Published on 26 June 2015 by **Jean-Luc Soulier**, Member of the Paris Bar
jl.soulier@soulier-avocats.com
Tel.: +33 (0)1 40 54 29 29, + 33 (0)4 72 82 20 80

Read this post online

Common law vs. Civil law: Cultural gaps in the rules of evidence

My participation in a panel on the rules of evidence during a meeting of the International Association of Defense Counsel (IADC) in Lisbon made me realize once again the substantial cultural gaps between Common law countries and Civil law countries.

Just like planets are not to meet each other, these gaps occur along several axes: the role of the parties, the role of the judge and the means legally admissible for the collection and production of evidence.

Pursuant to Article 9 of the French Code of Civil Procedure, each party is under the duty to prove, in accordance with the law, the facts that are necessary for the success of his claim.

One principle makes it more difficult for the parties to establish evidence: the principle according to which "no one can create proof for him/herself", the corollary of which being the right not to mention elements that could be detrimental to one's defense.

In Civil law countries, where laws have been modelled by the spirit and letter of Napoleonic codes, the consequence of these principles is that the statements made by the parties are treated by the judge with the utmost suspicion. Except for Italy, judges hardly ever hear the parties as they suspect them of distorting the truth. They rule on the basis of the submissions that are filed, the exhibits that are produced and the oral arguments of the attorneys of the parties during the pleading hearing. No "*cross examination*".

Whatever the amounts or interests at stake, the pleading hearing seldom lasts more than two hours while in Common law countries, in particular in the United States of America, public hearings for similar cases can last

several weeks.

Not so long ago, French judges did not even review the produced exhibits before the pleading hearing, but this would not prevent them from deliberating after the hearing. The lawyers' pleading was thus a key note of the process, so were approximations and playing loose with the truth.

In Common law countries, the conduct of oral hearings is a fundamental principle that has always prevailed. Parties can be heard as witnesses and call third-parties and private experts whose statements are cross-examined by the opposing party. The judge's role is confined to that of a moderator.

In Civil law countries, even though evidence can be brought by any means in commercial disputes, documentary evidence is *de facto* essential. Affidavits are admissible only if they are authored by third-parties unconnected with the party that had collected them, again in accordance with the principle that no one can create proof for him/herself.

A party may ask the judge to order the opponent or a third party to produce a document. But it must specify which document and the judge has full discretion to grant, or not to grant, the request. No *"discovery process"*.

In Common law countries, a party may request the other party to disclose all the relevant documents concerning the trial that are available to it. If the party requested to disclose such information fails to do so, it can be criminally convicted.

The French legislator has tried to protect French companies against the implementation of the *"discovery process"* in proceedings initiated in the United States of America by passing on July 16, 1980 a so-called "Blocking Statute" under which *"It is forbidden for all physical persons of French nationality, or who usually reside on the French territory, as well as all executives, representatives, agents or employees of legal persons having their head office, or an establishment, in France, to communicate to foreign public authorities, in writing, orally or under any other form, in any place, economical, commercial, industrial, financial or technical documents or information, the communication of which would cause prejudice to the sovereignty, to the security, to the essential economic interests of France or to public order(...)"*.

This Statute has hardly ever been implemented. And for a good reason: a company raising these provisions would be condemned to abandon the US market.

The other fragile barrier that French law has tried to erect to protect French natural persons and legal entities is the privilege of jurisdiction provided for by Articles 14 and 15 of the French Civil Code. Because of this principle, French courts have long considered that wherever an international convention on the recognition and enforcement of judgments had not been entered into between France and another country, a French citizen could refuse to be tried by the courts of that foreign country if he/she had not waived the privilege of jurisdiction under a contractual clause or by deciding to voluntarily appear as defendant. This principle has, however, been considerably undermined as a result of recent rulings of the *Cour de Cassation* (French Supreme Court).

In Civil law countries, private expert investigations are viewed by judges with the same degree of suspicion as the statements of the parties. Everything that originates from a party is suspicious.

Hence the frequent use of court-ordered expert investigations prior to any proceedings on the merits.

In this case, a party files a motion with the territorially competent judge and requests the appointment of a technical expert. The judge hears the parties and determines whether the request should be granted or not. The judge appoints the expert from a list of judicial experts registered with a Court of Appeals or the *Cour de Cassation* and specifies the tasks to be performed by the expert, on the basis of the parties' request.

In Common law countries, court-ordered expert investigations remain an unknown concept. The parties designate their own experts who are subject to "*cross examination*", just like the parties themselves and the witnesses they have called.

According to Professor Xavier Lagarde, who has written extensively on this subject, the differences between the two set of rules of evidence result from the fact that the Civil law practitioner believes in the truth but is "*quite pessimistic on the chances of grasping it during a dispute*" while the Common law practitioner does not believe in the truth but "*thinks that a well-organized trial will uncover it*".

This is a new illustration of our thirst for absolute that too often leads to abstract reasoning, and of the pragmatism of Anglo-Saxons who battle doubt in seeking efficiency.

Is it the reason why the judge plays so an important role in Civil law countries or is it the role assigned to the judge that has limited the role of the parties? Napoleon used to say that the investigating judge is the most powerful man in France. In the conduct of the trial, the civil judge also has extensive powers not possessed by Common law judges.

The weight of history and culture contributes substantially to the way our judicial systems work. During the IADC meeting I attended, I told myself that the presence of an ethnologist would have been highly valuable to discuss the subject addressed by our panel: "*Discovery in Anglo-Saxonic and Civil Law Jurisdictions : an old issue strictly dependent upon different conceptions of production of evidence*".

These two worlds co-exist in arbitration matters. Elsewhere, the convergence of the planets is little perceptible as both systems unperturbably continue to rotate around their own axis while carefully avoiding to confront each other.

specific needs.

For more information, please visit us at www.soulier-avocats.com.

This material has been prepared for informational purposes only and is not intended to be, and should not be construed as, legal advice. The addressee is solely liable for any use of the information contained herein.