Preface

Parties to transnational commercial and financial deals communicate with each other in languages of their choice. Sooner or later, however, one or more of the parties, whether as part of making or of enforcing the deal, will necessarily interact with governmental authorities. Examples of such authorities include a court, a registrar of security interests in collateral to secure repayment of credit, or a regulatory body. Almost universally, such an authority mandates that an official language be used for any interactions with it. The nature and extent of the mandate for use of an official language may induce the parties to structure their deal so as to limit the mandate’s infringement on their autonomy, including specifically on their choice of the language in which to advance their deal. The more burdensome are the requirements in connection with the mandated use of an official language other than that preferred by one or more of the parties, the more likely are the parties to attempt to work around such requirements. An unintended result of the language requirements associated with the governmental interaction may accordingly be to direct the parties away from both the interaction and the associated official language.

Legal systems tend broadly to favor party autonomy as to language. This tendency is illustrated in this work by the varied requirements of French-, Italian-, Portuguese- and Spanish-speaking jurisdictions relative to use of an official language, as well as by the regimes of the United States and the European Union pertaining to language and to the making and enforcement of commercial and financial business deals. Despite the tendency to favor party autonomy, requirements related to use of an official language for interactions with governmental authorities widely burden party preferences to conduct business in English or some other language. In the various systems examined, these requirements are defined principally by law relative to the constitutional status
of language, contractual choice of language, civil procedure, arbitration, creation of security interests, offer of securities, and government contracting. Although the various systems examined share the requirement to use an official language for interactions with governmental authorities, the specific bodies of law that govern particular such interactions in each system result in distinctly different levels of burden. That is, for parties for whom the official language is not a preferred language, the structure of the particular governmental interaction and the associated breadth and intricacy of language use determines just how much of a burden is constituted by the need to use an official language.

Astute lawyering to structure transnational deals largely accommodates parties’ desires to conduct business in the language of their choice and as they otherwise prefer, while mitigating impediments to enforcement of such transactions. However, as to topics strictly dependent on a governmental interaction, for example, registration of security interests to establish priority claims to collateral for a loan that can be defended against third parties, investment in lawyering is only partially effective to address the burden of language. In essence, initiatives to establish or exercise rights against third parties using tools of constructive notice and the coercion of administrative, regulatory and judicial authorities established under national law do not readily lend themselves to application of the lawyering tools that rely upon construction of bilateral deal terms between the parties with careful specification of governing law and forum for dispute resolution.

In view of the costs to parties of working around troublesome governmental interactions and the impracticality of completely avoiding them, governmental authorities, unilaterally and through international initiatives, have opportunities to facilitate transnational commerce and finance by coordinating legal frameworks to support cross-border transactions, including
through lightening their linguistic challenges. Such coordination mitigates the motivation of transaction parties to incur the costs of working around governmental requirements and accordingly increases the likelihood of effective implementation of the requirements.

How supranational communities address language in conjunction with their efforts to harmonize relevant law, changes the landscape of language promotion. The European Union is the most notable instance, but there are also the current example of the Organisation pour l’Harmonisation en Afrique du Droit des Affaires (“OHADA” – Organization for the Harmonization in Africa of Business Law) and the potential of the Comunidade dos Países de Língua Portuguesa (“CPLP” – Community of Portuguese Language Countries)—organizations respectively of sub-Saharan Francophone states and the Lusophone countries. The promise of such supranational communities, and the reality in the cases of the European Union with its twenty-three official languages and of OHADA with its initial focus on French now being augmented to extend also to include English, Portuguese and Spanish, is to reshape parochial national approaches to language. As the European Union and OHADA pursue their development, they create new channels, defined by approach to language, for international efforts to harmonize law relevant to transnational commercial and financial deals. The experiences of the European Union and OHADA reveal that language promotion and harmonization of law, when thoughtfully channeled and linked, can yield mutually reinforcing policies, goals and tools, that are productive simultaneously of party autonomy and of government policy implementation.

Interested stakeholders—government, business, and the broad community supportive of improving the rule of law, have the opportunity to invest in initiatives working to unify and harmonize law relevant to transnational commercial and financial deals. Such initiatives, when well-founded, promote the conduct of transnational commercial and financial deals within (rather
than outside) the framework of formal legal systems and their institutions.

For these initiatives to reform the legal frameworks relevant to transnational deals, the polyglot character of the global economy presents a challenge and an opportunity. The challenge derives from the conduct of transnational commercial and financial deals across the divides of the languages and the legal systems with which they are intertwined. The polyglot character of the global economy increases the challenge to the harmonization of law efforts that seek to bridge these gaps. The opportunity associated with such efforts is to harness the passion that those who speak a language tend to have, not only for their language, but also for the legal framework that they know best and with which the language is embedded. Harnessing this passion for language can greatly increase the likelihood of meaningful law reform across boundaries. Appropriately focused investment in initiatives to unify and harmonize commercial and financial law, particularly with attention to the key role of language, can support effective promotion of a language, while reinforcing the rule of law, thereby achieving a greater realization of the benefits of each.