Notes on the Cultural Dimension of International Commercial Arbitration

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This article offers some thoughts on the impact of "culture" – however elusive that term will, by definition, always be – on international commercial arbitration. It is a series of observations by two interested practitioners rather than an attempt at a comprehensive definition or explanation of the subject matter. Indeed, the authors suspect that any such attempt at a comprehensive systematic treatment of culture in arbitration is ultimately bound to fail. Rather, what interests us most is how cultural differences can lead to misunderstandings or conflicts in arbitral proceedings. At the end of the day, what we are concerned with is the conduct of our cases, and to ensure that they run smoothly.

We start by outlining some strands of thinking among scholars and practising lawyers on what constitutes the "cultural dimension" of international arbitration, and – to the degree that it is capable of definition – whether that dimension actually matters. We then set out our own view of the question. We think that culture matters a great deal. In particular, despite the rise of an increasingly uniform "arbitration culture", with an ever expanding body of soft law, cultural misunderstandings – resulting from different expectations among stakeholders – arbitrators, counsel, party representatives, witnesses – continue to play a material role in the course (and in some cases the outcome) of international arbitrations. Finally, we touch upon some examples of areas in which misunderstandings can occur, drawing upon anecdotes told by friends and colleagues, concluding with some thoughts on how practitioners may seek to hedge against such misunderstandings arising.

What is the "Cultural Dimension" of International Arbitration?

National legal culture

Many observers define cultural misunderstandings as arising out of the different national legal systems and cultures that shape the instincts and expectations of stakeholders in the arbitral process. For instance, delivering the annual School of Arbitration Lecture a few years ago, Professor Ibrahim Fadlallah lucidly outlined what he saw as the major fault lines, between distinct legal cultures, that lead to rifts in arbitration proceedings.[1] He saw a major divide between adversarial common law jurisdictions and inquisitorial civil-law jurisdictions, the former for instance characterised by a heavy reliance on written witness testimony, cross-examination and extensive document production rights, all of which are largely unknown in the latter. Professor Fadlallah identified a further fault line

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1 The revised manuscript of the lecture was subsequently published as Ibrahim Fadlallah, *Arbitration Facing Conflicts of Culture*, Arbitration International 25 (2009): pp. 303 – 317. Another example of this view of cultural misunderstandings in arbitration is Khawar Qureshi's *Cultural Sensitivity and International Arbitration*, International Journal of Arab Arbitration 2009, Vol. 1 Issuue 2, pp. 41 – 46.

between both these "western" legal traditions and the Middle Eastern tradition (or rather: traditions) with its/their infinitely subtle approach to parties' mutual obligations.

Transnational arbitration culture

Over the course of the last two decades or so, the cultural dimension of arbitration has increasingly been perceived as something *sui generis*: a distinct international arbitration culture, in which participants are shaping a more and more global identity and, as a seminal early sociological text on the subject puts it, a "*transnational legal order*".[2]

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This is not surprising, of course. As cross-border trade has increased so too has the use of international commercial arbitration clauses. This has given rise to a proliferation of arbitral proceedings, which in turn has led to the emergence of standards of international best practice, often built around popular guidelines on issues such as document production, conflict of interest and counsel conduct. The guidelines issued by the International Bar Association and the Chartered Institute of Arbitrators are particularly influential in this regard, but there are numerous others.

This is an ongoing process. There is now such a thing as an international arbitration culture, and looking back a few decades one can see clearly how it has evolved. For instance, it is hard to imagine today that a party-appointed arbitrator would, at a hearing, pass notes with instructions to "his" or "her" party, i.e. the party who made the nomination. Some 60 years ago, that is precisely what happened in an international border dispute.[3]

Nevertheless, the constantly shifting boundaries of that culture are difficult, if not impossible, to delineate, even though there is now a fairly large body of work attempting to do so. One scholar, Joshua Karton, has even bravely attempted to formulate a theory of international commercial arbitration culture that, he posits, provides a comprehensive framework for explaining and even predicting tribunal decisions.[4] Karton sets out to explain the impact of culture not merely on arbitral procedure (which is the most commonly analysed angle) but on substantive law.

Karton's effort is valiant and offers notable insights into the arbitral process from a multi-disciplinary angle that too few scholars dare to tackle. Yet it is, in our view, ultimately unsuccessful. Using numerous interviews with practitioners and tools of sociological theory, Karton convincingly shows that there is an important, and growing, trend towards a transnational arbitration culture. However, he, like any other observer of arbitration, fails to pin down with sufficient precision what that culture actually is. Partially, this is due to the nature of the commercial arbitration process, which – unlike investment arbitration – is usually confidential, with awards rarely published and hearings never open to the public.

Synthesis

There are, then, two principal cultural fault lines along which conflicts or misunderstandings can develop, though both ultimately defy comprehensive definition and categorisation. First, that between the different national or parochial legal traditions in which stakeholders in the arbitral process are raised. Secondly, that between those traditions and the (arguably still emerging) transnational arbitration. The two takes on the subject are not, of course, mutually exclusive. Quite the contrary: combining them probably offers the sharpest possible focus on cultural issues in arbitration. As one scholar insightfully shows, even the most seasoned global arbitrator has overlapping national and transnational cultural instincts.[5]

Renowned arbitrator Michael Hwang offers a handy and refreshing, though certainly non-exhaustive, range of categories of stakeholders in commercial arbitrations that are particularly prone to causing cultural rifts or misunderstandings.[6] On one hand, Hwang identifies what he terms *Arbitration Guerillas*:

2 Yves Dezalay and Bryant Garth *Dealing in Virtue: International Commercial Arbitration the Construction of a Transnational Legal Order*. Chicago: University of Chicago Press, 1996.

3 See I. B. Morton, *Buraimi: The Struggle for Power, Influence and Oil in Arabia*, London and New York: I. B. Tauris, 2013, pp. 166 *et seq.*

4 Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law*, Oxford: OUP, 2013.

5 Ralf Michaels, "Roles and Perceptions of International Arbitrators", in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance*, Oxford: OUP, 2014, pp. 47 – 73.

6 Michael Hwang, *Why is There Still Resistance to International Arbitration in Asia?* Lunchtime address at the International Arbitration Club, autumn 2007. Available here: http://www.arbitration-icca.org/media/4/92275989554120/media012232972346990why_is_there_still_resistance_to_arbitration_in_asia.pdf.

respondents that are familiar with international standards of practice, but who take the tactical decision to disrupt proceedings as they are convinced of a negative outcome, e.g. by disputing the jurisdiction of the tribunal at every turn, or by circumventing it in going to the local courts.

On the other hand, Hwang identifies parties and their representatives that are either wholly new to arbitration (what he calls *Arbitration Neophytes*) or have very little experience, which moreover is oftentimes negative (*Arbitration Atheists*, *Arbitration Agnostics* and *Arbitration Wannabes*). Such stakeholders will frequently cause disruption by not following international best practice, either because they are unfamiliar with best practice or because they genuinely object to arbitration or some of its aspects as a dispute resolution tool.

In our experience, dealing with *Arbitration Neophytes*, in particular, can be a tricky issue. Their behaviour is not tactical (and can, accordingly, not be countered by tactical measures) but is rather due to lack of familiarity with the arbitral process. For parties (and occasionally arbitrators) who are 'neophytes', the problem with arbitration tends to be a cultural question more than anything else. They will have certain ingrained expectations arising out of the culture (and particularly legal culture) in which they are at home, extending to issues such as the credibility of witnesses, approaches to document production, communications with the tribunal etc. They expect that international arbitration conforms to those expectations. This can give rise to cultural misunderstandings which – even though this may not be at all intended – can disrupt or even derail arbitration proceedings if not responded to carefully and sensitively.

Why Culture Matters

Perhaps as a result of the development towards greater uniformity on which we touched above, there is an increasingly strong view among practitioners and scholars that the cultural dimension is not really an important factor in arbitration anymore. Indeed, some have gone so far as to posit that culture does not really come into the conduct of arbitration at all. As one observer puts it:

> *"because of the predominant role played by the will of the parties and the accompanying legal framework, international arbitration is essentially culturally neutral and a-historic [...] [E]xcept for essential due process principles, it does not – and should not – lend itself to being "culturally" classified one way or another [...]"*[7]

This, another writer concludes, means that "*many "cultural conflicts" in international arbitration are in fact legal questions that must be resolved through the appropriate applicable provisions*".[8]

This view, with respect, is short-sighted. True, party autonomy is one of the fundamental tenets of arbitration. True, also, that many questions at the heart of what could be termed "cultural misunderstandings" are really procedural questions by another name: what is the extent of a party's document production rights? To what extent can counsel coach witnesses for their appearance at the hearing? Etc. This does not mean, however, that it is possible for the parties to address all of these issues in their agreement to arbitrate. Nor could one conceivably pre-empt them all from arising by 'legal' means, i.e. either by a further proliferation of laws, institutional rules and guidelines or by making arbitrators' procedural orders more detailed than they already tend to be.

There are two principal reasons for this. First, as to party autonomy, the will of the parties will usually only extend to a very general agreement to arbitrate. The parties rarely, if ever, have detailed expectations as to the handling of those procedural issues where the differing cultural backgrounds of stakeholders really come into play. Most parties at root still do not consider arbitration a *sui generis* kind of dispute resolution. As scholars have pointed out, and as shown by numerous surveys into the matter, parties tend to choose arbitration for a few very specific reasons, such

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7 Horacio A. Grigera Naon, "Cultural Clashes in International Arbitration: How Much of a Real Issue?" in Miguel Ángel Fernández-Ballestros and David Arias (Eds), *Liber Amicorum Bernardo Cremades*. La Ley: Wolters Kluwer España, 2010, pp. 557 – 560, p. 558.

8 Aníbal Sabater, *"Cultural Conflicts" in International Arbitration: Myths, Misunderstandings, and Lessons From Dealing With the Unusual*, WAMR 2012 Vol. 6, No 1, pp. 125-138, p. 125. This is not an entirely new hypothesis. For instance, William Slate II made essentially the same point more than a decade ago in his paper *Paying Attention to "Culture" in International Commercial Arbitration*, delivered to the 17th ICCA conference in Beijing on 18 May 2004 and available here: https://www.nottingham.ac.uk/research/groups/ctccs/projects/translating-cultures/documents/journals/paying-attention-to-culture-in-international-commercial-arbitration.pdf.

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as the enforceability of awards or the confidentiality of proceedings.[9] Their horizon of expectations does not usually extend to how the procedure of the arbitration would unfold.

Secondly, as to pre-empting such issues from arising by 'legal' means, most cultural issues of practical significance are simply too subtle to be capable of that sort of resolution. Making a question a 'legal' problem and resolving it through applying rules – whether extraneous laws or institutional rules or the arbitrators' own rulings – essentially means treating it as binary, as black-and-white: something is either allowed or it is prohibited. Yet that is not how most cultural misunderstandings arise in reality. The question how much weight a tribunal should attribute to witness testimony, for instance, which is discussed further below, cannot simply be resolved by making a rule about it (save for extreme cases, such as where a witness is manifestly not telling the truth, or fails to turn up at all). It is not even a question likely to be at the forefront of the panel's mind when making their decisions. Instead, the answer to the question is likely to be driven by the tribunal's sub-conscious, instinctive attitude.

In the view of these authors, therefore, the statement made by the eminent late Swiss scholar and practitioner Pierre Lalive two decades ago is still very much salient:

> *"If I had to sum up, in a few words, the most significant lesson I learned in several decades of practical experience as counsel or arbitrator, my choice would unhesitatingly fall on the extreme importance of the so-called "cultural dimension", together with one of its main consequences: i.e. the necessity of a "comparative" approach and of a really international outlook.*[10]"

The fact that, as we outlined above, this cultural dimension is inevitably hard to define and explain does not detract from its importance. The elusiveness of "culture" arguably makes it all the more important to be mindful of it in order to avoid unexpected complications in commercial arbitration proceedings.

Examples

With these general observations in mind, we outline below a few specific examples of cultural misunderstandings. The list is very much non-exhaustive.

That the examples are heavily tilted towards cultural misunderstandings between developed "Western" economies and other jurisdictions, and between Civil-law and Common-law ones, is purely owing to the fact that these happen to have been the real-life examples under discussion among our friends and colleagues.

A tribunal relying on documentary evidence to the exclusion of witness testimony

A number of years ago, a friend was involved in an arbitration brought by a claimant from a Western Common-law jurisdiction against a respondent from a Civil-law jurisdiction. The arbitral tribunal was entirely made up of lawyers from the respondent's country and neighbouring countries. The country in question is characterised by a corporate culture where a number of very large enterprises play an important role not only economically, but in politics and society as a whole, and in the lives of employees who work there.

The parties placed heavy reliance on the evidence of fact witnesses who were, in all cases, in the employment of the party on whose behalf they gave evidence. The claimant, in particular submitted comprehensive witness evidence, amounting to a very significant investment of time and underpinning a compelling narrative of the claimant's position.

The respondent submitted scarcely any evidence. In their award, the arbitrators chose – without much explanation – to discount the witness and expert evidence in its entirety and instead to rely on their own reading of the contemporaneous documents.

We can, of course, only speculate about the rationale behind the tribunal's thinking. The most compelling explanation we have, however, and one which is corroborated by other such instances we have come across and heard about, is that the arbitrators, steeped in a

9 See, in particular, the regular Queen Mary University of London arbitration surveys, available here: http://www.arbitration.qmul.ac.uk/research/index.html. See also, e.g., Joshua Karton, "International Arbitration Culture and Global Governance", in Walter Mattli and Thomas Dietz (Eds), *International Arbitration and Global Governance: Contending Theories and Evidence*. Oxford: Oxford University Press, 2014, pp. 74 – 116.

10 Pierre Lalive, *Cultural Differences and International Arbitration*, Euromoney, 1995, Vol. 9, pp. 13 – 15, p. 13.

culture where corporate loyalty is far more important than it would be in the West, instinctively mistrust evidence given by witnesses on behalf of their employer.

An expert witness faltering under cross-examination

Another anecdote concerned an arbitration that revolved heavily around a particular unsettled question of law of a certain jurisdiction. The question was the subject of a long-running academic debate in the jurisdiction in question.

One of the parties engaged a pre-eminent academic expert on the relevant area of law. The expert submitted a written report in which he unequivocally stated one clear answer to the question at hand. Yet at the hearing he failed to offer the same unequivocal endorsement of his answer. In particular, he declined, when pressed, to maintain that what he had written on the issue should be regarded as right and the diametrically opposed thesis of some other scholars should therefore be regarded as wrong. The tribunal did not follow the expert's views and the party that had engaged the expert lost its case as a direct result.

The expert subsequently indicated that it was simply not done, in his culture, to talk of oneself as being absolutely in the right.

This highlights, in our view, that there tends, not infrequently, to be a difference between written expert reports and statements made in oral hearings, all the more so when experts at the hearing encounter fellow specialists from the same (often quite narrow) field.

Fact witnesses under cross-examination

Friends have told of a large number of cross-examinations gone wrong. The problem is rarely that a witness changes his/her mind, or contradicts him/herself, or has gaps in his or her memory. Instead, by far the most prevalent problem in cross-examination is that the witness feels intimidated by the questioning, becomes flustered, is looking for a way to end the ordeal, and perhaps even feels the urge to agree with the questioner. It is significantly more likely that this sort of thing happens where the witness is from a legal culture that does not know cross-examination.

Cross-examination is very much a Common-law procedural tool. In Civil-law jurisdictions, it is primarily the Court that questions the witnesses. Party representatives may only ask supplementary questions once the Court is satisfied that it has made all the enquiries it needs to make. Importantly, training in examination technique does not tend to be part of legal training in most Civil-law jurisdictions.

Of course, the clash between an experienced Common-law interrogator and a timid witness from a Civil-law country can go both ways. One friend recalls a charming and soft-spoken witness interrogated rather harshly by an archetypical counsel raised in the Common-law tradition. The witness complained, quite rightly, about the counsel's discourteous treatment. The tribunal – made up, as it happens, of a mix of Common and Civil lawyers – was not amused.

Coaching witnesses

There is no prohibition against coaching witnesses in international arbitration doctrine as such.[11] Doing so is, however, strictly *taboo* as a matter of professional conduct in a number of national legal systems. English lawyers are, for instance, prohibited from coaching any witness about the specifics of the case at hand, though they can, and do, provide witnesses with more generalised training to familiarise them with what to expect at the hearing, most especially cross-examination. This is not, however, a Common-law vs Civil-law thing. For example, witness preparation is accepted and routinely practised throughout the United States.

This can lead to misunderstandings on a number of levels. It is not uncommon for a panel made up of English lawyers to instinctively assign less credibility to a witness who has obviously been coached, despite the fact that in that witnesses' own legal culture such coaching is *de rigeur*, and so the witness was not aware of doing anything wrong. It is similarly not unheard of for a witness from, say, England to be reluctant to undergo coaching, even though he or she would be entitled to do so before appearing before, say, a US forum.

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11 See Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration*, Oxford: Oxford University Press, 2015 (6th ed.) at 6.123 – 6.124.

Document production

Document production is one of those areas where most progress has been made in recent years in terms of developing a uniform set of guidelines (and expectations). The IBA Rules on the Taking of Evidence in International Arbitration, in particular, have been invaluable in this regard. They govern or guide a substantial proportion of arbitration disclosure today. Under these rules (which in reality operate more as guidelines) a party is – to simplify things slightly – entitled to all non-privileged documents relevant to the case and material to its outcome that the other party possesses, provided it can make sufficiently narrow requests that demonstrate the relevance and materiality of such documents.

Gone are the days when the stereotypical American party on one side of the dispute would make sweeping demands for "discovery" that essentially boiled down to access to all the opponent's documentation, only for such demands to be angrily resisted by the equally stereotypical Continental European party on the other side, which would categorically refuse to hand over any documents other than those it relied on.

Take some time, at the start of a case, to consider the background of all participants, in particular in terms of their "home" legal culture, and how it may shape their expectations regarding the proceedings ahead

Your clients are unlikely to be lawyers, let alone international arbitration professionals. They are far less likely than you to be mindful of the implications posed by the cultural background of their opponents and the tribunal. Take some time to explain the issue to them

Yet even within the universe of the IBA Rules, parties and arbitrators from different backgrounds tend to have widely diverging approaches to what it means for a document to be relevant and material, or to be privileged. Friends have, for instance, seen arbitral tribunals rule that none but the most direct attorney-client communications are privileged. Conversely, tribunals that have made such sweeping rulings on document requests under the IBA Rules that they are closer to US-style discovery than the more moderate process envisaged by the Rules.

The reasoning of arbitral awards

Much, perhaps too much, has been made of the stereotypical divide between the Civil and Common law systems. One point where, in our experience, this stereotype is perhaps more true than elsewhere is in the writing of judgments and awards. Civil-law judgments tend to be very brief by comparison to the more lengthy and mellifluous decisions of Common-law judges. Not infrequently, this writing culture has an impact on arbitral awards, especially if those judges go on to sit as arbitrators post-retirement (a frequent occurrence). Practitioners have told of parties with a Common-law background utterly dismayed by what they perceived to be a lack of coherence in the reasoning in the awards of tribunals made up solely of Civil lawyers.

Conclusions: Recommendations for Practitioners

One main common thread that goes through the above examples is that all the international arbitrations in question were conducted by high-calibre professionals on all sides (i.e. parties and tribunal), and yet these issues were not foreseen by anyone. Such cultural misunderstandings, in other words, are often the proverbial elephant in the room that can unexpectedly derail, or at least impede, the progress of an arbitration.

There are some simple recommendations that may, it is hoped, be helpful to practitioners seeking to minimise the impact of such understandings:

- *Be mindful of culture*: Take some time, at the start of a case, to consider the background of all participants, in particular in terms of their "home" legal culture, and how it may shape their expectations regarding the proceedings ahead. Also consider whether they may be *Guerillas*, *Neophytes*, *Atheists*, *Agnostics*, or *Wannabes*, and what this may mean for the proceedings.

- *Involve your clients*: Your clients are unlikely to be lawyers, let alone international arbitration professionals. They are far less likely than you to be mindful of the implications posed by the cultural background of their opponents and the tribunal. Take some time to explain the issue to them.

- *Make culture a factor in choosing your tribunal*: Assume you represent a client coming from one legal tradition against an opponent from a very different culture and tradition. Even if the contract in question purely concerns the law of the opponent's country, all the facts and assets are located in the opponent's country, and the parties have agreed for the proceedings to be conducted in that country's official language rather than in English – a rare occurrence, to be sure, but it does happen – it may not be a good idea to agree to appoint a tribunal made up exclusively of "local" lawyers. Their expectations may be so far removed from your client's

expectations that it makes shepherding the case to a good outcome unfeasibly difficult.

- *Make culture a factor in choosing counsel or co-counsel*: It is vital to ensure that any team of party representatives is able to "read" the tribunal to the maximum extent possible. Ideally, this should include at least one team member with a solid understanding of each tribunal member's cultural background.

  "Reading" a tribunal is of course an art rather than a science, and can take many forms. Not the least important aspect of it is being able to understand the tribunal members' body language.

  It is, of course, also advisable to consider this particular aspect (body language and the ability to interpret it) when selecting the tribunal (discussed above) and preparing witnesses for the hearing (discussed below).

- *Ensure your witnesses are properly prepared (in accordance with appropriate ethical and legal strictures)*: English lawyers, for instance, cannot engage in outright witness coaching in relation to the case at hand. But they can ensure that witnesses – including expert witnesses – know what to expect in cross-examination and are not afraid of it.

- *Consider expert conferencing*: The situation described above where an expert may be uneasy maintaining his or her position at the oral hearing, can often be avoided (or at least partially alleviated) by using conferencing instead of, or perhaps in addition to, the traditional cross-examination process. This tool is not, alas, available for fact witnesses.

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