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TRANSNATIONAL LITIGATION AND INTERNATIONAL ARBITRATION:

CROSS-CULTURAL REFLECTIONS

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Much has been written about globalization of legal practice, particularly commercial and corporate practice, and the increasing similarities (often referred to as "convergence", although surely less "convergent" in the legal domain than in the economic/financial domains generally) of legal practice among jurisdictions worldwide.

In some respects, particularly as to matters of substantive law, the great divide between the world's two archetypal legal systems -- the Anglo-American originated common law system (particularly, in its American form) and the Continental European originated civil law system -- does seem to have narrowed. In the eyes of the author (an American-trained but multi-qualified practitioner whose career has been split between the U.S. and Europe), matters of substantive law do indeed show significant convergence in the sense that parties are generally able to implement their commercial understandings under virtually any reasonably modern legal system.

Examples would include the areas of project finance or M&A generally, or private equity in particular: Inevitably, both applicable substantive provisions of law (e.g., financial assistance, fraudulent conveyance, consideration, corporate benefit, etc.) and relevant institutional supports (e.g., roles of public notaries and registers) will vary from jurisdiction to jurisdiction. These variances will have unavoidable consequences on the documentation structure and terms, broadly reflecting the civil/common law divide. But sophisticated civil jurisdiction counsel are nonetheless able to assist clients in effecting transactions which are lawful and effective… and which, in a given case, will have a remarkably similar "look and feel" to a transaction of the same nature the structure and documentation for which may have initially been pioneered in the common law world.

Less has been written about globalization in the contentious or litigation context, but some of the best recent scholarship in the area points to the existence of a series of fundamental cultural/conceptual differences as to the nature of the legal process which are so ingrained and "second nature" to practitioners that they inevitably and significantly color the nature of their advice in, and their entire appreciation of the course of, a litigious matter. (See in particular Gregory F. Hauser, "Representing Clients from Civil Law Systems in U.S. Litigation: Understanding How Clients from Civil Law Nations View Civil Litigation and Helping Them Understand U.S. Lawsuits", NYSBA International Law Practicum, Autumn 2004, Vol. 17, No. 2).

The hybrid area of international commercial arbitration, in which parties, counsel and arbitrators from divergent legal traditions are required to come together and craft a common procedure for the settlement of a dispute, provides an interesting window on this aspect of globalization/convergence of legal practice. It has been recently observed that:

the rules and procedures that commonly apply today in international arbitration reflect a mixture of common law and civil law norms… [and] appear to be evolving more in a common law direction that tends to favor counsel trained in the adversarial process. (Javier H. Rubinstein, "International Commercial Arbitration: Reflections of the Crossroads of the Common Law and Civil Law Traditions", 5 Chi. J. Int'l L. 303, 2004-2005).

By way of example, the disclosure process in international arbitration is said to involve a careful balance between the full disclosure approach of the common law practice of discovery and the much more limited approach of the civil law tradition (tending to result in sanctioning partial disclosure of documents within the possession of the adverse party, but only under the strict control and discretion of the arbitral tribunal). Similarly, international arbitration today tends to give greater scope to the presentation of live oral testimony (including examination by counsel and cross-examination by adverse counsel) than the civil law tradition, with its emphasis on written testimony, would normally countenance.

In the author's experience, however, (1) despite a significant degree of globalization/convergence on the surface, the tenaciousness and material significance of ingrained cultural/conceptual differences in the approaches taken by counsel in the contentious context suggests that globalization's "convergence" in the international commercial arbitration context may be more apparent than real, or at least, more superficial than profound… and that counsel would be well-advised to keep this in mind: and (2) the principal source of these inherent and deep-rooted differences in the common vs. civil law "mindset" may well be the prominent role of the jury as the finder of facts in the common law (particularly US) litigation system, and as such, the essential conditioner of the rules of evidence, practice and procedure in the common law mindset.

The following provides an overview of some of the most evident areas, in addition to the area of disclosure/discovery, in which the mindset of common law lawyers will clash with that of civil law lawyers:

- pleadings: Common law – short form "notice" pleadings are considered sufficient, e.g., a complaint will generally include little more than a basic statement of the cause(s) of action and basis for jurisdiction and a general indication of the nature/range of damages (which, to the civil law lawyer, will seem vague, evasive and incomplete). In addition, under the procedural rules of most U.S. jurisdictions, "pleading in the alternative" is permitted, which can lead in some cases to a single pleading that expresses two or more conflicting theories of the case. Since the discovery process (document production, depositions) is meant to bring out the truth, incompatible versions of alleged facts are allowed at the pleading stage.

  Civil law – pleadings, including the complaint and the answer, tend to be fulsome evocations of facts, law and evidence, including as to damages claimed (to the common law lawyer, these pleadings will seem premature, doctrinaire and unpersuasive).

- witness testimony: Common law – views live, direct, cross-examinable testimony (including by way of deposition, i.e., examination before trial) as the best, if not the only credible, evidence of facts ("the best evidence that the sun actually rose yesterday is to have a witness so testify from his direct knowledge"); testimony tends to be wide-ranging, and, once beyond direct examination, relatively unrehearsed and spontaneous, with ample scope for impeachment and delving into questions of credibility.

  Civil law – tends to view witness testimony as merely corroborative of a defined and already-explained position and of generally limited veracity (party witnesses being assumed to lack veracity). From the perspective of a common law lawyer, the civil law approach to witness testimony often amounts to no more than a stiff and rehearsed Q&A session with limited and relatively unrevealing cross-examination.

- unitary trial vs. staged proceeding: The prominence of the jury as decider of facts requires that the common law "trial" be a unitary process which has no parallel in civil practice, where witness hearings and oral arguments (such as they are) are merely among the many phases in the staged process.

- facts vs. law: Common law – generally, once trial is reached, motion practice and jury instructions have established or will establish the applicable rules of law, hence the trial is a search for truth of facts which are deemed at least as important, if not more so, than the law on point.

  Civil law – the law seems to be the paramount focal point of inquiry, with what the common law lawyer would see as a doctrinaire disregard for the importance of the facts and an excessively theoretical or "scientific" approach to the inquiry.

The above are only a few relevant examples of largely unbridgeable conceptual chasms between common law and civil law practitioners' mindsets as they approach litigation, chasms which have their sources in the respective systems of civil procedure. To the extent that these conflicting approaches come to the fore in the context of international arbitration, it is in this area in particular that counsel should be wary of their own (and their colleague's) culturally-conditioned conceptions, as no amount of globalization of legal practice will make these fully evaporate so long as the rules, practices and history of civil procedure vary so significantly between the world's two archetypal legal systems.

It has been recently stated that:

The confrontation between the European and U.S. systems is the greatest challenge which transnational commercial arbitration faces today… [I] margining and achieving accommodations between the world's two great arbitration systems is the most significant

task that practitioners of transnational commercial arbitration now face. (Ewell E. Murphy, Jr. "Confronting the Confrontation of the World's Two Great Arbitration Systems", The International Arbitration News, Vol. 3, No. 2, Summer 2003).

It is suggested that this accommodation will never be easy and the confrontation will subsist, albeit somewhat masked or muted by hybrid procedures that adopt elements characteristic of both systems. This confrontation can be a source of strategic or tactical advantage to alert, cross-culturally experienced counsel:

Practitioners tend to be influenced by their home system, genuinely believing that what is done at home is done everywhere and constitutes the best way to do justice….[But t]his kind of preconceived idea can be very dangerous and indeed fatal to the case… Arbitration allows enormous flexibility. An experienced practitioner is able to take advantage of this flexibility in the best interest of the case and not according to preconceived ideas as to what should be done and what should not. (E. Gaillard and P. Pinsolle, "Advocacy in International Commercial Arbitration: France," in The Art of Advocacy in International Arbitration, R. Doak Bishop, ed., 2004).

Thus, by way of example, pre-trial discovery, aggressive witness cross-examination, forceful, fact-focused argumentation and other standard "tools of the trade" of the common law litigator may not always be desirable in an international arbitration: a common-law trained advocate may be well-advised to mute or override his/her instincts in respect of these matters, and instead to weigh carefully their merits and demerits in light of the relevant facts and circumstances -- in particular, the orientation, experience, and likely mindset and expectations of opposing counsel and most especially that of the arbitral panel.

In conclusion, globalization in the legal and business environment inevitably tends toward harmonization and greater understanding of substantive legal rules, not to mention the increasing use of one common language (English being increasingly the language of choice in international business of course). But familiarity with the litigation mindset of opposing counsel, of one or more of the arbitrators in the arbitral tribunal, and even of one's own client and/or the opposing party, can be just as or more important in prevailing in an international arbitration case as a well-grounded knowledge of the relevant substantive law or fluency in the language of the arbitration.

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