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### **The worldwide dimension of continental law**

A new aspect of the global dimension of the Foundation's activities is the part taken in the design and distribution of the brochure entitled "continental law, global, predictable, flexible, cost-effective", together with the German legal professions. You will find a detailed account of the brochure and of course the brochure itself in this newsletter. What should be underlined at this stage is that this is the first coordinated effort made by legal professionals hailing from two different continental law countries to define the assets of this legal system in simple and accessible words for laymen. It is quite a difficult exercise to remain precise and accurate whilst aiming at a broad public. It's even more difficult when one does not hail from the same national law, not the same training, not, of course, the same language. The job was done however in a remarkably short time of barely more than a year. The objective is to support legal diversity by explaining to business and administration decision-makers, when they are in a capacity to prescribe the law to be implemented, that they often have the choice of the rule best suited to their specific needs. In this way, they are more likely to gain access to excellence and legal institutions are more likely to progress.

We however wish to reinforce yet further the global nature of this brochure. All the drafters party to this work are unanimous in their desire to see it blossom into a truly multinational instrument. This is why we call upon all the continental law jurists to join us in improving this document, so as to prepare with the next version one that will be even more representative of our common legal culture.

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### **Release of Brochure "Civil law: global, secure, inexpensive, flexible"**

The brochure "Civil Law: global, secure, inexpensive, flexible," developed jointly by French and German lawyers, was officially presented on February 7 in Berlin to Mrs. Leutheusser-Schnarrenberger, Federal Minister of Justice and on February 9 in Paris to Mr. Michel Mercier, Keeper of the Seals, Minister of Justice and Freedoms.

To understand the value of such a publication, one must go to the source of the project, namely German lawyers' response to the publication in 2008 by the English Law Society of a booklet entitled "England and Wales, Jurisdiction of Choice." Promoting to business leaders' their choosing English law and English courts clearly called into question the quality of "civil" law or civil law. In response, the legal community and judicial bodies beyond the Rhine soon stepped forward with the release of the publication in 2009 of a bilingual German-English information booklet designed to extol the advantages of German law. 50,000 copies of the brochure "Law - Made in Germany" were printed at the initiative of the Alliance for German law ("Bündnis für das deutsche Recht"), and provide information within the framework of economic efficiency, on the key legal concepts of the German system and do so in an accessible language that has seduced the economic decision-makers.



Photo S. Jabinet : Mr Axel Filges, Ms Leutheusser-Schnarrenberger, federal Minister of Justice, Pr. Michel Grimaldi

The partnership between the Fondation pour le droit continental and the Alliance is part of the logical continuation of this first German publication. Motivated by similar concepts concerning the soundness and effectiveness of "civil" law, the two organizations jointly developed in 2010 a draft booklet devoted to the advantages of civil law, and supported on the French side by the French National Bar Council, the Superior Council of Notaries, the founding members of the Fondation, the University of Paris II Panthéon-Assas, and the Association of Franco-German Jurists.

How should this new brochure, which is the result of merging the knowledge and expertise gathered together within the Alliance and the Foundation, be defined and interpreted? This brochure is primarily intended to serve as an international communications tool, and to raise the standing of civil law, by setting out the main strengths and explaining the application mechanisms therein forms the essential message of its contents, which are intended for an audience of non-lawyers, business leaders and economic policy-makers. As prescribers of the law through their choice of which law is applicable to a company's contracts, they should be encouraged to choose civil law and Romano-Germanic law, along with the legal professionals who advise them and defend them.



*Photo S. Jabinet: Ambassador Reinhard Schäfers, Mr Henri Lachmann, Mr Michel Mercier, Minister of justice and Pr. Wolfgang Ewer*

The brochure consists of some twenty pages of text published in France in a bilingual French-English version and in Germany in German-English. This brochure, which is synthesizing in its form as well as in its content, is tailored to various media and has been designed to be widely distributed at the many national and international events organized by legal professionals, who are partners in the project and by the supporting foundations.

Distribution of the brochure is the watchword of this initiative. The short and medium term prospects relate to broader publication and more translations thereby encouraging more and more countries to adopt it in order to transmit to the political, economic and administrative participants the reflex of a plurality of legal systems

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## European Contract Law



### **Response of the Fondation pour le droit continental to the consultation launched by the European Commission.**

By **Professor Michel Grimaldi**, Chairman of the Scientific Council of the Fondation

The Fondation pour le droit continental wanted its "response" to express the diversity of civil law, and thus its wealth, in Europe and outside of Europe.

Its response has two parts:

Part One: French response

Part Two: Colombian, Italian, Louisiana and Quebecois responses.

**The first part** reflects the difficulty in developing European Law, which, according to the continental tradition, is a written law, legislated and even codified, but is also "well-written" law, that is to say clear and accessible and also respectful of national traditions, to the fullest extent consistent with an undertaking to harmonize them. The difficulty - why deny it - is tremendous. Only a strong political will - which has always driven the great legislators, and even more so the codifiers - can overcome it. Without the will of a Europe that is united, not only on the defense of the Euro, but also on that of social justice, the undertaking to harmonize European law risks enduring stagnation.

**The second part** reflects that the undertaking to harmonize European Law is perceived differently, not only within Europe but also beyond. We note with interest the differing views that come to us from Quebec and Louisiana on what would be the best instrument to develop European contract law. However, there is complete agreement between these two civil law "countries" surrounded by a universe of common law in rebutting any analogy with the experience of the Uniform Commercial Code of the United States. This rebuttal is well worth pondering...

[Complete response of the Fondation pour le droit continental](#)



**Jacques Toubon,**

Former Minister, Secretary General of the Fiftieth Anniversary of African Independence

**What characteristics argue in favor of civil law in relation to the requirements proper to West Africa?**

This question is important because it summarizes the entire competition that exists today between Civil Law and Common Law. Globalization seems to go together with an extension of Anglo-Saxon law and particularly Anglo-Saxon procedure, which is to say, the prominent role of judges, jurisprudence, and thus, of course, legal professionals and particularly the familiar lawyers and law firms.

Whereas, if you look at the evolution since the 19th century, through colonization or simply through the expansion of world trade since the industrial revolution, we see that many countries far from Europe have adopted continental-type bodies and procedures. And here I would give one little known example that concerns France, which is Thailand, formerly Siam, whose law is modeled on that of France.

I make this comment because ultimately this rise of Anglo-Saxon law in today's globalization is not evident if one refers to the intrinsic nature of the two types of law. Common Law's advance is explained by the influence of the American economic power, which is accompanied by the legal power of legal professionals, academics and judges.

But if one looks at the characteristics of the law, civil law provides a better answer to what is now the central issue of globalization, namely development. From this point of view, the certainty of the legal environment appears to be a very important component. This is precisely what civil law can bring to fragile economies that have enormous needs for public and private investment.

And this is for one simple reason; this is written law that particularly includes a certification component called authenticity. The cost of legal services, which is to say access to the courts, is less expensive than in Anglo-Saxon proceedings. And I would add another advantage, as concerns us, the French and Europeans, which is the professional networks that practice law civil law (notaries, lawyers, bailiffs). They are extremely powerful and provide not only the security of civil law but also the guarantee of their professionalism. If one wants the new legal structures to be adapted to the requirements of development, it would make sense to turn instead to turn to civil law.

It is certainly generally believed that Anglo-Saxon law is the best for business. But this relates to the large international corporations. However, if I consider the interest of the State, local businesses and African societies, one can say exactly the opposite. I think this is a convincing argument today for the adoption of civil law. We need to make more room for civil law in international bodies such as the WTO, the World Bank or the African Development Bank.

**How could this law be implemented? Are we working on or studying the creation of research groups?**

I think the evolution of law specific to development should refer to the example of OHADA, an organization that concerns business law. The OHADA system, which is Francophone in nature, carries civil law jurisdiction and has a training school in Porto Novo, Benin (ERSUMA) and a common "cour de cassation". What seems crucial to me in this model is that it is not a system tacked onto a reality by an indifferent political will. On the contrary, business leaders are requesting it, especially all those who met during this fiftieth anniversary year. And they are also the prescribers. I watched how they refer cases to the courts. They develop arguments that are often upheld by judges and that mix Anglo-Saxon legal concepts and civil law concepts. This result in a kind of legal creation that I think could support some instruments, such as standard contracts, which are forms that might reflect this status of the law and make things easier. This does not involve research but is actually pragmatic implementation work.

Of course, there is also the question of research. Many academic studies have already been done on this subject, notably by the Germans. In France, we are among the most advanced lawyers in this field. When I was a member of the European Parliament, I promoted the presence of the French alongside the Germans and British.

As for the OHADA example, the Fondation could try to promote reflection about African law

much as there is Asian law and European law. We would certainly have allies in this endeavor. I am thinking particularly of the Germans, who set up an institute to promote German and civil law, and did so well before the creation of the Fondation. With their cooperation, we could try to promote an "African Law" operation and begin the project with a meeting of African lawyers, similar to that of Mediterranean zone lawyers that was organized with the Fondation's assistance. This would indeed be a way to initiate this thinking process concerning the common principles of civil law in Africa.

**Could you tell us more about these already existing trade-offs between Common Law and Civil law? Where do you think this ability to accommodate the two court systems comes from in legal professionals as well as individuals?**

Many things in this area still follow the legacy of colonization. Legal proceedings today are still largely organized along the lines of the colonizing country's legal proceedings depending on the nature of the colonial power. Legal traditions and cooperation follow in this direction, thus somehow in the direction of perpetuating the division between the two systems of law in Africa. But at the same time we realize, when studying the evolution of caselaw, that the courts that belong to the two opposing traditions, have in common a number of issues, and have developed common solutions and answers. Because in the end, African concepts rule. We must take this into account and not produce some kind of confrontation in order to try to defend the positions of Civil Law versus Common Law. For their development, it is in Africans' interest to compromise on both legal and judicial systems in order to arrive at solutions that are as consistent as possible with their needs, and in particular with a need that is essential in Africa, that of securing private investment. So instead of risking Common Law's eviction of Civil Law and in this way fight in its defense, we would have jurisdictional solutions that integrate all or part of the spirit of civil law. This would be win-win for this law.

**Specifically, what are the priority needs in matters of Civil law in West Africa?**

The needs identified by business investors can be summarized in three main aspects: first, clear and secure procedures, investment codes to determine what is allowed and under what conditions, secondly, clear competitive systems, public procurement that is followed through on, and thirdly (and perhaps now the most difficult) an independent judicial system.

In terms of needs, I can put forward one very specific issue, that of book publishing. The internet cannot be a substitute for paper books in Africa, and facilities and maintenance are expensive and their operation is very uncertain. There is therefore a great need for inexpensive publications. Good policy would stimulate and support local publishing. Publishers within universities should be assisted. The Ministry of Cooperation and the Francophone University Agency have taken action on a program concerning scientific matters. I think we should develop this type of action for the law. Today, publishers like Hachette are increasingly determined to support subsidiaries in Africa and not to ship books by boat. In terms of law in particular, I think we should encourage the publication of law reports. The IDEF (International Institute for the Expression of Law that is French-inspired) has, for example, released the OHADA code with case law memos, and not just the civil law courts but also memos from the English Common Law Courts. This again demonstrates that there are often common solutions that can come from different ideological approaches.

**What could be the role of partners of the Fondation pour le droit continental in support of your activities?**

Another means of development, that I think is fundamental, is the creation of a Professorship of civil law in Africa with the support of the Fondation and some patrons. The University of Yaounde works well, and hosts OHADA's Executive Secretariat and would be able to host a university professor. Using this mechanism, we could of course create publications, host lawyers from around the world, thus creating south-south links with legal professionals from South America, Egypt, etc. A sub-Saharan university could bring together a range of talent, produce Masters programs and theses and then expand these skills.

In conclusion, I would say that it is important to understand and distinguish the intrinsic elements of civil law that could effectively operate in developing countries and particularly in Africa. It is a mistake to consider the extension of the Common Law empire as unavoidable as long as the reality on the ground is taken into account.

## **European Perception of Arbitration with the Arab countries**

Introductory text by **Mr. Jacques el-Hakim**, Associate Professor, School of Law, Attorney

### **Are there any problems unique to arbitration between European countries and those in the Arab world?**

In this area as in many others, it seems difficult to group countries into opposite categories. The economic and social situation and the political and legal regimes vary so much from one country to another within the same category that would be inaccurate and irrelevant to oppose one to other as homogeneous components for comparison. It would make more sense between industrialized and agricultural countries, between developed and developing countries and between socialist and market economies... It would revive the problems of North-South dialogue, and even those resulting from the recent extension of the Common Market to Mediterranean countries.

In many Arab countries arbitration is prominently used, both for private companies as well as for the State. It has always been used among individuals and in public affairs (one can consider, in particular, the arbitration that occurred in 659 to decide between Ali and Mo'awiya, both candidates for the caliphate) and has not experienced, for example, the hesitancy of French law in this area. But yet again, at this level, the European party's position appears to be favored. With its organization and experience, the latter, upon signing the contract, was able to prepare a record of the litigation that it anticipated and gather the evidence to support its claims. Once the conflict arose, it was more apt to preserve its rights, and to initiate, at the timely moment, the proceeding to appoint arbitrators, advocates and qualified experts, which are all appropriate elements to achieve a favorable award, whose enforcement it can obtain by appropriate means. Faced with this preparation, the Arab side often appears disorganized and inexperienced: lack of records and evidence, delay in performing obligations, compounded by shortages of goods and currency, bureaucratic delays, lack of qualified staff. Once the dispute arises, the Arab party is barely able, in a timely manner, to initiate the proceeding, to reserve its rights, to appoint the appropriate arbitrators and advocates based on their objective qualifications. Under these circumstances it is natural that the Arab side often loses its arbitration and assigns blame on the arbitrators or on the institution administering the arbitration. The repetition of these unfortunate experiences has led some Arab countries to move away from arbitration itself and, more particularly, from foreign arbitration.

Unable to compete with its counterparts from industrialized countries on the economic and technological levels, the Arab side cannot easily comply with court decisions or arbitration awards that enshrine this imbalance. This inability to override the rules of international trade of the competing legal institutions forces it to compensate for the imbalance through factual or legal means. Only greater information concerning economics and judicial matters by Arab countries, better management thereof, and greater preparation to conduct the arbitration can reduce the imbalance that affects their relations with industrialized countries. An exemplary commitment to good faith can then do the rest, this being the alpha and omega of any business relationship.

#### **Access to the document:**

[Perception européenne de l'arbitrage avec les pays arabes 2011.pdf](#)



### **For a Critical Analysis of Chinese law**

By **LI Bin**, who won the thesis prize 2010

The research conducted on Chinese law in Francophone countries has intensified in recent years with the oral examination of the dissertations on various subjects of this law, which has itself been characterized by a legislative frenzy. The thesis prize, established by the Fondation pour le droit continental in a quest for emulation between legal systems, aims to encourage research by providing friendly intellectual support. There is a general consensus that the contemporary legal system in China is similar *a priori* to civil law. The reality of Chinese law is however much more complicated. In fact, Chinese law is very familiar with the methods of comparative law to meet the needs of economic reform. The Legislature refers to foreign law - common law and civil law -, as well as international legal standards, to draw useful lessons or as sources of inspiration for normative work. We must above all admit that reducing the gap between the development of rules of law and the effective implementation of these rules remains a major problem to be solved in China. This is not a issue of selecting standards, but of applying them. The virtues of civil law with respect to predictability and accessibility of law, the legal certainty of transactions and conflict prevention are relevant especially as the legal enforcement mechanisms in China still need to be adapted, reformed and restructured. The development of Chinese law in a changing society may well enrich the diversity of legal systems, but if and only if this law is truly real as a result of the proper functioning of the law's guarantees. Faced with the contrast between, on one hand, progress in the standardization work and, secondly, the stagnation of legal enforcement mechanisms, the critical approach to research is both timely and essential to advance law in China.

Critical analysis of Chinese law is an approach that is both constructive and objective, which consists of identifying problems, analyzing them and seeking possible solutions to improve Chinese law. The Fondation pour le droit continental, through these strategic actions designed to protect the diversity of law, is helping to increase awareness on the role of law in China by the coexistence, competition, and thus the balancing of different systems of law, which incites efforts for the development of law in China. Critical analysis of Chinese law is also a method which promotes openness that consists in referring to the experiences of foreign law, and then transposing and adapting them to specific situations in China.

The Fondation pour le droit continental, through these comparative approaches without prejudice, is a source of intellectual inspiration whose inclusion will contribute to the development of Chinese law.



### **Chair of Continental Law at the National University of Vietnam at Ho Chi Minh City**

By **Nicole Souletie**, Executive Director of the Fondation pour le droit continental  
The Law Professorship established by the Fondation pour le droit continental supports the training of a Masters in International Business Law that has been the subject of an agreement between the University Pantheon-Assas, the National University of Vietnam at Ho Chi Minh City, the Royal University of Cambodia and the Fondation pour le droit continental. The Fondation awards scholarships to five students seeking to obtain a doctoral degree in law. Four twenty-hour courses followed by a conference are scheduled for the academic year 2010-2011 regarding general obligation law.

The first session was conducted by Professor Marie Goré from December 16 to 19.

[Read the report.](#)

The second session was moderated by Professor Alain Ghozi from January 24 to 29.

[Read the report.](#)

The next courses are planned for April, conducted by Professor Denis Mazeaud and Professor Michel Grimaldi. An end of the year conference will be moderated by the Chinese Professor Li Bin.



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### **Justimemo : ABC of Justice and Law in France**



French Ministry of Justice launched its internet portal [Justimemo](#), a multimedia platform for the public to discover the world of Justice and Law. In a fun and educational manner, this program presents the world of the French legal system in all its aspects (proceedings, professions, organization) through online texts, reports and audio and video interviews, as well as many photographs. Its flexible and intuitive navigation makes it a user-friendly tool of knowledge that each user can take advantage of by creating a personalized browsing experience, downloading background files and consulting a glossary.