Do Companies Have Personalities and

Why Does It Matter?

Interview with Salli Swartz

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Salli A. Swartz, *has practiced international business law in Paris since 1979. Her practice is diverse and has involved the negotiation of aircraft leases, hydrocarbon development and production agreements, mineral extraction agreements and joint venture agreements in the hydrocarbon and extraction industries, transnational joint venture and consortium agreements and complex industrial investments and intellectual property licensing agreements. She regularly advises French and other European subsidiaries of major American and English multinational companies in connection with their business activities in Europe, Asia (China, Japan and India) and the Middle East and has recently advised many European, American and other clients with respect to compliance, corporate social responsibility issues and strategies and other issues arising out of the Foreign Corrupt Practices Act, anti-boycott laws and the OECD Convention on Combating Bribery of Foreign Public Officials. She is regularly lead counsel on due diligence and negotiations in connection with transnational acquisitions and mergers and has over 30 years' experience in international arbitrations (in particular ICC arbitrations) as well as mediations.*

Salli, why is it important to understand companies' personalities?

It matters because a company's personality will influence how it negotiates and generally engages with the government and well as its relations with local communities throughout the project.

Some companies make investments for the long-term and, thus, care--or should care--about their relations with the government and the local environment, but others – particularly in green fields – solely intend to receive a permit or concession for the purpose of selling it. Such companies are not interested in investing in the project for

the long-term, and, as a consequence, the negotiation may appear simple and quick but may also result in a contract less favorable to all concerned parties.

When I assist governments in their deal negotiations, I always encourage them to "do their homework," researching background information on the company to better understand its "personality." This generally involves researching its stock market filings, if the company is publicly traded, its financial statements, its national and international corporate structures, its reputation (often through press reports both in-country and internationally), its history of negotiations (e.g. does it have a history of always negotiating a stabilization clause?), the background of its negotiators (who is negotiating; what is his/her history with and influence on the company?), the history of its past and current investments, etc. It is also useful to understand if the company's negotiators have the actual power to decide or whether the negotiation will be protracted until the actual decision-makers enter negotiation.

Having a subscription to industry intelligence reports and archives can be useful, but without background research, the government will be missing the less tangible aspects of what type of company they are negotiating with. Thus, a government should always appoint someone to be responsible for this background research, whether that's an internal officer or an external technical advisor and everyone on the negotiation team should be aware of the information obtained.

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To what extent does a company's nationality affect its personality?

Nationalities of companies often reflect the particular culture of the country in which historic headquarters are located--such as Canada and Australia for mining companies or France, Norway, Great Britain and the United States for hydrocarbon companies. African nations often have adopted the legal systems of their historic colonizers. For example, in East Africa, they employ the basic legal system of England and in francophone West Africa, the basic legal system of France. These diverse cultures have different legal systems and traditions which affect the style, length, language, level of detail in the legal documentation and other aspects in negotiations. Also, the country and a company's anti-corruption and environmental history can and often does play a role.

Can you give us a deep dive into these various legal traditions?

In terms of legal traditions, there are essentially two legal systems: common law and civil law. Some countries use a hybrid system: For example, they could have one legal system for commercial and civil law and another for criminal law. Or, they could have one system for commercial, criminal and civil law and another one for family law, such as Sharia law.

Traditionally, in an Anglo-Saxon common law legal system, laws and regulations cover very broad subjects. To fill in the gaps in legislation, judicial precedent plays a very important role and contracts tend to be long and detailed. The general "rule" is that if it is not forbidden it is permitted. Thus, contracts and judicial precedent will provide for the narrowing of the broad laws. In civil law systems, the general "rule" is that if an act is not regulated by legislation, it is usually prohibited.

The cornerstone of the civil law legal system is the different codes (commercial, criminal, employment, mining, petroleum, tax, etc.) which incorporate in one body of law all existing laws in any given area of the law. Such codes are long, detailed and often all inclusive. Implemented decrees interpret the codes and cover many, if not all, of the issues affecting natural resource exploration and exploitation. Therefore, there is less of a necessity for very detailed contracts since, in most instances, the relevant subjects are a covered by applicable code(s) and implementing decrees. Consequently, the contracts concluded for licenses and permits negotiated under civil systems tend to be less complex and shorter owing to the fact that their scope is limited to cover areas not already included in applicable codes, laws, and regulations.

This being said, under both legal systems, detailed contracts and permits can be found and which sometimes can reflect an underdeveloped legal system.

Of course, today, with the evolution of the legal systems, there is often a hybridization of the two systems. However, by tradition and intuition, Anglo-Saxon companies will rely more on detailed, complex contracts which cover every imaginable instance, and civil law countries rely more on established codes, regulations and laws. The consequence of such differences is that negotiating with Anglo-Saxon companies may entail spending much time drafting very detailed clauses, whereas in civil law countries, contracts may be less detailed and shorter.

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Lastly, the history of anti-corruption prosecutions appears to be somewhat stronger in Anglo-Saxon, common law countries. To wit: the first anti-corruption legislation, the Foreign Corrupt Practices Act, was enacted in the United States in 1977 and has been regularly enforced. Many countries have followed its lead, such as the strong the UK Anti Bribery Act and the Canadian Corruption of Foreign Public Officials Act. Regional and international anti-corruption and anti-money laundering conventions are now numerous.[1]

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[1] The Council of Europe Civil Law Convention on Corruption, the European Union Convention against Corruption Involving Officials (EU Convention against Corruption), the EU Anti Money Laundering Directive https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/anti-money-laundering-and-counter-terrorist-financing_en, the Inter-American Convention against Corruption http://www.oas.org/juridico/english/sigs/Convenco.html, the United Nations Convention against Corruption https://www.unodc.org/unodc/en/corruption/uncac.html the African Union Convention on Preventing and Combating Corruption, https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption,

Do companies' nationalities affect negotiation styles?

In terms of differing negotiation styles, most American companies tend to be more transparent, upfront, verbal and forceful (if not to say aggressive) in negotiations, and they will also appear more friendly and outgoing, often asking about the families and hobbies of the government's negotiators for example. Their ostensibly friendly attitude should not mask their bottom-line: to obtain a good deal for their company. This can be confusing to government negotiators who fall into the "trap" of thinking they have made friends with the company's negotiators and further assuming they can assert their alleged friendship to negotiate a more favorable deal. This rarely works. Despite the friendly attitude, American negotiators will remain very tough in business. Europeans, on the contrary, will remain more distanced and appear perhaps less overtly friendly; they will concentrate on the business issues and will seek the same goals as Anglo-Saxon negotiators: the best (long term) deal for them. It is the style of the negotiations which will change, but often the results are very similar irrespective of the style of negotiation. Friendly attitudes and insincere, presumptuous praise for the government negotiators—comments on their family, clothes, or country—can be perceived as an undue attempt to hide a nefarious goal. Friendship should not cloud anyone's ultimate business, legal positions or strategies.

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When it comes to arbitration, how do companies differ in their behaviors?

Interestingly, Anglo-Saxon companies do not shy away from conflict; they are litigious and unafraid to walk away from a negotiation if they are not making progress. They generally see arbitration as a good manner to resolve disputes. Arbitration is confidential and the cost is considered an expense of doing business. Negotiators from civil law countries prefer to negotiate and find a practical solution, thus making them much slower to pull the trigger to litigate or arbitrate. They are also less apt to budget attorney fees and do not consider the cost of conflict resolution to be an unavoidable cost of doing business.

Of course, the above is a gross generalization, and much will depend upon the circumstances of the dispute, the type of investment, the character or personality of the company, the country of the investment, the attitude of financial investors, the long-term intentions of the parties and other negotiation factors.

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the OECD Convention on Combating Bribery of Foreign Public Officials
http://www.oecd.org/corruption/oecdantibriberyconvention.htm

How do you detect or assess a company's attitude to dispute resolution?

Generally, it is reflected by the amount of time companies spend in pre-arbitration phases, such as negotiation, mediation, and escalation to higher levels of management. If it is felt that the investing company is not putting its best efforts in good faith to resolve the dispute as well as not taking time to find a mutually agreeable solution, it often suggests that company is not interested in maintaining its relationship with the government or the asset. If the company thinks it can win in arbitration and does not want to pursue work in the mine, oil well or natural gas field nor is interested in other natural resources in the country, then it is unlikely that the parties will find a mutually acceptable settlement.

In addition, arbitration will unfold differently depending on the governing law of the contract and the arbitration. The contract will undoubtedly have a dispute resolution clause stating what law governs disputes which arise in connection with the contract. It will also provide a way to resolve disputes such as arbitration or courts. Occasionally, there will be two governing laws: (1) to settle contract disputes and (2) which will govern the arbitration itself. The contract arbitration clause will also specify the name of the institution (ICC, LCIA, AAA, UNICTRAL etc.) which will oversee the arbitration; it is rare for such clauses to specify an ad hoc arbitration. Institutional Rules set forth that institution's rules for arbitrations, but they generally leave certain procedural aspects to the decision of the parties. Typically the parties will decide such details in a document called the "Terms of Reference," usually specifying details such as the use of written witness statements (as opposed to having the witnesses appear at oral hearings), the type of evidence which is admissible ("hearsay" evidence for example), pre contractual negotiation evidence concerning the intentions of the parties, the proof of verbal contracts, the possibility (or not) of the cross examination of witnesses, the production and use of documentary evidence, the existence and restrictions on discovery, timing issues, etc. The substantive law governing the arbitration can also make a difference. For example, in some countries, substantive law will allow for the introduction of the intent of the parties into evidence before the contract has been signed, whereas other countries' substantive laws do not permit such evidence being admitted. And there are many other situations where the choice of procedural and substantive laws can and does make a difference.

When companies have an "Anglo-Saxon" personality, they will be more apt to litigate/arbitrate and will seek to have rules that mirror the Anglo-Saxon common law system. When companies have a "civil law" personality, they may be less enthusiastic about litigation/arbitration and will want to use civil law procedures which differ in many aspects from common law procedures.

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To conclude, what is your best advice for governments when it comes to understanding companies' personalities?

My best advice is to learn as much as you can about the companies with which you are negotiating as well as the people with whom you will be negotiating. Put together a knowledgeable negotiating team comprised of engineers, lawyers, geologists, tax experts, economists and other experts. The team should coordinate and agree on all of the positions that government negotiators will adopt in negotiations and should also confer regularly. Discord amongst the negotiating team should never appear in the negotiating room, and, foremost, the team should have the trust of the leadership of the government (President, Prime Minister, Cabinet level Ministers) and agree prior to negotiations on the goals for the negotiation, for the project, and for the country. These goals and objectives should be clear and adopted by all of those concerned and involved in the negotiations. In other words: Do your homework on the company, know your "adversary"; be clear about your objectives and speak with one voice.

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