International Business Law and National Culture – A Natural Marriage

When we talk about international business law, we often forget the importance of local culture in business transactions between foreign companies. Knowing the legal rules is essential for lawyers, but having knowledge of multicultural issues that can arise in a social business setting is a key to providing efficient advice to our clients. This article discusses the bounds between law and culture in France, Canada and Korea.

Introduction

"International law is for states not only a set of rules but also a common language."
Boutros Boutros-Ghali, former General Secretary of the United Nations.

The example of the diffusion of French law worldwide through the civil code of 1804, alongside the interest of people in French culture and language, demonstrates how law and culture are intimately connected.

The nineteenth century was the heyday of French civil law. During this time, almost all its neighbouring countries adopted French law. During the period of colonisation, the French civil code was widespread in French-speaking countries, in Africa, in the West Indies, in Asia, in the Middle East and also in Latin America.

French civil law seems to be what France exported best back in the nineteenth century. The supreme economical, geopolitical and cultural power of France during this time could be an explanation. Colonising a significant part of the world by imposing its language, culture and institutions provoked France's legal system's inevitable expansion. This was accomplished either by force during colonisation or willingly by other countries, such as Romania, accepting the benefit of French juridical experiences.

The question is: why are we talking about French civil law exportation in a paper dedicated to current legal questions for international business lawyers?

The French Civil Code of 1804 was followed by the publication of another Napoleon's code in 1807: the Commercial Code. French contract law arose from the Civil Code. Nevertheless, trade and contracts are eternal allies. Contracts are the written form of interpersonal relationships; therefore, intercultural issues are to be taken into account, especially for international trade.

So what is the situation 200 years later? In a world shaped by emerging countries named here as 'BRICS' (for Brazil, Russia, India, China, South Africa) and old European economies such as France, what are the links between the law, especially business law, and culture and what kind of influence do they have on this new world order?

First, we will review the various existing legal systems in the world. Second, we will illustrate how a personal legal experience in three very different countries shows the link between law and culture. Third, we will distinguish four steps in the legal business process where law and culture are bound.

The Classification of Legal Systems

Lawyers and jurists who are reading this paper will forgive the delving into basic notions of law. A 'legal system' creates structures and these structures and modes of operation are attached to the application of legal rules. Therefore, it embraces judicial and non-judicial systems. To explain more precisely our point, let us consider the existing legal systems in the world. The legal systems of the world are classified commonly as:

- Romano-Germanic law (civil law);
- Common Law;
- Customary law;
- Religious law.

French Civil Law drew its roots from Roman law and contains a complete set of rules codified by legislators, applied and interpreted by judges. Judicial decisions do not have legal force, although decisions of supreme courts profoundly influence lower courts. In theory, only a legal act defines judicial decisions.

Common law from England is adopted by many countries and was spread worldwide, particularly by English colonisation between the nineteenth and twentieth centuries. This law is essentially based on case law decided by courts, albeit they have to comply with laws passed by Parliament.

Custom as an overriding source of law only exists in a few countries. In most Asian and African countries, custom has become a residual source of law alongside civil law. On the other hand, there are areas where custom remains dominant. Particularly, in *lex mercatoria* international business law, a set of customary rules have framed contractual relationships between traders in Europe since the Middle Ages.

Our description of these systems is voluntarily simplified. Global inspiration and influences between legal systems have meant that many mixed systems have emerged.

The impact of cultural references such as history and the usual modes of reasoning are important for the construction of national legal systems. More precisely, French Cartesianism, Anglo-Saxon pragmatism and North Asian Confucianism have indeed affected the construction and diffusion of legal systems.

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Yet such a definition of 'legal system' does not seem to show clearly the impact or the link between law and culture. The strong connection between law and culture is discernable particularly through international trade.

Cultural and Legal Experiences in Europe, America and Asia.

To introduce our opinion, let us adopt the definition of 'Culture' provided by Oxford Dictionaries as being: 'The arts and other manifestations of human intellectual achievement regarded collectively; the attitudes and behavior characteristic of a particular social group'.

Comparison between South Korea and France

I was lucky enough to work as a chief legal officer within a Korean company and as a lawyer in South Korea. On the face of it, South Korea and France appear to be completely dissimilar: they are separated geographically, have different religious traditions and use completely different languages. Despite these patent differences, when I arrived in South Korea as a European lawyer, I was astonished to discover that our legal systems do have common roots: South Korea adopted civil law from Japan at the beginning of the twenthieth century, when Japan was inspired by the German civil law system close to our French one. Thereby, I found strong connections and similarities between Korean and French contract, labour, commercial and corporate laws. For example, similarities between 'Sociétés Anonymes', 'Société A Responsabilité Limitée' (French corporations legal form) and 'Chusik Hoesa', 'Yuhan Hoesa' (Korean corporations legal form) were obvious.

As far as labour law is concerned, my French national and international clients share the same opinion: French labour law is too protective of employees, too complex, too expensive and adverse for businesses. Korean labour law is also protective of employees. The notion of 'dismissal for a just cause' in Korea is approximately the same as the notion of 'dismissal for real and serious grounds' in France. Trade unions hold an opponent position and the regulations are also similar in the two countries.

What are the reasons for this similarity between Korean and French labour law? Different cultural reasons lead to the same results. In France there is sort of a 'culture of opposition' and a 'sense of equality' which means constant defence of employees against employers. Inherited from the revolution of 1789, trade unions were powerful and contributed to the creation of a protective labour law towards employees.

In Korea, there is a completely different reason: the Confucianism culture valorised the group instead of the individual, therefore trade unions contributed, as in France, to the development of a labour law shaped for employees. In addition, the protective management of Korean companies led managers to control and protect employees under their supervision. There is a strict sense of hierarchy leading to conflicts and powerful Unions as well.

Canadian Experience

Strong connections between France and Canada date from the time of French colonisation after the arrival of Jacques Cartier in 1534 in Quebec, where I am proud to have succeeded at the Bar exam. The Napoleon Civil Code was adopted and amended by the people of Quebec in 1866. However, Quebec's legal system is today a mixed system of common and civil law.

In the litigation field, there is a combination of common law rules, being an adversarial system, and also civil law rules with an inquisitorial, contradictory procedure where judges take the lead in trials.

The notion of liability is omnipresent in common law and the amount given for losses can be extremely high depending on the parties. Whereas, in civilian traditions, judges are trusted to interpret contracts and are entitled to diminish the amount of contractual penalty. The amount of damages is usually much lower and the liability of a party is determined primarily by the law, and accessorily by a contract. The contract is used as final reference by the judge after looking at the legal provisions, case law and business practices, not in the first place.

There is probably a religious and a cultural reason behind this fact. France and Quebec are Christian countries and civil law was also derived from canon law made by the Catholic Church authorities. The relationship with money is far less inhibited in Catholicism than in other religions. This probably impacts the award and amount of contractual penalties between parties in the case of litigation.

What are the Cultural and Legal Bounds During the Business Legal Process?

My personal experiences lead me to identify four main steps in the legal process where law and culture are deeply connected.

Legal Methodology

The way legal studies are organised has a remarkable effect on the methodology that legalists use to build a legal system and to practice their profession.

In France, law enrolment in university occurs after a high school diploma is obtained. It takes five years in university and a year and a half of bar school for students to be eligible to become lawyers. In law school, students acquire significant reasoning skills and tend to use Cartesian logic based on thesis–antithesis–synthesis. The sagacity of critical thinking of philosophers of the Age of Enlightenment is the bedrock of French legal reasoning. French lawyers always use the same process: we take a look at what the codes provide, then eventually we check the jurisprudence to examine the interpretation of the law given by judges. The written legal norm adopted by the French Parliament illustrating democracy and the place where critical thinking expresses itself, is the major source of law.

One of the biggest differences in comparing Quebec to France is the federal system and the common law. Canadian provinces are the expression of the combination of civil law and English common law traditions. This mixed legal system subjoined to federalism leads, in my opinion, to the open-minded thinking of Quebec's jurists and lawyers, and openness to new legal concepts and the fact they are accustomed to thinking on different levels. They shall look at the federal and provincial legal rules and, then use the common law and the civil law reasoning and jurisprudence. Quebec's lawyers treat written law and jurisprudence almost equally. Their law has become an innovative inter-mixture of evolutionary concepts neatly selected for their relevance.

Recourse to a Lawyer

In Korea, lawyers have an important status and a high social recognition arising from their triumph of surviving the long and drastic selection of law schools. Due to this high social status, the Korean SME's executives think that Korean lawyers are unaccessible and unaffordable for them. Moreover, due to their culture of compromise, Korean people tend to solve their problems amicably first, so that neither party loses face. Then, litigation in Korea is not so common or such a threat, compared to the United States where you can obtain a huge amount of damages as a victim.

French businesses are familiar with free and effective public services, together with highly qualified judges and properly working institutions. Thus, French SMEs culturally, psychologically and financially are reluctant to pay for legal counsel. Some courts do not require the presence of a lawyer, such as the commercial court. Big businesses have their own legal departments and choose their outside counsel according to severe criteria. In France, where a win-lose culture dominates, conflict before the courts is the normal way, even if arbitration procedures for commercial matters are frequently used and mediation between companies is developing.

As for Canada, it seems that it is much more natural for business people to use a lawyer as in the US. Lawyers accept work on a success-fee basis and are considered as genuine partners of businesses. There is a high level of professionalism and a rigourous deontology, contributing to the lawyer's credibly and legitimacy.

Contracts Negotiation

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In my opinion, Anglo-Saxon negotiators seem to be very professional and pragmatic by initially indicating their expectations, especially when it comes to financial aspects. They consider law as a tool for their commercial interests and lawyers as an essential binomial. Legal risks are perfectly integrated into their business culture. Lawyers are necessary counsellors, and pre-contractual stages are very developed and mastered by lawyers frequently drafting the Non-Disclosure Agreement, Memorandum Of Understanding and Letter Of Intent.

This professionalism is not yet always developed by French corporate clients. A significant evolution has occurred in the past decade, but NDAs, MOUs and LOIs are not yet used enough. Even if we place much more importance on preliminary contracts than before to settle confidential negotiations, we are still more attached to classic legal mechanisms, such as civil liability provided in our civil code, for a violation of confidentiality or the sudden breach of a business relationship.

Also, French negotiators focus on the outcome of negotiations after which the contract springs and forecast the intervention of judges in the case of litigation, instead of avoiding this by carefully negotiating every provision and specifying the conditions in which the contract will be executed.

In Korea, Confucianism has a strong impact on contract negotiations: the parties should take time to build a personal relationship between them and try to put the other contracting party in an agreeable atmosphere to negotiate. Contract negotiations vary depending on the position of buyer or seller, client or provider. If the Korean partner is the client, he is in a strong position to impose strict requirements during the negotiation. If he is a provider, he will do his best to please his client and to lead negotiations in pleasant surroundings, in order to improve his chances. On the flip side, if the Western partner does not take the initiative to propose a NDA, a MOU or a LOI, Koreans will rarely propose them and tend to rely on confidence between both parties instead of written engagements.

Contract Drafting.

In a civil law system, the law is a conceptual system founded on general principles and concepts which are interpreted by judges. Therefore, our contracts are usually more synthesised than common law contracts and require a judge's intervention in case of dispute. Germany illustrates best this way of thinking: summary is the key.

Also, the preamble of the contract contains a description of the contract's purpose and the processes leading to the agreement. Its legal force can be substantial, especially when it comes to a judge to interpret the intent of the parties to the agreement. Moreover, written clauses have consequential value, unlike promises. A specific right written into the contract cannot be overridden due to an inexplicit external legal fact. Also, parties prefer to leave some unsolved issues during the contract drafting to the judge.

Common law contracts do not usually have such detailed preambles as in the civil law contracts but judges do a literal interpretation of every word of each relevant clause.

These contract writers provide definitions to clarify terms that are used and to improve the contract's management. Efficiency and pragmatism are key competencies. Therefore, contracts are usually detailed and comprehensive. Also, the parties' behaviour can serve as a basis for excluding a clause. This is what waiver's are for: it is a clause providing for the conditions under which the rights in the contract can be given up.

In Korea, it is difficult to systematise a specific contract writing method. While it is true that it is a country of civil law tradition, it is equally true that American business practices have strong influences due to historical ties with the US. Many Korean lawyers were trained in the US and are familiar with its common law legal culture.

More than in drafting of contract clauses, where it is difficult to identify civil law from common law, it really is the relationship to the contract that is different. The contract is seen as a framework apt to evolve, to build trust between parties, rather than as an intangible document. Therefore, promises are as fundamental as keeping a good relationship based on trust with the other party. The Confucianism culture can be deeply felt in Korean business and legal practices.

Conclusion

Behind companies, there are women and men, with their own language and cultural references that seem, at first glance, far removed from national and international legal systems.

With its expansion during the nineteenth century, French civil law lived well. Nowadays, civil law, embellished by history and culture, continues to serve as a model for states. For example the African States which are strongly inspired by our civil law principles, established in 1993 the Organization for the Harmonization of Business Law in Africa ('OHADA') that includes 17 African states. Its objective is to facilitate trade and investment, ensuring legal and judicial security of business activities. OHADA law is thus used to contribute to economic development and create a large integrated market transforming Africa into a 'development pole'.

Whereas, Europe first created an economic community market in 1957, gradually adding legal principles leading to an European Union legal system that is every day becoming more developed, the founders of the OHADA have made the opposite choice by aligning states' regulations to economically develop the entire continent. These tremendous OHADA economic objectives are achieved by a tool that comes first: a set of common legal rules and system.

We could also mention UNIDROIT; a useful set of harmonised norms in the field of international trade relations, whose purpose is to modernise, harmonise and coordinate commercial law between states and develop uniform law instruments, principles and rules.

Whether it is OHADA, the European Union or UNIDROIT, one of the major languages these organisations work with is French. Let us remember that language is the main vehicle of culture. Language is prominent in our legal science especially when it comes to legal qualification of facts. By choosing French as a working language, it is the French legal culture which is still used as a reference in these organisations and in the enactment of international regulations.

It appears clear that we cannot separate a legal system from its history and cultural roots. As Boutros Boutros-Ghali said, 'Let's make the twenty-first century the century of a more harmonised world order in which "law becomes a common language" and culture, a bridge between Asia, America, Europe, Oceania and Africa.'

It may be interesting to note that many multi-national companies are still investing in India without running afoul of the relevant anti-corruption laws as these are companies which benefit from a robust compliance culture, stringent oversight protocols and resilient internal controls.

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Cecile Dekeuwer has legal qualifications and experience in France, Korea and Canada. Her main fields of intervention are corporate law, M&A, commercial law, contracts and litigation. She is a former head of legal departments of several multinational companies. She is the founder of the law firm 'D2K Avocats', the group of multicultural lawyers 'Lex in IT', and the European Economic Interest Grouping '4E' (Europe Energy Efficiency Expertise).