

“What Do You Need To Know To Become A Global Deal Lawyer”

American Bar Association Section Of International Law
2010 Spring Meeting New York.

April 15, 2010
Yilmaz Law Offices, Istanbul
Cagatay YILMAZ

What Kind of Lawyering Is This?

I once returned back home from work at 4 o'clock in the morning. We were representing an American Nasdaq Company in a stock purchase deal with a Turkish Company. The negotiations were tough and I was trying to find a solution. So the meetings with the Turkish party were lasting long. Anyway I returned home and crept into the bedroom where I assumed my wife in bed was fast asleep. Well, she was in bed but she was not sleeping. I was a little tipsy (but still as sober as a judge) but believe me drinking was an essential part of the business in the story I will tell you. My wife looked at me and begun the cross examination,

"Where have you been?"

"Work"

"At 4 o'clock in the morning??? What kind of work is this?"

To which I replied "I am a lawyer honey". She then she ended the conversation by saying "Let me remind you that I am also a lawyer and we have been working at the same office for many years, but never have I come back home from work drunk at this time of night. What kind of lawyering is this?"

So, in response to this rhetorical question, I started thinking "What kind of lawyering IS this?" 70% of what I am doing is not what we were taught at law school. So is this really lawyering???

That night the Turkish party felt offended only because of the size of the first draft of the Share Purchase Agreement presented to them. This first draft was prepared by the client's lawyers in the States and it was about 50 pages long. In Turkey within the normal course of business we do not enter into such details in an agreement. Taking the view that this was a merger in which the parties would be doing business together in the future, the Turkish party took this as a lack of trust and the negotiations were broke down. To try and overcome this

stalemate I took my client to dinner and tried to explain him the issue. He was a very open minded person and together we called the lawyers in the States and explained to them that we would be simplifying the agreement. Then that very same night I had my second dinner of the evening with the Turkish party and convinced him that although we would be simplifying the agreement it is still going to be more than a “one page” agreement. So having two separate dinners one after another with bottles of wine I was drunk but at the end our client had the deal and everybody was happy.....except perhaps my wife

How can lawyering be global when law is not global?

I always wanted to study law but at the same time I always wanted to have an occupation that gave me the opportunity to travel around the world and meet and deal with people from different countries and cultures. Both of my parents were lawyers as well. So when I told them about my dreams I was told that law is not something global or international, just the opposite, law is something very national and geographically conservative. Therefore wherever you study law and have your license that is the place you can practice and those are the people that you deal with. This is the limit. That's it...

Now, we know that it is not. Investments, business people, trade has no borders.

We all studied law in one country and I suppose every lawyer in this room is licensed to practice law in one or at most two jurisdictions, but not more. However, we are all travelling around the world for and with the clients even though we do not have a common one global law. Law is still national even if economy and trade isn't .

So for sure we can say that lawyering is one of the professions which has been effected by globalization in a most peculiar way. We are different from doctors who have a knowledge of an anatomy the same the world over, nor are we like engineers for whom 2 times 2 always

makes 4. We are lawyers. We are lawyers that are educated nationally and licensed to practice law nationally.

So What is “Global Lawyering”?

Basically we can say that ;

- migration to developed countries,
- growth of multinational corporations and
- international investors
- The connection of markets and geographic regions by internet and cellular and satellite communications¹

increased the possibility of intercultural mixes between lawyers and clients.² And naturally this led the lawyers to educate themselves in intercultural communication skills.

Global lawyering could be defined as “lawyering in the international market where such lawyering involves performance in more than one jurisdiction or parties of different, sometimes several, nationalities.”³

We Are Not Litigators But Deal Lawyers

We are deal lawyers, not litigators and we do not feel comfortable in the courtroom because we believe that a good attorney is one that solves a problem in the office rather than the courtroom. The good attorney is one who catches the whiff of the possibility of a future problem at the very beginning and finds the most creative solution to prevent any possible

¹ “Lawyering In The International Market” Dennis CAMPBELL and Bryan BIRKELAND Preface

² “The Lawyers Intercultural Communication Problems With Clients from Diverse Cultures” Joan B.KESSLER, Northwestern Journal of International Law & Business V.9 Nr.1 (“KESSLER”) www.kesslerandkessler.com/publications/pdfs/Lawyers_intercultural_comm.pdf.

³ International Lawyer’s Deskbook Second Edition ABA pg.1 “The International Practice of Law” Lucinda A.Low, Patric M.Norton, Daniel M.Drory.

negative outcomes. Therefore we must be able to gather as much information as possible and clearly communicate with the client.

Being a deal lawyer is something very different from being a litigator. There is only one victorious party at the end of a trial but in a deal very often both parties get something out of the deal. Because a deal is very often shaped like this:

Two businessmen come together, negotiate and agree to enter into a deal together. If the two businessmen are doing something together for sure both are expecting some kind of profit because this is business not charity. Nobody is forcing the other party to enter into a deal with the other party; they do so of their own free will. So each believes that they will get something out of this deal. Once the business negotiations are over, it is time for the lawyers to appear on the stage. Our mission is to identify and at least minimize the possible risks for the client. But since the client is entering into this deal of his own free will, we, the lawyers, have to be creative in protecting our clients. Considering the fact that our client wants this profitable deal to go through, breaking off the deal is the last resort.

Clear communication is the basic tool we need to have. We really have to understand what the client is expecting from the deal. Clear communication with the client is absolutely not sufficient to be creative that clear communication with the other party is also essential. When dealing with parties from different cultures and nationalities we have to be prepared to take on the role of a cultural communication bridge between the two parties.

In a stock purchase agreement in which we were representing the American buyers it was agreed that the clients were going to purchase 50% of the stock of the Turkish Company. At a certain point during the negotiations of the terms of the Stock Purchase Agreement the negotiations were broke down because of a dispute between the parties on some business terms. However, our clients were very much willing to enter into this deal and they decided to

make a gesture of goodwill to the Turkish party. Unbelievable but true they transferred a considerable amount of the purchase price in advance, prior to signing the SPA. But this early payment had the exact opposite effect of what was intended causing the Turkish party to feel offended. So why was that? Well the Turkish party thought that seeing as they were going to be partners in business after the merger the parties would have to trust each other and trust was not something that they thought could be purchased with money.

Challenges In International Communication

Language

In verbal communication language is the biggest challenge. It *does* happen very often that a foreign language is the common communication language of the client and the lawyer but that language is a “foreign language” to both of them. I am communicating with clients from Germany, Italy, Qatar, Korea, Israel and our common language is English. For sure our vocabulary is limited, compared to our mother tongues and sometimes we give different meanings to the very same word. We, therefore, have to search for the real meaning of what the client is saying. What I do is to ask open ended questions to confirm that I really understand the client’s needs correctly. I push the client to tell me the story from the very beginning and spend really more time with patience, compared to a local client, to understand the whole picture. Language is a barrier not only in client/lawyer communication but also in business communication of both parties. Sometimes we see that a client and the other party, with total good faith, believe that they agree on something but actually they both mean different things. So actually there is no agreement. Therefore a deal lawyer has to search for the real meaning of not only what the client is saying but also what the other party is saying.

Recently, a few months ago we were approached by a Korean Company seeking legal assistance in a specific matter. Their investment in Turkey is a partnership with some local Turkish Companies so there are Turkish members on the board of the Company but the majority of the shares and therefore the majority of the seats on the board belong to the Koreans. At first we had a meeting with the Korean clients and during the meeting we were very confident that we understood the problem clearly and that we had the ability to provide them with an effective solution. We were told that they were very much satisfied and the solution we were proposing was also exactly what the Turkish partners were looking for. Later on one of the Turkish board members who was informed about our meeting with the Korean clients called me on the phone and told me totally a different story. We were very much confused and realised that there was almost no communication between the Koreans and their local partners. So we proposed to meet with the Turkish and Korean parties together and what we saw was that some of the Turkish board members did not speak a word of English, they only spoke Turkish. The other Turkish board members spoke some English, but could not be described as fluent and it was this group who had taken on the task of translating what the Koreans were saying for the non-English speakers. Naturally the result was that nobody understood anybody properly but all sides believed that they were in agreement.

Different Approach To Lawyers

Clients from different cultures may have different ways of working with lawyers. For example most people in Western country want their lawyers to be with them from the very beginning. I personally also believe that this is the way it should be but on the other hand we know that in some cultures, especially in the east, the attitude is “you do not need to contact a lawyer till everything is messed up.” or “call the lawyer at the very last minute just for formalities sake.” It has happened to us. We’ve come face-to-face with a 50-page contract that we have never

seen before, emailed to us for revision and with just 30 minutes for us to share our detailed comments! And to be honest I do not know how to overcome this “inter-cultural problem”.

Foreign Investors’ Limited Initiative

The foreign direct investments of multinational companies very often appear to be separate affiliate companies registered in that foreign country. Although these companies have their own directors, managers and organization because they are “affiliates” the directors and managers may not have the initiative to take important decisions. It is for this reason that we have to be careful about timing. We have to notify the client as early as possible so that they would have the time to consult to the headquarters.

Foreigners Do Not Know What We Know About Our Law And Legal System

Law itself is a part of the culture and the client may think that the legal system is or should be more or less the same in a different country. This may not be only a client-centred mistake, it is possible for a lawyer to have a similar view. When dealing with a local client usually we do not bother emphasizing the widely known legal basis and instead we simply jump to the conclusion because we assume that the client is aware of the basics of the legal system. However, the situation with the foreign client may be (and often is), totally different. When assisting the client we have to make sure that he or she understands why we are doing things that way but not the other. We have to be patient in explaining the ABC of our legal system so that we can communicate better. For example, there are some routine but important things that we all do. Normally a local client would know when and what to do in such routine situations however a chief legal counsel sitting at the headquarters of a multinational corporation dealing with issues concerning their investments in China, Italy, Germany, and U.S.A. may not be aware of or recall some procedures that have to be carried out Turkey. We do experience instances where multinational Companies forget and or

cannot understand why certain routine work is important. So what we do is even if for a routine and basic task we always start with a simple one paragraph explanation on local law, try to outline very briefly the highlights and then in the second paragraph we ask for the required documents.

Eye Contact

In some cultures eye contact is believed to be essential for good communication. In contrast, especially in the Far East, for some cultures this is not the case. So a client from Tokyo may not look directly into our eyes while we present an important legal issue but that does not necessarily mean that he or she is not paying attention to what we are talking about.⁴

Personal Space And Touch

In Northern Europe and Northern America for example people usually leave a space between themselves when interacting. Business people do not touch each other. In the Mediterranean region on the other hand even business people get closer and people do not need to be friends or family members to touch each other.⁵

Ethnocentrism

When I was a small child if I behaved badly to a friend my mother would tell me “Do not do unto others what you would not want them to do to you.” This code of behaviour sounds absolutely correct and it has been a golden rule throughout my life but be careful, this rule does not work in intercultural communication. This is a kind of ethnocentrism.

⁴ “Cross Cultural Negotiation” www.kwintessential.co.uk/cultural-services/articles/cross-cultural-negotiation.html.

⁵ ibid

Ethnocentrism can be defined as “viewing the whole world only through one’s eyes with one’s belief.”⁶ This is a trap that we all have to be careful to avoid. We all have to be aware that the client may have a different background and we have to be honest to ourselves that we may have some prejudices. If we cannot manage to overcome these prejudices we have to learn to control them.

The golden rule to achieve an efficient intercultural communication is “increasing empathy” but the challenge in increasing empathy in intercultural communication is we have to have some idea about the other party’s background and culture. When I meet with a client whose culture I am not very familiar with I read up on not only the possible legal issues that we are going to discuss but also try to collect as much information as I can prior to the meeting. The Internet can be a very useful source for this.

Stereotyping

Stereotyping can be defined as “generalizing a group based on some prior assumptions.” If I believe “all Americans are know-alls, they think they know everything.” or “all Iraqis love guns” or “Italian clients always try to find a way not pay to lawyers fees.” (This is valid for Turkish clients by the way☺) then I forget that we (including the clients) are individuals that whatever group we belong to we may have different values. Stereotyping is something very dangerous for lawyers because if we start stereotyping then we start forgetting that each client is an individual. And if we start forgetting that each client is an individual then we start forgetting that whatever we are doing for each client is unique. No two deals can be identical, there is and there should always be a personal touch in each issue we are dealing with.

⁶ KESSLER pg 68

Cultural Imperialism

We are all brought up in a certain culture and it is not unnatural that deep in our hearts we may believe that our culture is better than the others but let me tell you a secret no culture is superior to the other. Such prejudice may lead what is called a “horizontal dialogue”⁷. In a horizontal dialogue parties are not equal, one party is “higher” than the other party. The most efficient dialogue is “vertical dialogue” where parties are equal and no one is superior to the other⁸.

Education

It's a “cliché” but it all starts with education. For sure law students should know law but this is no longer enough in our global world. Law is “sine qua non” for a law student but in addition to classical legal knowledge students have to be aware that there are different types of law practice and lawyering in the international field is not something that only a small, selected group of lawyers do, but just the opposite it is quite common practice today compared to 1960's or even 1970's. Within this scope, intercultural communication skills become an important issue. When it comes to communication skills it is always better to have some concrete hands-on experience than trying to get something out of theoretical books. Therefore inviting foreign lawyers who have international experience would be an alternative to make such lessons more attractive.

⁷ “Attention to Cultural Imperialism Beneath Discourse Implicature in International Business Communication” Xinping GUAN www.immi.se/intercultural/nr9/guan.htm

⁸ “Communicative Challenges In Multinational Project Work” Jonas STIER, Margareta S.KJELLIN Malardalen University, Sweden. www.immi.se/jicc/index.php/jicc/article/view/47/22

Time

Lawyering in the international market always takes more time compared to lawyering in the domestic market. Even the very basic things like talking to the client and making sure that parties understand each other takes more time because of interacting in a foreign language. A lawyer, whatever field he or she is working in, has to think alternatively for possible aspects of an action or a word, but a global lawyer has to think two or three times more alternatively because it is not only law that has to be considered.

Respect (But Real Respect)

Respecting each other is also a “cliché”. Of course we have to respect each other, we have to respect different cultures and individuals with different backgrounds. However, what I am talking about is “real” respect.

Respect may occur in the way of not agitating the other party to enter into “sensitive fields”. You may believe that what United States is doing in Iraq or what Israel is doing to the Palestinians or what happened to the Armenians in Turkey is totally correct however it may not be a good idea to bring up this subject if the other party or your client is from Iraq, Palestine or Armenia and the real challenge is we have to learn to listen to the other party with patience and empathy if by chance we enter into these “sensitive fields”.

Go Global By Staying Local

This is a phrase I read in an article of Carole SILVER and I have to admit that I loved this phrase⁹. When dealing with international issues, it is always better to have local contacts in

⁹ “Winners And Losers In The Globalization Of Legal Services: Situating The Market For Foreign Lawyers”
Carole SILVER http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=carole_silver

that foreign jurisdiction. No doubt that a local lawyer has deep knowledge in local laws but more than that he or she is the one who can guide us in interacting with the local clients and/or with the other party.

For A Better Peaceful World....

I know that it sounds very idealistic but with all my heart I do believe that lawyers dealing with international issues are hidden powers for global peace. It is not enough just to have a deep knowledge of law anymore to be a good lawyer. We have to improve our intercultural communication skills. We play a great role in building a bridge between the parties for a better understanding. Very often we act as “cultural interpreters” and believe me this is what this planet needs.