadvantages of the skills teaching and assessment methods currently in use and 2) whether there were any suggestions for improvement of these teaching and assessment methods.

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[51] At http://www.mcgeorge.edu/Faculty_and_Scholarship/Centers_and_Institutes/Global_Center_for_Business_and_Development/International_Educational_Programs/Intercultural_Legal_Competence_Initiative/Researching_the_Keys_to_Int-x3648-ml.htm

The purpose of the interviews with non-law teachers and non-law students was to provide a comparative study to find out whether there were any alternative teaching and assessment methods from other subjects that could be used to help intending ICP lawyers.

The structures of the interviews

The plan was to undertake five interviews with law teachers and five interviews with non-law teachers; five students from law schools and five students from non-law subjects. These interviews were planned to be semi-structured (Cohen et al. 2011, p. 298) but were more structured overall than the interviews with lawyers. This was because the interviews needed to be very clearly focused around skills teaching and assessment by contrast with the lawyers, where a predetermined list of questions would be less appropriate due to the greater diversity of experience and roles that was being explored.

The interview schedules for teachers are attached as Appendix D and Appendix E.

For the law teachers, Qs 2 and 3 of the interviews concentrated on the teaching methods for each legal skill frequently used in law schools. Furthermore, Q4 sought to discover whether the learning outcomes were, from the teachers' perspective, being met. What kind of improvements could be made in the existing teaching methods was covered by Q5. The other important consideration for teaching is the feedback given to students to help them to make improvements in the development of their skills (Q6).

For the law students, the interviews were treated as feedback on existing teaching methods: 1) whether the existing teaching and assessment methods are effective or not (Q3 & Q4) and 2) where is the most effective place for skills learning, the classroom or the workplace (Q3 & Q4)? This, as discussed in Chapter 3 is an important aspect of the context of skills learning.

For non-law teachers, the interviews were more unstructured and designed to find out whether there were skills teaching and assessment methods that could be adopted for teaching lawyering skills. For the non-law students, the expectation

for interviewing them was similar to interviewing law students as feedback on the existing teaching methods.

Sampling and data collection

The disciplines of drama, education, fashion, international relations and nursing were identified as suitable non-law disciplines. Fashion and nursing were identified as particularly skills-based and, in the case of fashion, involving creativity. Teachers in the discipline of education could be expected to be experts in learning, teaching and assessment. Drama was selected because it was skills-based and also because the actor's expertise in communication and understanding of different roles had some relevance for international commercial practice. Finally, international relations specialists had expertise in collaborating across cultures and countries in a similar way to ICP lawyers. They would also understand the political and multi-jurisdictional perspectives of international work which might influence legal work at both the top and the bottom levels of the pyramid in Figure 5.

Gatekeepers were approached by the researcher and her supervisors. However, it was possible in the limited time available only to carry out the following interviews:

	Teachers	Students	Comments
Drama	0	0	No gatekeeper could be located.
Education	1	0	The single interviewee was responsible for international exchanges so was able to give very good insight on the kind of students who take international opportunities and how to persuade them to do so.

	Teachers	Students	Comments
Fashion	0	0	Gatekeeper approached did not respond.
International relations	1	0	
Law	6	2	Interviewees had a range of experience from English vocational courses, Spain and the USA.
Nursing	1	0	

Table 7 Law and non-law education participants

Teaching observations and background understanding

In addition, the researcher carried out a series of non-participant teaching observations. This involved one session on a nursing degree, one law PBL session, LPC sessions in research, writing and drafting. These observations were intended to provide background and to help the researcher to address research questions 3, 4, 5 and 6. Besides formal teaching observation, the researcher also attended other academic activities to enhance her background understanding (see Appendix I).

Analysis

Questionnaires

As most of the questionnaires completed by the Chinese lawyers were in hard copy, an initial stage in analysis was to enter those into the SurveyMoz software so that they could be analysed alongside the data entered online. Data was stored in two databases, one recording the data from the Chinese lawyers and the other the data from the non-Chinese lawyers (all of whom had completed the questionnaire online).

Entries were checked for anomalies such as incomplete questionnaires, duplicate responses, failing (in hard copy) to answer the ranking question as expected. As one participant was observed by the researcher to take and copy from another respondents' completed questionnaire, this participant's questionnaire was separated and scrutinised closely. It was apparent that answers to certain questions had been copied but other answers had not. Therefore the data from the questions that had been copied was discarded but the remainder was included in the dataset. Partial responses were included in the dataset and the number of respondents to each question is indicated where the data is reported in the thesis.

Some initial cross-tabulation was carried out and indicated that there was no significant difference in response between male and female respondents. Cross tabulation of respondents by level of seniority did produce some differences which are discussed in the chapters below.

Data from the questionnaires is reported in Chapters 7, 8, 9 and 10, including, where appropriate, in tables and charts. The data is not weighted because it was impossible, for the reasons set out above, to identify the demographics of the set of 'ICP lawyers'.

It is important to note that an issue arose in relation to the online version of the questionnaire that was offered to the Chinese lawyers in respect of the options offered to them for the second sub-question of Q9, Q11, Q13, Q15 and Q17. The narrative of the question was as above and clearly offered them four choices. However, the survey software automatically generated five boxes for recording their choice, rather than four boxes and it was not possible to configure the online questionnaire to avoid this problem. Consequently, some participants selected the fifth box and it is not possible to be sure whether they thought they were stating that the matter was 'highly serious' or whether they were attempting to convey that they thought it was even more serious than that. This was not an issue with the paper format questionnaire delivered to Chinese lawyers because those participants were not presented with the apparent fifth choice. When the questionnaire was later distributed to the non-Chinese lawyers, the rubric of the relevant questions was adjusted to offer a five scale selection, rather than four scales, as the researcher was anxious to avoid confusion, but it was not possible to

achieve this by adjusting the number of selection boxes presented by the software, which automatically provided five. The adjustment was made by offering a fifth choice ('extremely serious'). This raised issues in relation to data being presented on slightly different scales, depending upon which version of the questionnaire an individual completed. To facilitate data analysis, the researcher transferred the data from the paper format questionnaires into the online system, which necessitated making a decision about how to deal with the fact that these questionnaires clearly only offered four choices. As the four choices, however, were worded identically to the first four out of the five choices offered in the revised online questionnaire, the decision was made to transfer the data for these questions into their corresponding boxes on the online survey. When it came to analysing and reporting on the data, the researcher addressed the issue of the different scales by combining the data for choices 3 and 4 (paper format), or 3 – 5 (online format), in order to present an aggregated figure.

Interviews

Interviews were, with the permission of the interviewee, audio recorded with the exception of two that were video-recorded because the interviews were conducted using Skype. Transcription was carried out by the researcher and by professional transcription services under conditions of confidentiality. Interviews in Chinese were transcribed into Chinese and, where quoted in this thesis, the English translations were made by the researcher. The aim of the transcription was to produce usable and accurate transcripts. A complete verbatim record was not required as the method of analysis was not discourse based. However, where quotations have been used they have been checked against the audio or video recording by the researcher.

As an interpretative phenomenological study, the aim of the approach taken to analysis of the transcripts was to understand the lived experiences of the interview participants. There was, however, as described in Chapter 5, some element of bracketing so as not to prejudge the list of skills that would emerge from the data. The approach to the analysis was, therefore, thematic. The data was coded by the researcher. Some coding took place manually and at a later stage NVivo was also used to help in the analysis. Start codes were taken from the

literature and the results of the questionnaires. Other codes were developed *in vivo* as interviewees raised new ideas, such as the idea that an ICP lawyer needed to deal with political risk.

The codes inform Chapters 7, 8, 9 and 10 which discuss the main findings in relation to the major topics of the thesis. Sub themes, such as becoming an international commercial lawyer and cultural awareness, are pervasive in the analysis. Participants quoted in this thesis are described in Appendix G. The relationship between the codes and the chapters is as follows:

Type of code	Source of code	Codes	Comments and relationship with chapters
Start codes	Drawn from educational theory literature:	• Behaviourism • Cognitivisim • Constructivism • Experiential learning • PBL • Social constructivism	These codes appeared most in the interviews of teachers. Experiential learning and PBL appeared most frequently together with the *in vivo* code 'imitation'. Although these pervade the analysis to some extent, they are most important in chapter 11, where they are relevant to curriculum design.
	Drawn from literature on legal skills:	• Advocacy • Drafting/writing • Interviewing • Negotiation • Research • Problem –solving	These terms appeared most clearly in interviews with law teachers who referred to them as components of courses. Lawyers, however, were less likely to mention these skills as standalone topics, but as part of a wider picture of the tasks performed by ICP lawyers. This might be because the Chinese lawyers in particular were aware that these skills are not included in the curriculum. The wider picture was coded *in vivo* to capture the context in which the skills were used.
	Drawn from literature on internationalisation and the results of the questionnaire	• Internationalisation • English language skills • Intercultural skills • Creativity • Collaboration • Risk management • Commercial practice	Internationalisation and intercultural skills are discussed pervasively. 'Commercial practice' informed Chapter 7, which seeks to define what international commercial practice is. 'Collaboration' is important for Chapter 8; 'English language skills' is important in Chapter 9 and 'creativity' is important in Chapter 10. Risk management is a pervasive aspect of the data, but the *in vivo* code 'political risk' (listed below) represented a new perspective on the role of an ICP lawyer. It is discussed in Chapter 7 and also as an element of collaboration in Chapter 8.

Type of code	Source of code	Codes	Comments and relationship with chapters
Generated *in vivo* during the process of analysis		• American way of doing things • Anglo-American lawyer • Art • Context understanding • Cultural awareness • Decision making • Educational institution structure • Examination • Hampel method • Imitation • Independent knowledge • Interaction in classes • Knowledge and know how[52] • Knowledge to hands[53] • Language • Legal competence • Manner • Motivation • Multidisciplinary • Open-minded • Political risk	Some *in vivo* codes appeared only once in the dataset and have been discarded: 'American way of doing things', 'context understanding', 'decision-making', 'educational institution structure', 'Hampel method' and 'independent knowledge'. Other codes represented sub-categories of some of the wider start codes. 'Art' fell under creativity. Several codes fell under the umbrellas of language and cultural awareness. So, 'language' appeared more frequently as an aspect of English language or cultural awareness, 'Anglo-American lawyer', 'manner', 'open-minded', 'similarity' became an aspect of cultural awareness. A distinction between cultural awareness and intercultural skills might be that awareness represents knowledge and skills activity. Other codes were more pervasive across categories. So, for example, 'Multidisciplinarity' was used to identify the topics interviewees had studied other than law. It therefore influenced discussion of English language, becoming an ICP lawyer and the elements related to accounting and business that appear in the curriculum in Chapter 11. 'Legal competence' in the context of this dataset was related to the pervasive theme of becoming an international commercial lawyer ('reasons for becoming ICP lawyers')

[52] This was mentioned by one respondent in the context of the culture of law firms and as a distinction between practical and academic learning.

[53] The nursing teacher made a contrast between academic knowledge and practical skills as "You've got to have 50% knowledge and 50% hands". This contrast was described by other respondents in different ways.

Type of code	Source of code	Codes	Comments and relationship with chapters
		• Reasons for becoming ICP lawyers • Reflection • Similarity • Simulation • Skills training position[54] • Updating the course	'Examination'; 'motivation' related to encouraging students to learn and the need to 'update the course', mentioned by law teachers, have all informed Chapter 11. Similarly 'interaction in classes', 'imitation' 'reflection' and 'simulation' fell under the wider discussion of PBL and experiential learning.

Table 8 Data Analysis codes

[54] This related to a discussion by a US law teacher about the different position within the law faculty, of those who teach skills when contrasted with those who teach academic law.

Open-mindedness is not discussed separately in the chapters that follow, as the concept was found in the course of analysis to be related to a number of topics. It is, it is suggested, neither knowledge nor a skill, but rather it is an attitude, which tolerates, encourages or even actively seeks different information, ideas or behaviours.

Kohls (Kohls 2001, p. 61) suggests that a way to become open-minded is to consciously reject negative opinions in the first place. This may be because negative opinions inhibit an individual's ability to learn more and to take risks. He further thinks:

> "each person's reactions are very nearly unique. Yours will be too. It is therefore important not to let your perception of your host country be filtered too much through the eyes and experience of other Americans (your countrymen or friends)"
> (Kohls 2001, p. 61).

The ways in which "open-mindedness" manifested in the data is discussed in the chapters that follow and informs the curriculum design in Chapter 11.

Conclusion

This chapter has covered the sampling, design and process of data collection as well as the approach to analysis of the different groups of data.

Before moving on to discuss the data, however, it is necessary to discuss the extent to which it is possible to define what 'international commercial practice' is. This is covered in the next chapter.

Chapter 7: The Nature of International Commercial Legal Practice

Introduction

Chapter 2 predicts that the probable most important trend for Chinese lawyers will be a growth in the demand for international commercial legal services rather than any other legal sectors. Chapter 3 describes the present inconsistency between the needs of ICP lawyers and the legal educational system that is currently supporting such needs. In particular, Chapter 3 argues that there is a significant need for skills development, which is not addressed by the existing legal education system in Mainland China. This chapter, therefore, will explain what the core tasks are that Chinese ICP lawyers need to undertake and highlight the need for a distinct skillset in order to do so successfully. This then leads to a discussion of the particular skills that Chinese ICP lawyers will need in the following chapters, such as collaboration and creativity.

Before discussing the tasks that need to be undertaken by Chinese ICP lawyers, we first need to understand the nature of international commercial law as relevant to this thesis. A starting point in identifying what exactly 'international commercial law' is, is to examine the literature. However, as will be explained below, this produced a number of different conceptual approaches, none of which was, ultimately, satisfactory for the purposes of this thesis.

Theoretical inquiry

Legal philosophy: positivism and natural law

In order to begin the process of defining 'international commercial law', it is first necessary to reflect upon the nature of law itself. There are two distinct schools of thought regarding the nature of law, namely positivist and natural law. Positivists believe the existence of law depends on the social facts rather than the merits. In other words, "[l]aw is a social construction" (Green 2012, p. XV) , even if it is inhumane, unjust, and undemocratic, it is law as long as it has been enacted according to the rules of the relevant society. Societies evolve and develop over time and have different histories, cultures and societal expectations which will influence what laws a society makes and what form those laws take. Given this, therefore, it is not difficult to conclude that law varies from one jurisdiction to another and changes as society moves from the past to the future.

On the contrary, natural law originates from the belief that

> "[t]here will not be one law at Rome, another at Athens, one now, another later, but one law both everlasting and unchangeable will encompass all nations and for all time."
>
> (Cicero 2013, p. 99)

This suggests that natural law is not something that anyone made up and also that no one can change it either (Green 2012, p. xviii).[55]

If we take these views of positivist law and natural law, it would suggest that there is a very clear distinction to be drawn between the two. This may be true within a purely domestic or local context, however, a dilemma appears when discussing what law exists and how it operates in the international arena. Imagine an international legal transaction across multiple jurisdictions and, therefore, encountering multiple legal systems. At this point, it seems that the positivist "social construction" concept prevails because there is no consistent or persistent

[55] At least it is not for human beings to make up. Some may argue that it is made by God (Freeman 2008).

sole legal system that exists as naturalists would argue. However, if ultimately an international deal has been achieved, there is no doubt that there are also some common approaches or principles across jurisdictions that have been agreed, at least, by the parties. For example, they may agree to use English law as the governing law of the transaction. Such an agreement may be reached and be legally valid for several underpinning reasons, for instance:

1) There are no mandatory rules in any of the relevant jurisdictions forbidding them from reaching such an agreement i.e. there is a common principle of laws from these jurisdictions that allows the parties the freedom to choose a governing law themselves;

2) The parties may be from quite different cultural backgrounds and various jurisdictions, but they all recognise that English law is trustworthy and are happy, or at least accept, to choose it, i.e. there is common acknowledgement of the value of laws, at least to a level that trade can be made. From such a perspective, it is hard to argue that law is a "social construction" that results in independent legal systems in different jurisdictions. This could only be true if each of the jurisdictions was a small part of an even larger "social construction" of all human beings, sharing a consistent understanding of the nature of law that is argued by the naturalists is dominant. Consequently the "social construction" argument works, it is argued, at the level of domestic law but does not do so in the international commercial arena.

3) Although many jurisdictions may have laws covering similar areas of law, for example, contract law, company law, there are still some differences in the details, and therefore, the parties will need to choose an appropriate law for their transaction. i.e. this suggests that there are similar needs across jurisdictions (naturalist arguments) and there are also different aspects and details (positivist) within that similarity.

Consequently, there is no single, consistent body of laws that operates in the commercial arena worldwide, and governs every aspect of commercial transactions, not least because the engagement with national jurisdictions remains. However, it is understandable that, over time, because of the frequent

interaction between jurisdictions, the level of similarity may grow. Therefore, whatever law is being formed within the international commercial arena cannot be described as natural law in a pure sense, because it changes over time. However, it cannot be described as positivist law either because there is no single authority or force acting as a deterrent or imposing sanctions if this law is broken. Nonetheless, given that natural and positivist law are the main schools regarding the nature of law, the following sections will examine these two schools' representative theories to understand the elements that form international commercial law.

Put simply, positivist law is, as described above, law that is created by an authority, usually for a single jurisdiction and, as Hart indicates, is not related to morality: "morally iniquitous rules may still be law" (Hart, 2012, p 212).

Law may therefore include more than criminal law which may involve:

> "forbidding or enjoying certain actions under penalty, most resembles orders backed by threats given by one person to others, such a statute [criminal statute] none the less differs from such orders in the important respect that it commonly applies to those who enact it and not merely to others. Secondly, there are other varieties of law, notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relation (private powers) which cannot, without absurdity, be construed as orders backed by threats."
>
> (Hart 2012, p. 79)

By contrast, natural law involves universal principles, described by Finnis as "the set of principles of practical reasonableness in ordering human life and human communities" (Finnis 2011, p. 280) Natural law is the basis of positivist law because there is a common acknowledgment of the values that all human being share. However, international law may be moving towards positivism by establishing international courts, organisations and armies as equivalents to similar organisations at the domestic level. In addition, steps are being taken by governments to codify existing norms as international conventions, bilateral or multi-lateral agreements or by non-state organisations such as the ICC in the case of the *lex mercatoria.* However, the power of those international courts,

organisations and armies may be weaker than their domestic peers. Therefore the level of positivism may remain weaker than the domestic equivalent. More space will be left for creativity for private actors who need to be open-minded to seek out ideas and best practices from a range of jurisdictions and synthesise them to generate new principles and ways of working in the international commercial arena. Therefore, ICP lawyers play an even more important part at the international level than their peers at the domestic level. This is because they are also law-makers.as well as law interpreters. This makes it difficult to define precisely what the 'international commercial law' is that they are both making and interpreting.

International law and domestic law

One approach to the challenge of identifying what 'international commercial law' is, would involve focusing upon the 'international' nature of this area of practice. Dixon, for example, in a textbook on international law (Dixon 2007), introduces international law as being almost an opposite concept to that of domestic law. Dixon argues that "national law is concerned primarily with the legal rights and duties of legal persons (individuals) within a body politic - the state or similar entity" (Dixon 2007, p. 2). On the other hand, "international law is concerned with the rights and duties of the states themselves" (Dixon 2007, p. 2). Arguably, this definition of *international law* is specifically for public international law only, but it expresses that there are fundamental differences between international law and domestic law. Although these two expressions are useful to some extent, especially to classify legal sectors, in the sense that they argue for a fundamental difference between the two concepts, it is argued that the relationship between the two is more complex and they may not, in fact, be as "fundamentally different" from each other as Dixon's definitions suggests, especially in the international commercial legal practice.

As will be seen from the discussion later in this chapter, international commercial legal practice does not, in fact, fit neatly into the definition of international law, but is more complex and varied in its nature.

Lex mercatoria

A body of laws of sorts has emerged over many centuries that can still be seen to operate in the international commercial arena, namely the *lex mercatoria*. The *lex mercatoria* is a body of principles and practices that, over time, have come to be accepted and employed by all, or at least almost all, of those who engage in international commercial transactions. For example, the International Chamber of Commerce (ICC) has developed the International Commercial Terms (Incoterms) that seek to pre-define key contractual terms that may be incorporated into an international commercial contract for the sale of goods. According to the ICC website, the "rules have been developed and maintained by experts and practitioners brought together by ICC and have become the standard in international business rules setting" (International Chamber of Commerce 2010, p. 1). As such, even though the ICC does not go so far as to assert that the Incoterms have become law, it may be argued that these, along with other common principles and practices, may have become so widely used and entrenched within legal practice that they have something akin to the force of law.

However, even the Incoterms or other principles and practices that are universally employed, can never comprise a complete and independent body of laws, because international commercial transactions are still inevitably impacted by national laws, for example the tax laws of a particular jurisdiction, which may apply to a transaction and which obviously cannot be ignored. Of course, it may be argued that a lawyer working on a purely domestic transaction, with no international aspects, also cannot ignore relevant laws. This is true, but it is argued that international commercial practice is distinct and unique in part because of the way in which practitioners have sought to establish shared principles and practice (for example, via the Incoterms) and also because any one transaction may require engagement with a number of different jurisdictions, each with their own different legal systems, thus leading to challenges in terms of determining which laws will impact upon the transaction and how these may, if necessary, be reconciled with each other. This thesis argues that an effective international commercial lawyer

will need a specific skillset in order to succeed in this unique legal environment. The skills that this involves will be explored in detail in Chapters 8, 9 and 10.

Having, therefore, explored the nature of law and argued that international commercial law is in some way unique, it is now necessary to consider in more detail what it is that ICP lawyers know and what they do.

A practical approach: defining international commercial law by tasks and specialist areas of knowledge

Goode's Commercial Law (referring to English law) offers a possible definition. It says, "commercial law is characterised primarily by those principles, rules and statutory provisions which are concerned to uphold and protect the acceptable customs and practices of merchants" (McKendrick and Goode 2010, p. 1348).

Although such a description is useful for understanding the concept of international commercial law as a whole, there is nonetheless a risk of misunderstanding here. That is, that the principles of 'commercial law' may have different meanings in different jurisdictions and this may in turn impact upon how a transaction may be implemented when it has an international element. Take real property for example, which is not one of the discrete subjects of Goode's book, but is a common element of setting up a company or in the corporate insolvency process (which is one of the topics in Goode's book). The ultimate owner of land in England is, technically, still the monarch, but in China it is the state, village committee and farmers. British citizens are entitled to hold the freehold of a piece of land indefinitely, which is not the case under the Chinese legal system, where tenure varies according to the use of the land. For example, residential land in a city area can only be held for a period, typically, of 70 years, not indefinitely.

Inevitably, therefore, the customs and practices of individual merchants will be shaped and informed by their native jurisdiction and perhaps other jurisdictions where they have significant engagement. Consequently, although it may be argued that there is a concept of law that relates specifically to merchants and commercial transactions (according to Goode, this would be 'commercial law'), the specific requirements and practical application of the law can differ widely between

nations. There is no single set of positivist laws that is universally accepted and consistently applied by everyone. However, to be successful as an international commercial lawyer, an individual must be equipped with the skillset to respond positively and appropriately to law drawn from multiple jurisdictions. If the answer cannot be found by looking at local laws issued by local authorities, then answers must be sought beyond the power of local authorities in for example international treaties or principles such as the *lex mercatori*a.

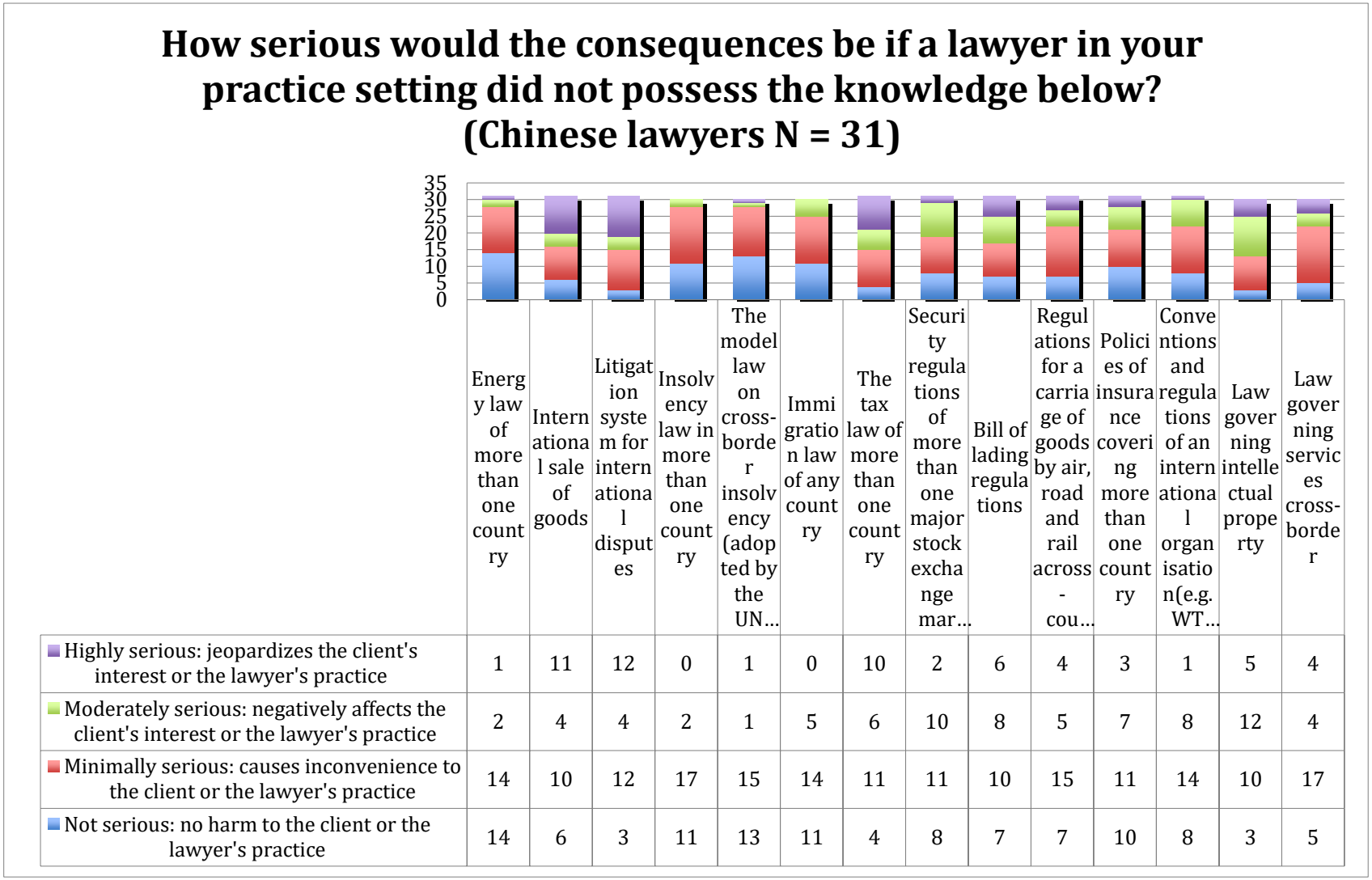
According to *Schmithoff's Export Trade* (Murray et al. 2012, pp. ix–xxviii), one of the most popular text books in the international trade area, the field of international commercial law covers export of goods, transportation, and payment related financial issues. However, although it is an excellent book in its identified field, its scope is deliberately limited. In particular, it does not cover law beyond that which is needed specifically for trading in goods, such as the provision of services (rather than goods) and foreign direct investment, both of which, it is argued, fall within the scope of activity of Chinese ICP lawyers.

This may be contrasted with a different book, *Documents in International Economic Law; Trade, Investment and Finance,* which is more explicitly focused upon international economic law (Tams and Tietje 2012, pp. ix–xi). This book argues that international economic law consists of three pillars: trade, investment and finance. However, although it initially appears to include each aspect of the international commercial area, on reading it, it became apparent that it did not adequately describe the field in full, as it confined itself to positivist international conventions, treaties, and multilateral agreements. These are largely areas of public or governmental concern. However, while ICP lawyers may have a role to play in these areas, they do not form the entirety of international commercial legal practice, nor are they necessarily the core of it. From the perspective of the practising lawyer, in fact, the lawyer's role would also encompass such matters as establishing companies in different jurisdictions, contract drafting, and similar private law activities and indeed these areas are likely to be the main areas of practice for most ICP lawyers.

It might be argued that any book which purports to establish the scope of the field is bound to be flawed in the sense that the book may be written on the assumption

that the areas of legal knowledge addressed by the book are of equal importance to all lawyers practising in that area. In reality, this thesis argues that, in terms of legal knowledge, this will vary between individual lawyers based upon their particular specialisation and the nature of the legal work that they undertake.

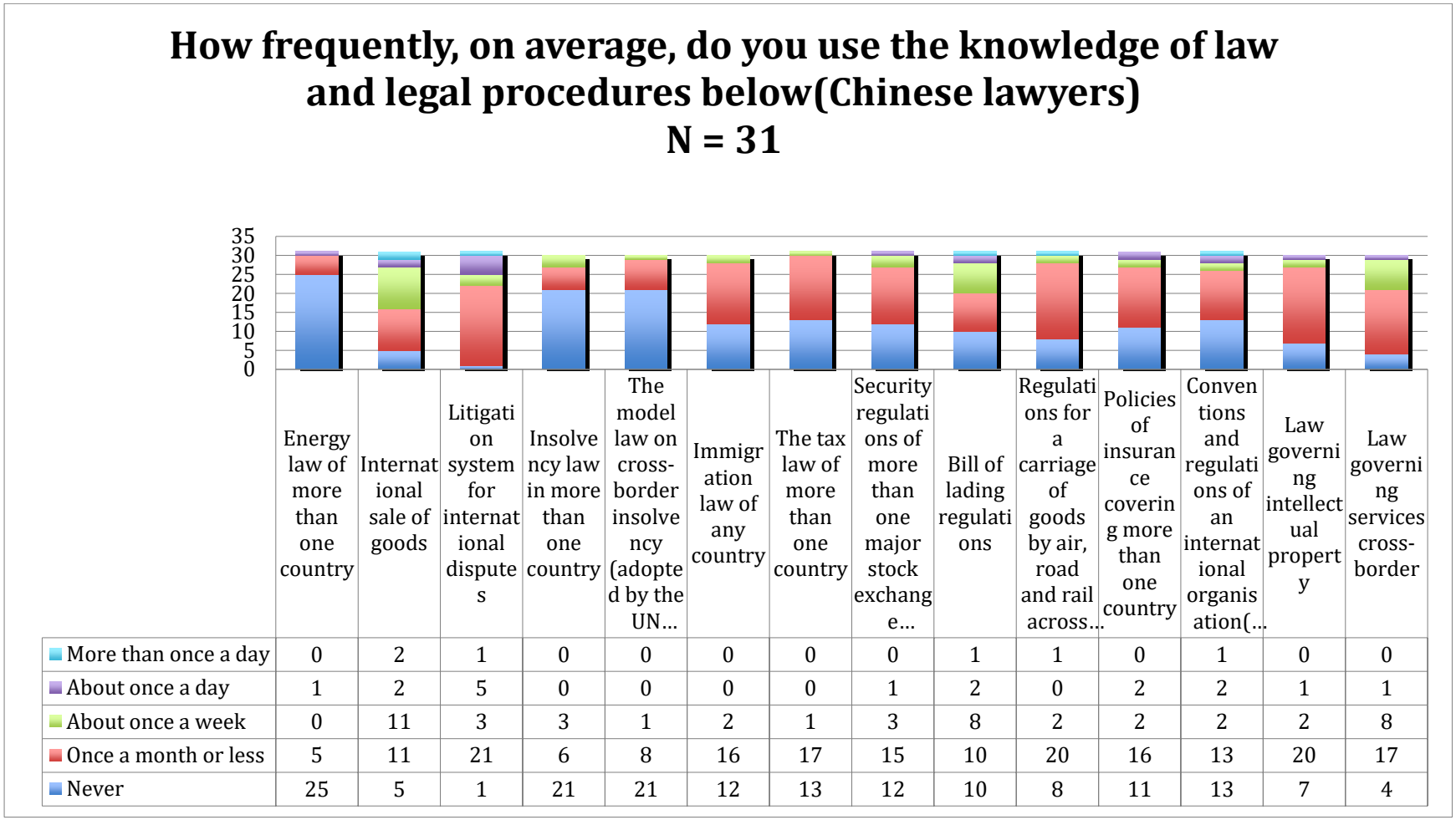
Although there is clearly a wide range of practice areas, as described in Chapter 2, questionnaire respondents were asked their views about the severity of the implications of not having knowledge of a predetermined selection of areas of law taken from the literature.



	Energy law of more than one country	International sale of goods	Litigation system for international disputes	Insolvency law in more than one country	The model law on cross-border insolvency (adopted by the UN...	Immigration law of any country	The tax law of more than one country	Security regulations of more than one major stock exchange mar...	Bill of lading regulations	Regulations for a carriage of goods by air, road and rail across-cou...	Policies of insurance covering more than one country	Conventions and regulations of an international organisation(e.g. WT...	Law governing intellectual property	Law governing services cross-border
Highly serious: jeopardizes the client's interest or the lawyer's practice	1	11	12	0	1	0	10	2	6	4	3	1	5	4
Moderately serious: negatively affects the client's interest or the lawyer's practice	2	4	4	2	1	5	6	10	8	5	7	8	12	4
Minimally serious: causes inconvenience to the client or the lawyer's practice	14	10	12	17	15	14	11	11	10	15	11	14	10	17
Not serious: no harm to the client or the lawyer's practice	14	6	3	11	13	11	4	8	7	7	10	8	3	5

Table 9 Seriousness in relation to knowledge

Although 31 respondents answered this question, only 30 provided complete answers. International sale of goods (11), litigation system for international disputes (12) and the tax law of more than one country (10) were identified as high risk areas of knowledge, with significant implications if a lawyer did not know the law in that area. Knowledge of energy law of more than one country (14), the model law on cross-border insolvency (Ho 2012)(13), insolvency law of more than one country (11), immigration law of any country (11) and policies of insurance covering more than one country (10) were identified as having the lowest risk. This can be compared with the same participants' responses as to the frequency with which knowledge of these areas was used. Here, for example, international sale of goods and the litigation system for international disputes were the two most frequently used areas of legal knowledge by participants and they were also considered highly serious by the highest numbers of participants (11 and 12 respectively).



	Energy law of more than one country	International sale of goods	Litigation system for international disputes	Insolvency law in more than one country	The model law on cross-border insolvency (adopted by the UN...	Immigration law of any country	The tax law of more than one country	Security regulations of more than one major stock exchange...	Bill of lading regulations	Regulations for a carriage of goods by air, road and rail across...	Policies of insurance covering more than one country	Conventions and regulations of an international organisation(...	Law governing intellectual property	Law governing services cross-border
More than once a day	0	2	1	0	0	0	0	0	1	1	0	1	0	0
About once a day	1	2	5	0	0	0	0	1	2	0	2	2	1	1
About once a week	0	11	3	3	1	2	1	3	8	2	2	2	2	8
Once a month or less	5	11	21	6	8	16	17	15	10	20	16	13	20	17
Never	25	5	1	21	21	12	13	12	10	8	11	13	7	4

Table 10 Frequency in relation to knowledge

For some specific areas such as energy law of more than one country, narrative comments from Chinese and non-Chinese lawyers included views that

> "[T]his part's answers mainly depend on the lawyer's major clients and practising area" (Chinese lawyer)

> "[T]he severity of not knowing a subject varies depending on the issue of the service. Clearly one cannot provide service pertaining to the energy sector without knowing the energy law, but for other lawyers such law may not be that important" (Israeli lawyer)

> "It was very difficult to set the importance of the areas as everything depends on specific case…" (Polish lawyer)

However, there was one exception to this uncertainty. Knowledge of the tax law of more than one country was not frequently used by the participants. However most of them considered it as a highly serious item in terms of the risk in making errors in tax law, presumably because of the direct financial consequences for the client. In fact, tax might be the most important element of the transaction. This also came through in the interviews, where, for example, one of the interviewees said:

> "…[and you need] some financial knowledge besides law, because the purpose of investment is largely to gain financial benefits. To gain financial benefit will relate to tax issues, therefore, during a transaction process, much of the framework is tailored by tax issues, some transaction frameworks specifically [for tax reasons]…"[56]

[56] Interview of Participant 6. The original conversation was in Chinese as "……在法律基础之上还要了解相应的一些财务上的知识，因为投资过来之后都需要在这里获得收益。获得收益就涉及到税收问题，就涉及到财务上的问题，所以在这个交易过程当中很多交易结构都是为了税务上的安排，做的一些特殊的交易结构。……"

This argument that knowledge varies according to specialisation results from the questionnaire data for this project. As can be seen from Table 11 below, although all the Chinese questionnaire respondents identified themselves as ICP lawyers, when asked which areas they specialised in, the Chinese questionnaire respondents identified a very wide range. Only two of them (Respondent 4 and 17) gave exactly the same answers. Further, the answers also demonstrated the different extents of engagement with specific tasks. For example, Respondent 1 thought he/she was widely engaged in international investment while Respondent 6, 7 and 16 were more narrowly focused on foreign direct investment (FDI) which may refer to inbound investment only. Although some may generally undertake most kinds of international transactions such as Respondents 2, 4, 11, 14 and 17, some may focus more on specific types of transactions such as Respondents 10 and 27.

Which area do you specialise in? N= 32	
1	International Investment, M&A,
2	trade and investment
3	Maritime, Aviation, and Insurance
4	Business law
5	Financial Law and Foreign Investment Law
6	FDI
7	Foreign direct investment Commercial litigation and arbitration Cross border insolvency
8	Litigation Company Legal Counsel
9	Real estate Company Contract
10	国际贸易， 国际投资， 涉外酒店管理合同谈判 [international trade transactions, international investment, foreign-related hotel management contract negotiation]
11	Banking, International trade
12	Financial; real estate, etc
13	Corporation law, International Investment ,IP, Trade law, etc
14	foreign affair related business
15	general commercial matters (mostly foreign-related)
16	FDI, IP, Company Law, Security law
17	Business law

Which area do you specialise in? N= 32	
18	Corporate law Trade Remedy International Dispute Solution
19	Litigation & arbitration
20	Cross-border transaction IP
21	Investment, Dispute Resolution, commercial
22	International Trade Remedy M&A Antitrust
23	Cross-border transaction M&A
24	international trade and investment
25	Company law International commerce
26	Civil and commercial law
27	shipping law and international trade, investment
28	International Investment, Arbitration, Complex litigation
29	Franchise and License. IP
30	ADCVD [Anti-Dumping and Countervailing Duties – US Customs and Border Protection]
31	Law suit
32	Civil, Criminal, insurance

Table 11 Areas of specialisation (Chinese lawyers)

The same question was asked in the questionnaire completed by non-Chinese lawyers. Although the overall number of respondents was lower for this questionnaire, the responses to this question showed a similar diversity of practice areas, as shown in Table 12 below

Which area do you specialise in? N= 12
International transactions
Civil matters, low civil value litigation and contractual drafting
Corporate, commercial and employment- internationally
Labor law and trade law
international data privacy, international contract

Which area do you specialise in? N= 12
Commercial law, corporate law, financial services law, investment funds law, data protection, intellectual property, business affairs.
Civil, Criminal and Corporate.
Intellectual property
Financial Tax Public Corporate
Financial law
Commercial law, administrative law
Commercial & Corporate law.

Table 12 Areas of specialisation (non-Chinese lawyers)

From the tables above, it can be seen that both the Chinese and non-Chinese lawyers not only have a wide range of practice areas, but also have a different concept of specificity of what they are practising in. This may link to the barriers and complexity of engagement with international commercial legal practice. In fact, as one of the Chinese interview participants said, "any legal area can be foreign related". Therefore, similarly, it may be argued that any commercial law area can potentially become an *international* commercial law area if there are some foreign elements involved. For example, when several parties decide to set up a joint venture and one of them comes from a different country from the others, the case may be described as 'international'. If it is accepted that something may be described as 'international' on the basis that it has some international element, it is still necessary to consider how 'commercial law' may be defined in order ultimately to determine what is 'international commercial law'.

To sum up, according to the questionnaire results, there are some legal areas that were generally frequently used by all the ICP lawyers in the sample. Other areas of knowledge, such as litigation, were more specific to a small proportion of the

sample. Generally speaking, when knowledge of particular areas was used more frequently, the level of severity of making errors in that field of law grew higher accordingly. However, this conventional rule has exceptions, for instance, the knowledge of tax law. The implications for the curriculum are, therefore, that as it is not possible to teach every area of law that an international commercial lawyer might encounter, what is more important is to develop the skill of working with (foreign) lawyers who do know the area of law.

Therefore, it may be said that there is no single definition of the subcategories of work comprised in international commercial law that would be recognised by every international commercial lawyer as fully reflecting the role that they perform. It is a much more disparate and fluid concept.

However, this thesis will also ultimately argue that there is an identifiable skillset that is required by all ICP lawyers and is transferrable between different specialisations. What these skills may be will be discussed in the following chapters.

A hierarchical approach to determining what it is that ICP lawyers do.

Consequently, a jurisprudential approach, considering law as positivist, or as natural law, is not adequate to define 'international commercial law' for this thesis; and an attempt to create a definition by reference to subcategories of legal knowledge, has also been found inadequate both in the literature and in the data. In this section, a synthesis is generated that can be more helpfully used to identify what is common about international commercial practice, and the interplay between national and international aspects, on which a skills-based curriculum can be based.

To understand the relationship between domestic and international laws more deeply, in this analysis, law and legal practice can be divided into three layers according to the level of control exerted by the local authorities. At the lowest layer, we find the local/domestic laws that exist within individual legal jurisdictions where national legislative bodies or even local authorities have

absolute control. The term 'local/domestic law' instead of 'national law' has been chosen to avoid ambiguity as some countries may have several jurisdictions and legal practice may be different according to local government policy within the same jurisdiction. For example, in the United Kingdom, the main legislative body is Parliament (or, in some circumstances, the Scottish Parliament or Welsh Assembly). Parliament may make laws which seek to regulate public behaviour, which are intended to apply only within the United Kingdom itself. However, it may even delegate that power to individual local authorities or other statutory bodies, who can make what are known as by-laws, for example to prevent people from climbing on bridges or playing near highways (such as local councils under the Local Government Act 1972) or to protect the local environment (such as the Marine Management Organisation which was given power under the Marine and Coastal Access Act 2009 to control access to certain marine environments around the United Kingdom coast).

By way of another example, in mainland China, although it is technically a single jurisdiction with laws that apply to the whole country, in practice some law-making powers are delegated to individual provinces. China has laws relating to the incorporation and activities of companies that apply to the whole country. However, individual provinces have been given delegated powers to determine the content of the paperwork that will be needed in order to incorporate a company within that province and hence, while the list of forms required to do this may be common to all provinces, the contents of the paperwork and some of the information required by that paperwork may vary from province to province.

Indeed, this concept of delegated power has been developed even further in China, to permit selected provinces to enjoy even greater local law-making powers. This is for those provinces that have a population where the majority are individuals who are members of an ethnic group that is actually a minority group in China as a whole.

For example, in Tibet the majority of the population are members of the 'Zang' ethnic group. However, within mainland China overall, the 'Zang' people are a very small ethnic minority group (Case Western Researve University n.d., p. 1, WorldAtlas 2016, p. 1). For provinces with a majority population that derives from

a minority group that is a minority in the population as a whole, therefore, the Chinese government has delegated extra law-making powers in areas that may be relevant to the particular minority group, for example the ability to make laws to vary the number of children that a couple may have or to reflect the matriarchal traditions of the ethnic group within a Chinese society (and legislative culture) that is otherwise patriarchal in nature. Clearly, these laws are very local in nature and cannot accurately be described as 'national'.

Therefore, 'local/domestic law' is a more accurate description than 'national law', as 'national law' will typically be assumed to mean the law governing the whole country. In the context of international commercial practice, it would be a mistake to assume that purely local/domestic law is not relevant. This is because even the most wide-ranging international transaction will still touch and concern different geographical locations.

For example, a large international commercial transaction might, as part of that transaction, require the incorporation of one or more companies. Those companies will be incorporated in the jurisdictions that are appropriate to the overall deal. That might include particular provinces in China (or indeed other countries with comparable variation in how law is implemented) and so it will be necessary to engage and comply with not only the national law of China in relation to companies, but also the unique requirements of the relevant provinces. Clearly, no individual lawyer can be an expert in all these possible legal permutations. Therefore, it is the skillset of the individual lawyer that will be important in terms of their ability to ensure that the transactions they manage are compliant with local/domestic laws. In an inbound transaction (defined below), indeed, the local lawyer has been selected primarily for their expertise in local law, which they then need to have sufficient communication skills to explain to foreign lawyers and clients. On this layer of the pyramid are, therefore, purely domestic transactions: a Chinese lawyer advising a Chinese client on Chinese law for a transaction to take place in China. Here the lawyer is acting as an interpreter of domestic positivist law and the Chinese legislative and regulatory authorities have complete control. Although skills such as drafting and client communication are important, the

lawyer is employed essentially as a 'trusted advisor' to interpret the law of which he or she has expert knowledge.

This first layer of 'local/domestic law' is followed by a second more cross-border category, where local authorities still hold the power of control but law is influenced by powers outside those of the national legislative body or local authority. We can label this layer 'inter-jurisdictional law', and includes the norms of private international law, rules of international non-governmental organisations (e.g. in maritime law International Association of Classification Societies (IACS)) and the *lex mercatoria.* In both inbound and outbound transactions (see discussion below), ICP lawyers need to be able to deal with this level of legislation.

The second layer of the pyramid involves cross border transactions and therefore elements of private international law. These might be inbound, in which, for example, a Chinese lawyer advises a US client and his or her lawyer on a transaction to take place in China. They might be outbound, in which a Chinese lawyer seeks the help of a British lawyer to advise on the tax implications of a Chinese client setting up business in the UK. Choices will be made about the governing law of the contract, but this will still, normally, be a choice of the domestic law of one of the countries involved. From this perspective, the lawyer's knowledge of the positivist law of his or her own jurisdiction is still key. This is the case even where, as in the case of the EU, elements of the domestic law are derived from directives which have resulted in new domestic legislation. The lawyer acts both as interpreter of his or her domestic law, but also as translator, choosing a structure for the transaction and also a governing national law that best achieves the client's purpose.

Because of the cross-border element to the transaction, however, lawyers and clients from different jurisdictions need to work together to achieve clients' goals, in circumstances where they have no expert knowledge of the governing law of the transaction. There may be conflicts, as for example between the ethical or regulatory requirements of the different national legal professions, or between individuals who struggle to work together. Consequently, skills in language, particularly the English language, and in collaboration, become, it is suggested,

more significant at this level. Although it does not fit neatly into the pyramid structure, the federal laws of a state such as the USA might fit into this layer of the pyramid. The tasks of the lawyer here may depart from any form of national or sub-federal law. However, where there is no clear and detailed positivist 'law' to apply, the lawyer's role becomes even more strongly that of a translator and even a law maker. Where there is no clearly identifiable positivist law to refer to, and the *lex mercatoria* is unable to help, the lawyer is required, above all, to be creative. This layer provides the greatest freedom to lawyers to be creative and to make law because it is not entirely within the control of national legislative bodies or local authorities. Nor is it within the remit of international organisations that sit in the third layer.

The third layer can be called 'global law' (super international law) where individual local authorities are no longer the responsible authorities but broader organisations such as the EU, UN or WTO have legislative power (United Nation Conventions and EU Regulations) and so public international law dominates. The final layer of the pyramid represents a kind of international practice where such positivist law as there is has been created by supranational bodies such as the EU, with direct effect into domestic law. It may involve a wider global reach, with contracts that are not simply inbound or outbound to a single country, but with require implementation across the world. There may be agreed international practices such as the Hague-Visby rules, or more generic frameworks provided by treaties and supranational bodies such as the UN or WTO. Flexibility and ingenuity will be required. Understanding of changes in society, and differences between societies, become important.

Figure 5 below shows the three layers diagrammatically.

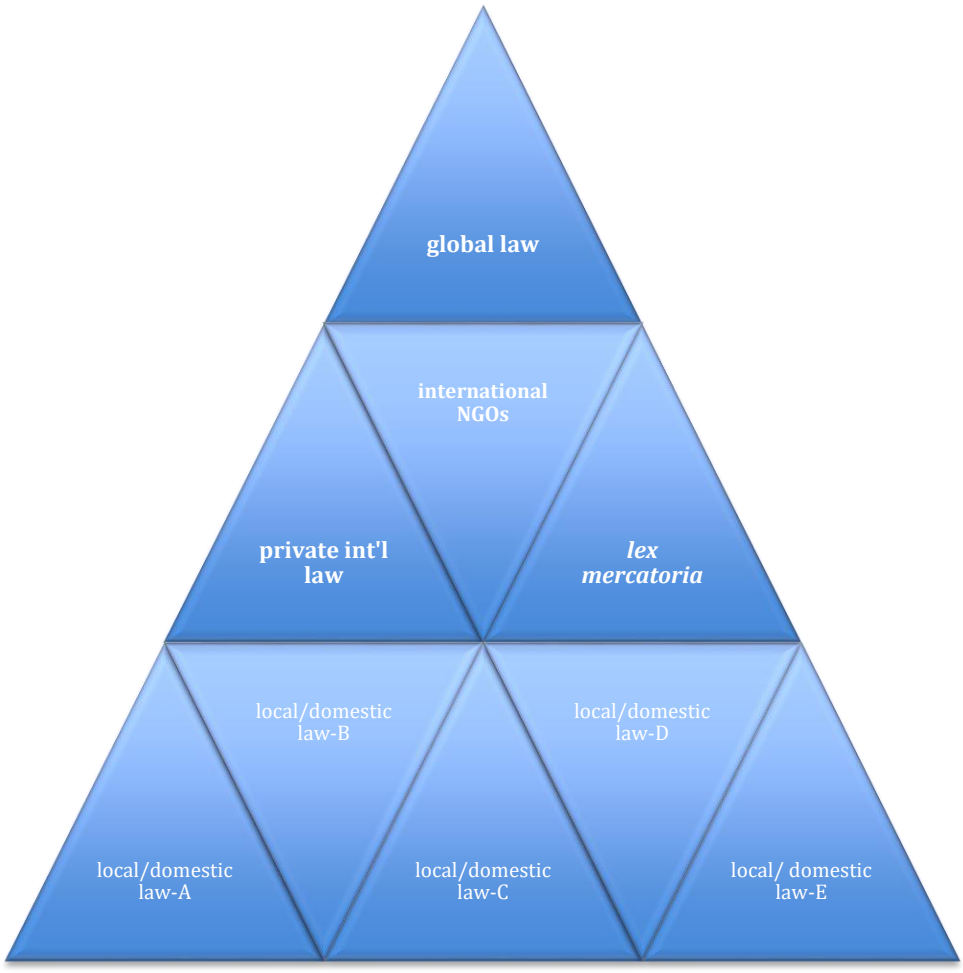


Figure 5 Pyramid of legal activity

These three layers represent relative, rather than absolute, concepts. A specific legal system may sit in different layers in different situations for an international commercial lawyer. Take 'national law' for example, when a foreign client wants to set up a business in the USA, the Code of Laws of the United States of America and the Code of Federal Regulation are local law in the first place. However, after the client makes up his mind as to the precise state(s) which is/are the target jurisdiction(s), the law of that/those state(s) as 'local/domestic law' becomes involved as the transaction becomes inter-jurisdictional law and moves into the second layer.

According to the definitions of international law and national law discussed above, we may see international law is normally located in the second and third layers and national law is more likely to sit in the first and second layers. In terms of the research questions for this thesis, and in particular the generic skillset required of ICP lawyers, it is then necessary to consider the practical implications of the layers of this pyramid.

Practical considerations in the hierarchical approach

"International law has emerged from the practical necessity, not or not only from needs for philosophical speculation" (Mälksoo 2005, p. 182). Therefore, if, as argued in the early sections of this chapter, it is not straightforward to attempt to define the field academically and directly by references to sub-categories of law, the alternative set out above is to attempt to do so by reference to concepts derived from practical perspectives. From such perspectives, although international commercial legal practice is labelled as 'international', this does not mean it stands on the opposite side of national law. Quite the contrary, it covers all three layers of the pyramid. Therefore, at different times, it involves both private and public international law.

Currently and in the foreseeable future, international commercial law is and will be practised by lawyers whose qualification and regulation is located at least in one of the local jurisdictions. The majority of their practice may be situated on the first layer, moving into the second and third layer on occasions. Of the 30 Chinese lawyers who answered the question "Which jurisdiction(s) do(es) your work cover", only six mentioned jurisdictions outside China. This suggests that at present the majority of their work is inbound.

This can be contrasted with the data from the questionnaire conducted with non-Chinese lawyers where seven out of 12 respondents identified that their practice extended across jurisdictions other than their own. This picture is further endorsed in the data from the interviews with Chinese ICP lawyers. During the fieldwork, most of the interviewees divided their legal services into 'inbound' and 'outbound' cases.

One of the interviewees said that in an outbound case, the lawyer should understand the local law both in the home jurisdiction (first layer of the pyramid) and the host jurisdiction. Further, he should be open-minded enough to also research other laws in different jurisdictions or on different layers of the pyramid to find possible solutions to the problem that could not be solved by either the home and target jurisdictions. He also gave two examples which can be connected with Figure 5. The first was that of a client from location A going to set up a business in location B, where the lawyer discovered that businesses in both location A and B were obliged to pay heavy tax duties. Therefore, the lawyer might choose to use a tax haven which is location C. In such a case, all the legal services being used are at a local level although many jurisdictions are involved and therefore the second layer of the pyramid is involved.

> "For example, in some host jurisdictions, where I have invested in, they charge a high tax rate. Therefore, I cannot solve it [by applying local law] then it may require you to consider BVA, establishing a company in the Cayman Islands, whether you need to hold the shares of the company, and then use another shell company to control the local company…"[57]

Another example of the interplay between the different layers is about the control of what can be called 'political' risks. For instance, when businesses invest in African countries, they normally set up a shell company in the Republic of Mauritius before they invest in other African countries. This is because Mauritius corporates' property belonging to Mauritian corporations is entitled to priority of compensation when local government expropriates private property in other African countries according to specific bilateral and multilateral agreements. In this case, the legal services cover three local law areas (first and second layers) but also involve multinational agreements situated in the third layer.

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[57] Interview of Participant 6. The original conversation was in Chinese as "……比方说在目的地这个地方，我投资这个地方，税很高。那么在当地解决不了，可能就会要求你是不是要去 BVA，去开曼群岛设立的投资公司，是不是需要控股公司，然后再用其他的壳公司来控制当地的公司。……"

> "…Let's say we invest in Africa, we may choose to set up a shell company in Mauritius, and then we use this shell company to control the African [company]. Then what's the benefit for doing so? That is because Mauritius [has] reciprocal agreements with most of the African countries, [if we set up a shell company in Mauritius], they will not treat us as Chinese investors, but Mauritian investors. [58] Therefore, we can benefit from favourable tax policy, the freedom of moving goods… "[59]

The pyramid shape in Figure 5, was a deliberate choice to represent the fact that there are, simply, more local laws than there are global laws –such as conventions and treaties - at present. Explaining the hierarchy of the three layers is, however, more challenging because of the fluidity of the concept and the complexity of the interrelationships between them. Further, the international commercial lawyer may also need to be able to be open-minded and creative in addressing non-legal issues, such as economics and cultural differences.

For example, an interview participant said:

> "…for investment overseas, it requires lawyers, firstly, having knowledge of the Chinese local law, this is for sure, [e.g.] the compulsory process, [for] the capital of Chinese enterprises to moving out [of China]. On the other hand, [you] need to acknowledge the local law of the host jurisdiction… [and you need] some financial knowledge besides law, because the purpose of investment are largely to gain financial benefits. To gain financial benefit will relate to tax issues, therefore, during a transaction process, much of the framework is tailored by tax issues, especially some specific transaction framework.
> Another challenge, [you] need to know some international law. For example, after studying the local law of China and the host jurisdiction, you should be able to use some international

[58] It can be inferred, therefore, that this participant was open-minded enough to reject any negative opinions that might be held of Mauritians.

[59] Interview of Participant 6. The original conversation was in Chinese as "……比方说我们投资非洲，我们会选择在毛里求斯设立一个壳公司，然后用毛里求斯的壳公司来控制非洲。那么好处是什么呢？就是毛里求斯设立的公司在非洲多处国家都认为它都有相关的互惠协议，这样他就不视为我们是中国投资，而视为是毛里求斯投资。那就会给这个企业税收上的优惠，货物上进出的自由。"

[regional law], [to set up some] transaction framework to solve the needs of investment in the host jurisdiction."[60]

This is an example not only of the complexity of international commercial transactions, but also of the need to be open-minded towards – and work creatively with – foreign laws and non-legal considerations.

A synthesis: what ICP lawyers do

The preceding sections of this chapter have explored a number of different approaches to defining the complex concept of 'international commercial practice'. Trying to define the concept by reference to literature or to sub-categories of legal knowledge was not feasible. The hierarchical approach set out in Figure 5 has served to show the complexity of the work of the international commercial lawyer, moving in and out of different layers of positivist legal control. That hierarchical approach has set out the parameters of this study, although it has, however, focused on legal knowledge, rather than skills. Nevertheless, because of the complex structure of knowledge needed for ICP lawyers shown in Figure 5, some skills and attitudes such as creativity and open-mindedness have begun to emerge as important.

Given that the ultimate focus of this thesis is upon the skills needed by lawyers working in international commercial practice, therefore, it is necessary now to consider what the role of the lawyer actually is within this field as this defines the

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[60] Interview of Participant 6. The original conversation was in Chinese as "做海外投资的话，要求律师有第一要求中国国内法律方面的知识，这是肯定的，都履行哪些手续，国内企业的资金才能出来。另外一个要了解目的地当地的法律，在法律基础之上还要了解相应的一些财务上的知识，因为投资过来之后都需要在这里获得收益。获得收益就涉及到税收问题，就涉及到财务上的问题，所以在这个交易过程当中很多交易结构都是为了税务上的安排，做的一些特殊的交易结构。如果这个律师在法律领域知识不全面的话，比方说对税法缺少了解，对财务上的安排缺少了解。那么再像刚才所说的对于公司当地协调的需要、融合的需要也缺乏了解。事实上这个律师在这个领域剩下的工作就更少了，就剩下写合同，应该多少钱买什么东西，就写这个了，变成一个人事部的工作。这个挑战是挺大的，要了解目的地当地的一些公司结构上的、财务上的、税务方面的一些要求，这是一个。

再一个挑战，要了解国际方面的法律情况。比方说在研究了中国国内和目的地的法律安排之后，你需要能够利用其他国际上的，其他一些地区的交易结构的安排来解决你在目的地这个地方投资的一些需要。"

tasks such lawyers undertake and the skills they need to use. It is argued that the role is different from the role of a lawyer operating in a purely domestic context (at the first layer of the pyramid). However, there are some similarities between the aims and approaches of ICP lawyers from different local backgrounds:

> "First of all, [we] admit that this is an issue that lawyers from any country may encounter, this is a common issue, but this issue is an even bigger challenge for Chinese lawyers. Because for foreign (Anglo-American) lawyers, they start internationalisation earlier than us, we are still at an early stage. Furthermore, those foreign big law firms have local offices worldwide, for example, American law firms, British law firms. Let's say you want to invest in Africa, or you want to invest in South America, just name the place, our law firm has a branch there, i.e. an extra office, we [the big foreign law firm] can solve your problem by making a phone call. However, our Chinese lawyers are still at an early stage of internationalisation at present, for example, our own law firm only has no more than 20 branches outside China, for other places we need to co-operate with other local law firms."[61]

> "… Because if you are in a local market, it must be the local lawyer who may enjoy the advantage first. First of all, we say those lawyers who were qualified in China, you cannot compete with local lawyers, unless you open a local branch and recruit local staff, you will use local lawyers. Just like what American law firms, British law firms did when they came to China before, we just copy what they have done…" [62]

The basis of most legal services is tied to different national legal systems and jurisdictions. As has been discussed earlier in this chapter, international commercial legal services are, by contrast, in an area where there is no single

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[61] Interview of Participant 6. The original conversation was in Chinese as "首先应该承认各国律师都会碰到，这是一个共性的问题，但是对于中国律师可能更大这个挑战。因为对于国外律师来讲，他们国际化比我们早，我们刚开始国际化。并且国外的大型律师事务所在世界各地设有分署，比方说美国的律师事务所、英国的律师事务所。你说去非洲投资，你说去南美投资，你说去哪儿投资吧，我事务所在那儿都有分支机构，相当于都有办公室，一个电话都解决了。但是我们中国的律师目前国际化还在起步阶段，像我们事务所目前国际化的起步也就是在境外只有 10 几个分支机构，剩下的要和当地的律师事务所进行合作。"

[62] Interview of Participant 1. The original conversation was in Chinese as "……因为你在当地市场的话，第一有优势的肯定是当地律师。我们先说是在中国拿到执照的中国 qualified 的律师的话你没有办法去跟当地的律师去竞争，除非说你在当地开个分所，然后你在当地招人，你会用当地的律师。就像当年美国所、英国所到我们中国来做的事情一样，我们再 copy 一遍……"

authority to regulate activities, therefore, as acknowledged earlier, lawyers need to be open-minded and creative in choosing from existing legal systems by using, for example, a choice of law clause or by using contractual terms to create a new legal mechanism to manage the task in hand for the sake of certainty (second layer of the pyramid). First of all, because of the dominance of Anglo-American financial sectors and law firms in the international commercial arena, driving the availability of finance and the terms upon which transactions may be undertaken, the second and third layers of the pyramid are likely to be strongly influenced by common law approaches. Moreover, the need to be creative in lawmaking at the second layer of the pyramid favours a common law approach in any event, as this is inherently more flexible than the civil law approach familiar to Chinese lawyers. However, this does place greater emphasis on the skills of the lawyer as, for example, each term of a contract may need to be separately negotiated rather than referring to a civil code for generic contract terms. Therefore, even if the dominance of Anglo-American lawyers is eventually challenged, for example by Chinese ICP lawyers, it is probable that the common law traditions will remain strongly influential in international commercial practice (unless lawmaking at this level develops practice to such an extent that it effectively becomes codified). Therefore, Chinese ICP lawyers wishing to operate at this layer of the pyramid need to be flexible and have a skillset that will enable them to work with this system.

The next section, however, discusses how ICP lawyers came to be in that field of work, which might not be related to knowledge of law or the skills identified above.

Becoming an ICP lawyer

This section analyses the themes in the data surrounding the way in which interviewees had become ICP lawyers. There appeared to be two main routes.

One of the reasons that some lawyers became international is because they were senior lawyers or they were some of the brightest young lawyers working in large law firms dealing with international cases. The other reason is because they had a language advantage or already had some international background.

Seniority and brightness

As a result of the complexity of the tasks that ICP lawyers do, described earlier in this chapter, it is reasonable for clients to wish to select elite lawyers from their local legal service markets to support them in navigating the venture in the uncertain international commercial area. Such elite lawyers have a track record of high competence. For example, they may be senior lawyers in the local market because their sophisticated experience may help them with international tasks or they may be young lawyers who are perceived to be 'bright', perhaps because they have distinguished themselves in a local market by their legal education background, and achievement in some difficult tasks or even confident enough to accept and handle a rare opportunity. Moreover, because international commercial deals are normally larger and more complex and with greater financial risks, it is unsurprising that such tasks are more attractive to ambitious lawyers than common local legal tasks.

Therefore, seniority and brightness in the local legal service market are reasons for lawyers to be selected for international legal tasks. For example, Maurizio Maiano, an Italian lawyer said in one of the McGeorge Law School interviews:

> "…What does it take to become an international lawyer, … So you cannot be expected to understand or know deeply enough legal systems and laws, regulations of all different jurisdictions. So, firstly a transnational lawyer has to be a very good lawyer in his own jurisdiction. So, understand and be very, very competent locally." [63]

This view is shared by Joe Smallhoover, a member of both French and American bars:

[63] Interview conducted by McGeorge Law School.

> "…One is to be thoroughly competent in your own area of your life and you to know what you are talking about, the way things are at home…" [64]

In addition to the subjective opinions of the interviewees, the requirements for seniority and brightness can also be evidenced more objectively by looking at the background of the participants. For the group of Chinese interviewees, 14 lawyers in total, 11 of them were partners or senior partners or founders of their law firms. Only three of them were young lawyers without a specific senior title in their law firm and one of these three was working in one of the top national law firms in China before it merged with other leading law firms in other jurisdictions. The questionnaire respondents were similarly senior, with 18 of 32 respondents having 11 to 20 years' experience as a practising lawyer and another one having more than 21 years' practising experience.

In the group of non-Chinese lawyers who participated in the McGeorge Law School interviews, from their profile, Mates was

> "Principal Counsel at the International Finance Corporation (IFC) in Washington, D.C., the intergovernmental international financial organization that is the private sector affiliate of the World Bank, where she worked for almost three decades. She represented IFC as a lender and equity investor in private-sector projects in emerging markets including Latin America, Africa, Eastern and Central Europe, India and East Asia."

Joseph Smallhoover "[was] a member of the Paris as well as Pennsylvania and California bars and [had] practised law in France, Germany and Belgium for nearly 30 years"(McGeorge School of Law n.d., p. 1).

Such attributes appear not only in the samples from the McGeorge Law School's and the researcher's study. They are consistent with Flood's example of John

[64] ibid.

Morris as an early documented ICP lawyer, he "showed a particular flair for this kind of work (merchant banking)" (Flood 2013, p. 1106).

The seniority and brightness reasons play a more important role for Anglo-American lawyers than in non-English speaking countries as English is the *lingua franca* of international business and many contracts are negotiated in English and written in English (at least in one version) and even use Anglo-American standard clauses. As a result, Anglo-American lawyers enjoy a dominant advantage from both a language and a legal education background. Therefore, in the Anglo-American system, the most senior and brightest young lawyers were more likely to obtain opportunities to become ICP lawyers. Having a strong legal education background is unsurprising as one of the important factors used to distinguish between graduates. Some participants in the researcher's study also mentioned certain personal attributes, namely steadiness and reliability, as essential required personality traits for being a good lawyer. Communication skills are also influential factors for ICP lawyers, as are teamwork skills. For example,

> "The first thing, I think I will consider his education background, he must have a strong education background. Secondly, it is the overall characteristics, including his personality, whether he is steady and reliable, we need such steady and reliable personality. For these, I mean, they are the requirement for fresh graduates, not including those who already has practical experience and join my team afterwards. For steady and reliable, I mean, you need to be steady to do some legal research including writing memos, you must be very careful to do that. Therefore, he should be patient, no hasty, including the speed of talking, I will observe them…
> And then the communication skills, not introverted, I mean he must have this kind of team work capability, communicate in the team and work collaboratively,[65] he must have such capability, not only take care of himself and cannot listen to others, such kind of person cannot do…" [66]

[65] These key skills of collaboration and communication are discussed further in later chapters.

[66] Interview of Participant 7. The original conversation was in Chinese as "首先我觉得还是要看他的学历背景，有一个比较好的一个学历背景的话，这是第一个，第二个就是这个人的综合素质，包括就是他做事的这种比较沉稳，需要这样沉稳的性格。然后就是，我指的是新招的人，不包括那些本身有经验加入到你团队的人。那么刚才讲到一个是学历，第二个就是他的一个性格。

However, even for the brightest lawyers with strong personal attributes, it seemed to be necessary for a strong motivation to be present to take up the challenge of moving outside local law and local culture.

Motivation

As one of the participants stated:

> "… that's the key: be motivated, being interested[67] is the key to doing well, and also with studying, …, with your career as you go forward." [68]

An interesting example of international experience that actually gave the person the motivation to work in the international area was provided by one of the participants in the researcher's data who described his initial motivation to work in international relations as below:

> "International relation is actually very real in my own life as well as others. Stems a little bit from my background and my experiences, my background is that I'm half British and half Jordanian so I've always had experience of living in different countries either in the UK or in Jordan as I was growing up and having heritage - perhaps we term it multiculturalism now in Britain at the minute. My heritage is quite international, my heritage is quite diverse, and that always made me look at international processes, it always made me consider as I was

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要能够坐的住因为做 legal research 包括写东西，包括写 memo，都需要你一个很仔细，第二个就是能够沉的下心去做这些 research，所以这方面的性格是要培养，耐心，不能用很急躁的，包括他在讲语言的速度，我都会在观察他们。如果那种很急躁的人。

然后沟通能力比较好，不是说那种特别特别内向，就我的意思就是他的这种 team work 的能力要有，所以在这个 team 里头的一种沟通能力，大家一起协助的能力，这种素质要有，不是说自各管自各，然后人家意见听不进去的，这种人肯定不行。"

[67] This could include the rejection of negative opinions that Kohls sees as part of being open-minded.

[68] Interview of Participant 8.

> growing up international processes and it's very easy for some people who live within countries and grow up within one country perhaps they have holidays or visits for school or whatever else abroad but they are growing up within the context of one country and they don't necessarily realise those ways in which international processes affect them."[69]

This participant, therefore went beyond, in Kohls' terms (expressed at the end of Chapter 6), rejection of negative opinions of cultures other than his own but actively assumed that cultures will be different. He was also able to link his ability to do this to his own elite international background and was conscious that individuals who did not have that background might be less able to be so open-minded. This has implications for the filtering element of the curriculum described in Chapter 11.

Although none of the ICP lawyers in the sample discussed their background directly, it seems this example is not a rare case, according to the experience of one interviewee about which UK students are motivated to go abroad for exchange programmes. This participant also considered motivations other than those provided by an elite background:

> "… the self-motivated ones, I think we find that they sometimes have, mm, this is a good question. Sometimes we find that they have some kind of international background. Maybe they have a parent who's from another country, or they've travelled quite a bit already. For example I have one student who I'm sending to the US for study abroad next year and his mother is British and his father is American. So he lives here but he wants to learn more about his father's country. So he wants to go. He's going to California, … to study for a year, so. So I would say, you know, a number of those students that come to us have an international background. Or they have international interests. So they maybe got interested in China through learning Chinese, or you know, they got interested in Spain by learning Spanish somewhere. So it's, but those, it's really hard to kind of stereotype them I think. And like I said there are some students who just really

[69] Interview of Participant 8.

understand that an experience like that will be beneficial to them, both personally and professionally in the future."[70]

Motivations for students from other countries, may, of course be different. Nevertheless, motivation is, it is argued, insufficient without the opportunity to move into the international area. This could come from an individual's family or personal background, or from taking up opportunities that have been offered.

Opportunity and background

Besides English, having international experience in their background, especially in their legal education background, is another important factor for lawyers who become international, especially for those who come from outside Anglo-American countries. However, in China, the opportunity to travel or be educated abroad was not easily available between the 1950s and 1980s, and during that period it was a source of shame to have been born into a wealthy family. It also potentially excluded such people from education and career opportunities. Consequently, there is likely to be a smaller group of elite, foreign educated Chinese people who have international social capital than in some other countries. Therefore, the route by which the interviewees became ICP lawyers may be different from that of more recent generations. However, from the 1990s, higher education has expanded in China and it is now likely that substantially more young people are able to obtain international experience.

However, recruiters and academics may be from the earlier generation which perhaps suggests that a revised JM curriculum can not only address differences between young Chinese people from elite and non-elite backgrounds, but can be used to reinforce the importance of international commercial practice and the differences between it and local practice, for academics and for those who employ ICP lawyers. It will provide a clear career path.

[70] Interview of Participant 9.

Other attributes for becoming ICP lawyers

The previous section has discussed the possible advantages for elite, foreign educated Chinese people in becoming ICP lawyers. As Chesterman (2009, pp. 883, 886) argues, ICP lawyers are considered an elite group in any event. This is because there is a barrier that prevents everyone becoming ICP lawyers. Therefore, the concept of an 'elite group' in this context is wider than the traditional understanding of being born in a wealthy family or having an elite education background. However, there is not only one type of ICP lawyer and no one characteristic is dominant to the exclusion of all others.

Therefore, it is important to recognise that there is not one single criterion that is important in becoming a successful ICP lawyer. This is consistent with the difficulty, described earlier, in discovering a single definition of what 'international commercial practice' is. Different layers of the pyramid or different specialisations may require different emphasis. For example, one interviewee said:

> "… I feel the recruiting criteria are different in different arenas, and [this] varies from working team to team. Of course they [admired candidates] should have integrity, this is a must, this is basic. Then when it is in the IPO area, they [the employer] may be concerned more about whether this person can endure hard labour, whether he/she is thoughtful, whether he/she is diligent, [because the work] often requires extra working hours. Because there is no other way, this is shaped by the nature of the tasks, he must endure such hard labour, needs to negotiate with those brokers [security companies], with those accountants, they need to deal with them daily. [He/she] cannot get annoyed by some small details or this information, or give up easily, this person must be very patient. These are what brokers may be concerned with.
>
> To those who work in the intellectual property field, they may wish to have someone with a background in [science and] technology for intellectual property rights, [who is] intelligent, good at rationality and logic. [These] will help them solve disputes in intellectual property rights or patent issues within them [disputes].
>
> To us who do M & A, apart from having integrity and being good at English, I would more emphasise sense. Nowadays, there are plenty of law graduates, but as a lawyer, whether you can have a successful career, actually mainly [depends on] whether you

> are clever or not and have good sense or not. … [The name of another lawyer in the interview] just mentioned that some people are very clever, but do not have a nice nature, I know a lot [like that], this [kind of] person may have a lot of cunning or some other kind of intelligence that hasn't been used in the right place, and is perhaps not very good for long-term development. Therefore, …, to be relatively perfect then, [a lawyer must] have a good character, be good at English, have a decent educational background, be industrious, willing to make a solid effort to do the work, and clever, with strong logic and rational sense, that is perfect. "[71]

However, the data in this thesis, suggests there are some skills that all ICP lawyers need to some level (see Chapters 8, 9 and 10). In particular, collaboration is discussed in Chapter 8, English is discussed in Chapter 9 and 'sense' as an aspect of creativity is discussed in Chapter 10.

As a relativist, the researcher is concerned not only with differences and similarities in practice, but also in the individual learning styles of students which can be used both to strengthen their own advantages as well as improving their deficiencies. Chapter 11, therefore, describes a curriculum that focuses on key skills but also, through electives, allows students to specialise. Other skills that Chinese ICP lawyers might need can be identified by examining the reasons why Chinese lawyers in the past have become ICP lawyers.

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[71] Interview of Participant 3. The original conversation was in Chinese as "……我觉得做不同领域专业，不同的团队招人的标准是不一样的。当然为人要好，这方面是一定的，这是最最基础的。然后要做到上市，他们可能会更看重这人能不能熬，是不是很细心，是不是很勤奋，会经常加班。因为没办法，工作性质决定的，他就需要这么熬，就需要跟那些券商，跟那些会计师，每天就是和这些搞。不能因为有一些很小的细节或者是觉得这些信息很烦，而且容易放弃，这个人必须得很有耐心，这个是证券要考虑的。做知识产权的那些人，他们可能希望招的是在知识产权方面可能有些工科背景的，人比较聪明的，逻辑性比较强的，可以有助于他们解决这些知识产权争端或者是里面的一些专利方面的问题。对于我们做并购的来说除了人品要好英文要好以外，我会比较看重是不是比较有悟性。现在学生很多，但是做律师的话你最终能不能做好，其实聪不聪明和悟性高不高是很重要的。刚才刘永提到说如果有些人很聪明，但是这个人不是特别好，我也见过很多，这个人非常聪明，但是可能会有很多小聪明或者是其他的东西没有用到正途上的话，也许对于发展来说就不是特别好。……，比较完美的就是说人首先品格比较好，英文比较好，受过很好的教育，然后比较勤奋，愿意扎扎实实的工作，然后又比较聪明，做事逻辑性比较强，那就完美了。"

Why Chinese lawyers have become ICP lawyers

Chinese qualified lawyers have moved into international commercial practice in the past for a variety of reasons, some of which have been given above. By way of further example, one of the Chinese lawyers talked about the difference between young lawyers who have an international legal background and those who have graduated solely from Chinese law schools:

> "…The first thing, I feel, is about international mindedness. People who have travelled to or lived in several countries have different levels of horizons and self-esteem compare to those who have lived in one country only. Those who have been [studied] abroad, you will feel that they are confident. Because they have seen a lot of things, have experience then they become confident and thoughtful. This is the first difference between young lawyers who have international education background and those who do not have.
>
> Secondly, they [lawyers trained in Anglo-American legal education] are better at legal research than students graduated from Chinese law schools, they are meticulous. Because, for example, in England and United States, one of the pedagogies is case study, therefore, they need to find a lot of cases and do the legal research themselves. The differences between the two are huge, for example, whether the things are done in a detailed way, whether all the relevant documents have been collected. Some lawyers graduated from Chinese law schools may come to conclusion by considering the regulations from the relevant law only; their [conclusions] do not like memos written by lawyers with common law legal education experience, layer by layer, very detailed.
>
> …I am not saying language, this has substantial difference…
>
> Additionally, the speed of finishing a task, when you hand over a task, some may find all the relevant documents in one day, some may find nothing for a day. This means they have different methods of doing legal research. Some[with legal educational background in foreign countries] may find comprehensive [documents] very quickly, including foreign codes and cases,…"[72]

[72] Interview of Participant 7. The original conversation was in Chinese as "第一个我感觉他的一个国际视野吧，你总是在一个国家跟多个国家呆过，他的那种国际视野和自信程度是不一样的,

It can be noted that this participant's idea of "international-mindedness" shares some characteristics with the concept of "open-mindedness" used in this thesis in its emphasis on actively seeking new information, ideas or behaviours, but, because it is in a specific context, is here used in a narrower way. When asked whether those young lawyers who have graduated from Anglo-American law schools have difficulties in understanding local Chinese law, the participant's answer – which highlighted the relationship between an open-minded attitude and the acquisition of skills that become transferable - was:

> "I don't think they have. On the contrary, such experience has actually enhanced their understanding of local Chinese law. Because when they have a comparative horizon, they acknowledge the roots of some laws. For example, trust law, and some other commercial laws, such laws were first developed from common law, we transplant from them. Therefore, their education backgrounds actually help them understand why our law is stipulated in such way. Another example is Property law and creditor behavior , these concepts are from Germany, our law is mature behind these jurisdictions. Therefore, I personally think studying abroad will deepen the understanding of [local] laws."[73]

你出过国的人，你就感觉他自信也有，因为他看的多了，就像一个人， 有 experience，他到哪里都经历过，他就会感觉他很自信，大气，这个是，我觉得是一个区别。

第二个就是他法律的检索的能力，比国内的要强，他细致。因为到国外比如说英国、美国他们那种教学一个是 case study 的， 第二个就是要你找很多的案例，就是你自己研究的能力要特别的强，这个是也是很大的区别，就是做事情是不是很 detail，然后要去找那些东西，全部把它找齐了，因为判例法你肯定都要找齐。国内因为他们有时候如果有点粗的话，法律会怎么规定的，我马上就得出一个结论，就不像英美法写 memo 写的一层一层，剥的很细的那种。

……，语言我不去谈，这个最根本的有区别，……，就是 legal research， 你判断，一个做的快不快，一个事情交给这个人做，一个人可能一天就把你所有的东西都给你找齐了，他一个人他可能找半天都找不到。就说明他的一个 legal research 他的途径方法，有些人就找的特别全，很快，包括找国外的法律或者怎么样，或者判例都给你找出来了，所以这个就是一个能力的问题了。"

[73] Interview of Participant 7. The original conversation was in Chinese as "我觉得应该是没有，而且应该是更加促进他对本土法律的理解，因为他有一个比较的视野之后，他就，而且他了解到有一些法律的根源，比如一些信托法，或者是一些 commercial law 方面，那还是英美发展起来的，很多都借鉴于他们的，所以说更加有利于你去理解我们国家的这个立法为什么是这样。比如说关于第三人，包括物权行为和债权行为的分离啊，这个是德国法这一块，所以我觉得是

Another reason is that such experience of education abroad may strengthen language skills, especially when the lawyer comes from a non-English speaking country even if they do not have work experience in an English speaking country, because English is the *lingua franca* of international universities (Jenkins 2014, p. 2) and international commercial practice. In addition, such experience may change the mind-set and even the behaviour of the lawyers, reflecting a growing maturity in intercultural skills based on open-mindedness. For example, Maiano identified ways in which he actively changed his behaviour to suit different contexts:

> "Well, first of all, like sometimes even my accent changes if I have to deal with Americans or with the UK for example, and that my behavior slightly changes with the UK lawyers for example old clients."

Additionally, ICP lawyers were not alone in finding that international experience enhanced the opportunity to be involved in international work. One of the participants who worked in the international education area shared the following view:

> "… after I did my masters, I was thinking that I wanted to go into cross-cultural psychology and in order to do that you have to have some international experience. So I heard about a programme called the Jet programme and the Jet programme's about going to Japan and teaching English. So I signed up for the Jet programme and I went to Japan for, intending only to stay one year. And I loved it, it's a great culture, the people were lovely. So I ended up staying for three years and decided that I really liked working in the international field. So when I came back from Japan after three years, there was a job available at

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有利于你去理解我**们**的法律，我**们**的法律必定是后面成熟的。所以我个人也**觉**得到国外去以后，更加深刻的能**够**了解**这**个立法的原意是什么，**为**什么它要**这**么去立**这**个法，我**觉**得**应该还**是有促**进**作用的。"

> the Japanese Embassy in Washington DC. And so it was to manage the Jet programme. So the same programme that I went to Japan on. So I applied for the job and got it and ever since then I've worked in international exchange, international education."[74]

Therefore, in conclusion, already having an international interest is the key factor in motivating students to travel abroad and explore the international context so as to develop more open-minded attitudes and reject negative opinions about other cultures. Some students who already have an international connection may have obtained or understood that advantage because they are members of an elite and wealthy group, able to pay for education overseas and for international travel. Those students who do not have this kind of background may, however, develop that motivation and an open-minded attitude by being exposed to opportunities at the university stage. Such experience then appears to be recognised as an advantage in a future career in international legal practice, even if, as the participant above described, only in confidence.

This is consistent with Flood's (Flood and Lederer 2012, pp. 2521–2522) study of Peter Lederer, who was born in Frankfurt and grew up in Vienna, was forced to leave after 1938 and went to university in the United States. Before he joined the army, he worked for United World Federalists for years. He received legal training in America and learned German law afterwards, and then changed to a Swiss university for the second year of study through his tutor and joined a law firm in Switzerland and became a partner in the law firm within four months. He was international from childhood.

A skills-based course in the university clearly cannot create senior lawyers. The question underlying this thesis is, however, whether any of the elements of the second route can be provided in the classroom. It will be argued that by focussing on skills, cultural awareness and open-mindedness, students on a redesigned JM could be provided with some of the attributes of lawyers in international

[74] Interview of Participant 9.

background and cultural understanding as well as with the motivation and confidence to take up opportunities to work in the international sector.

> "That's learning and then you have to learn how to imitate, to let the other side, when you don't know yet, let the people whose culture you come into take the lead,[75] … you have to learn how to meet that rhythm of the culture that it is."[76]

Traditionally, education tries to equip students with knowledge and skills that make them capable of giving the right answers. However, in an international context, and when working with people from other cultures, it may be more important to be able to ask questions rather than having the answers directly.

> "…When you first come out of law school and you enter the practice of law, there's just pressure on you that you're supposed to know things, and so the urge is always to be right, to not let on that you don't know. When you're working in a multicultural environment, the ability to ask questions with an open mind, to be comfortable saying, no I'm not quite sure what do you mean by that, would you tell me more about that, or if an– develop a few catchphrases, that's interesting, can you tell me more about that? I'm not familiar with that, and that's one of the things I had to do, but it's like ability to ask questions with an open mind and to remain curious. So if you hear something that's different, don't presume you should know it, presume that this is an opportunity to learn something new, which is completely different than the way most young lawyers come out of law school thinking that they need to show, they know everything that they studied hard and that they're not caught off guard by a new phrase or a new term. And that is exactly what is going to sabotage them in an international environment, a multicultural environment…"[77]

This example shows how having an open mind translates into a useful skill of, here, asking questions, which enhances the collaboration skills discussed in more detail in Chapter 8. The participant also notes that, in his opinion, current law school

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[75] This is an example of rejection of negative opinions as an aspect of open-mindedness.

[76] Done by McGeorge Law School. The answer is from Joe Smallhoover.

[77] Done by McGeorge Law School. The answer is from Kate Baragona.

graduates do not necessarily have this skill and this impacts negatively on their performance in the international environment.

Conclusion

This chapter has discussed three possible approaches to defining the parameters of 'international commercial practice'. It has concluded that, although each sheds useful light on the topic, no one definition is complete. The pyramid approach, however, shows the complexity, and interrelationship between law at different national and international levels, and this can be translated into the different kinds of tasks that ICP lawyers do, so as to help to understand the skills that are needed to carry out that role.

In conclusion, from the practical perspective, international commercial law is not simply the opposite of national law, but rather it involves law in all three layers (see the pyramid in Figure 5). The tasks undertaken by ICP lawyers may appear to require them to be equipped with the full range of legal knowledge (across all three layers).

However, there are two reasons that suggest that such a requirement can be neither feasible nor efficient. First, for an individual to be qualified in one jurisdiction may take a number of years. There are more than three hundred countries in the world and some countries have more than one jurisdiction. Therefore, even if an individual lawyer was able to qualify in all jurisdictions, there is not enough time even for any single human being to learn the legal knowledge required for all these jurisdictions (first layer) at a level even of basic competence. Second, as the questionnaire and interview participants pointed out, different ICP lawyers may have their own specialisation and thus the frequency with which they use certain legal knowledge and the significance of that legal knowledge to their tasks will vary depending upon their particular specialisation and the nature of the tasks in hand. Therefore, even to attempt to master all possible legal knowledge in order to be able to cover all legal sectors even within a single jurisdiction is not an efficient approach to learning for any ICP lawyers and a

similar logic may apply to the acquisition of legal knowledge for multiple jurisdictions.

What is, therefore, critical is the skills that ICP lawyers are able to use. While participants were consistent in their view that international commercial law is complex and multi-jurisdictional, there was no universal agreement among participants that it was necessary to provide a precise and consistent definition. While participants might identify some common characteristics, some respondents were of the view that the area was too fluid and variable for a single definition to work, and participants themselves tended to focus on the role of the lawyer or the skills that were needed. For example:

> "To be honest, I think there won't be the classification of international lawyers after two or three decades, this should be more about the classification of industry and specialisation, you can do it [both] locally [and internationally], international is only more about foreign languages, because most of your legal knowledge is Chinese law, language is Chinese and English, therefore, there is no specific concept of international lawyer that exists."[78]

> "I guess the concept may vanish over time, but the classification should exist [in the future]. Let's say [you are] having an arbitration in Hong Kong, not everybody would dare to go, especially to attend the hearings. Therefore, I think it is necessary to retain such classification."[79]

Although at present the skills considered in this thesis are formulated in terms of a separate education for intending commercial lawyers, it is entirely possible that, in the light of globalisation, in the near future, no lawyers can afford to neglect these skills. For example, one interview participant commented that:

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[78] Interview of Participant 1. The original conversation in Chinese was "说实话我在想过了二三十年就没有涉外律师这个分类了，更多是专业的分类，你又可以做内资，涉外只是涉外的语言而已，因为你的专业知识还是中国法律，语言无非是中文和英文，所以也没有什么很特别的有涉外律师这个概念在。"

[79] Interview of Participant 3. The original conversation in Chinese was "我觉得概念可能会慢慢的消失，这个分类应该还是会有的。比如说在香港仲裁院仲裁，不是所有人都敢去的，特别是开庭。这一块我觉得还是要的。"

> "... we did a negotiation in Australia, Chinese lawyers are not Australian qualified lawyers, especially those qualified by the New York Bar. Do you still have the confidence to sit [at the negotiation table] or are [you] capable or sophisticated enough to negotiate with your counterparties, to solve the problems. We have some experienced partner or senior partner, even if he is not qualified in Australia, by New York Bar or in Britain, they have great confidence, actually they can sit there to negotiate themselves completely, Australian lawyers are playing an assistant role, that was the situation. This is also a process of accumulating experience, accumulation of foreign relate projects and practice, because he knows the common [issues in such projects]. ... I've experienced such negotiations many times, I do believe that many lawyers will finally have such capability and negotiate directly [with limited support from local lawyers.]"[80]

It seems likely, therefore, that in order to progress into an international career, elite lawyers (senior lawyers or bright young lawyers) also need additional factors of motivation; confidence and opportunity. In the case of elite lawyers with seniority and brightness, the motivation might be to follow a client expanding into international markets; confidence is provided by the client's assessment of the lawyer as a good lawyer in the domestic context, who they can trust and the opportunity is provided by the client offering international work. In the case of an individual already with international experience, such experience might provide motivation as well as the necessary attitude of open-mindedness, and having had international experience may also provide confidence to take the step into international work. The opportunity may be provided by an employer who recruits a young lawyer from this group to use them in international work.

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[80] Interview of Participant 3. The original conversation in Chinese was "……我们谈判去澳大利亚，中国律师不是 qualified 澳大利亚律师，特别是 New York Bar 的那种。你敢不敢坐在那上面或者是说他有没有足够的能力经验坐在那上面跟对方谈，去解决这些问题。我们有很多丰富经验的合伙人或者是资深合伙人，即使他不是澳洲 qualified， New York Bar 也好或者是英国 qualified 也好，非常有自信，实际上他们的能力完全可以达到坐在那儿跟对方谈，澳洲律师只是一个辅助，是这么一种情况。这其实也是一种经验的积累，以及涉外项目经验的积累和锻炼，因为他基本上都知道。主要的几个方面是什么方面，基本上怎么谈，这个里面会有什么问题。不同的只是说要根据当地法律，调一个当地的专人确认一下，整个主体他可以完全直接操作下来。我经历过很多场这种谈判，我觉得很多律师慢慢会具备这种能力，直接去谈。"

This chapter has demonstrated, therefore, that it is not possible to take a purely academic law approach to international commercial practice. Therefore, this thesis focuses on the transferable legal skills that ICP lawyers need, rather than on legal knowledge. These skills will be discussed in the following Chapters 8, 9 and 10 about collaboration, communication and language skills, and creativity.

Chapter 8: Collaboration Skills

Introduction

As discussed in the previous chapter, this chapter argues that collaboration is already an important skill for ICP lawyers, but given the future trends of legal services, it will become even more important in the future.

It is important first to be clear about what is meant by 'collaboration' in the context of this thesis. The idea of collaboration as a skill is not completely new and in fact should best be viewed as a set of skills encompassing a range of oral skills rather than a single skill. For example, it should be regarded as including communication skills that are essential aspects of certain of the traditional DRAIN skills (Drafting, Research, Advocacy, Interviewing and Negotiation), notably advocacy, interviewing and negotiation.

This chapter will explore the concept of collaboration and why it is important. As part of this, it will also analyse by reference to the data the different elements which comprise effective collaboration in the international commercial legal services context.

Why 'collaboration'?

Conventionally, collaboration may not be perceived to be one of the core skills needed by lawyers whose work is focused upon only the local market. Therefore, traditionally, the focus of legal skills training has been upon the DRAIN skillset, which has been recognised as being important (Boon 1996, p. 105). However, with the development of the legal services market, the importance of collaboration is now explicitly recognised worldwide. For example, in England and Wales, Maughan and Webb (2005, pp. 81–106) provide a whole chapter in their book on group learning and group skills, which are aspects of collaboration, and also

address the importance of inter-cultural factors when they discuss communication training.

In Australia, according to Kift et al (2010, p. 8), collaboration skills are important for modern lawyers both in large law firms and small ones. Moreover, in 2015, the American Bar Association suggested, as one of its requirements for what law schools should do, that law schools should use formal learning outcomes, and that these could include "collaboration" and "cultural competency" (ABA Section of Legal Education and Admissions to the Bar 2015c, p. 2).

Clearly, therefore, the importance of collaboration as a legal skill is becoming more widely recognised as distinct and valuable. There is a growing emphasis upon it within the context of legal education across countries. As discussed in Chapter 2, one of the features of the modern legal services market is that there is an increasing proportion of international elements. Therefore, it is arguable that there is a link between the globalisation trend of the legal services market and the rising requirement for collaboration skills and cultural awareness in the legal education arena. The importance of collaboration has been mentioned by several Chinese lawyers (interview participants). One of them explained it as:

> "…personal energy is limited, we may have a client invest in America, another client invest in France. This is reality. You cannot say I only deal with the clients who invest in America, it will be different if your specialisation is at that level. [At present,] you cannot do that in such depth. I feel it is still at the general level. I still think we need to solve [these problems] by collaboration. You cannot, [it is] also not necessary for you to practise a foreign law as an real expert in a foreign jurisdiction…[What we] need is more about a platform… then you co-operate with aligned law firms… become a kind of relationship…"[81]

[81] Interview of Participant 10. The original conversation was in Chinese as "……你的精力还是太有限了，我们的客户，可能这个客户到美国投资，那个客户到法国投资，现实就是这样的，就是你还没做到你只做美国投资这块业务，专业化到这个程度就……那就不一样了，你现在就是，还没有深度，我觉得就是太泛泛的。这个我感觉还是要通过合作来解决的，你不能，也没必要把一个外国的法律做得多精通，更需要的是，……一个平台，……然后跟你跟缔结国的律师事务所的合作……形成一种关系……"

As a result, for those lawyers working in the context of international commercial legal services, geographical distances, language barriers, cultural differences, and the number of people and organisations involved create complexity (Cohen and Mankin 2002, p. 117) that may demand collaboration at a different level. Therefore, the following section will explore the definition and importance of collaboration skills as a newly emphasised independent concept in the legal sector.

What is 'collaboration'?

Collaboration skills include "teamwork, working in groups, and working cooperatively with others" (Kift et al. 2010, p. 22). However, this description, which appears in an Australian set of standards for the undergraduate law degree, is not further explained in that document. However, looking at the wording of the sentence itself, it may be assumed that "teamwork" and "working in groups" are intended to mean different things. Therefore, 'team' and 'group' may represent two different concepts and this is explored below. The third part of the definition is rather interesting, in that it could be considered to be an explanation of the former two, as working cooperatively with others can be crucial when people work in a 'team' or in a 'group'. Alternatively, this part could also have a meaning in parallel with the former two. In such a case, it could mean being collaborative with someone beyond the subject's regular 'team' or 'group'. Following such logic, we can categorise the first two as about being collaboration on a long-term basis and the last one as being about short-term collaboration skills. This thesis includes both meanings and discusses them both collectively and separately below.

Short-term and long-term collaboration

ICP lawyers at present often work in large law firms. This may mean that they work on small sections of transactions, in very specialised areas of law and that they may not know very much about their colleagues' abilities (Moorhead 2015, p. 1) However, because they are very specialised, they do need to collaborate with others. This also means that managers have to allocate and collate the work of

different specialists into a response for the client. However, big law firms are not the only solution for complex international commercial legal practice, with the support of technology development, we can foresee that the routine work of ICP lawyers will be undertaken by AI systems and only the creative work will be left in ICP lawyers' hands. Therefore, the size of international commercial law firms can be smaller. Indeed, some big law firms will either grow smaller or become bankrupt as has already happened in America.

However, at present, ICP lawyers still need to collaborate with colleagues within their law firm very often. For example, a Chinese lawyer interviewee said:

> "…normally, for a big case or a big project, I am not saying a very big project, three will not be enough, but for a normal big project, one partner, one senior lawyer and a [legal] assistant is a conventional arrangement…"[82]

This sort of collaboration with colleagues within a firm is normally based on a long-term relationship within the same organisation, where the hierarchy is clear and understood by everyone within the organisation. Further, if the internal promotion system of the organisation is perceived to be effective, then employees could be expected to trust the expertise of their seniors. For example, in the case mentioned in the quotation above, the partner knows the senior lawyer very well and she knows what kind of tasks she can rely on the senior lawyer to perform and when she needs to take charge herself. Because they have been able to develop effective ways of communicating with each other over a long period of time, their communications are inclined to be smoother and more efficient.

In contrast, collaboration with lawyers in other cultures and for the first time or on a short-term basis may present more difficulties:

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[82] Interview of participant 7. The original conversation was in Chinese "一般来讲我们一个大的案子也好，或者一个大的项目来讲，我不是说很大很大的项目可能不止三个人。一般的一个高活，一个合伙人或者资深律师再带一个助理就差不多了。"

> "…we collaborate with local law firms, when (we) have a transaction, you need to contact the law firm first, and ask whether they can handle the case, and ask for the fees, (we also need) to understand their work efficiency and the quality of their services. All these things (we) need to understand and have them under our control…"[83]

Therefore, in such a case, the parties may not have as much trust in each other. In addition, there may be many practical barriers to communication. For example, Joe Smallhoover and his French clients failed to connect with their counsel in Poland for a whole day:

> "We had a transaction … in Paris and we were dealing with a firm in Poland. … 10 o'clock. So we get into the office, … spent 15-20 minutes shaking people's hands, because that's the French thing …, … which is changing now, by the way. … so we were ready … by 10:30, … called counsels in Poland, …, the Poles, at that time were on second breakfast. So because, … second breakfast … So we would then miss them for that period of time …, … by the time about 10:30 then the clients will take their coffee break at 11:15 to 11:30. … then we wanted to call the Poles and they had gone to lunch because they get the lunch at 12, 12:15 or something like that ... they will go home, because they go home at 4:30, because they were been there since 7."[84]

In Smallhoover's example, French clients and Polish counsel found that different conventional working timings between the two cultures meant that they did not naturally work easily together.

Similar issues may also be caused by religious sensitivities and represent a political risk. For example, a Chinese lawyer shared this example:

> "… the success or failure of a project, very often, is not determined by the local regulations but local culture, local

[83] Interview of Participant 6. The original conversation was in Chinese "我们跟当地律所合作，有了业务，你要和这个律师事务所先沟通，他能不能做，了解，报价怎么样，大概工作效率怎么样、工作质量怎么样。这个都需要对他有一定的了解和把握。"

[84] Interview conducted by McGeorge Law School.

> custom, and whether that is an investor-friendly environment. A very simple case, for example, we bought a piece of land in a country, the land was bought for building a new plant, the due diligence had been done beautifully, but you would never imagine that the local village has a holy monument on the land which you cannot move. If you dare move the monument, the local villagers would fight you with their lives! This is a real case, the local government would not help you with this, if it offended local voters. Ultimately, this project failed… "[85]

More significant political risks can appear when dealing with national governments. For example, an interviewee who taught international relations commented:

> "A lot of people will consider you know countries as what we call 'unitary, rationale, homogenous actors'; that China is one actor; Britain is one actor, the United States is one actor. China makes decisions, Britain makes decisions, the United States makes decisions. And that's not actually the reality. The reality of it is that governments are made up of lots of different people, they're made up of lots of different decision-makers, they're made up of lots of different departments and agencies. And those departments and agencies themselves might have competing interests. You might find a ministry in China and a ministry in the United Kingdom that have similar goals or similar interests and actually can interact with each other. At the same time another department of the government in China or another department in the government in the UK might have completely different interests to those Chinese or British ministries themselves. So you can sometimes see that you have to engage in what we call "bureaucratic politics" or analysis of bureaucratic politics to understand how decisions are made within governments, which actors within the governments are doing what, which departments and agencies have what interests and do they compete with each other."[86]

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[85] Interview of Participant 4. The original conversation was in Chinese: "…… 一个项目的成败，很多时候不是取决于当地法律规定是什么而是取决于当地的文化，当地的风俗，当地的投资环境是不是友善。举个很简单的例子，比如我们在某个国家买了一块地，这个地准备建个工厂，律师的尽职调查报告做得非常好，但你万万没想到你圈的这快地里面，有一个当地村落，设立了一块神碑，这个神碑你要是给它拆迁或挪走，当地居民绝对是和你拼命的，这是个真实的案例。然而，就是由于这个神碑没弄好，当地政府也不会因为这个事，因为你，得罪当地的居民或选民。最后这个项目就黄了……"

[86] Interview of Participant 8.

However, this does not mean that collaboration between individuals for the first time and on a short-term basis is necessarily a bad experience. It is normally quite clear to each collaborator why they have been involved in the project and what their expected role will be. For example, one of the Chinese lawyers said:

> "… it is more like when foreign investors came to China before, …. At that time, foreigners found American lawyers, they used American lawyers, [for example, lawyers from] Baker & McKenzie, Linklaters, and Clifford Chance, they don't know Chinese law, they invested in China, used international usages and norms, and then let Chinese lawyers provide legal opinions, on which of them does not conform to Chinese law., And then they [the Anglo-American firms] will learn from the experience step by step, until now, they still have a lot of Chinese lawyers in their law firms so they cannot entirely do without Chinese lawyers being involved in investments in China. Therefore, we [the Chinese firms] are in the same position now [when Chinese clients invest in other countries for outbound projects]."[87]

This statement indicates that the clients normally bring their lawyers from their home country, even though those home country lawyers may not be experts in the local (Chinese) law of the country the client is engaging with. Nonetheless, the usual approach may be for the home country lawyers to be in overall charge of the project, but local lawyers will be instructed to assist them by providing the necessary expertise in the local law (an outbound transaction).

Therefore, as shown in Table 13 below, short-term collaboration and long-term collaboration may enjoy different advantages and challenges.

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[87] Interview of Participant 3. The original conversation in Chinese was "……有点像当年外国人在中国投资的时候所做的项目，也就是说我们是在一个学习的过程。当时外国人就找了美国律师，找了美国人 Baker & McKenzie， Linklaters and Clifford Chance，他们不懂中国法律，他们在中国投，用国际那套规则来投，然后让中国律师提供意见，哪些是不符合中国法律的，然后他自己慢慢再学，学也需要一个过程，到现在为止他除了请了一大批中国律师到外国律师事务所以外，他也没有办法能够完全地摆脱外国投资中国事物的这些作用。所以我们现在也是这么样的一个角色。"

On a short-term basis, lawyers may find it difficult to build trust between each other when they first meet and may have many unexpected obstacles to communicate smoothly, which in the international legal services context, may be caused by language differences and cultural barriers. However, because short-term collaboration (including first time collaboration) is normally based on the actual needs of existing tasks, therefore, it is often task-based and everybody involved is normally quite clear why he or she is involved.

In contrast, for a long-term based collaboration, professionals will have known each other for a period of time and have established ways of communicating with each other. However, they will face challenges because they have known each other in the context of particular projects and thus they may be drawing on their past impressions of those collaborators from those projects which can then cause difficulties if a new project is different and requires different strengths in the team. For example, in the example given in the first quotation in the section above on short term and long term collaboration, if the normal practice was for the partner to report to the clients directly and to supervise the work of the senior lawyer, it may become difficult to change these established roles for a new project in an area of law where the senior lawyer, and not the partner, has the most experience. If they are unable to balance the requirements of the project with the existing hierarchy, the result may be that the partner and the senior lawyer begin to compete for control of the project during the collaboration. Further, there is an extra risk for long-term collaboration, which is *groupthink*.

	Advantages	Challenges
Short-term (including first-time collaboration)	1. Each member is clear about their role and normally is content with that (whose clients; who should be in charge; who has more experience)	1. Trust 2. Effective communication (language differences and cultural barriers)

	2. More focused on work rather than relationship	
Long-term	1. Trust 2. Communication will be smoother and efficient	1. Greater difficulty in changing roles between different tasks 2. Competition between the roles 3. The risk of groupthink

Table 13 Advantages and disadvantages of forms of collaboration

Groupthink

The concept of groupthink was introduced by Janis (1972, 1982), and, as explained by Janis, can result in a group of individuals making faulty decisions. He describes eight symptoms of groupthink, falling within three types, as set out below, some of which are the opposite of open-mindedness in the sense used in this thesis:

> "Type I: Overestimations of the group---its power and morality
>
> 1. An illusion of invulnerability, shared by most or all the members, which creates excessive optimism and encourages taking extreme risks
>
> 2. An unquestioned belief in the group's inherent morality, inclining the members to ignore the ethical or moral consequences of their decisions
>
> Type II: Closed-mindedness
>
> 3. Collective efforts to rationalize in order to discount warnings or other information that might lead the members to reconsider their assumptions before they recommit themselves to their past policy decisions

4. Stereotyped views of enemy leaders as too evil to warrant genuine attempts to negotiate, or as too weak and stupid to counter whatever risky attempts are made to defeat their purposes

Type III: Pressures toward uniformity

5. Self-censorship of deviations from the apparent group consensus, reflecting each member's inclination to minimize to himself the importance of his doubts and counterarguments

6. A shred illusion of unanimity concerning judgments conforming to the majority view (partly resulting from self-censorship of deviations, augmented by the false assumption that silence means consent)

7. Direct pressure on any member who expresses strong arguments against any of the group's stereotypes, illusions, or commitments, making clear that this type of dissent is contrary to what is expected of all loyal members

8. The emergence of self-appointed mindguards---members who protect the group from adverse information that might shatter their shared complacency about the effectiveness and morality of their decisions."

(Janis 1982, pp. 174–175)

Janis considers that people may be more "concerned with retaining the approval of the fellow members of their work group than with coming up with good solutions to the tasks at hand" (Janis 1982, p. vii). To be more specific, Janis provides the example of politicians making decisions on behalf of a government, that is, a homogenous group making decisions that will impact on external relations with another country. For example, a decision may be made even to declare war upon another country, without a proper exploration of alternatives.

However, not everyone accepts Janis' view of groupthink. For example, Belbin (2000, p. 15), who is an acknowledged expert on teamwork, argued that he had never experienced the symptoms of groupthink in a 'team', because a 'team' is, as described below, by definition, of a size which creates efficiency and the shared or rotated leadership makes team members interactive and open-minded. In other words, Belbin appears to argue that a team which is functioning properly, and may

therefore be described as truly being a team, will never suffer from groupthink. Presumably, therefore, Belbin would argue that the problem of groupthink indicates that a team is not functioning effectively and cannot be truly described as a team. Belbin would describe this non-functioning team as a 'group' rather than a 'team'. However, Janis' concept of groupthink is actually derived from "small" and a "we-feeling of solidarity" (Janis 1982, p. vii) in small groups rather than large and autocratic ones. Consequently, and despite Belbin's view, it appears that Janis is more likely to have 'team' in his mind rather than 'group'.

Therefore, although both Belbin and Janis make valid points, they are describing different effects of the shared leadership and warm atmosphere of a 'team'. Belbin is optimistic. He considers a 'team' to be the solution for the defects of an otherwise autocratic 'group' and his focus is upon team building; selecting the right person to work in the team. Based on such an understanding, he introduced his popular team role theory. Belbin's (2010, p. 22) 'team' includes nine roles: plant, resource investigator, co-ordinator, shaper, monitor evaluator, team-worker, implementer, completer finisher and specialist.

However, once selection has taken place, Belbin seems to suggest that the team will work perfectly forever. Unfortunately, although the personalities of team members may not obviously change, the relative relationships among members may vary over time. Individuals in a team, for example, come to know more about their fellow members (for example, the characters, their habits) over a period of time. They may build on their experience of their colleagues to work towards good project outcomes. Alternatively, they may sacrifice their own opinions for the sake of group harmony, for example if they have learned that a particular individual can be difficult to work with if his or her opinions are challenged. If they do this, of course, then groupthink is more likely to emerge in that 'team', even though it was previously a high performing team. To avoid this situation arising, 'teamwork' should be considered to be a living process that includes team building and working collaboratively in the team over a long period of time. However, before discussing this issue in further detail, it is necessary to clarify the concept of 'team' and 'group' in the international commercial arena.

'Team' and 'group'

As has been discussed at the beginning of this section, lawyers may work with others on either a long term or a short term basis. Does this mean that they are part of a team or are they a part of a group? Belbin's team role theory and his Team-Role Self-Perception Inventory (BTRSPI) is very popular in the UK in the management arena (Manning et al. 2006).

Belbin argued that there are six differences between 'team' and 'group' in size, selection, leadership, perception, style and spirit (Belbin 2000, pp. 14–18). A 'team' has a limited size compared with a 'group'. The selection of team members is crucial to the success of a 'team' but immaterial in the context of a 'group'. Leadership is shared or rotated among team members, whereas in a group the leader is constant. The perception of team members relies on mutual knowledge and understanding; on the other hand, group members focus on leaders. Overall, 'team' involves co-ordination between people with a range of roles, whereas a group is convergent and conformist.

Based on such features, team members normally interact dynamically with each other and are comfortable challenging each other when necessary, whereas group members value togetherness more highly than healthy debate, leading them to avoid even constructive challenge. An individual within the group who is perceived to threaten that togetherness by making a challenge may be singled out by the other group members and effectively isolated. Therefore, there are a range of differences between teams and groups. Among these differences, size is one of the obvious determining features. Therefore, this is worth exploring in more detail.

According to Belbin's (2000, p. 14) experience, basically, the rule is the smaller the number of group or team members, the greater the efficiency of that group or team. However, this does not mean the number can be reduced without limit and there seems to be a minimum number below which there is not a team. For example, he found that when two people work together, the focus rests mostly on their relationship rather than the tasks that they perform (Belbin 2000, p. 2). In terms of his analysis, for a team, the ideal number of team members is four. He also warned that when the number exceeds six, "the spread of contributions between

members becomes more uneven and one person becomes more likely to dominate" (Belbin 2000, p. 15). When that occurs, according to Belbin's theory, the result is more likely to be a 'group' rather than a 'team', with a sole leader taking control and other members taking their places below the leader. Such domination is reinforced and increases in proportion to the increase in numbers. Therefore, if a 'team' wants to keep its shared leadership, it should keep the number of members below six, otherwise it is probable that it will grow into a 'group' with solo leadership.

The form of leadership will further shape the relationships between team members and atmosphere of the team. Within a team, the team members share or rotate the leadership, therefore, they tend to have greater mutual knowledge and understanding. Such a relationship creates a democratic atmosphere in the team that leads to the dynamic interaction. Following this logic, 'team' represents *democracy*, and 'group', in contrast, involves a *hierarchy*.

Although, according to Belbin (2000, pp. 14–18), a 'team' is a better format than a 'group', he also admitted that a 'group' is the traditional dominant model in management. Historically, law firms move from being small locally based partnerships undertaking particular types of work (for example they may be focused on domestic litigation) towards becoming large international corporate law firms providing very different services, although the timing and scale of change may vary in different countries or even in different cities (Galanter and Palay 1993, Morgan and Quack 2005). Traditionally, large law firms appear to operate as hierarchical groups. For example, when considering a large law firm with a significant litigation practice, Kirkland (2005, p. 637) focuses on the way the lawyers in the firm are trained to adapt to different partners' work norms and the implications of this ''choice of norm rule'', for example in relation to how those lawyers may or may not develop an ethical approach to litigation (Kirkland 2005, p. 638). He argues that ''understanding the organizational influences on large-firm litigators is, therefore, essential to understanding the development of litigation ethics'' (Kirkland 2005, p. 662). His work further suggests that lawyers actually do not work democratically in the large law firms, because partners are in a dominant situation. When a team is established within a certain law firm, a senior partner

will normally be in charge of most of the activities or authorise someone he or she trusts to take charge. In parallel with the growth of international transactions, law firms have developed from a local basis to an international basis (Russell 2014, p. 234). However, as long as they have partners, lawyers, legal assistants and secretaries,[88] they will work in a hierarchical way (i.e. as a 'group' rather than as a 'team') (Galanter and Henderson 2008, pp. 1879–1881). This will persist until new services formats are established, such as VistaLaw, which operate without "entry-level associates" (Dzienkowski 2013, p. 3011).

It may be possible to understand the dominance and the potential weaknesses of the hierarchical model by considering what has happened within the legal services market in recent times. In the international commercial legal services context, it would be most useful to employ Anglo-American law firms as examples. This is because the UK and US international law firms have led the way in terms of developing their international commercial practice and it is expected that they will continue to lead the international commercial services market in the foreseeable future (Flood 2007, 2013, Russell 2014). One of the reasons is that a key driver of internationalisation is financial services, and the world's financial centres are in London and New York, and the most advanced rules and norms for financial services are also in these two jurisdictions (Flood 2013, p. 1096).

This was also mentioned by Kate Baragona, in one of the McGeorge interviews:

> "…My work is all finance and financial structuring, and English is the language of finance and financial structuring, because the instruments, the products are all are going to be New York or London based. Even now working in Ghana and Nigeria, we are negotiating for bonds, capital markets, private placements, syndications, these are all concepts in English in US Law, and a lot of times even their own jurisdictions don't have these concepts and laws,…"[89]

[88] The titles may vary from law firm to law firm.

[89] Interview conducted by McGeorge Law School.

Furthermore, there is a changing landscape of lawyers' relationships with their law firm in terms of where their 'team' or 'group' is likely to be based, compared with where it may have been based traditionally. Traditionally, both in England and America, lawyers tended to stay in the same law firm unless it became clear that they would not have the opportunity to be promoted to partner (Galanter and Palay 1993, pp. 23–27, Brandon 2011, p. 1). However, such a tradition has been broken down in recent times by more and more active lateral hiring and nowadays some lawyers may not be working towards partnership in any event (Galanter and Henderson 2008, p. 1871, Brandon 2011, pp. 6–12).

Although such lateral hiring may be a strategic shortcut employed by some law firms to acquire trained and experienced lawyers that can position the firm to explore a new market abroad or to expand into new legal services areas, this strategy is not without its own problems. For example, it is a high cost approach and can cause integration problems afterwards for the hiring law firm, as the new recruits may struggle to find their place within their new team. This is without counting the cost of the loss of human capital lost that may have occurred for the original law firms where these new recruits previously worked (Brandon 2011, pp. 43–56, Williams 2015, p. 1). In addition, if clients had a very strong relationship with a particular lawyer, and that lawyer moves to a new law firm, the clients may follow that lawyer. Because of this, large law firms are now trying to replace the client--partner relationship with a client--law firm dynamic i.e. the client will feel loyalty to the firm rather than to any particular individual lawyer within it (Galanter and Henderson 2008, p. 1876, Wheeler 2014, p. 1).

Similarly, this also may affect the provision of training in legal skills that firms are willing to provide. If the mobility of lawyers keeps on increasing, there might be less willingness in law firms to train their own lawyers from the very beginning because they think talent can be bought in from other firms and also that they themselves are at risk of losing the lawyers who they have invested in. Interestingly, this may lead the traditionally hierarchical model within large law firms towards a more democratic model, at least to some extent, because some of the new laterally hired lawyers may have equal knowledge, skills and experience to the senior lawyers or partners in the law firm. As lateral hires are recruited for

their existing expertise in specific tasks, perhaps to bring clients with them, or to handle a specialist area on their own, they may not see themselves as junior to or needing to be deferential to, the existing partners in the firm (Williams 2015, p. 1). However, there is a risk in relying on lateral hires, who may come from a very different national and firm culture, who may not necessarily bring clients with them and whose reasons for moving may not be as simple as seeking a higher salary. Further, regardless of their level of expertise, there is some suggestion that if they have made a significant geographic move (for example to another country) then their level of expertise will not be fully recognised by their new colleagues (Dinovitzer and Hagan 2006, p. 131). Another effect is the responsibility of training lawyers may further shift from law firm to law schools to a certain extent (discussed in Chapter 3).

Although the relationships between lawyers and law firms are not as tight as before, whether they are working in a 'team' or a 'group' is still largely defined by the nature of the institutions where they are working. Kate Baragona said:

> "… and part of that's the nature of the World Bank, the kind of World Bank Group, their position as market leaders. It would be different I think than for a private sector council, and that's why I was going to make the distinction is because there would be the ones that would necessarily have a global contrary of international colleagues at the World Bank. You may be on a team and you have someone from Portugal, someone from Lebanon as part of your team, someone who is Muslim, someone who is Catholic, someone who is one of the Southeast Asian face, Buddhist, so you have this whole mix as part of your work group. When you're in the private sector, you're more likely to be in a firm with people who are of similar education, similar socioeconomic, similar race even. And that's where you may be more likely to have the experience with lawyer is he getting the coaching, and sometimes in the transactions those private sector council, all the ones that will make those mistakes…"[90]

[90] This interview was done by McGeorge Law School. This is part of the answer from Kate Baragona.

The World Bank has an advantage as its membership is necessarily diverse, and members have, at least in principle, an equal say, which is democratic in nature. In order to encourage students to become open-minded and to seek new ideas and reject pre-existing negative opinions, a law school could create similar conditions by employing international staff and recruiting international students. For a law firm, however, there are more challenges in being able to capture a diverse, culturally aware and open-minded perspective when decisions are made. Groups assigned to tasks, even in an international law firm, may not in fact be diverse if the firm's recruitment strategy is to hire lawyers from very similar backgrounds. Further, if members of a working group are diverse, but do not feel able to disagree with the majority, or feel that their perspectives will not be heard, advantages of having a diverse group will be lost, and in contrast, the risk of groupthink grows. Consequently, it is more important in this context to encourage students to develop open-minded approaches to information-seeking and decision-making when they are in the classroom.

Most ICP lawyers work in the context of large private international law firms (Russell 2014, pp. 234–240) or as consultants in large private international companies. The structure of the organisation may also have an effect on working practices. So, for example, where the firm uses a best friends/referral model (e.g. Slaughter & May), collaboration is likely to be quite loose, and is by definition with an external organisation, although it is likely to be on a long term basis. Another model is the Swiss verein (e.g. Baker & MacKenzie, Denton Dacheng) which keeps key financial affairs and profits separate but where there is sharing of branding, technology and strategy. Here the long term collaboration is helped by the common brand and use of technology, however, because the profits are kept separate there may be less incentive to share clients and work (Jarrett-Kerr and Wesemann, n.d.).

However, there are also international firms which attempt to operate as a single firm with multiple offices (the "one firm" model: (Muzio and Faulconbridge 2013, pp. 900–901)), even though those offices are located in different jurisdictions and cultures. Although it would appear that long term collaboration in this model should be easy, in fact, if lawyers are recruited overseas to the overseas offices,

differences in culture and challenges in communication may arise. There may also be a disparity in resources between different offices, with a team culture in the small overseas office and more of a group culture in the head office. Faulconbridge refers to four models:

> "Global – when the headquarters creates strategies and 'best practices' that all subsidiaries implement
>
> International – when the headquarters defines strategies that each subsidiary implements using its own forms of practice
>
> Multinational – when each subsidiary defines its own strategies and practices
>
> Transnational – when vertical (between headquarters and subsidiaries) and horizontal (from subsidiary to subsidiary) consultation leads to firm-wide negotiated and agreed-upon strategies and 'best practices'."
>
> (Faulconbridge 2008, p. 199)[91]

There are other organisational models for example, VistaLaw, which is a global network, provides high-quality legal services to corporate clients (no entry-level associates). Clients may use VistaLaw when the needs of general counsel or the size of the client's in-house team in foreign markets is insufficient. Their employees are in-house and outside corporate lawyers and it also has relationships with law firms to carry out litigation (Dzienkowski 2013, pp. 3020–3032). However, as Faulconbridge acknowledges, firms do not conform neatly to any of these models. They might also move between them over time. Consequently in this thesis, the concept of international commercial practice will be considered as a more generic context, rather than attempting to examine how it might operate in a large range of different managerial models.

Within the firm, whatever its model, another concern comes from the selection point. Belbin (2000, p. 16) thought it is crucial in his concept of 'team' for the manager to select the right team members in the right combination. He gave an

[91] In the context of legal education, Chesterman also uses the terms "transnational", "international" and "global" but in a different way (see Chapter 3)

example of football fans. The fans were asked what they would do if the team they supported disappointed them consistently. They would demand the dismissal of the manager, even though the manager did not play the football game himself. Clearly, when the team is first formed, selection is the responsibility of the originator of the team. However, if the team is democratic in nature it may not be clear who is to take responsibility for pointing out problems arising from selection at later stages. In addition, if the team is profitable and successful, so that there is competition to join it, it is difficult to see that the originator who is able to assign members to the team, can avoid having a dominant role.

Implications

In conclusion, for lawyers and law firms working in the international commercial context, in the foreseeable future, these two concepts of 'team' and 'group' may not be alternatives but interdependent factors. This is because democracy has its limitations, particularly as Belbin's ideal size of 'team' is four to six people. Consequently, some degree of hierarchy is needed if teams of larger sizes are to function effectively. For example, the concept of trust changes when law firms grow. In a traditional law firm, each partner, who is liable for the debts of the partnership, has to trust all of the other partners. Members of the team will need to accept, and be content with, the fact there is a hierarchy. In any event, traditional forms of hierarchy in law firms are being broken down as partnerships move into LLPs and more corporate models of management.

Furthermore, there are some reasons why hierarchy exists. As Belbin explained (2000, p. 111, 2010, pp. 98–128), there are always some people who want to be in charge, but the reason why this is must be to meet a need of society. It is suggested that one of the reasons is avoiding unnecessary conflicts and the other is convenience.

Hierarchy and collaboration might become more complex when working in international commercial practice. For example, the team might not be a stable team. This may be either because of the movement of individual reasons (e.g. lateral hiring) or because tasks are changing which requires the lawyer to

collaborate with different colleagues in the office or in different offices (e.g. working in an international law firm with identical offices). There might for example, be a core team on a particular kind of transaction in the London office, but they might be working at different times with lawyers from the Hong Kong office of the same firm, the New York office of the same firm, or 'best friends' firms in Shang Hai or Delhi.

The team is likely to be more diverse, with members from different language groups, legal cultures, educational backgrounds and cultures. Lawyers representing other parties in the same transaction may be members of the 'team' in the broadest sense as in a non-litigation context, everyone is working towards the same result. Who is at the top of the hierarchy and who ought to be at the top of the hierarchy and for what, now become much more complex. There may be conventions, such as the convention that in a banking transaction it is normally the lawyers for the bank who produce the first draft. Who takes charge could be planned, could be opportunistic (one person behaves as though they are in charge and everyone else allows them to do so) or not necessarily the most technically able, but a person who is given responsibility because they have e.g. the language skills.

According to Belbin's (2010, p. 83) distinction between the chairman/co-ordinator (who has strong leadership/who is accepting other's leadership), plant (who is creative) and implementer (who gets things done), different skills will be emphasised when lawyers are playing different roles in the team or group. Consequently it is important to look at the different components of collaboration.

Components of collaboration

Collaboration is not a single skill but a series of skills that work together in order to achieve a desired outcome. They may include skills such as language skills, cultural awareness, open-mindedness (which informs skills in asking questions and in making decisions), negotiation, communication, teamwork skills as a leader and teamwork skills as a member and team role switching skills, some of which are mentioned in the data discussed below.

Although as an independent concept, collaboration skills have only recently begun to be emphasised in the legal sector, they do include elements of the traditional DRAIN skills such as negotiation. Moreover, other collaboration skills from the list, such as communication, are involved in interviewing. Further, language skills may be learned to some extent through drafting and advocacy training. Teamwork skills, open-mindedness, and cultural awareness are, however, relatively new elements for legal skills training.

Although these factors are considered to be components of collaboration, it does not mean they are independent factors from each other. In contrast, they are interdependent and sometimes overlap. For example, when a lawyer has a collaborative attitude, he/she may use language skills to convey his/her attitude (see, for example, the reference to use of a foreign language as an icebreaker in Chapter 9)

The questionnaire, as described in Chapter 6, included 13 questions about components of collaboration.

As can be seen from the questionnaire results set out in Chapter 2, when participants, who were all Chinese ICP lawyers, albeit with varying degrees of experience, were asked to rank skills in order of importance, the three elements of collaboration (languages (especially English), communication skills, and teamwork skills) were ranked as top three). Similarly, later in the same questionnaire, when participants were asked to respond to a series of questions focusing upon collaboration skills in particular, they rated the skills frequently used and will cause serious problems if they conduct it wrongly.

There is an exception, which is intercultural skills, which is ranked the sixth out of ten options. Similarly, there were few participants who thought cultural awareness is something not important both in the ranking question and the questions that placed it in the practice context. There may be more than one possible explanation for this apparent discrepancy. One possible explanation is that intercultural skill is an important skill, but individuals do not necessarily notice it until something goes wrong.

Participants were asked how frequently they collaborated in different ways and then what the implications of failure to do so would be.

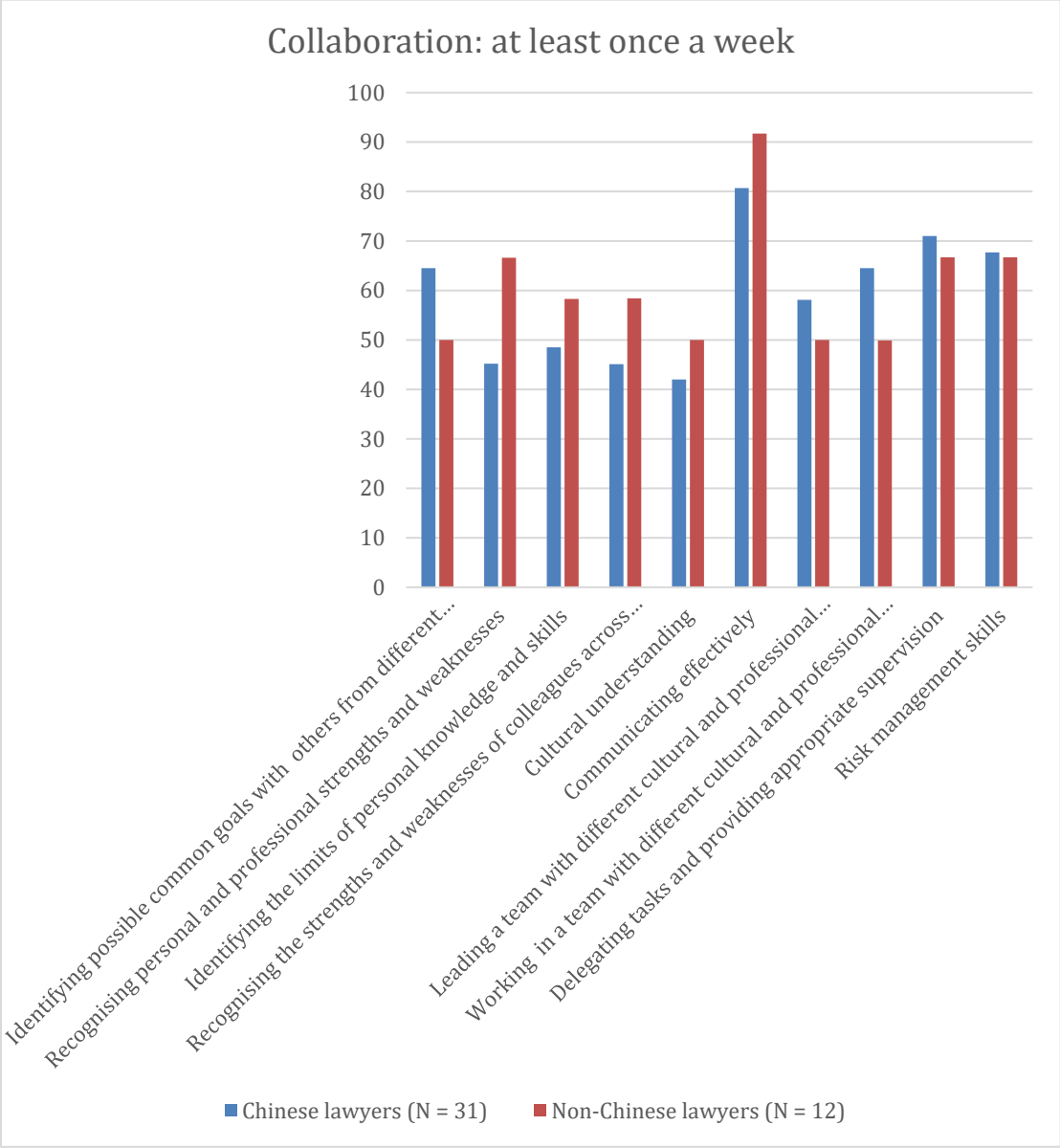

Table 14 Frequency in relation to collaboration

The Chinese lawyers identified communication, delegation, risk management and, jointly, identifying common goals and team working as the most frequent components of collaboration. The non-Chinese lawyers also placed communication, delegation and risk management (jointly) as the most frequent components, followed by recognising one's own strengths and weaknesses. The difference between the Chinese and non-Chinese lawyers in both leading and

working in teams may represent their relative seniority. The awareness of their own strengths, weaknesses and limits and those of others in the responses of the non-Chinese lawyers may also reflect their comparative lack of seniority (with four of the 12 respondents having no more than five years' experience).

A difficulty that has been identified in international collaboration has been a "resentment" from lawyers trained in some countries to "teamwork designed to enhance client service and/or the firm's success" (Faulconbridge et al. 2012, p. 58) This may be a product of the professional regulation system, in particular where young lawyers are not required to work for a more senior lawyer before they can do so on their own (ibid, p.57). Although five of the Chinese lawyers said they never worked in a team, there is nothing in the data to suggest that Chinese lawyers share this attitude. In fact, Chinese lawyers are not permitted to open their own sole practice[92] until they have at least five years' experience and have not been suspended from legal practice by way of punishment under articles 14 and 16 of the *Law of the People's Republic of China on Lawyers (2007)* and capable of full time practice under article 11 of *Measure for the Administration of Law Firms (2016)*. Therefore, they clearly do spend a significant amount of their early career working with other lawyers.

Although the sample of non-Chinese lawyers was small, there was no obvious link between place of qualification and attitude to teamwork. There was also no obvious correlation between place of qualification and their assessment of the consequence of a lack of collaboration skills.

[92] Which must have unlimited liability according to article 16 of the *Law of the People's Republic of China on Lawyers (2007)* and an investment of 100,000 RMB according to article 11 of *Measure for the Administration of Law Firms (2016)*.

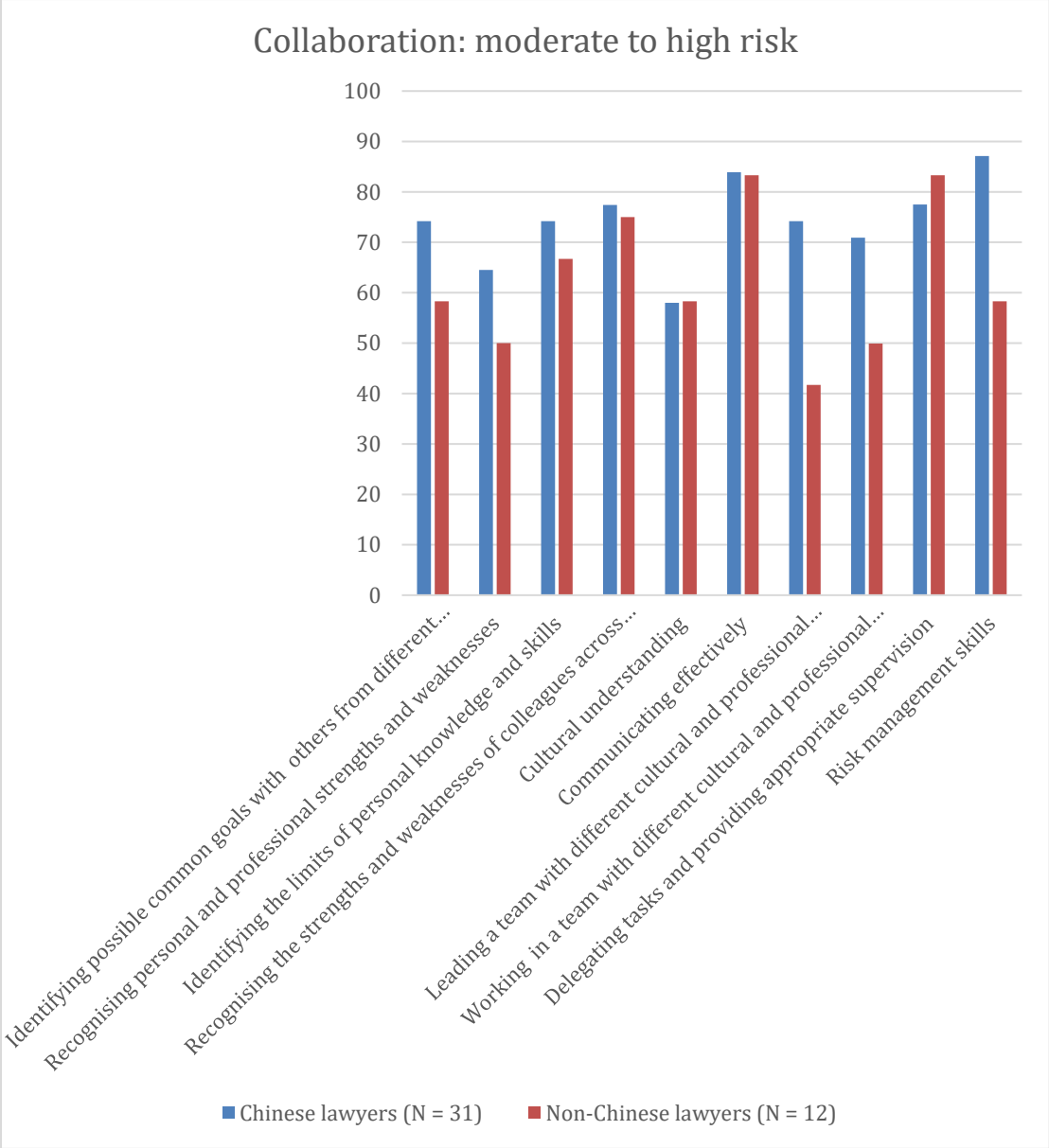

Table 15 Seriousness in relation to collaboration

The Chinese lawyers identified risk management, communication, delegation, and recognising the strengths and weaknesses of others as having the most serious consequences if a lawyer in their practice setting did not possess the relevant component of collaboration skills. The non-Chinese lawyers placed communication and delegation jointly as having the most serious consequences, with recognising the strengths and weaknesses of others and recognising personal strengths and weaknesses as the next most serious components. The non-Chinese lawyers, who were less senior, appeared to be more conscious of the implications

of the strengths and weaknesses of members of the team and of inappropriate delegation.

Conclusion

This chapter has defined different kinds of collaboration, in particular, short term and long term collaboration and collaboration in 'teams' and in 'groups'. It has explored the advantages and disadvantages of each in the context of international law firms and set out the components of collaboration that must be addressed in any revised JM curriculum. In conclusion, the ability to collaborate, in both short term and long term relationships, and with a variety of different people across differences in language, culture and legal context, is critical for ICP lawyers. For Chinese lawyers in particular, as one of the interview participants said above, collaboration is extremely important for ICP lawyers because ICP lawyers are supposed to deal with legal issues in many jurisdictions where they may not have full or detailed knowledge of the law and how it applies. At the very least, therefore, they need to be able to collaborate with the local lawyers whom they instruct to provide the necessary local knowledge. The place for collaboration in a PBL-based curriculum is signalled in the stage 1 introduction and later activities of the revised JM course described in chapter 11 and in Table 22.

One aspect of collaboration is communication, which is discussed in the next chapter.

Chapter 9: Language and communication skills

Introduction

According to Dunbar (1993, pp. 689–693), language is one of the main tools that helped human beings to collaborate on a higher level than other non-human primates. The complexity of human language provides not only effectiveness and accuracy in communication but also brings ambiguity and barriers, especially in the context of international communication. So, for example, (Barna 1998, pp. 173–190) lists a number of problems or barriers in international communication:

- Assumption of similarities
- Language differences
- Non-verbal misinterpretation
- Preconceptions and stereotypes (e.g. Smallhoover's example of working with Polish people mentioned in Chapter 8 under short term and long term collaboration)
- Tendency to quickly evaluate (e.g. to react with "that's rude" from one's own cultural perspective without thinking)
- High anxiety.

In order to understand the cause of such ambiguity and barriers, the definition of *language* used in this chapter should be clarified first. In the light of the definition in Collins' dictionary, language can be referred to as "various means of communication involving recognizable symbols, non-verbal sounds, or actions", although normally a language means "a set of sounds and written symbols which are used by the people of a particular country or region for talking or writing" (Sinclair 2014, p. 932). Therefore, besides various spoken and written languages,

the social language that is implied from conventions around verbal and non-verbal languages such as body language in a certain society or social class should also be taken into account. However, specific to international commercial legal services, because of the development of technology, emails and conference calls are frequently used to replace traditional face-to-face communication (Russell 2014, p. 230). This development may reduce the influence of some elements of the face to face context such as the body language involved in shaking hands. On the other hand, technological developments such as video meetings may in fact strengthen the influence of other elements of body language such as facial expression, which may therefore become more important. In the absence of any body language at all, such as in email or conference calls, the clarity and effectiveness of both speaking and understanding of verbal language becomes even more important than ever. Therefore, this chapter will discuss both verbal languages and non-verbal languages in the context of global legal services.

For verbal languages, according to Bellos (2012, p. 7), there are four options to overcome the obstacle that different languages are used by different communities: "learn the languages of all the different communities we wish to engage with, or we could decide to speak the same language, or adopt a single common language for communicating with other communities," or translation. Each of these will be discussed in this chapter.

Learn the languages of all the different communities

There are around 70,000 languages spoken in the world. Although 90% of these languages are used by fewer than 100,000 people, we still have over a million people conversant in 150~200 languages (BBC n.d.). It is impossible for a single person to learn all of them. Indeed, until the 1980s, Chinese society was closed and although a second language is compulsory in Chinese schools, students were more likely to study Russian than English. However, to focus on the languages that ICP lawyers should engage with, it may be possible to narrow it down to nine commonly spoken languages:

> "English (somewhere between 800 and 1,800 million), Chinese (1,300 million), Hindi (800 million), Arabic (530 million), Spanish (350 million), Russian (278 million), Urdu (180 million) French (175 million), Japanese (130 million)"
>
> (Bellos 2012, p. 10)

One way of determining which languages are most significant for ICP lawyers is to identify which languages are represented by the highest GDP economies. The larger the economy, the more likely it is to offer substantial opportunities for ICP lawyers. In a revised JM curriculum, this analysis may also be useful in deciding which other cultures and legal systems students should learn about. The top 20 economies identified by the World Bank (The World Bank 2015b)[93] can be shown by reference to their main language as follows:

Gross Domestic Products 2014			
Language	***Ranking***	***Economy***	***(millions of US dollars)***
English	1	United States	17,419,000
Chinese	2	China	10,360,105
Japanese	3	Japan	4,601,461
German	4	Germany	3,852,556
English	5	United Kingdom	2,941,886
French	6	France	2,829,192
Portuguese	7	Brazil	2,346,118
Italian	8	Italy	2,144,338
Hindi/English	9	India	2,066,902
Russian	10	Russian Federation	1,860,598
English	11	Canada	1,786,655
English	12	Australia	1,453,770
Korean	13	Korea, Rep.	1,410,383
Spanish	14	Spain	1,404,307
Spanish	15	Mexico	1,282,720

[93] There is a slight change of the ranking in GDP in 2015, but the top six countries have not moved, and also there is a positive movement of India (where English is an official language) from 9 to 8 and Canada from 11 to 10. Therefore, the position of English as a *lingua franca* will not be changed but may be strengthened.

Gross Domestic Products 2014			
Language	*Ranking*	*Economy*	*(millions of US dollars)*
Indonesian	16	Indonesia	888,538
Dutch/English[94]	17	Netherlands	869,508
Turkish	18	Turkey	799,535
Arabic	19	Saudi Arabia	746,249
German/French/ Italian/Romansh	20	Switzerland	*685,434*

Table 16 Relationship between GDP and language

It can be seen, therefore, that some languages appear more than once, such as English and Spanish. It becomes easier, therefore, to identify the languages that are overall most significant for international commercial trade by combining the GDP of all countries that share a main language.

GDP In Language Areas		
Language	*Ranking*	*(millions of US dollars)*
English	1	23,601,311~
Chinese	2	10,360,105
Japanese	3	4,601,461
German	4	4,081,034
French	5	3,057,670
Spanish	6	2,687,027
Italian	7	2,372,816
Portuguese	8	2,346,118
Hindi	9	2,066,902
Russian	10	1,860,598
Korean	11	1,410,383
Indonesian	12	888,538
Dutch	13	869,508
Turkish	14	799,535
Arabic	15	746,249

Table 17 GDP in language areas

[94] English has been included because, even if it is not an official language, the Dutch are known for their strong English-language skills.

If we combine the information of Tables 16 and 17 with the nine widely used languages, English, Chinese, Japanese, French, Spanish and Hindi appear in the top nine in both groups. Because Hindi is spoken in India where English is also one of the official languages, therefore, it is suggested that German should replace Hindi due to its important position in the commercial arena. However, it is not suggested that a revised JM course should involve teaching all these six languages to a working language level. What is suggested is that students should be exposed to the basic cultural background of these countries as part of their cultural awareness. This is addressed in stage 2 of the revised JM course described in chapter 11 and in Table 22, as part of an applied exercise in cultural awareness.

Speak the same language, or adopt a single common language: English as the *lingua franca*

For the second and third options, to speak the same language or adopt a single common language for communication in a specific context such as the international commercial arena, English plays the role of *lingua franca*.

English is considered to be the global language in the international business workplace (Jackson 2014), international universities (Jenkins 2014) and serves as the "most widespread means of international and intercultural communication that the world has ever seen" (Seidlhofer 2011, p. preface). Evidence for this can also be found in the data, where both Anglo-American lawyers and lawyers from non-English speaking countries had the same feeling. For example, Mates (an American lawyer) said,

> "…I was just going to say on the English point, I think we all, you know, took an appreciation to the British where the sun never set on the British Empire because English is the dominant language, English is the language of business, even the French use English in their cross-border loan agreements, and the younger French lawyers that they all are fluent in English and English is just the language of international business…"[95]

[95] Interview of Carol Mates by McGeorge Law School.

According to the ranking question in the questionnaire carried out for this project, eight out of the 25 Chinese lawyers who answered that question [96] thought language (especially English) was the most important skill for ICP lawyers. A further four thoughts that communication skills generally were the most important.

Of the non-Chinese lawyers, only two (from the UK and Portugal) thought language (especially English) was the most important skill, and only two (from England and Wales and Poland) thought communication skills generally were most important. However, when asked about how frequently they needed to communicate clearly in English, all the non-Chinese lawyers indicated that they did so at least once a week. It has been assumed that the four UK respondents were native English speakers and that the respondents from Sri Lanka and Pakistan might be. Only one native English speaker (from the UK) thought language was the most important skill of all. He further commented, "Good knowledge of English is fundamental. Knowledge of other languages is an advantage but not essential". Another respondent, from Sri Lanka, commented "Knowledge of English is dependent on where you practise. But yes, knowledge of language in the jurisdiction you practise is very important".

However, English language was only one of the communication skills covered in the questionnaire:

[96] Some of the respondents who completed the questionnaire in hard copy did not fully answer this question. However, one partial response also included English language, one ranked English and communication skills equally (although it was not clear how highly) and another said that all the listed skills were very important. Another respondent added, as a skill missing from the list "communication skills to clients on Chinese part".

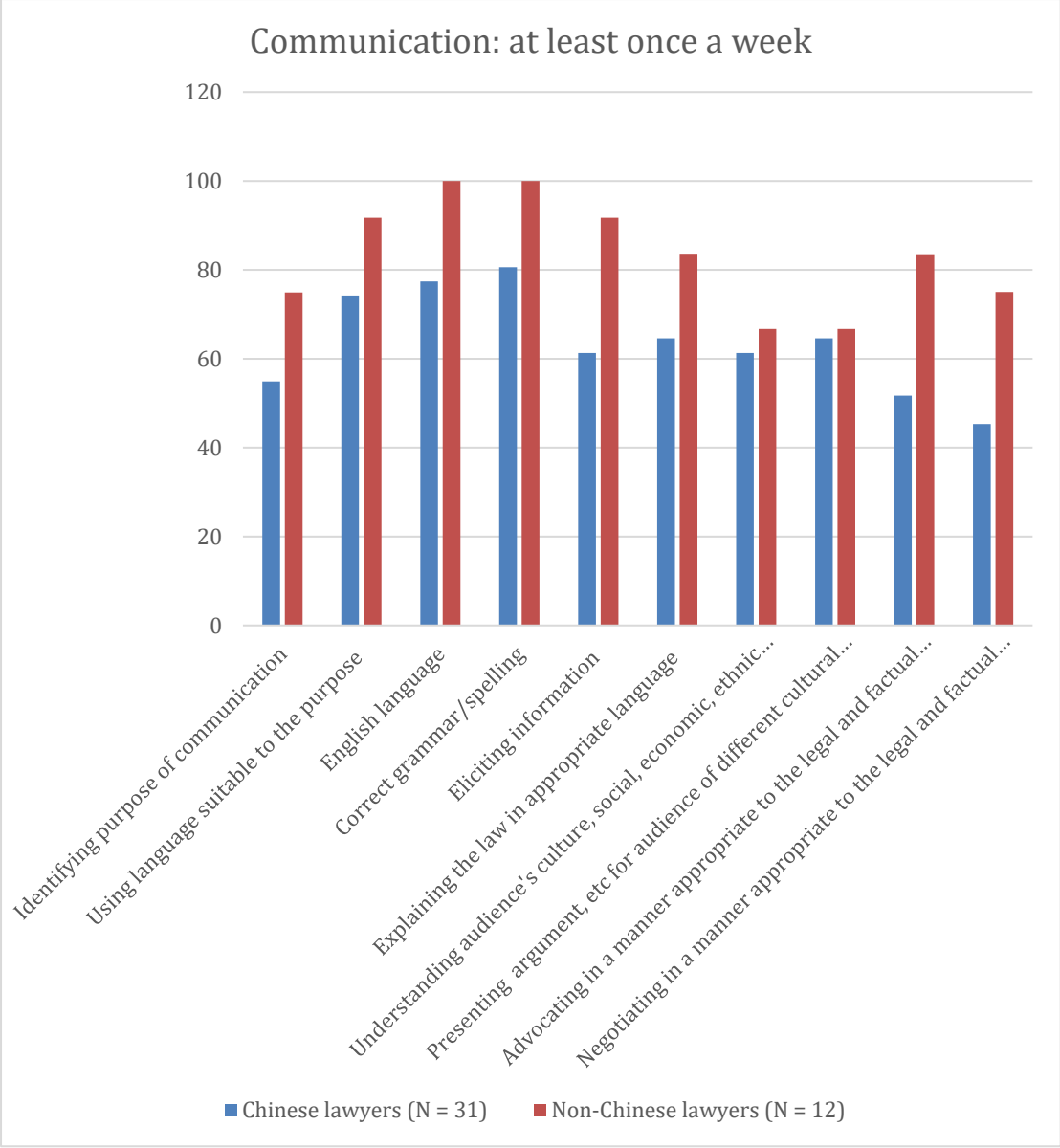

Table 18 Frequency in relation to communication

Whether or not respondents were working in English, all respondents valued correct grammar and spelling in communication very highly. This places technical accuracy higher than aspects of cultural competence such as explaining clearly and tailoring communication to the needs of the client or other audiences, which may need to be emphasised for commercial lawyers who practise in more than one country.

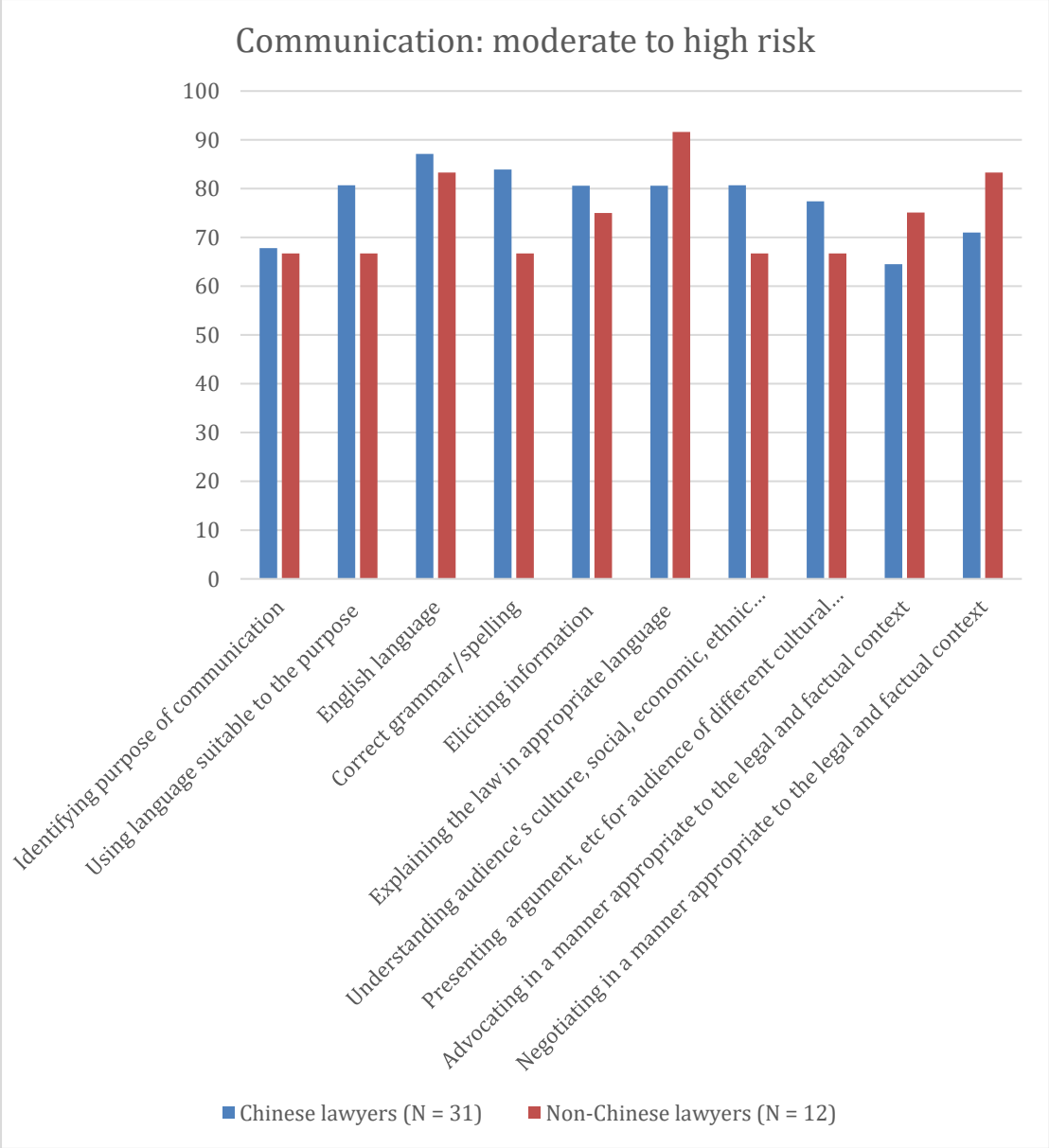

Table 19 Seriousness in relation to communication

The Chinese lawyers, therefore, reported English, grammar and spelling, using language suitable to the purpose, eliciting information and explaining the law in appropriate language (which could be in Chinese) as the highest risks. In contrast, the non-Chinese lawyers treated explaining the law in appropriate language as the highest risk, followed by English, negotiating, eliciting information and advocating as the highest risks. Chinese lawyers, who generally reported using the skills less often than the non-Chinese lawyers, tended to indicate that the skills were of higher risk. This could be due to lack of confidence as well as lack of actual

competence. As the Chinese lawyers were senior (with the exception of specialist skills such as advocacy), it is perhaps less likely that they chose not to use the skills *because* they were higher risk. Although half the sample of non-Chinese lawyers were native English speakers, it is notable that there was not a particularly great difference between the Chinese and non-Chinese lawyers in relation to this skill, although it was reported as higher risk by the Chinese lawyers. Similarly, there was not a particularly great difference in the assessment of risk between the two groups for the cultural awareness aspects of understanding background and presenting to a variety of audiences.

However, when the responses of the non-Chinese lawyers are broken down into native and non-native English speakers, two thirds of the native English speakers thought that if a lawyer in their practice setting did not possess skills in the English language, it would be extremely serious. Of the non-native English speakers, none thought it would be extremely serious, although two thirds thought it would be highly serious. The remainder thought it would be only minimally serious or not serious at all. This may represent simple lack of language skills (Surveylang 2012, p. 17), that make the native English speakers dependent on the prevalence of English as a *lingua franca*, and consequently less able to accommodate 'getting by' in English that may be acceptable to the non-English speakers. Although some Anglo-American lawyers in the data were prepared to speak more than one language, being bilingual is not crucial enough either to prevent Anglo-American lawyers from becoming ICP lawyers or even to limit them in being very successful in international commercial legal service markets. One of the reasons is that, as English is the *lingua franca* of the world, people from non-English speaking countries do not normally expect their counterparts or partners from other countries to speak their local language. For example, a Chinese lawyer from Dalian, where there are many international transactions between Japan and China, said:

> "…mainly English, Japanese do not insist you can speak Japanese as a lawyer, fluent in English is good enough for them…"[97]

Mates also said:

> "…no Turkish people expect an American to know any Turkish…"[98]

Apart from that, the format of contracts, their terms and legal concepts in some international transactions come from the Anglo-American system, even where there is no Anglo-American involvement in that transaction.

> "…even now working in Ghana and Nigeria, we are negotiating for bonds, capital markets, private placements, syndications, these are all concepts in English in US Law, and a lot of times even their own jurisdictions don't have these concepts and laws…"[99]

English native speakers do not always recognise that they benefit from the priority of English as a *lingua franca* compared to those for whom English is their second language (Jackson 2014, pp. 274–275). ICP lawyers working in an Anglo-American system may be capable of speaking several languages or may declare they speak only English and have no talent in learning foreign languages at all. For example, one of the McGeorge Law School interviewees said:

> "…I don't have any different languages and I'm terrible at different languages…" [100]

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[97] Interview of Participant 11. The original conversation was in Chinese as "主要是英语，日本人不太看重你会不会讲日语，对于律师来说只要你英语讲的好就行了……"

[98] Interview of Professor Carol Mates by McGeorge Law School.

[99] Interview of Kate Baragone by McGeorge Law School.

[100] Interview of Kate Baragone by McGeorge Law School.

Even if they are capable of speaking several languages and are talented in foreign language learning, they may talk about using such languages as an icebreaker as part of their intercultural skills, rather than as a serious working language:

> "… I found as going into countries if, … that if you at least learn a few words … I learned how to say thank you and … or, you know, thank you very much actually I learned and it's very – there's no way I could learn the language, you know, it [would] take me 20 years, it's very complex language, but I found that's, that's an icebreaker." [101]

And this was agreed by Mates.

> "…So simply, you know, you have to say thank you even though I'm sure my accent is terrible, their face lights up and it shows that you're not trying to dominate them with your American culture, that you're willing to make the effort, you know, the French, who are notorious, people say they're notoriously anti-American, I did spend a summer there after college, and my French was pretty good, and people were so welcoming, you know, they took me into their homes, you know, it was – because, you know, I could speak their language."

They may only realise that there is an issue, when they encounter different kinds of native English speech:

> "…I'm not even monolingual. I'm semi-lingual because I speak Mercan, that's what my English colleagues told me. When I was a new solicitor in the UK, we had to have English assessment and I grew up speaking, teaching French in Louisiana, little bit of Spanish, little bit of Italian, and speak American English, and I had my English language assessment, actually I had my French language assessment at the firm I worked with in England, and

[101] Interviewer in the McGeorge Law School interviews (may be a member of academic staff at the Law School).

> they came back and they said she's not monolingual, she's semi-lingual, she only speaks Mercan. So, the point you said, even if you speak English, it doesn't mean you all speak the same language.
>
> And when I was in the UK as a young English solicitor, my colleagues would ask me questions and I would say, pardon, and they knew I didn't have a clue because we get this kind of deer in the headlights look and just go pardon, pardon, because I could hear the words and they had a meaning in American English, but it didn't translate into anything I knew when they were speaking British English to me, and one colleague would just speak louder and louder until he was yelling at me. I'm like, I'm not deaf, I just don't know what those two words mean and it was for example, you go down to the [indiscernible] and take a left across the zebra crossing and cross the zebra. And I'm like, you want me to do what, the Belisha and cross the [who], and then – and he just kept it saying it louder and louder, and I was like I really have no clue what you were talking about, [we were both] speaking English so. Even if it's English, it's not necessarily the same thing."[102]

However, for non-native speakers, as described in Chapter 7, competence in English may be the reason why they are able to become ICP lawyers in the first place. In one of the McGeorge School of Law interviews, Maiano said the reason why he had an opportunity to enter international commercial legal services in the first place was because he was the best English speaker amongst Italian lawyers at the time.

> "…first of all when I started my training time period in a law firm which was a – I think it was the only one was in the branch or a foreign office of a US firm, Grant & James which was actually in Italy. ... It was sort of a very peculiar situation where because of my – at that time very, very few Italian law graduates would speak hardly any foreign languages.
>
> So because of my language capabilities I was hired and I kind of started my apprenticeship in this law firm where English was required because of the fact that they had a lot of Italian client. The client was a very old San Francisco firm Grant & James,

[102] Interview of Kate Baragone by McGeorge Law School.

> which doesn't exist any longer. It was dissolved 10 years ago, but for a few years, the lawyer that founded the office was the resident partner of this American firm…"[103]

A similar case appeared in the interviews with Chinese ICP lawyers carried out for this project. One of the participants had majored in English at university and a senior lawyer persuaded him to study law because the senior lawyer recognised the value of his English language skills in the context of international commercial transactions.

> "This came from an influential person's words, in 1966, I met a well-known lawyer in Qingdao, he thought I had English education background and had been working in insurance area for a long time, especially in the international insurance area, if I can learn some legal knowledge, I would become a very precious multi-disciplinary talent in the legal area…"[104]

Later, the interviewee also benefitted from his English language skills in being able to give government-sponsored presentations to foreign visitors on Chinese investment opportunities. He now attracted most of his clients in this way.

This strongly supports the view that English should be chosen as the instruction language of the proposed revised JM course. The experience of the PCLL should, however, be learned from. Even though all students have an IELTS test score of 7 or above, and could therefore be supposed to have a high level of language skills in English, there have been problems in the drafting elements of the PCLL, and some of the students who failed their drafting tests were English native speakers (Young 2005, p. 50). This suggests that simple technical accuracy in the language is not sufficient on its own. Understanding the legal concepts underpinning the drafting and the client's purpose are also important. Consequently, in stage 3 of

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[103] Interview of Maiano by McGeorge Law School.

[104] Interview of Participant 4. The original conversation was in Chinese as "这个可能起源于一次贵人点拨。1996 年，我遇到一位青岛当地的大律师，他认为我学英语专业出身，长期做保险业务，尤其是国际贸易的保险，如果再学些法律，将会是难得的综合性人才。"

the revised JM course described in Chapter 11 and Table 22, students will be exposed to transactions involving different languages and different forms of English, some of which will take them into the top layer of the pyramid set out in Figure 5.

Translation

For the final option suggested by Bellos, translation, the most important thing is to recognise the possible limitations of translation/interpreting. As Baragona indicates, simple translation of the language does not help the lawyer deal with variations in legal concepts:

> "…They were generally speaking English and would have simultaneous translation as we get into complicated details. My work is all finance and financial structuring, and English is the language of finance and financial structuring, because the instruments, the products are all are going to be New York or London based. Even now working in Ghana and Nigeria, we are negotiating for bonds, capital markets, private placements, syndications, these are all concepts in English in US Law, and a lot of times even their own jurisdictions don't have these concepts and laws, so I'm lucky, we always do fall back, and even if there is a simultaneous translation or concurrent translation, it's – you slow down because it's very technical. You're very slow if you're in London, New York as well because it becomes just so technical. I find schedule reviews to be very different though."[105]

A similar issue was identified in the data collected for this thesis, where one of the Chinese lawyers mentioned the difference in meaning of 'damage' in Chinese law (mainland)and Hong Kong law:

> "…take 'damage' for example, if you don't understand it in certain legal background, you will misuse it…that's underpinning legal

[105] Interview of Kate Baragona by McGeorge Law School.

> theory. We once drafted a contract governed by Hong Kong law, we gave an exact figure, let's say 3 million or 5 million, in the contract. Our Hong Kong lawyer told us that we cannot define the amount of 'damage' in advance, … because under Hong Kong law, damage refers to actual losses [106]

In terms of intercultural communication, therefore, translation is not an adequate solution as it struggles to capture nuances and rhetoric. For example, one lawyer may be using highly persuasive language as part of a negotiation, but this language may not be adequately captured by a technically correct translation. Consequently one aspect of stage 3 of the revised JM course described in Chapter 11 and Table 22, when it covers cultural awareness, is to ensure that students can communicate efficiently across cultures, using the *lingua franca* and paying attention to issues of rhetoric.

The researcher is very aware of the limitations of translation and this underlies the relevance of rhetoric to the methodology adopted in this project. The researcher has had to consider herself as author, the probably English native speaker audience and the message contained in the thesis. The interview data has, for example, not only been translated from audio to text, but some of it has also been translated from Chinese into English. A large part of the work of the thesis has, therefore, involved translation and interpretation and considerations of rhetoric.

Conclusion

This chapter has discussed the meaning of language, both as verbal language and as body language which is related to intercultural skills and cultural awareness. The data also identified English as a particular issue for ICP lawyers. Non-native speakers felt that being able to use English effectively was a key to successful international commercial practice and might be the reason why an individual

[106] Interview of Participant 12. The original conversation was in Chinese as "……打个比方说吧，就我们刚刚说的 damage 这个单词，你如果不知道这个体系下 damage 这个单词的涵义，……我们在适用香港法的合同的时候，……，写了个固定的赔偿金额，赔偿金额三百万，五百万，香港的律师给我们的法律意见是这个在香港法律下是不行的，……不是这个赔偿金额，而是根据这个实际损失来定赔偿金额的。"

became an ICP lawyer in the first place. Native speakers might make assumptions that others would speak English, or use other languages only as an icebreaker. They might only become aware of differences when they met speakers of other kinds of English. Nevertheless, their lack of ability in languages other than English did not prevent them from becoming successful ICP lawyers.

Respondents to the questionnaire, however, valued technical accuracy more highly than aspects of cultural competence which may need to be emphasised for ICP lawyers who practise in more than one country. Chinese lawyers, who generally reported using communication skills less often than the non-Chinese lawyers, tended to indicate that the skills were of higher risk. It has been argued that this could be due to lack of confidence as well as lack of actual competence.

However, it is impossible to teach any language from zero to a working level in two years in the classroom. Therefore, the revised JM course described in Chapter 11 and Table 22 is not for students who are complete beginners in English but those who already have some level of competence. The value of this course is to teach students how to use English in an intercultural context.

English is now a compulsory subject in Chinese schools, so, on the face of it, language skills should not be so much of a barrier in the future. However, the issue for ICP lawyers is not simply having the vocabulary and technical knowledge of another language, but also an attitude that enables them to use those languages (an attitude that seemed to be missing in native-English speakers in the sample) and open-mindedness to cultural differences. English at school will not address these attitudes, which, it is suggested, are developed from actual engagement with people from other languages and cultures. This engagement is related to the skill already identified in the questionnaire for ICP lawyers, in being able to collaborate effectively with people from other groups. At present, however, as described in Chapter 7, the social and cultural capital required is probably achieved by those from elite backgrounds who have the resources to travel or study abroad. The question for this research is whether some elements of that social and cultural capital can be acquired through skills education in the classroom, going some way to redress the social bias.

The final key theme in the data, which is related to the fact that ICP lawyers are law-makers rather than law interpreters, and so are working at the second layer of the pyramid in Figure 5, is creativity. This is discussed in the following chapter.

Chapter 10: Creativity

Introduction

According to dictionaries, creativity is the ability to invent and develop original, new, unusual and interesting ideas, actions or things (Chambers 1988, Sinclair 2014). There are two key elements that can be extracted from such statement; one is *original* and *new*, and the other is *unusual* and *interesting*. There is a clear overlap between this and the definition of open-mindedness provided in Chapter 6, particularly in relation to the attitude of tolerating, encouraging and actively seeking different information, ideas or behaviours.

The idea that creativity involves 'new ideas' and 'actions', has been studied as a mental process in psychology, in order to understand how the conscious and unconscious processes work (Koestler 1964, Csikszentmihaly 1997, Plucker and Renzulli 2004) and what steps may be taken to develop creativity generally (Kneller 1965, Byttebier and Vullings 2007), and apply it to the workplace (Claxton and Lucas 2004). In addition, factors that can lead us towards creativity, such as motivation (Collins and Amabile 2004), intelligence (Sternberg and O'Hara 2004) and personality (Feist 2004, Hampson 2006) have also been studied by researchers.

The discussion of international commercial practice in Chapter 7 argued that ICP lawyers need to be creative as they work in the second layer of the pyramid. The questionnaire and interviews, therefore, sought to discover the extent to which ICP lawyers thought that creativity was, or should be, part of their job.

The word 'creativity' was, therefore, used in the questionnaire without a more detailed definition in order to find out, without assumption, how lawyers understood it in relation to their work. As indicated in chapter 2, for example, one participant linked creativity to analytical and problem-solving skills.

Creativity used by lawyers

As can be seen from Table 2 (Chapter 2), both Chinese and non-Chinese lawyers did not rank creativity highly in the initial ranking question in the questionnaire. However, later in the questionnaire, respondents were asked a number of questions, in sections about analytical skills, oral and written communication skills and on collaboration, which related to creativity. They answered these rather differently as is shown in the figures below on frequency and risk.

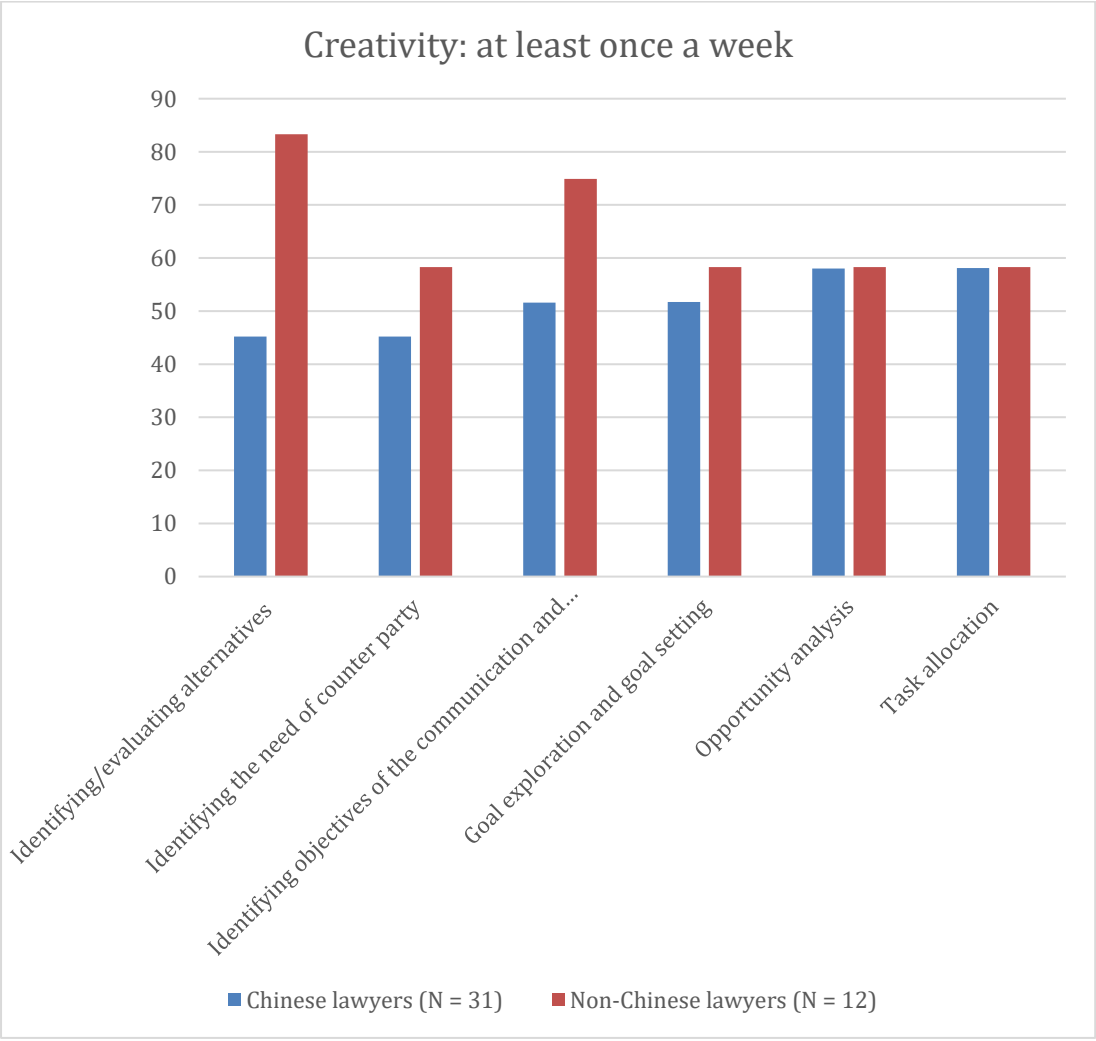

Table 20 Frequency in relation to creativity

Given the low ranking accorded to creativity overall, it is surprising to see the comparatively high frequency with which it is used. The frequency with which Chinese lawyers considered that they used creativity in these respects was typically lower than the non-Chinese lawyers. However, when specific aspects of creativity were considered, the difference between the two groups was less in the three creativity questions in the collaboration section, despite the non-Chinese lawyers having ranked 'teamwork' far lower than the Chinese lawyers had. The difference between the two groups was much more marked when creativity was involved in analytical skills and in communication.

This data may support the suggestion, discussed further below, that Chinese lawyers' traditional role did not allow them, or encourage them, to be creative in this way, and thus creativity may be identified as a gap in the Chinese lawyer's skill set.

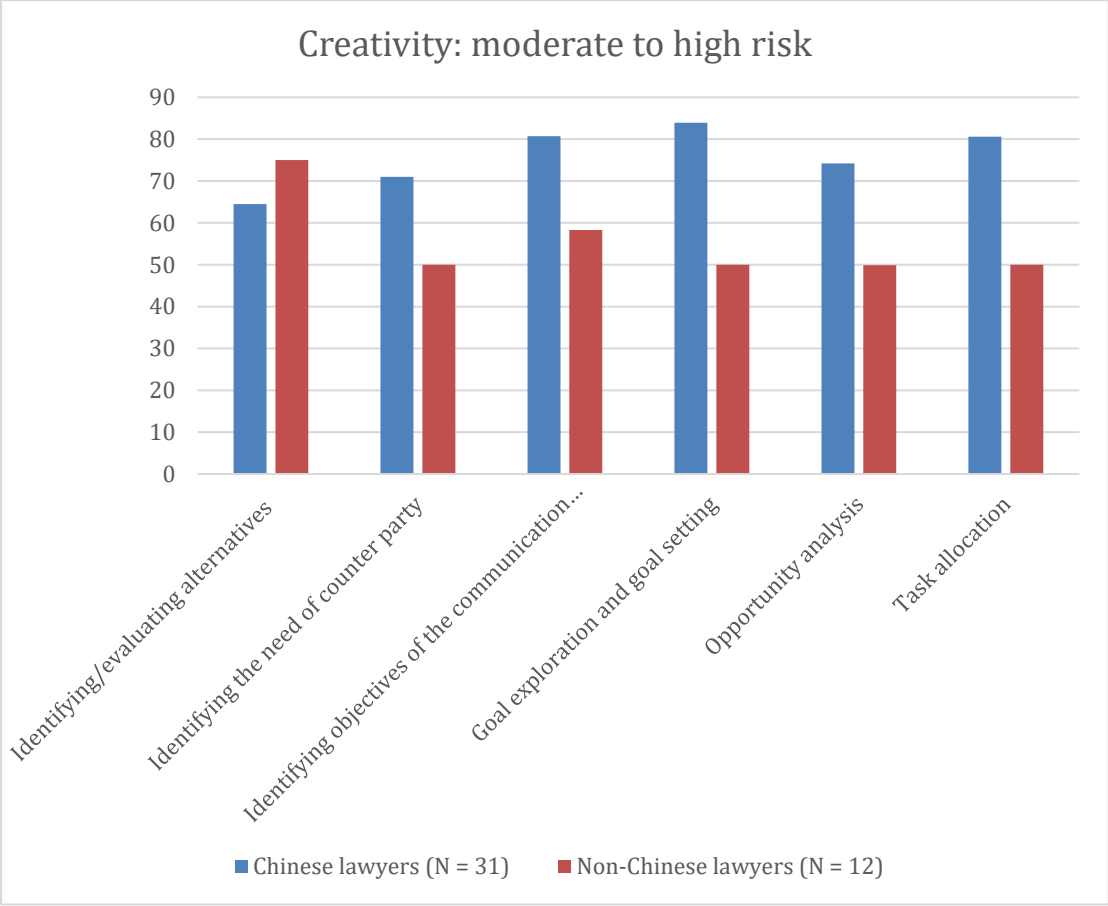

Table 21 Seriousness in relation to creativity

Although Chinese lawyers appeared not to use creativity skills as often as non-Chinese lawyers, overall they attached greater risk to not doing so. This may indicate that they are actively conscious of this gap in their skillset for international commercial practice.

This is supported by data from the interviews. A Chinese lawyer stated that creativity for lawyers means reconsidering their role. This is because lawyers should not only consider themselves as interpreters of law but also professionals who can support clients with business ideas:

> "… because [we] only did some explanation of law before, however, during the international interaction, many things are not only legal issues, therefore, we need to be creative, I think that is what Chinese lawyers need, this is the distance [of Chinese lawyers from world leading lawyers], the concept of *business lawyer*…" [107]

The other participant in the same interview added that creativity for Chinese ICP lawyers may mean Chinese lawyers should do something different from lawyers of other jurisdictions to support the unique needs of Chinese clients and Chinese economic development:

> "… I think there is one point I shall remind, that [the legal services that] Chinese lawyers [provide to support] outbound transactions for Chinese enterprises must have its own attributes, this is not only the issue that [we] shall learn from foreign lawyers. It may actually be about the creativity; how can

[107]Interview of Participant 13. The original conversation was in Chinese "……因为以前就是做一些法律解释，但是要在做国际交流中，很多事情是不是纯粹的法律方面的问题，需要律师的创造性，我觉得这个可能是中国律师需要，就是这个差距所在，就是我们叫 business lawyer 这个概念……"

> [we] really provide [legal] services that can support Chinese enterprises and economic policies… "[108]

However, such an argument was not accepted by all the Chinese lawyers. Another participant in the same group interview disagreed:

> "When talking about international legal services, the precedent condition of international legal services is there is a need. We have such needs now, but from the perspective of experience, they [western lawyers] already have the whole framework of international legal services, or international law, the framework is largely the western framework. Under such circumstance, if you are not familiar with [the framework], … even if you enter [the framework] as a critic, it is really difficult… A Chinese judge, [name of the judge], said he felt himself just enter the door, but he was the Chinese negotiator of finance and economics [representing the country] before [he was a judge]. Therefore, actually, the whole legal framework, we can't say whether it is right or not, is largely compliant with western legal theories, under such circumstances, it is not possible to be creative for us, because we are just a novice, at the very beginning. Therefore, although there was a rapid development of our economic power, but our political influence, our soft powers, including legal powers are still very weak. Therefore, you will feel there is a high demand, but there is a far distance away, or let's say powerless, our legal services are unable to support our economic needs, that is the first impression."[109]

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[108] Interview of Participant 14. The original conversation was in Chinese "……但是我觉得尤其要提醒一点，就是说肯定中国的律师（服务）中国的企业走出（有）自己的特点，这里面不光是向国外律师学习的问题，可能还真的涉及到创新的问题。怎么能够真正为中国自己的企业，经济政策做好这方面的服务，……"

[109] Interview of Participant 15. The original conversation was in Chinese as "你是讲国际法律服务，那么国际法律服务的前提，首先他的需求，我们现在也有很多需求，但是从经验来说确实是，因为人家已经整个国际法律服务，或者国际法律的框架，很大程度上还是在于西方这个法律框架，那么这种情况下，如果我们法律框架主要是人家的框架，我们对人家的框架不熟悉。即便我们是作为一个批评者的角度去进入，但是你既然不熟悉的情况下，对他的文化，和法律文化都不是很了解的情况下，你要去服务，就会面临很大的困难。 ……，中国的法官（名字），他就觉得说他干了两年才刚刚入门，他自己都刚刚入门，那是原来中国财经谈判的大使。也就是说，实际上就是整个法律框架，我们不好说谁对谁错，但是由于大部分还是按照西方的这种法律思维进行，我们在里面，不要说我们去创造，……，我们自己的加入还在比较初级的，初步的阶段。所以这种情况下，尽管我们的经济实力已经有了大幅的提升。但是我们的政治，我们的软实力，包括法律这个实力还比较弱。这种情况下你就会感觉有很高的需求，但是有比较大的一个差距或者说比较大的一个无力，就是说我们的法律服务还不能支撑我们的经济需求，这是第一个感觉……"

Although how Chinese lawyers can be creative does not have unanimous agreement, the need to be creative as an ICP lawyer was not rejected. Moreover, as mentioned in Chapters 2 and 7, the current Anglo-American domination of international commercial practice can be expected to continue in the immediate future, even as the number of Chinese ICP lawyers expands. As long as international commercial practice continues to operate at layers two and three of the pyramid in Figure 5, the inherent flexibility of the common law system will support Anglo-American dominance and a civil law system would find it difficult to challenge this. Therefore, simulated transactions included in the revised JM course described in Chapter 11 and Table 22 will require students to engage with the common law, to enable them to transition into international commercial practice.

Given the final quotation above, there may be scope to encourage the development of a creative attitude in the classroom Creativity is not only linked to competence, but is also important for capability and open-mindedness as mentioned earlier. Consequently, creativity and open-mindedness are pervasive in stage 2 and enhanced in stage 3 of the revised JM course described in Chapter 11 and Table 22. However, unlike other skills, it is also linked to moral issues.

The 'creative' lawyer: devil or angel?

Although creativity may not be the first thing that someone might mention when talking about lawyers, nonetheless it is not a new expectation that lawyers should be creative in order to solve problems (MacLeod 1963, Kloppenberg 2006). Nevertheless, it is a controversial topic from an ethical perspective. For example, ICP lawyers may be "creatively compliant" (McBarnet 2009, p. 5) with local laws and international treaties which leads to, for example, "tax abuse" (McCormack 2013, p. 34, Rostain and Jr 2014, pp. 217–242) and "treaty abuse" (Kahale 2011, p. 1). This is because, while they may not go so far as to break the law, they actually bypass the law and thus defeat the original purpose of that law, which may in turn

cause wider problems such as a banking crisis (McBarnet 2009, p. 2) or cause the receiving countries of bilateral treaties to suffer (Kahale 2011, p. 1).

The root of the negative assumptions about creative lawyers is based on the presumption that lawyers should be conservative and that they are trained to interpret existing law rather than being active lawmakers (Menkel-Meadow 2001, p. 103). Even at the level of local jurisdictions, where positivism (law is expressed and remains unchanged until a new law has passed the law making process (Hart 2012)) dominates, "lawyers [were] a primary source of innovation and change in American public law" (Neal 1967, p. 608) both historically and contemporaneously (Zacharias 2009, pp. 1952, 1609). In the context of international commercial legal services, as discussed in Chapter 7, ICP lawyers are in need of a high level of creativity to navigate the existing law that traditional lawyers work in and also to make new rules informally in unexplored areas in the second layer of the pyramid. Therefore, creativity is crucial for ICP lawyers and this thesis.

From a positive perspective, creative compliance with laws can also be used to fill the gaps or holes in those laws (Khanna V Lovell White Durrant 1994, pp. 124–126), for example where situations have arisen which were not predicted when the law was originally enacted, for example in the employment law sector (Pyman 2005). As such, it is possible to view creativity through different lenses. In the context of morality, the analogy of nuclear power can be used. People can use it as a nuclear weapon to destroy, but it can also be used through a nuclear power plant to benefit daily lives. Therefore, it is argued that although strong creative skills can cause great harm when they are being used immorally, this is not a sufficient reason to stop exploring advanced techniques and learning of skills, although it is important to make sure ethical issues are borne in mind as part of the learning process.

The data suggests, however, other lenses through which creativity can be seen.

The elements of creativity

From the teacher participants' view, creativity may be considered to represent a high quality of services delivery. In a real life situation, students have to be able to do more than simply follow the processes; they have to be creative in adopting original and possibly unusual approaches to achieve the appropriate outcome:

> "It's difficult to quantify, because nursing is an art as well as it being a science. So we have to have that knowledge so that what we do is safe for the patient to the best of our ability. But you can't teach somebody to care. You can't teach somebody how to have a good therapeutic touch. How to 'read' the non-verbal and the verbal communication appropriately. That's difficult. … I don't believe you can *make* a nurse. Because you have to be able to approach people in a certain way. You have to try and make them feel safe. You have to try and get their trust, quite quickly, in certain situations."[110]

Two Chinese lawyers described the importance of having 'good sense' in a similar way:

> "… for us dealing with M & A tasks, besides fine character and fluent English, I will highlight quick comprehension. Nowadays, we have plenty of law graduates, but whether you can become a good lawyer or not, it actually depends on whether you are clever or not and whether you have quickness or not…"[111]

The other lawyer in same group interview supported that idea:

> "There is a word, when we interviewed candidates before, our boss liked to say whether he/she has a good *sense*; that is the

[110] Interview of Participant 16.

[111] Interview of Participant 3. The original conversation was in Chinese: "……对于我们做并购的来说除了人品要好英文要好以外，我会比较看重是不是比较有悟性。现在学生很多，但是做律师的话你最终能不能做好，其实聪不聪明和悟性高不高是很重要的。……"

> sense of being a lawyer. Because some people have good sense, they can [handle] this legal issue [themselves] or can catch on quickly, but some people, they may never understand even you have spent a lot of time to teach. *Sense* is very important, it is hard to express explicitly."[112]

Although good sense can be an innate attribute of some people, and hard to express, some of the legal tasks learned in law schools, for example, legal drafting can help to improve students' good sense:

> "… first, [they] know how to solve a *new* problem, be able to study the legal issue on their own. If you are instructed to draft a legal document without previous experience, you at least know it will not work by writing a few lines on a blank sheet. You must consider what is the title, what is the format, even though you cannot get it right the first time, even though the writing is not good enough, at least you have considered it, this is what I value. This kind of person learns very fast, can engage with the work very quickly… "[113] [emphasis added]

Besides high quality, creativity can also mean style:

> "I think that can be in some ways, one of the dangers with advocacy teaching. That you can, you can make 'mini-yous'. The students can be influenced to just want to copy your style. But the reality is in advocacy you really want, what you want the student to be able to do is to find their own voice."[114]

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[112] Interview of Participant 1. The original conversation was in Chinese: "有一个词，我们那个时候面试，我们老板很喜欢说这个人的 sense 如何，就是我们做律师的感觉。因为有些人 sense 好，这个法律问题他自己就能够一点就通，有些人 sense 点了半天也不通。sense 很重要，这个东西说不清楚。"

[113] Interview of Participant 6. The original conversation was in Chinese: "……首先一个新的问题来了知道怎么解决，能把这个法律问题独立的研究清楚，如果说过去没有经验，但是现在让你写一个法律文件，他能够考虑到我这个文件不可能在白纸上就写几句话，他会考虑到抬头是什么，应该有一个什么格式，哪怕写的不对，哪怕写的不好，但是有这个思想。比较看中这样的，这样的人用不了太长时间就会马上进入状态。……"

[114] Interview of Participant 17.

The revised JM course described in Chapter 11 and Table 22 includes a short simulated transaction supported by skills workshops in negotiation and drafting, to support students in developing good sense and their own voice.

Consequently the elements of creativity have been defined in addition to those listed in the questionnaire, as providing high quality services (which might need to be original and unusual); using good sense (to create solutions that are original and new), developing a personal style (that might be unusual and interesting). In all of these, however, the lawyer must work within the law and remain ethical. However, it is argued that creativity is required for lawyers to work as law makers in the second layer of the pyramid.

Chinese lawyers in the data recognised the need to be creative, perhaps in a distinctly Chinese way, but seemed less confident about their ability to do so. This might be related to the history of the legal profession, in China (described in Chapter 2), as innovation might be seen as disruptive to society:

> "a farming society with a stable feudal structure, for instance, would be one where tradition counts more than novelty." (Henry 2006, p. 8)

It has also been suggested that a centralised model of government does not promote creativity:

> "central authority tends toward absolutism, it is less likely that experimentation will be encouraged"
>
> (Henry 2006, p. 8)

However, China has had a centralised government over thousands of years. This did not prevent people from being creative when there was a balance between centralisation and diversity in the political model. A centralised government can decide to allocate resources to particular needs, including creative development:

> "… aristocracies or oligarchies may be better able to support creativity than democracies or social regimes, simply because when wealth and power are concentrated in a few hands, it is easier to use part of it for risky or 'unnecessary' experiments."
>
> (Henry 2006, p. 8)

Consequently if Chinese lawyers are not confident in being creative, the reason may be economic. Chinese society, from the economic perspective, is already moving towards having enough wealth to encourage creativity or innovation:

> "a society that enjoys a material surplus is in a better position to help the creative process. A wealthier society is able to make information more readily available, allows for a greater rate of specialization and experimentation, and is better equipped to reward and implement new ideas. Subsistence societies have fewer opportunities to encourage and reward novelty, especially if it is expensive to produce"
>
> (Henry 2006, p. 8)

Allocation of wealth for creativity moved from a public interest to a private interest, which encourages individual commercial enterprise that, in its turn, requires lawyers to support it. This extends beyond the purely domestic arena as those enterprises seek to extend their international reach either by organic growth or by acquisition of foreign targets. This takes Chinese lawyers into the second layer of activity in the pyramid in Figure 5 where creativity is, it is argued, essential. One way in which the Chinese government could also support this is in investment in higher education. However, it is argued that in the case of international commercial law, this will not be achieved unless the content of the legal education curriculum is changed to one that more effectively reflects the skills needed by ICP lawyers and encourages students to explore opportunities for being creative.

Conclusion

This chapter has first defined creativity as having two key elements: *original* and *new*, and *unusual* and *interesting*. The activity of ICP lawyers can cover both.

Respondents to the questionnaire did not rank creativity highly. However, when answering questions, in sections about analytical skills, oral and written communication skills and on collaboration, which related to 'creativity' they were more likely to indicate that creativity could be important. Chinese lawyers generally used skills in creativity less than the non-Chinese lawyers and it was argued that this could be because Chinese lawyers' traditional role did not encourage them to be creative in this way. However, Chinese lawyers attached greater risk than non-Chinese lawyers to not being creative. This may indicate that they are actively conscious of this gap in their skillset. Indeed, a Chinese interviewee stated that creativity for lawyers meant reconsidering their role in order to support clients with business ideas. However, another interviewee felt that the Chinese legal profession was still immature and not yet able to become creative.

This chapter has also explored the ethical dimensions of creativity, when being innovative becomes being unethical.

The data relating to the three key elements of collaboration, communication and creativity is drawn on in the following chapter to create a design for a revised JM course for intending ICP lawyers.

Chapter 11: A Skills-based Curriculum for Chinese ICP lawyers

Introduction

As discussed in the previous chapters, the practice of ICP lawyers is based on their local legal work. Therefore, the skills involved in local legal services are also needed for those providing international commercial legal services. However, the skills set for ICP lawyers includes additional skills, namely intercultural skills (such as common language skills (Chapter 9)), collaboration skills (Chapter 8) and creativity (Chapter 10] in the process of communication and providing legal services. In addition, besides the advantages afforded by seniority and brightness, according to the analysis in Chapter 7 a key characteristic of ICP lawyers is open-mindedness.

Open-mindedness, is the underpinning feature or common link that supports and unites all the knowledge and skills that are important to ICP lawyers. It will impact upon how they communicate with people, how they collaborate with people and how they work to identify creative solutions.

If they are open-minded in their outlook on life and their professional role, students may learn new knowledge, intercultural skills (including sophisticated and culturally-responsive communication skills), collaboration and creativity through lectures, simulation, role play, and problem-solving, which will equip them for their future career in the international commercial arena.

As explained in Chapter 4, there is a wide range of learning and education theories, such as behaviourism and cognitive theory. Each theory represents different perspectives on understanding the learning process and emphasises different stages of the learning process. In this thesis, although the final objective is skills training for future ICP lawyers, it has been shown that there can be no effective

skills training without adjusting attitude and delivering relevant knowledge. Therefore, the subject matter of learning in this thesis covers attitude, knowledge and skills. As a result, a holistic theory is needed to balance and connect different learning materials and requirements of professional competence together. Experiential learning is such a theory.

An experiential learning process (the first aspect described in Chapter 4) is not only important for students to understand their own learning process better, but also will support them in understanding other people's reactions when they communicate with counterparties and clients after graduation. This argument is inspired by one of the participants, who expressed the need to educate clients:

> "… I am impressed with such experience in Angola, we had Portuguese lawyers, local lawyers in Angola, the first thing they told me was, in Angola, you could not expect that progress would be fast, or smooth. Sometimes, things may change daily. You had to go along with [the local authorities] and respect the local convention. If you wanted to do business [in their area], you must accept the way that they deal with business. Therefore, we must balance [the original expectation of the clients with the local reality]. As lawyers we totally understand [the situation], when we deal with some tasks about company registration and government approval, we also came across similar problems that this member of staff gave you this answer this day and another may provide you with another on another day. Therefore, when we are in a foreign country, we need to balance the relationship [between the original expectation of the clients and the local reality], the [key] is how should we explain that [reality] to the clients)…"[115]

Lawyers interacting (as above) with their clients in the real world, and tutors delivering classes to their students that seek, through experiential learning, to

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[115] Interview of Participant 12. The original conversation was in Chinese as "……这个是我在安哥拉体会比较大，我们请葡萄牙律师，请安哥拉律师，人家第一件和我讲的事情就是，在安哥拉做事情你不要想多快，你不要想多好，很多事情是今天是这样的，明天就是那样的，你必须要跟着它来，人家说怎么样就怎么样。你如果想要做事情就必须接受他们做事情的方式。那我们就必须得平衡这个东西，作为律师我们很能理解，我们在做一些公司注册或政府审批上的事情，也会发生今天我问这个人，他是这么说的，明天问那个人，他是那么说的，也是这样的，那么我们在国外，我们要平衡这个关系就是，我怎么去跟客户说，……"

simulate the real world are both trying to achieve the same ends (the first aspect of experiential learning described in Chapter 4). However, the way in which they go about this, for example, the techniques that they employ, are likely to be very different (the second aspect of experiential learning described in Chapter 4).

This chapter, drawing together all the themes from the literature and the data, will go on to demonstrate how the skills, knowledge and attitudes necessary for Chinese students to enter practice as ICP lawyers, can be included in a curriculum for a revised JM course.

Curriculum design

As discussed earlier, intending ICP lawyers should have an open-minded attitude and be able to use their knowledge both in law and non-law subjects. This positions them to understand their clients (communication skills) and facilitate their clients' achieving their commercial goals in other countries by communicating and collaborating with them and others in an intercultural context (collaboration, communication, intercultural skills). Moreover, they should be able, for example, to structure deals and transactions and draft related documents to suit particular commercial purposes (creativity), particularly when working in the upper layers of the pyramid described in Chapter 7. The data in this thesis can be used to develop a competence framework for ICP lawyers.

As this is a skills-based course, the course is based on an experiential learning process (for the reasons discussed above and in Chapter 4). As discussed in Chapter 4, experiential learning processes may not be suitable for everyone. Therefore, students should be selected as part of the admission process. The key filter is whether the student will strongly resist reflecting on what they have done and resist communicating with other people. This is because those who strongly resist such a process cannot be open-minded in respect of international cultures and no teacher can help a student who resists learning. Therefore, the filter should not focus on whether a student is already a good reflector or not, but whether he or she is willing to be so in this context. An example of this kind of filter is provided by the webpage for the University of York PBL course, which explains to applicants

what will be required of them (York Law Schoool n.d., p. 1) and thus may be presumed to enable students to make a preliminary assessment for themselves as to whether the course is suitable for them. Any test must be applied cautiously so as to avoid excluding good students who might be able to make the necessary shift to participate in the course. One way in which to mitigate this risk might be to administer the test in two stages. The first stage is diagnostic, seeking to identify whether the individual does not yet know how to reflect or is resistant to it. The individual should be given some initial feedback following this test, the purpose of which would be to highlight concerns and thus give them the opportunity to reflect upon and respond to that feedback before the second stage of the test. The second stage could take the form of an exercise that involves reflection, communication and open-mindedness, to test whether the individual has the potential to participate in a course of this kind.

However, once suitable students have been selected, it is suggested that the course could proceed as follows.

Stage 1: introduction

Cultural awareness is a key part of the open-minded attitude that ICP lawyers need, and this course will seek to transform the students from their original culture and break down their automatic learning process (previous assumptions) as discussed in Chapter 4 so that they will slow down and reflect upon what they encounter during the course. Therefore, before the main body of the course starts, it is proposed that teachers will use two weeks in an introductory 'warm up' session for the students. This will include standard induction matters as well as explaining the learning outcomes of the course (which reflect the competences required of ICP lawyers) to help students develop the reflective approach that they will use in the later stages of the course.

As a relativist, the researcher is particularly concerned to take into account the different learning styles of the students. Consequently, students will be asked to complete questionnaires that aim to help them to understand their own learning styles (for example, the VARK Test or Kolb's Learning Styles Inventory), which

may also function as a warm-up activity requiring them to reflect on their previous learning experience. Therefore, they will be asked to write a reflective report on their learning styles or discuss them orally with the teacher or in a team. In addition, in order to help students understand teamwork and collaboration, they will be asked to complete a Belbin test. As well as introducing students to the reflective learning aspects of the course, a key purpose of this stage is to surprise the students and challenge their assumptions about what is conventional and even what is moral and polite as an introduction to open-mindedness and intercultural skills. One way of doing this, might be to use the checklist in Appendix H. As another example, the teacher may introduce a topic such as polygamy which can be easily understood by anyone and in respect of which anyone may be expected to have a view as to what is acceptable and what is not. This topic can be expanded to further topics, such as requiring the students to find out the legal marriage age for different countries and whether people can marry their own cousin legally in different states of the USA.

Stage 2

Stage two covers three areas (cultural differences, international law subjects, and business subjects) and all the skills which emerged as important from the data. Activities are included in this stage which actively focus upon the key skills, although creativity and open-mindedness are pervasive throughout as students are encouraged to experiment and challenge their own assumptions. In this stage, students will build on the coverage of experiential learning in stage 1 by actively engaging with simulations and developing their own learning plans.

There are key areas of knowledge which underpin these skills and which students will be required to study during the course. For example, theories related to negotiation and drafting, and key concepts used during the course such as learning outcomes, competences, experiential learning, open-mindedness, reflection, teamwork and collaboration.

In addition, there are key areas of substantive law relating to international commercial practice, which all students need to know. Depending upon their

prior study experiences, some students may already have a reasonable command of these areas, but others may not have studied them at all. It is not anticipated that the course will provide modules covering these areas, but rather that they are available on other courses, such as the LLB or the LLM. Therefore, it may be necessary for some students to use their stage 2 elective choices to, for example, study relevant modules with LLB or LLM students to make sure that they have covered these areas. Care will need to be taken to ensure appropriate credit points can be allocated and at the appropriate level, particularly if a student needs to study alongside LLB students.

To support students' knowledge of more specialist key areas of law relevant to international commercial practice, a series of elective courses will be available throughout stages 2 and 3, in both law and business topics. This will also enhance students' commercial awareness. The elective courses, some of which may be delivered online, could therefore cover a range which broadly reflects the top five non-law subjects identified as important for lawyers (Coates et al. 2014, pp. 445–449):

- Understanding and interpreting accounts and other financial data;
- Business strategy and modelling;
- European law;
- Investment and finance law in China;
- Law of several main international organisations (e.g. W.T.O.);
- Corporate finance.

An individual university could choose to offer other electives in, for example employment law.

This stage will begin with an applied exercise in cultural awareness. This will be based around Barna's (1997) list of problems or barriers in international communication referred to in Chapter 9.

For example, students will be asked to find out what is appropriate as a gift for people from six different countries. This knowledge then leads to further questions in the international commercial business context. For example: how to form and maintain business relationships, how to start an intercultural meeting,

and how to negotiate across different cultures. After that, students can choose to take further elective courses in specific cultures that are of most interest to them. For those students who do not have a strong preference, some reports such as the rank of trading relationship between countries will be provided for them to select no more than three cultures to explore in class. For the reasons set out in Chapter 9, the focus of this exercise should be on countries where English, Chinese, Japanese, French, Spanish and German are spoken.

Following the cultural awareness exercise, students will be given a simulated inbound transaction in which they conduct a small contract deal for a foreign client seeking to invest in China. From the student's perspective, this represents the bottom layer of the pyramid in Figure 5. There will be a range of transactions available, instructions will be designed to include a variety of issues around cultural differences and some of the instructions will be in English. Students will work together, in groups, on one of those transactions, each performing a different role in relation to that transaction and representing both sides (and also both lawyers and clients). The importance of this activity is in experiencing – and becoming comfortable in - a simulated transaction and also being able to understand the different perspectives of the different people involved.

They will negotiate, draft a contract and work with the client to complete the deal. This simulation will be supported by relevant skills workshops in, for example, drafting and negotiation. This will be important because, in this stage, students will need to move beyond a civil law approach into a common law approach. This means that, first of all, they will need to recognise that there may be no formal code available to determine and thus simplify the terms and format of the contract. Therefore, students will need to maintain an open-minded attitude so that they do not assume terms are provided by a code, or that a particular code is to be preferred simply because it is the one they are accustomed to using. Consequently, they may need to engage in more extensive negotiation and to draft documents in more detail and with a greater degree of creativity than they are used to doing.

Students will be asked to write a reflective report after this transaction (including reflection on their experiences of collaboration) and will be encouraged to use this to inform their selection of elective courses on law subjects or business subjects.

Consequently, the next stage will increase the complexity of the activity by a) allowing students to use their elective study and b) using a PBL approach which is less directed by the tutor than the previous simulation. However, during the PBL exercise, elective tutors will be available to help students, if asked, on specialised topics. The PBL exercise will be helping a foreign client to invest in China or a Chinese client to invest overseas so cultural and communication issues will emerge as the exercise proceeds. This has elements of both inbound and outbound transactions and so, from the student's perspective, may be said to represent both the bottom and the middle layers of the pyramid.

Students will be asked to do what they have already done for the client in the simulated transaction, but there will be no documents or other sources given in advance until they ask the client for them. Moreover, the transaction may, notionally, extend across a period of years, and clients may give new and unexpected instructions at any stage for example, to seek a change in fundamental terms or delay payment, to which the students must respond appropriately. This PBL exercise will be supported by relevant skills workshops in, for example, collaboration. The students will be asked to write a detailed reflective report after the exercise.

Stage 3

In the second year of the course, students will be able to continue to take elective courses and skills workshops. At the same time, they will also participate in a series of transactions which will be either or both clinic or simulated and which will be more complex than those in the first year. By now, students will know each other well, and will work throughout this second year in 'firms' for the whole year, which will provide an experience of long term collaboration by contrast with the short term collaboration in the first year. These will also involve interaction with real lawyers and 'clients' (real or simulated) from other countries. The lawyers and clients may speak other languages or different forms of English. A considerable degree of creativity in problem solving and identification of solutions

will be expected. Indeed, at this stage, some of the work will take them into the top layer of the pyramid.

After each transaction, the students will submit a reflective report. The Regulations of the PRC on Academic Degrees, article 5 requires students from a master's degree to have:

> "Passed examinations in the required courses for the masters' degree and successfully defended their dissertations; and have attained the following academic standards:
>
> 1. Having a firm grasp of basic theories and a systematic specialised knowledge in the discipline concerned;
> 2. Having the ability to undertake scientific research or *independently* to engage in a special technical work." [researcher's italics]

Stage 1 introduces a number of theories and concepts which are important for skills. In stage 2, during the PBL activity, the tutors are more hands off, compared with the first simulation. This means the students are more and more in control of what they are doing and the direction in which they are moving forward. They will become increasingly independent in their learning and this is finally demonstrated in the second year of the course.

By the time they have completed the final simulation, or clinic, the students will be able to show their independent capacity to handle a case. Throughout the course, students will show that they have a firm grasp of theories around cultural awareness, collaboration, communication and creativity which underpin their skills as well as a range of more knowledge-based elective courses. The reflective journals and reports will show the individual student's independent contribution to the group work.

The course will make use of 'models' –experienced ICP lawyers and tutors whose work students can observe and learn from. For example, a tutor may demonstrate a skill; students might take field trips to ICP lawyers in practice; volunteer ICP lawyers might work with students in simulations or appear in videos.

In the revised JM course, the main form of formative assessment will be a reflective journal kept by each student. The journals will involve feedback from the tutors as well as the students evaluating their performance, identifying what they have learned and making plans for the next stage, this being an important aspect of experiential learning as described in Chapter 4. As part of the cultural awareness elements of the course students will be expected in their reflections to question their own assumptions. Students will be encouraged to be honest in their reflections, and tutors giving feedback will respect this.

Summative assessments will include some knowledge based examinations for the elective courses, and skills assessments in e.g. negotiation, drafting, client interviewing and teamwork. These will measure competence, in the first year in comparatively simple transactions and in the second year in more complex transactions. In addition, for each of the simulated/PBL activities students will be required to draw on their journal to create a reflective report which might be required to address certain topics or answer certain questions. The final 'dissertation' will be a written project relating to the second year simulations and clinic, which may include independent research as well as reflection.

The defence of the final reflective report will involve academics and ICP lawyers conducting a viva of the student.

The whole course is summarised below (see Table 22). As recommended by some of the education interviewees, it will be important for the tutors to reflect on the structure and effectiveness of the course continually and after the first graduation.

Stage	Learning outcome	Process	Formative and summative assessments	Themes from the data	Underlying Knowledge
1 (two weeks)	By the end of this stage, you should be able to 1) Use a reflective approach to develop your learning from experience and to challenge your own assumptions 2) Explain concepts such as 'competence', 'experiential learning' and 'open-mindedness' and their importance for international commercial practice	1) Induction 2) Explain learning outcomes/competences explain and discuss experiential learning 3) Questionnaire for learning styles and the process of experiential learning 4) Explain reflective learning and reflective writing 5) Challenge students' assumptions about different cultures: introduce and discuss a cultural difference e.g. polygamy – and the historical, economic, religious reasons behind it 6) Use a Belbin test to explore teamwork and collaboration and to support later group work on the course	Formative feedback from the tutor throughout Formative reflective journal	Collaboration Communication Competence Creativity Open-mindedness	Key concepts e.g. learning outcomes, competences, experiential learning, open-mindedness, reflection, teamwork and collaboration.
2 (rest of year 1)	By the end of this unit you should be able to: 1) Use a reflective approach to develop your learning from experience and to challenge your own assumptions 2) Respond appropriately to cultural differences and	1) Cultural awareness exercise based around problems or barriers in international communication 2) Short simulated transaction supported by skills workshops in negotiation and drafting 3) Selection of elective courses, including where necessary those delivered on the LLB or	Formative feedback from the tutor throughout Formative reflective journal on cultural awareness exercise Formative reflective journal on short simulated transaction	Collaboration (short term) Communication Competence Creativity Intercultural skills Open-mindedness	Principles of cultural awareness and international communication Negotiation and drafting techniques e.g. co-operative negotiation,

Stage	Learning outcome	Process	Formative and summative assessments	Themes from the data	Underlying Knowledge
	communicate effectively with people from a range of cultural contexts in relation to international legal services 3) Demonstrate skills at a basic level in negotiation and drafting in an international legal services context 4) Collaborate effectively on a short term basis with colleagues and clients in an international legal services context 5) Use knowledge, skills and creativity to solve problems and complete straightforward transactions in an international commercial context 6) Demonstrate competence in knowledge and understanding in a range of elective topics relevant to international commercial practice	LLM (which then run in parallel until the end of the course) 4) PBL exercise supported by workshops on collaboration	Elective courses delivered as part of the course will include both formative and summative assessments Summative reflective report after PBL exercise (including on experience of collaboration) Summative skills assessments on eg negotiation, drafting, collaboration		common approaches in commercial and investment contracts Core knowledges relevant to main course if not previously studied e.g. contract law, land law, conflict of laws, tax law, business organisations including company and partnership law, principles of insolvency law, theories of risk management Core knowledges relevant to chosen electives e.g. Understanding and

Stage	Learning outcome	Process	Formative and summative assessments	Themes from the data	Underlying Knowledge
					interpreting accounts and other financial data; Business strategy and modelling; European law; Investment and finance law in China; Law of several main international organisations (e.g. W.T.O.); Corporate finance. Theories of teamwork and collaboration
3 (year 2)	1) Use a reflective approach to develop your learning from experience and to challenge your own assumptions 2) Respond appropriately to cultural differences and communicate effectively with people from a range	1) Electives and skills workshops continue 2) Series of transactions (clinic or simulated)	Formative feedback from the tutor throughout Elective courses include both formative and summative assessments Summative skills assessments on eg	Collaboration (long term with colleagues and short term with clients) Communication Competence Creativity	The underlying knowledges are the same as in Stage 2, but in Stage 3 students will be expected deepen their understanding

Stage	Learning outcome	Process	Formative and summative assessments	Themes from the data	Underlying Knowledge
	of cultural contexts in relation to international legal services 3) Demonstrate skills at a higher level in negotiation and drafting in an international legal services context 4) Collaborate effectively on a long term basis with colleagues and on a short term basis with clients in an international legal services context 5) Use knowledge, skills and creativity to solve problems and complete more complex transactions in an international commercial context 6) Demonstrate competence in knowledge and understanding in a range of elective topics relevant to international commercial practice		negotiation, drafting, collaboration Summative comprehensive reflective project report covering each transaction, research and answers to specific questions Defence of reflective project report before a viva panel	Intercultural skills Open-mindedness	of them and to use these knowledges creatively with core skills such as collaboration, communication, intercultural skills and open-mindedness

Table 22 A curriculum for a revised JM course

At present, it is possible that Chinese law teachers do not possess the skills necessary to teach this curriculum. Further, cultural awareness and collaboration skills will be enhanced if students on the course are exposed to people from other jurisdictions. This could include both staff and students on the course. Consequently, it may be necessary for a Chinese law school that wishes to offer this course, to do so in collaboration with a law school from outside China, in order to ensure the involvement of staff with experience of both civil and common law systems. In particular, given that the students will already have studied civil law, there will be a particular need for staff with expertise in the common law approach. This collaboration would be different from a double degree because the focus is not on the law of the two jurisdictions, nor would it be simply about adopting an Anglo-American approach. Rather, it is about benefiting from people with common law experiences who can support students as they learn to work internationally, and indeed staff and students could be recruited from all over the world.

Conclusion

As expressed above, experiential learning theory has been selected for this thesis because it is a holistic theory which is able to unite the themes that have been discussed in this thesis. Secondly, it is a theory concerned with learning from doing, suitable for skills training. Finally, experiential learning theory is especially effective for teaching adults as it acknowledges that they have a range of prior experiences (internal experience) on which to reflect. Kolb's learning theory is the basis for the thesis, but has been adapted. The key adaptations involve:

a) adding a filter before the concrete experience stage to help students understand what the expectations of the experience are;
b) emphasising reflection as the key process for the learners but recognising that different students may reflect on the same learning content in different ways due to their individual learning style and different internal experience which they bring to their reflections.

This course is focused on simulation in the classroom or clinic which is under the supervision of qualified and experienced teachers. This allows the experience to be more consistent and rich in terms of learning than the currently haphazard placement embedded in the JM. At the end of the course, students should be practice-ready to enter international commercial work at a junior level.

Chapter 12: Conclusion and Recommendations for policy and future research

Introduction

The aim of this thesis was to identify the skills that are important for Chinese lawyers in international commercial practice (ICP lawyers) and to make recommendations for changes to legal education at masters level in the Chinese mainland context.

As part 1 of the thesis, Chapter 1, therefore, gave a brief introduction of the aim, objectives and framework of this thesis.

In part 2 of the thesis, Chapter 2 explored the future of lawyers, especially in the context of the Chinese mainland area and found that the need for international commercial legal services in China was of particular significance for the economic development of the country in the future.

It also argued that technology will not replace human lawyers in the core skills of collaboration and creativity. It may, in fact, allow them to work in new areas. It also allows greater internationalisation in legal practice and legal education. Client demand and business development mean that lawyers will need to work internationally and this brings challenges in collaborating through technology and building trust with clients on an international basis.

Chapter 3 then described the structure of the existing framework for professional legal education in mainland China. It identified that traditional law teaching in China involves theoretical and academic study of the law. The JM, which is supposed to be more profession-led than the LLM, and includes some skills and

placement elements, is not effective for the reasons discussed in that chapter. Further, the JM is not designed for international commercial practice. The JM was compared, in that chapter with other vocational courses from around the world and it was concluded that transplanting a course from another jurisdiction would not solve the problems that exist in the Chinese legal education system. This was particularly in relation to skills, English competence and the fact that the 'legal profession' as a group, is only a comparatively recent phenomenon in China. This chapter also concluded that existing trends to 'internationalisation' of legal education, represented by a number of examples, did not go far enough in equipping young lawyers with the skills needed for international commercial practice.

As explained in Chapter 3, currently, Chinese legal education is lacking in skills training, although some academics have asserted that there is little need for such training, if there is any at all. After a rapid growth in law schools and numbers of graduates, there is no shortage of lawyers who want to work in the larger cities where commercial work is done. Some new issues, therefore, arise, such as law graduates not being able to get jobs, or at least well paid jobs in the areas in which they want to work. Therefore, it is the right time to consider the quality of law graduates in general or to diversify the standard of what law graduates should be capable of.

One solution outside the scope of this thesis is that the Chinese government allows graduates with lower grades to practise, provided they practise in rural areas. Adding skills courses to the curriculum has the potential to increase competence generally as well as to reduce the training burden on law firms. A reduced training burden may lead employers to pay young lawyers better. In the context of this thesis it is argued that skills are particularly important for ICP lawyers. As discussed in Chapter 7, lawyers play different roles according to the various different natures of the law they are facing. In the context of international commercial law, we consider ICP lawyers to be the pioneers in dealing with activities in the second layer of the pyramid in Figure 5. To be more specific, ICP lawyers more often act as lawmakers rather than law interpreters. In such a situation, although knowledge of positivist law still plays an important part in how

an ICP lawyer works, it is not the most significant part as it is for local lawyers. Instead, skills may become the main tools to facilitate ICP lawyers in navigating international commercial legal tasks.

Consequently, Chapter 4 then examined educational theory in relation to skills. A behaviourist element in skills learning was noted, but it was argued was not sufficient. Some elements of social cognitive approaches, such as imitation, might be important, but overall, a constructivist, experiential learning approach, allowing students to explore and to practise skills, is most suitable for skills learning in this context.

In order to design a competence framework or a new curriculum, however, it was important to define what is meant by 'international commercial practice' and the skills needed for it. Of the two chapters in part 3 of the thesis, Chapter 5 identified that it was most appropriate to take an interpretive phenomenological approach to this investigation, allowing lawyers and others to speak for themselves, but interpreting the data and grouping it into themes for the purposes of later analysis. Chapter 6 described the research instruments used, the samples investigated and the method of analysis of the data.

The data is then reported by way of themes in the chapters that form part 4 of the thesis. These chapters considered: defining what 'international commercial practice' is (Chapter 7); collaboration (Chapter 8), languages and communication (Chapter 9) and creativity (Chapter 10). Important themes of cultural awareness and becoming an international commercial lawyer were pervasive in this discussion. One of the direct barriers to collaboration, communication and cultural awareness is the language barrier. English is considered to be a *lingua franca*, and this is especially acknowledged by non- English speakers. Therefore, it is very important to emphasise that although English is the common language for international commercial practice, ICP lawyers need to be alert to the different ways in which it is used.

The three skills described in detail in Chapters 8, 9 and 10, on the basis of analysis of the data, have been singled out as the key content for law schools to teach at the JM. stage in China as part of a training course for IPC lawyers. Using the data, part

5 of the thesis, in Chapter 11, then proposed a skills-based, experiential learning curriculum for a revised JM. course that could be adopted by some universities in China.

Contribution to knowledge

This project has, to the best of the researcher's knowledge, been the first to examine empirically the perceptions of Chinese and non-Chinese lawyers about the skills currently needed to work in international commercial practice. The project is also unique in considering a wide range of educational theories and options for vocational courses. In contrast with some Chinese legal educators, the researcher has investigated the vocational courses of England and Wales and Hong Kong as possible models rather than automatically defaulting to the US JD as a solution. The thesis, ultimately rejects the idea that a simple transplant of, for example, the PCLL or JD will address the social, professional and economic needs of mainland China as it develops in the international trade arena. The contribution to knowledge represented by this thesis, then is a unique understanding of the needs of Chinese ICP lawyers in particular and in the context of their cultural and educational background, and in making recommendations for a new evidence-based curriculum which will assist them to compete more successfully in the future with their Anglo-American peers.

Recommendations for policy and future research

Legal Education

The findings of this project suggest that policymakers in China should consider a wider approach than simply seeking to transplant the JD into China. The Distinguished Legal Talents Scheme is useful in drawing attention to Chinese society's need for ICP lawyers, but it is not sustainable. By contrast, this thesis argues that instead of selecting the law schools on a top-down basis by the government, a bottom up approach, encouraging law schools to choose whether or not to provide ICP training and then to evaluate whether it is sustainable. For those who may be interested in providing it, revising the established JM course

may be one of the feasible approaches to creating a new generation of ICP lawyers. Law schools are in a better position than government to understand the job market for their graduates and the needs of practitioners in their areas. They are also better able to respond quickly to meet those needs by updating the course. The revised JM should, therefore, be considered by both government and law schools.

This project has used data from practitioners and data from those involved in education to identify what is missing from Chinese legal education for intending ICP lawyers. Future research could use these findings to see whether similar gaps exist in other countries where the legal profession is still emerging, but where economic policy is directed towards increased international trade.

The data has also been used to design a proposed curriculum. It was not possible, within the timescale of this project, to carry out experiments using an experiential learning approach with Chinese law students. It was also not possible to circulate the proposed curriculum to Chinese practitioners or legal educators for their comments. A future stage of this project, therefore, would be to work on implementing and testing the curriculum.

Legal Profession

This thesis aims to support the development of Chinese ICP lawyers and help them to compete more successfully in the future with their Anglo-American peers, who dominate the international commercial legal services market (Flood 2013, p. 1090) (Chapter 3). However, this thesis does not go so far as to predict that the rise of Chinese ICP lawyers will change the nature of international commercial legal practice itself (Chapter 7).

As discussed in Chapter 2, the Chinese economy is expected to continue to grow and mature over time, but its development cannot continue without a truly global economy. Therefore, the demand for Chinese ICP lawyers will increase commensurately and such increase can be expected to continue in the near future. Further, such a demand for Chinese ICP lawyers has already attracted the government's attention (Chapter 3) resulting in the Distinguished Legal Talents Training Programme (Selecting law schools to cultivate intending ICP lawyers at

students' stages) and the Leading Talent of Foreign-related Lawyers Programme (Selecting Chinese practising lawyers and train them as leader in international commercial legal practice). Because of the existing demand and the efforts that have been and will continue to be made to meet this demand, there can be no doubt that Chinese ICP lawyers will develop dramatically both in quantity and quality. As Lin (Lin 2015, p. 1) described, in the Chinese market, foreign ICP lawyers and foreign international law firms are leaving, and Chinese ICP lawyers are growing at the same time (Chapter 2). Consequently, Chinese ICP lawyers may be expected to become dominant in the Chinese market at least.

However, from the author's perspective, although the legal knowledge and skills identified in this thesis are essential for Chinese ICP lawyers to take their place fully in the international commercial arena, this is not to say that they will become dominant outside of the Chinese market. One determining element for whether Chinese ICP lawyers will play an equal role alongside their Anglo-American peers is whether China can truly establish an international financial centre (similar to London and New York) as this infrastructure is currently not yet fully mature (this was discussed in Chapter 2). Banks, which control access to finance, are most powerful in the international commercial arena and also tend to be in charge of the legal framework through the international commercial transactions they are involved in by providing the initial legal documents. For example, it is normally the lender (the Bank) which instructs their lawyers to prepare the documents at the beginning of negotiating financing (Practical Law Finance 2017, p. 1). This was reflected in data from the McGeorge Law School's interview (see part of Baragona's answer in Chapter 8). As a result, Anglo-American lawyers who are trusted by these banks are dominant as well (a client-led factor). [116]

[116] The person in power is the one who holds the money because financing is a key issue in most international commercial transactions. As we have seen, at a local level, small businesses cannot necessarily afford legal services (Roy 2015, pp. 169–170). Similarly, small businesses seeking to operate at an international level (which is a growing phenomenon as a result of economic globalisation) may also not be able to afford legal services, given the fact that legal service providers at the international level may charge even more than local services. Therefore, at the international level, the link between money and power may be even more pronounced.

In addition, according to Flood (2013, p. 1096), lawyers in the common law system are both granted the freedom to, and forced to, draft lengthy contracts that deal with all possible aspects of the transaction. Therefore, considering the uncertainty and flexible nature of international commercial legal practice that has been described in Chapter 2 and 7, common law contracts are more sophisticated than the civil law short contracts which largely depend on particular codes. In addition, the increasing involvement of Chinese ICP lawyers will increase the diversity of the group of legal practitioners operating in the market, which in turn will actually strengthen the flexible nature of international commercial legal practice as they bring their own skillset, culture and practices with them. As a result, the need for common law skills that are designed to deal with flexibility will be rapidly enhanced rather than decreased.

Therefore, although Chinese ICP lawyers will play a bigger role in the international commercial legal services market in the future, without an international finance centre on a scale to compete with New York and London, they are unlikely to play an equal part with their Anglo-American peers. In fact, Chinese ICP lawyers may bring an open-mindedness with them, developed from their recognition of the need to engage with the common law as well as their domestic civil law system, or the importance of being able to speak English, that gives them, at the moment at least, an advantage over their Anglo-American counterparts when it comes to a willingness to learn from others and adopt best practice. Therefore, Chinese international lawyers may not develop as a brand-new group of lawyers equipped with different skills-set from their Anglo-American peers. In contrast, they are more likely to develop as a different force for international economic development sharing common skills-set with their Anglo-American peers. Therefore, the skills needed for Chinese ICP lawyers, which are considered to be essential to succeed in an area still dominated by the common law system (at least in relation to matters of private international law), will not change as the flexible nature of ICP will remain in the foreseeable future.

At the moment, Chinese ICP lawyers are a very new profession and they are a profession working with an education system that emphasises local knowledge rather than international knowledge (particularly common law) and skills.

Moreover, China does not yet have all the necessary infrastructure in place to support full development of international commercial practice, such as a financial centre on a scale of those established in New York and London. For these reasons, Chinese ICP lawyers are not yet in a position to influence international commercial law practice. However, it is suggested that the curriculum proposed in Chapter 11 goes a long way to address this and to place Chinese ICP lawyers in a position where they can compete on a more equal level.

Appendices

Appendix A Questionnaire for ICP Lawyers

Information for Participants

Legal knowledge and skills along with some non-law subject knowledge and skills are essential to the practising lawyers in their professional life. However, do lawyers dealing international commercial tasks use different knowledge and skills or use the same knowledge and skills differently compared to traditional domestic lawyers? This survey is waiting for your answer. Your answers may be used to establish new skills-based course for ICP lawyers especially in the Chinese legal education context. The researcher is Yingxiang Long, a PhD student of Nottingham Law School (Trent University) in the United Kingdom, supervised by Professor Jane Ching, Professor Rebecca Huxley-Binns and Professor Rebecca Parry. This is an anonymised investigation and your participation is entirely voluntary and you may withdraw at any time without giving any reason and without any negative consequences. Your responses will feed into the research project and any useful insights you provide may be used in the thesis and related publications. The whole process should take you 25-40 minutes. Raw data will be stored by the researcher, and will only be accessible to her until the conclusion of the project. You should be aware that the researcher is not in a position to guarantee that she will be able to redact from an anonymised answer all details which might inadvertently identify you or your organisation. You should bear this in mind when considering whether to participate in the survey and, if you do, what you answer. There will be an opportunity to ask questions or offer further comments at the end of the survey questions. You can contact the researcher with any questions or complaints by e-mailing: longyingxiang@hotmail.com or the researcher's director of Study: Professor Jane Ching: jane.ching@ntu.ac.uk. *

- [ ] I have read the notice above and allow the researcher to use my answers as described above.

If you agree to be contacted for follow-up questions or interviews, please provide your name and contact details below:

Where are you qualified as a lawyer?

How long have you worked as a practising lawyer?

- [ ] Under five years (including five)
- [ ] Six to ten years
- [ ] Eleven to twenty years
- [ ] More than twenty-one years

Which area do you specialise in?

Which jurisdiction(s) do(es) your work cover?

Have you ever worked with Chinese lawyers? If yes, Do you think they work in different ways?

May I have your gender, please?

☐ Female

☐ Male

What knowledge and skills that are important for international commercial lawyers? There are 10 items suggested in the next page for your consideration.

Which knowledge or skills do you think are the most useful ones for international commercial lawyers? (Please move them into appropriate order 1=least useful)

Legal knowledge of international commercial activities	
Knowledge of non-law subjects relating to international commercial legal services	
Drafting legal document	
Researching	
Communication skills (both oral and in writing e.g.interviewing, negotiation, advocacy,writing correspondence)	
Languages (especially English)	
Intercultural skills (understanding cultural differences and dealing properly with individuals from different cultural backgrounds)	
Teamwork skills (both working as team leader and member)	
Analytical and problem-solving skills	
Creativity	

Do you have any comment on this point (eg. anything missing in the list) ?

11. The Knowledge and Skills used in the Workplace

During your professional life, you may use some knowledge and skills daily and others rarely. The following questions discuss the possible knowledge and skills items asked previously into more detail. Please share your experience and opinions by answering them on: 1) the frequency of using the knowledge or skills; and 2) the severity of harm that may caused by not having the knowledge and skills.

12. Knowledge of Law and Legal Procedures

*

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below?(1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
The tax law of more than one country		
Energy law of more than one country		
Security regulations of more than one major stock exchange markets		
International sale of goods		
Bill of lading regulations		
Regulations for carriage of goods by air, road and rail across-countries		

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below?(1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
Policies of insurance covering more than one country		
Litigation system for international disputes		
Conventions and regulations of an international organisation (e.g. WTO, EU)		
Law governing intellectual property		
Law governing services cross-border		
Insolvency law in more than one country		

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below?(1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
The Model Law on Cross-border Insolvency (adopted by the United Nations Commission on International Trade Law)		
Immigration law of any country		

Do you have any comment on this part?

Analytical Skills

*

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below?(1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
Identifying client's goals and objectives from various cultural, social, economic and ethnic background		
Identifying relevant facts, and legal, ethical, and practical issues in global context		
Analysing the results of research		

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below?(1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
Identifying due diligence required		
Applying the law to the legal and factual context		
Assessing possible courses of action and range of likely outcomes		
Creativity in identifying and evaluating the appropriateness of alternatives for resolution of the issue or disputes		

Do you have any comment on this part?

16. Oral and Written Communication Skills

*

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below? (1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
Identifying the purpose of the proposed communication in global context		

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below? (1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
Creativity in identifying the need of counter party		
Creativity in identifying objectives of the communication and whether they can be achieved		
Using language suitable to the purpose of the communication and for its intended audience		
Communicating clearly in the English		
Using correct grammar and spelling		

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below? (1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
Eliciting information or obtaining instructions from clients and others		
Explaining the law in language appropriate to the intended audience		
Understanding the culture, social, economic and ethnic background of intended audience		
Effectively formulating and presenting well-reasoned and accurate legal argument, analysis, advice or submissions for		

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below? (1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
audience of different cultural backgrounds		
Advocating in a manner appropriate to the legal and factual context		
Negotiating in a manner appropriate to the legal and factual context		

Do you have any comment on this part?

Personal Management Skills

*

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below? (1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
Managing time (including prioritizing and managing tasks, tracking deadlines)		
Managing files (including opening/closing files,		

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below? (1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
checklist development, file storage/destruction)		
Managing professional responsibilities (including ethical, licensing, and other professional responsibilities)		
Managing finances (including trust accounting)		
Managing efficiently, effectively and concurrently a number of client matters		
Managing personal workload		

Do you have any comment on this part?

20. Collaboration (Co-operation) Skills

*

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below? (1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
Identifying possible common goals with clients, colleagues and others from different cultural, social, economic and ethnic backgrounds		
Creativity in goal exploration and goal setting		
Recognising personal and professional strengths and weaknesses		
Identifying the limits of personal knowledge and skills		

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below? (1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
Recognising the strengths and weaknesses of others with whom you need to work across cultures		
Cultural understanding		
Communicating effectively		
Creativity in opportunity analysis		
Leading a team effectively when its members have different cultural and professional		

	How frequently, on average, do you use the skills? (1=Never; 2=Once a month or less; 3=About once a week; 4=About once a day; 5=More than once a day)	How serious would the consequences be if a lawyer in your practice setting did not possess the skills below? (1=Not serious: no harm to the client or the lawyer's practice; 2=Minimally serious: causes inconvenience to the client or the lawyer's practice; 3=Moderately serious: negatively affects the client's interest or the lawyer's practice; 4=Highly serious: Jeopardizes the client's interest or the lawyer's practice; 5=Extremely serious: Destroy the client's interest or the lawyer's entirely or materially)
backgrounds (for team leaders)		
Creativity in task allocation		
Working effectively as a team-member in a team which has different cultural and professional backgrounds (for team members)		
Delegating tasks and providing appropriate supervision		
Risk management skills		

Do you have any comment on this part or any part of the survey?

Appendix B Consent form for interviews

I confirm that I have read and understood the Information Sheet for the above project (which I may keep for my records) and that I have had the opportunity to ask any questions I may have.

I agree to take part in the above project and am willing to:

- Have my telephone or face to face interview recorded via voice recorder; and
- Be quoted anonymously in the thesis of the above project and related publications.

I understand that my information will be held and processed for the purposes of a PhD project on legal education and publications related to that project, such information to be held confidentially and not identified against the individuals or organisations concerned without their prior consent.

I understand that my participation is voluntary and that I am free to withdraw at any time up to the day of interview without giving any reason and without any negative consequences.

Name of Participant:

Date:

Signature:

Name of Researcher: Yingxiang (Jo) Long

Appendix C Information sheet for interviews

This is part of the data collection of a PhD research project. The research aims to establish a new skills-based curriculum for cultivating international commercial lawyers in the Chinese legal education context. The researcher is Yingxiang Long, a PhD student of Nottingham Law School in the United Kingdom. She is a lecturer in China and a Chinese practising lawyer.

Information for participants:

- Your participation in this study is entirely voluntary and you may withdraw at any time up to the day of interview without giving any reason and without any negative consequences.
- The interview will involve a set of questions intended to find out about your views about legal skills for international commercial lawyers or how to teach or learn the skills.
- Your responses will feed into the research project and any useful insights you provide may be used in the thesis and related publications.
- Today's discussion should take no more than 60 minutes.
- There is a possibility that you may be contacted by e-mail if the researcher has any follow-up questions.
- Raw data will be stored by the researcher, and will only be accessible to her and to any transcriber or interpreter, until the conclusion of the project.
- At the end of the project anonymised transcripts will be retained by the researcher. You should be aware that the researcher is not in a position to guarantee that she will be able to redact from an anonymised transcript all details which might inadvertently identify you or your organisation. You should bear this in mind when considering whether to participate in the interview and, if you do, what you disclose.

- There will be an opportunity to ask questions or offer feedback at the end of the discussion.

You can contact the researcher with any questions or complaints, or to withdraw, by e-mailing: N0487268@my.ntu.ac.uk; or the researcher's Director of Studies: Professor Jane Ching: jane.ching@ntu.ac.uk.

Appendix D Semi-structured interview schedule: non-law teachers

After completing a consent form before conducting an interview, the researcher will ask the following question:

Do you have any query concerning this interview? If not, let's start now.

1. Personal information
   - Which subject are you teaching?
   - Do you teach any skill in the subject?
   - How long have you been teaching these skills?
2. Teaching techniques
   - What techniques do you use?
   - Why do you use these techniques?
   - Which technique is your favourite? Why?
3. Do the students learn the skills in the way you wished?
4. Have you improved or changed your teaching techniques since you became a teacher?
   - What are the new or different techniques?
   - Which part of the new or different techniques do you like or not like?
   - The reason for like or dislike
5. Feedback for the students
   - What kind of ways (eg. test)
   - How often?
   - One to one or all together

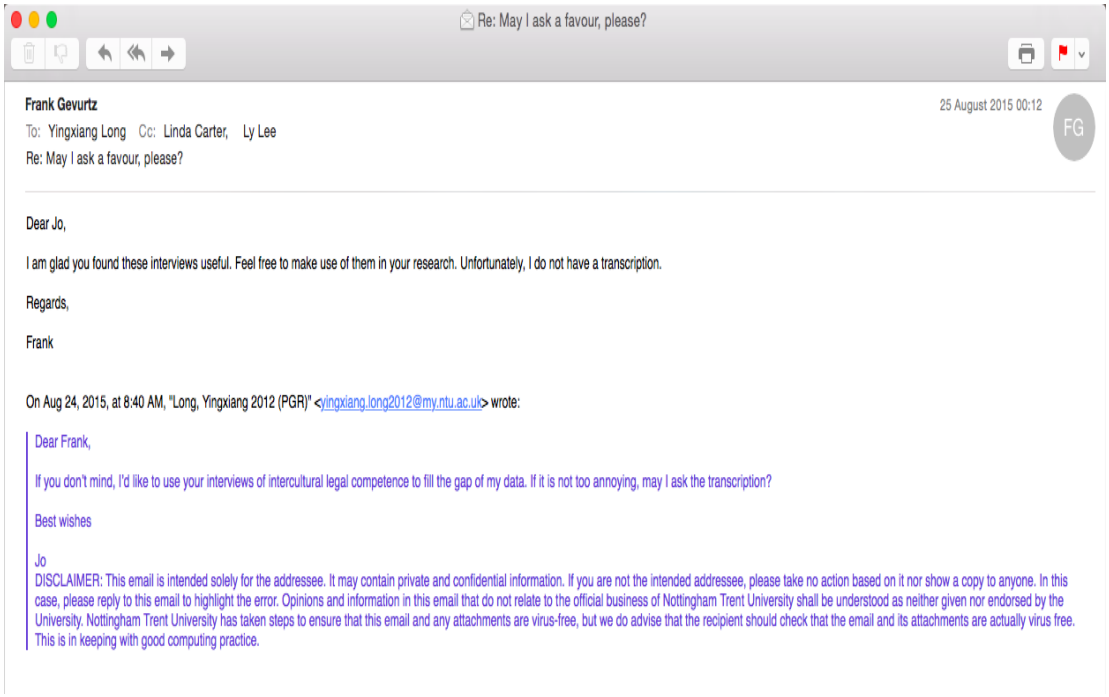
Appendix E Semi-structured interview schedule: law teachers

After completing a consent form before conducting an interview, the researcher will ask the following question:

Do you have any query concerning this interview? If not, let's start now.

1. Personal information
   - Which skills are you teaching?
   - How long have you been teaching these skills?
2. What are your goals of teaching these skills?
   - Legal writing
   - Advocacy
   - Managing workload
   - Research
   - Interviewing
   - Negotiation
   - Other
3. Teaching techniques
   - What techniques do you use?
   - Why do you use these techniques?
   - Which technique is your favourite? Why?
4. Do the students learn the skills in the way you wish?
5. Have you improved or changed your teaching techniques since you started your teaching career?
   - What are the new or different techniques?
   - Which part of the new or different techniques do you like or not like?
   - The reason for like or dislike
6. Feedback for the students
   - What kind of ways (eg. test)
   - How often?
   - One to one or all together?

Appendix F Permission to use the McGeorge interviews



Re: May I ask a favour, please?

Frank Gevurtz 25 August 2015 00:12

To: Yingxiang Long Cc: Linda Carter, Ly Lee

Re: May I ask a favour, please?

FG

Dear Jo,

I am glad you found these interviews useful. Feel free to make use of them in your research. Unfortunately, I do not have a transcription.

Regards,

Frank

On Aug 24, 2015, at 8:40 AM, "Long, Yingxiang 2012 (PGR)" <yingxiang.long2012@my.ntu.ac.uk> wrote:

> Dear Frank,
>
> If you don't mind, I'd like to use your interviews of intercultural legal competence to fill the gap of my data. If it is not too annoying, may I ask the transcription?
>
> Best wishes
>
> Jo
> DISCLAIMER: This email is intended solely for the addressee. It may contain private and confidential information. If you are not the intended addressee, please take no action based on it nor show a copy to anyone. In this case, please reply to this email to highlight the error. Opinions and information in this email that do not relate to the official business of Nottingham Trent University shall be understood as neither given nor endorsed by the University. Nottingham Trent University has taken steps to ensure that this email and any attachments are virus-free, but we do advise that the recipient should check that the email and its attachments are actually virus free. This is in keeping with good computing practice.

Appendix G Interview participants quoted in the thesis

Participant number	Participant description
1	Male senior partner of a Chinese national law firm (Shang Hai office)
2	Young female lawyer from a law firm in the mid-area of China, living in the USA and working there most of the time
3	Young male lawyer from a Chinese international law firm with foreign offices (Guangzhou office)
4	Male lawyer from a Qingdao law firm
5	Female LPC teacher (England and Wales)
6	Male senior partner of a Chinese international law firm (Beijing office)
7	Female senior partner of a Zhejiang law firm
8	Male international relations teacher (England and Wales)
9	Female university student exchange co-ordinator (England and Wales)
10	Female Partner of an Inner Mongolia law firm. She is ethnic minority and English is her third language
11	Male partner of a Liaoning law firm with in-house experience
12	Young male lawyer from a Chinese national law firm who had studied in the UK (Sichuang office)
13	Male partner of a Chinese national law firm (Shang Hai office)
14	Male senior partner of a Chinese national law firm (Sichuang office)
15	Male founding partner of a Fujiang law firm
16	Female nursing teacher (England and Wales)
17	Female BPTC teacher (England and Wales)

The table does not include the McGeorge interviewees.

Appendix H Cultural Awareness Checklist

For an icebreaker on cultural awareness and general background purposes, a starting list is provided by Kohls (2001, pp. 69–73):

"1. What kind of government does our host country have? Can you name people prominent in the country's affairs (politics, athletics, religion, the arts, etc.)

2. Who are the country's national heroes and heroines? Can you recognize the national anthem?

3. What is your host country's attitude toward trash? The environment? Conservation of resources?

4. Are other languages spoken besides the dominant language? What are the social and political implications of language usage?

5. What are the most important religious observances and ceremonies? How regularly do people participate in them?

6. If, as a customer, you touch or handle merchandise for sale, will the storekeeper think you are knowledgeable? Inconsiderate? Within your rights? Completely outside your rights? Other?

7. How do people organize their daily activities? What is the normal meal schedule? Is there a day-time rest period? What is the customary time for visiting friends?

8. What foods are most popular, and how are they prepared? Who sits down together for meals? Who is served first?

9. What things are taboo in this society?

10. Are there special privileges of age and/or gender? What kinds of group social activities are there? Are they divided by gender?

11. If you are invited to dinner, should you arrive early? On time? If late, how late? Is being on time an important consideration in keeping doctor's appointments? Business appointments?

12. On what occasions would you present (or accept) gifts from people in the country? What kinds of gifts would you exchange?

13. Do some flowers have a particular significance?

14. How do people greet one another? Shake hands? Embrace or kiss? How do they take leave of one another? What does any variation from the usual greeting or leave-taking signify?

15. What are the important holidays? How is each observed?

16. What are the favourite leisure and recreational activities of adults? Children? Teenagers? Are men and women separated in these activities? Where are these activities held?

17. What is the normal work schedule? Is it important to be on time?

18. What kind of local public transportation is available? Do all classes of people use it?

19. Who has the right of way in traffic? Vehicles? Animals? Pedestrians?

20. Is military training compulsory?

21. What is the history of the relationship between this country and your home country?

22. Are there many foreign expatriates living in this country? Where do they live?

23. What kinds of health services are available? Where are they located?

24. What kinds of schools are considered best? Public? Private? Parochial?

25. Where are the important universities of the country? If university education is sought abroad, to what countries and universities do students go?"[117]

[117] The original list has 47 questions in total for Americans. This list has been edited to suit business purposes and also to avoid some sensitive questions for any lawyers from one country wishing to do business in another country.

Appendix I Activities attended for this thesis

2013

24-26 March Association of Law Teachers' Annual Conference 2013 (Nottingham)

Attended on recommendation of director of studies

9 May Graduate School Spring Conference (poster competition for first year research students) (Nottingham Trent University)

Submitted a poster named *Legal Education for International Lawyers* (one of the finalists)

14 May NLS Internal Learning and Teaching Conference (Nottingham Trent University)

Provided a presentation titled *Legal Education in China: Main Existing problems*

2 December NLS Designing a Digital Hub for Legal Education Conference (Nottingham Trent University)

Recognised some potential changes relevant to my subject and collected some potential interviewees

2014

7 February NLS Centre for Legal Education Annual Conference 2014 (Nottingham Trent University)

Attendance facilitated by NLS. Gave a presentation titled *The Value of Teaching Co-operation as a New Legal Skill* (met potential interviewees)

13-15 April Association of Law Teachers' Annual Conference 2014 (Leeds)

Attendance funded by the Stan Marsh bursary. No paper at that conference but collected some positive ideas as well as some critics of my subject. Tried to collect some potential interviewees

14 May NLS Research Conference 2014: Capability, Collaboration and Confessions in Research (Research Away Day) (Nottingham Trent University)

Attended the 3-minute presentation competition with the title *Co-operation in Legal Education* and was the prize-winner of Best Research Student Slide

15 May First Annual Professional Research Practice Conference: Breaking Boundaries 2014 (Nottingham Trent University)

Gave a presentation on the topic of *Legal Education for International Lawyers in China*

2015

29-31 March Association of Law Teachers' Annual Conference 2015 (Cardiff)

Attendance funded by the Stan Marsh bursary. Hunting for potential interviewees

19-21 June NLS Centre for Legal Education Conference 2015 (Nottingham Trent University)

Attendance facilitated by NLS. Rethinking the nature of international law and hunting for potential interviewees. Conducted an interview after the conference

29 -30 June Symposium of Corporate lawyers and Corporate clients (Birmingham)

Belbin's theory of teamwork was presented, which I used in my collaboration chapter

22 September SME China Forum 2015 (Held by China-Britain Business Council) (Nottingham)

Hunting for interviewees and questionnaire participants, understanding clients' attitudes towards needs for legal services from the clients of small and medium sized enterprises

23 September Symposium about perceptions on researching legal education (LERN) (London)

Questioning the traditional ranking system of legal education and the possibility of diversifying legal education

5 November Workshop about embedding dissemination in research design (LERN) (London)

2016

20-22 March Association of Law Teachers' Annual Conference 2016 (Newcastle)
Presented a poster titled *Collaboration in International Commercial Legal Services* and met a gatekeeper for extra interviewees

3-4 June Conference on Teaching and Learning in Law (Chinese University of Hong Kong)
Gave a presentation titled *Innovative Private Law Makers: Future International Commercial Lawyers*

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