Business Horizons (2014) 57, 677—684

Available online at www.sciencedirect.com

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BUSINESS LAW & ETHICS CORNER

Contracting from East to West: Bridging the cultural divide

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KEYWORDS
China;
Contract law;
Contracting;
Culture;
Cultural differences;
Individualism;
International business;
Collectivism;
Universalism;
Particularism;
Power distance

Abstract When contracting in a global environment, basic cultural differences increase the risk of misunderstandings. Culture generally provides the context for contract language and shapes the parties' most basic assumptions regarding their respective rights and responsibilities. Businesses must recognize, respect, and reconcile cultural differences if they hope to contract successfully in the global environment. For U.S. and Chinese businesses to better understand how to successfully negotiate and carry out contractual relations with one another, they must recognize the differences in core cultural values between the two countries and develop strategies for reconciling these differences. Bridging these cultural differences adds value to business transactions and minimizes the risk of failure. To help managers recognize and understand cultural differences between the U.S. and China, this installment of Business Law & Ethics Corner focuses on five dimensions of the culture of the U.S. and China: individualism/collectivism, universalism/particularism, power distance, context, and direction. These aspects explain some of the major differences in viewing the law and approaching contracts. To help managers navigate these cultural differences, this article offers guidance regarding how to respect and reconcile cultural predispositions to achieve true synergies. By bridging these cross-cultural differences between the U.S. and China, managers can achieve the mutual expectations necessary to the long-term success of cross-cultural business transactions.

1. Introduction

As the line blurs between domestic and global business, managers today scan the globe in search of suppliers, customers, and other partners. They pay particular attention to the Far East, in large part due to China's extensive labor pool and consumer market. At the same time, China has emerged as a leader in overseas investment. For example, Chinese foreign direct investment (FDI) in the United States has increased more than 300% since the global financial crisis, while FDI from most other countries has consistently decreased. The impetus for China's growing appetite for FDI stems from the country's governmental policies and the increasing number of private Chinese companies which recognize the competitive benefits of global expansion (Lee, 2013).

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0007-6813/$ — see front matter
http://dx.doi.org/10.1016/j.bushor.2014.04.003

2. Contracting to minimize risks

Of course, business opportunities generally are accompanied by corresponding risks. The nature and complexity of those risks often increase exponentially as firms expand their horizons in search of greater returns. Successful global companies recognize the need to carefully identify risks and develop sound strategies for managing them. Particularly in the United States, this form of risk management is implemented through the use of business contracts.

The wise use of contracting can be integral to the success of a business transaction. Proper negotiation and careful drafting of the underlying agreement facilitate planning and provide greater peace of mind for participants in complex transactions. After all, costs might rise to unmanageable levels if managers could not rely on suppliers' promises to deliver raw materials at agreed-upon prices and at designated times and locations. Similarly, a manufacturer would be unwilling to commit to purchasing raw materials if it was uncertain whether distributors would honor promises to market the finished products.

Within the United States contracts are negotiated and drafted by private parties, but are enforced by public institutions: the courts. Even in cases whereby contracting partners agree to resolve disputes through private arbitration, courts enforce the arbitrators' decisions. In essence, U.S. courts elevate private agreements to legally-binding obligations; they become a form of private law that lends certainty and credibility to the corresponding promises of the contracting partners (Richards & Shackelford, 2014).

2.1. Contracts and mutual intent

To maximize their effectiveness, contractual agreements should be negotiated and drafted in a manner that accurately reflects the parties' original intent. At the most basic level, this requires the parties to identify and comprehend one another's expectations fully. This is no small task. For instance, in *Heggblade-Marguleas-Tenneco v. Sunshine Biscuit* (1976), a potato grower contracted to sell 10 million pounds of potatoes to a food processor. This contract was the grower's first experience with selling potatoes for processing. When the time of performance arrived, the processor would accept delivery of only 6 million pounds because of a decline in demand for its processed potato products. The grower sued, arguing that the processor was liable for the full amount because the quantity term in the contract was definite and unambiguous. However, a California court sided with the processor, concluding that the express language in the contract was trumped by a trade usage in the potato processing industry, which treated the number of potatoes specified in such contracts as mere estimates subject to actual demand. Ultimately, the processor prevailed in the lawsuit despite the fact that it knew the grower was new to the industry and never mentioned at the time of contracting that quantity terms were mere estimates.

Being new to the industry, the grower did not realize that the express term '10 million pounds' actually meant 10 million pounds *or less*—depending on demand for the processor's product. Yet, under prevailing contract law in the United States, such trade usages are part of the meaning of the words in the agreement unless they are carefully negated when the contract is drafted. Unless the contract expressly rejects such industry standards, they are implicitly incorporated into the agreement. Obviously, the two parties to this contract had very different expectations when they inserted the quantity language in their agreement because of their different levels of familiarity with the prevailing industry standards. However, objective standards—determined by trade usage—prevailed over the grower's subjective intent. Ultimately, the *Heggblade* dispute illustrates both that language is contextual and that pitfalls await those who fail to grasp that fact.

2.2. Culture's impact on contracting

When contracting in a global environment, the likelihood of misunderstanding is heightened due to cultural differences. Why is this? Culture generally provides the context within which the contractual language derives its meaning. Culture also shapes the most basic expectations people have over the role that contracts—and law, in general—should play in the interactions between the parties. Ultimately, cultural values define the parties' assumptions regarding their respective rights and responsibilities. This is an important point because the long-term success of business transactions often depends upon the existence of mutual expectations. Trompenaars and his co-authors have reviewed the issues and the dimensions whereupon differences in culture emerge (Trompenaars & Hampden-Turner, 1998; Trompenaars & Woolliams, 2003). Accordingly, businesses must recognize, respect, and reconcile cultural differences if they hope to contract successfully in the global environment.

Understanding the importance of recognizing cultural differences represents only half the battle; one must also discover those value distinctions. Yet, the most powerful values that define our culture are acquired so early in our lives that they might not be