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French fancy

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William Curtin, Hogan & Hartson
The clarity of Anglo-Saxon M&A contracts has given them prominence in French transactional law, and helped France compete on the global stage. By William Curtin

The prominence of Anglo-Saxon contract norms in French M&A transactions, often referred to as the 'Anglo-Saxonisation' of French M&A contract norms, is a topic that lawyers in France still like to debate. But the issue itself has moved to the books of history.

An Anglo-Saxon form of M&A contract is meant to be a structured and complete document. It is structured in that it opens with a series of recitals presenting the transaction and its objectives, and then proceeds to articles and sections that set out the steps required to implement the core transaction.

It is complete insofar as it documents: the specific representations and warranties that each party makes and the other relies upon; the other commercial agreements the parties have reached; the specific conditions that must occur (unless waived by the benefiting party) in order for the transaction to close; the circumstances under which, and the time when, the contract might be terminated by a party; and the liabilities, qualified and quantified, to which a party be exposed.

The benefits of this structured and complete approach are clear: with its sound structure, the agreement is easier to understand and the parties are less likely to forget to address an issue, and, with completeness, there is no, or at least very little place left for, uncertainty as to what has been agreed.

Admittedly, the Anglo-Saxon form of an M&A contract is longer and takes more time to negotiate and draft than many other forms. But once the parties reach agreement on a particular commercial point or legal issue relating to the transaction, the out-of-pocket cost of translating their agreement into words in a contract is usually very modest compared with the potential cost of litigation to determine the original intent of the parties, not to mention the delay and, most importantly, transaction uncertainty often generated by such litigation.

Historically, French M&A contracts, while attractive for not being as voluminous, can be less complete and less structured than the Anglo-Saxon form: a traditional French form of M&A contract tells the story of an agreement, and sets forth the parties' shared commercial objectives, but often focuses less on the means to address certain contingencies or to implement the transaction itself.

Uncertainties would have to be decided by a court in accordance with the French principle of sovereign interpretation of the contract by the court (interprétation souveraine du juge du fond). However, if the parties' specific understandings are not well reflected in their contract, even if the court were to dispense justice as fairly and evenhandedly as Saint

Louis of France famously did while “[sitting] down with his back against an oak” in the Vincennes Forest, the parties run the risk that, in a world in which M&A transactions (and the parties themselves) are increasingly complex, their contract may not be enforced by a French court in a way that perfectly reflects the parties’ original intent.

French business leaders have been active leaders in the globalisation of business and finance for decades and, in our experience, have increasingly accepted, and in some cases even requested, that their M&A transactions benefit from Anglo-Saxon contracting norms - in much the same spirit of openness that the French have accepted and embraced the transposition of several EU directives into French law (such as the tender offer rules).

In so doing, French M&A practice has not succumbed to a form of economic imperialism by the English speaking peoples of the world, but rather advanced the successes and effectiveness of French M&A within France and on the global stage.

William Curtin is a partner at Hogan & Hartson