

The Whole Enchilada: Cultural Differences in International Arbitration

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International arbitration has exploded from its early acceptance in Continental Europe to virtually all nations and cultures. It is even regaining acceptance in Middle Eastern countries where its history has been a roller-coaster ride, most recently climbing out of the disrepute into which it fell during the era of colonialism. The available tribunals, international treaties, codes, rules, and procedures are voluminous and varied. It is a sprawling subject, as diverse as the countries and parties and governments that have use it.

But one theme is common: "It is a trite observation that cultural...considerations can play a vital role in the acceptance and successful functioning of international commercial arbitration." (Kutty). Trite, but true, and easier to recognize than to accomplish. When diverse parties from different backgrounds try to resolve their disputes through any form of ADR, they have to start with an analysis of not only the arbitrator's style and legal background, but their own and that of their opponent to ensure that the process functions as intended. In other words, smooth sailing in international arbitration should start with cross-cultural analysis, strategy and awareness.

What does Culture Mean?

What does culture mean?

Some define culture as a group's common experiences and perspectives, including such things as values, manners, norms, dress, language, institutions and beliefs. (deBy & Mastoris)

Geert and Gert Jan Hofstede, father and son cultural researchers, define it as: "Software of the mind that guides but does not predetermine the manner in which members of a particular collective think, feel and act."

Another author defines culture as "a system of expressive practices fraught with feelings, a system of symbols, premises, rules, forms, and the domains and dimensions of mutual meanings associated with these." (Donal Carbaugh)

An appealing and simple definition is: "How do things work around here?" (Stringer & Lusardo)

In an arbitration setting, that question can usefully be asked twice: First, how do things work around the parties' home legal systems? And second, how do things work

around the parties' home countries? Two different sets of issues are encompassed by these questions: 1) procedural and substantive differences in the home legal systems; for example, difference among common law, civil law, Shari'a law, international law, national law; and 2) personal and experiential differences in communication style, perceptions, mores.

First, the parties' home legal systems may affect their expectations of how the arbitration process itself should work. This is true notwithstanding governing rules and administrative codes like the AAA International Rules or UNCITRAL, because parties and lawyers will still bring their own training and understanding of justice and how it works into the arbitration room. A short article cannot possibly cover this adequately; the purpose here is to lay a foundation for understanding generally the kinds of issues that might arise by way of a few examples and suggestions.

Second, all participants, including the arbitrator, will bring their own particular politics, gender, religion, communication styles, perception of time and context, gestures, body language and taboos into the hearing room with them. To make the process work, everyone has to also bring a respectful understanding of each other's styles and careful attention to their own, not because the arbitration will bring about world peace and understanding or end in a group hug and chorus of kumbaya but because without some baseline concept of "how do things work" for these diverse participants, the entire process can crash and burn on miscommunications or worse. This article gives just a quick overview of the kinds of areas in which cultural awareness may matter most.

Whenever the subject is cultural differences, the risk of employing vast and sometimes superficial generalizations is certain. But even generalizations can be a helpful first step in approaching and understanding differences, so long as they do not spill over into harmful stereotypes, condescension, or worse. So take everything with a grain of salt and realize that the ultimate goal is to take reasonable steps to understand the participants in the room and "where they are coming from."

How do things work around the parties' home legal systems?

The differences between legal systems presented by either the common or civil law on the one hand and Shari'a law on the other are simply beyond the scope of this modest paper. Suffice to say that Shari'a law is becoming increasingly important in international disputes and some understanding of at least its basics - enough to know when to go and get an expert - is critical. It is also easy to run aground in some countries and systems if a party or arbitrator is unaware of requirements very foreign to a U.S. ear, such as the mandate in some Muslim countries that in some circumstances, an arbitrator can only be male and Muslim.

But common law and civil law traditions differ from each other as well (and, of course, differ among themselves, another subject too large to approach here). Successfully arbitrating across these traditions as a party and certainly as an arbitrator requires at a minimum alertness to the following four "ways things work" and an effort to bridge differences appropriately.

1. Witnesses: Put it in writing or tell it like it is

A key difference is the use of documents and witnesses in these two systems. In most civil law systems, the case is presented on documents before a hearing occurs, if a hearing occurs at all, and documents are viewed as the single most credible type of evidence. The judge reads everything in advance, including written witness statements. If a live witness appears, the questioning is done largely by the judge based on suggestions of the parties. And if something isn't corroborated by documents, it isn't likely to be given as much weight. In fact, in some systems, the entire responsibility for conducting an inquiry and investigation lies with the tribunal.

In common law systems, the scales tip the other direction. The testimony of a witness may have much greater weight than documents and it is important that documents be corroborated by testimony. Lawyers do the questioning and, perhaps the most distasteful to a civil lawyer, cross-examination U.S./English style is viewed as an appropriate means of garnering the truth. Judges are not inquisitors, for the most part. Thus, even when you are operating under a set of rules chosen by the parties in their contract - say, the AAA commercial arbitration rules - in an international context, as an arbitrator, you have to take these different expectations into account. The civil law lawyer will want to do lengthy pre-hearing submissions of all of the evidence seriatim to fully develop the case, and the common law lawyer will, at most, want to submit a legal brief and present all of the evidence live at the hearing. The civil lawyer will not be adept at cross-examination and the common law lawyer may become overly aggressive and be perceived as hostile. The civil lawyer may expect the arbitrator to be much more active than is expected by someone hailing from a common law tradition.

The differences can be bridged with some creativity. For example, it has become common in the international context - and sometimes it is done in domestic cases as well - to present direct testimony in writing, leaving the opportunity for questions by the lawyers and the arbitrator to follow. Some arbitrators put time limits on cross examinations in an effort to tone down the technique without depriving the common law participant of it altogether. Some tribunals let the parties question first and then conduct such questioning of their own as the arbitrators find necessary.

2. Experts: Yours, Mine and Theirs

Here, the common law and civil law traditions of Europe and England are in the process of converging and stand in contrast to the common law practices of the U.S. England is encouraging parties to use joint experts and even experts hired and chosen by the parties have a duty to help the court, which can override their duty to their client. Thus, England is moving toward the Continental practice of experts being primarily servants of the court or tribunal. The U.S. tradition is for experts to be hired by the parties and to present views favorable to the parties who hired them, subject to cross-examination.

Thus, in arbitration, the common law lawyers may want to present their own experts (live) while the civil law lawyers will expect the tribunal to appoint its own experts (who report in writing) and the parties then allowed to challenge the findings. Harmonizing these practices is relatively easy. Most international rules provide for the tribunal to appoint one or more experts, as needed. The parties may also present their own experts, use live testimony, and question all experts, including those appointed by the tribunal.

3. Argument: Blueprints and Snapshots

A detailed outline, complete with authority drawn from codes, professors and learned commentaries, all extensively detailed and recited in order with precision at the hearing. That's the civil oral argument, a blueprint of exactly what the advocate contends.

A focus on priority points in any order the lawyer selects (however they may have been presented in a brief) with authority drawn mainly from court cases. Responses to arbitrator questions. That's the common law oral argument, a snapshot of key issues.

These differences of style can obviously be readily combined and that is what is happening in international arbitrations. Depending on the governing law and the force of the authorities under that law, international lawyers have become accustomed to citing case law as well as code and commentary. Likewise, international lawyers from the common law tradition often prepare outlines of their points and authorities and hand them to the court at the oral argument. Experienced international arbitrators will accommodate both styles.

4. SHHH: Discovery or onus probandi incumbat alleganti

English and American style discovery have historically been almost offensive to civil law countries. Viewed as an invasion of privacy and an effort to enlist the party in bringing about its own destruction, discovery is one of the single biggest cultural differences between the systems. Civil law practitioners expect to present their case via lengthy and thorough documentation in an iterative process that may never culminate in a hearing. They understand that they bear the entire burden of proving their positions.

U.S. common law lawyers in particular, however, expect to get by with "notice pleading" and then prove their case partly through documents and testimony obtained from the other side. "Americans tend to expect that liberal discovery will be available after the case is commenced, and may find themselves at loggerheads with a civil law opponent whose idea of liberal discovery would be to allow one party to obtain from the other a signed copy of a document of which the requesting party has only an unsigned one." (Elsing & Townsend).

A friendly tool for the arbitrator confronted by these different expectations is the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration. It bridges the gap by permitting some exchange of documentary discovery at the discretion of the arbitrator, if it can be justified as relevant and material to the case. But even with this rule, other familiar procedures like depositions and interrogatories will very rarely be involved in an international arbitration unless the parties agree and cooperation is voluntary.

The more common international arbitration becomes, the less important differing legal traditions will become. Participants have a stake in harmonizing and converging differing practices in order to reach reasonable accommodations that make an arbitration work. And the parties can increasingly build in to their arbitration agreements some ways to bridge gaps, like explicit reliance on the IBA rules. Awareness of different legal traditions, then, is a step toward building a flexible international norm.

How do things work around the parties' home countries?

Arguably more difficult than harmonizing different legal traditions is accounting for differences in communication styles, cultural mores, perceptions of time and context, religion, politics, gender, taboos, body language. How do the participants take these things fairly into account and how does an arbitrator (or mediator) ensure a trustworthy process that seems fair to both sides?

This can be an eggshell subject, with the views even of the experts differing wildly on whether cultural differences matter very much; whether speaking of them veers too close to dangerous stereotypes; whether "culture" is a buzz word for touchy-feely. For purposes of this paper, the subject is practical: in an international commercial context, the parties and the arbitrators should find out and know, at the very least, three basics.

1. What impact do language differences have?
2. What gestures, body language or taboos should be avoided?
3. Are there some overview characteristics of the parties' home countries that are helpful to know?

Business people routinely research these kinds of questions whenever they are entering into an international project. Parties and arbitrators ought to do the same in the context of international commercial arbitration in order to maximize the utility and fairness of the process. This section suggests some resources for answering these questions and exploring others.

1. The impact of language: The Whole Enchilda Redux

In a Tokyo Store:

Our nylons cost more than common, but you'll find they are best in the long run.

In a Budapest Zoo:

Please do not feed the animals. If you have any suitable food, give it to the guard on duty.

In a Copenhagen airline ticket office:

We take your bags and send them in all directions

On a Swiss menu:

Our wines leave you nothing to hope for.

Nothing is more important than skilled professional translators and interpreters in an international arbitration. Even if the parties have specified the language of the arbitration in their agreement, documents may need to be interpreted and witnesses may

still require assistance with translation during live testimony. Skilled workers in both professions must not only know the source language and the target language, but also the subject matter of their work - familiarity with the arbitral process and with the subject matter of the dispute, especially one involving highly technical terminology, is crucial.

But even when aided by translators and interpreters, the parties and the arbitrators should take great care to attempt to use standard business language in their native tongues and to avoid colloquialisms and peculiar idioms, especially idioms that may be offensive or particularly difficult to translate, the "whole enchilada" being one of them. If and when an awkward moment comes about because of language differences, the arbitrator has to be ready to repair the problem; confronting it directly may be the best approach: "I think that the translation is problematic: "whole enchilada" has no meaning in Farsi and the translator was unable to find a matching colloquialism. Perhaps you can restate."

2. Gestures and Body Language: V's, O.K. and Thumbs Up?

Gestures and body language are dangerous territory indeed. Before you point a finger at someone or flash the O.K. sign or wave V for Victory or signal thumbs up, ask yourself whether you want to create an international incident and send your arbitration process and the parties before you into shock:

The opening session of Bangladesh's new parliament turned into chaos Sunday after opposition legislators reacted with fury to an alleged offensive thumb gesture by Shipping Minister A.S.M.Rab. The gesture is considered a grave insult in Bangladesh. "This is a dishonor not only to Parliament but to the nation" [one legislator said.]

(Axtell, *Gestures* at p. 1). The gesture was a thumbs-up, highly offensive in Bangladesh.

Similarly, body language - for example, the depth of a bow in Japan - may convey important information that you want to convey, if at all, only consciously. Whether to shake hands, wait for a hand to be offered, to show the bottom of the foot, to hug in greeting, to use formal titles, how loud to be, what distance to remain away from someone to whom you are talking, these all present potential pitfalls throughout any international encounter. Moreover, the rules may differ for men and women - for example, in Saudi Arabia, casual conversation about women is to be avoided, even to inquire into the health of someone's wife, and western women should keep a scarf handy in the event the situation requires head-covering. Gender and religion can be especially

sensitive in the international context. The dearth of female arbitrators in "big case" commercial international arbitration is one indication that an entire substrate of issues related to gender and international women's rights are still in play in the field. (Goldhaber).

The safest thing for an arbitrator and the parties to do is to research the country of all participants and be aware of the meaning of gestures and body language so that care can be taken to avoid gratuitously and unintentionally giving offense. Good sources for understanding these basics are the U.S. Department of Commerce's Trade Information Center; the International Business Etiquette and Manners website, Axtell's books and the Dun and Bradstreet guides, see bibliography.

Doesn't this result in superficial stereotyping? Not if approached in the right spirit: an effort to understand and honor the potential sensibilities of the parties, even if any given individual may not harbor them, does no harm. And again, the arbitrator who is confronted by an awkward moment of inter-cultural confusion or shock has a duty to deal with the resulting discomfort of the parties, perhaps a simple explanation that a gesture was unintended or a reminder that voices could be lowered will be appropriate.

3. *Country by Country "Cultural Dimensions"*

Geert Hofstede is a well-known researcher in national cultures. He developed a five-point scale for measuring trends and propensities within countries and that scale is frequently used by businesses to gain at least a broad brush appreciation of the tendencies of the participants in international projects. It is equally useful for international arbitration, as a background tool for understanding the possible orientations of the parties. In a nutshell, he has looked at five characteristics of national societies: 1) the degree to which power inequalities are accepted from the top to the bottom of the society; 2) individualism versus collectivism; 3) assertive versus caring attitudes, dubbed the "masculinity" scale; 4) preference for a high or low degree of uncertainty; 5) long-term orientation versus short term orientation. Much more on these scales and how they apply in various countries based on this research is contained on the Geert Hofstede website.

For purposes of arbitration, it is helpful to review all of these scales for the countries involved, but the most practical from an arbitrator's viewpoint is probably number four. Parties who prefer a very low degree of uncertainty will expect more from the arbitrator in terms of scheduling, control of the process, following the rules with more rigidity, and may view with suspicion the type of "let's just see what happens" or "let it in for what its worth" approach that many U.S. arbitrators and parties may find quite comfortable. In a recent arbitration with U.S. and a European party, this author used the Geert Hofstede index to discover that particular European country was nearly off the

chart on the uncertainty avoidance scale, far higher than the U.S. where uncertainty is less commonly problematic. This has been helpful in accommodating the need of European counsel for extremely precise and clear statements during conferences and detailed explanation of changes in scheduling or procedure that may develop and become necessary as the process unfolds. And the added precision does no harm to the U.S. parties, it simply takes a few minutes more.

Additional resources for exploring the Geert Hofstede research and its critics are contained in the attached bibliography. Other resources on cultural differences can be found there as well. The participants themselves can be a helpful source of information - not that an arbitrator should start an international arbitration by asking what cultural differences people have, but some related questions can be usefully dealt with at pre-hearing conferences, such as the need for interpreters and translators or whether any party needs particular accommodations to religious requirements such as times for prayer or avoiding holy days as working days, or whether any party's home country severely limits certain discovery techniques even if the parties have agreed.

Awareness and understanding and good manners. That's the bottom line for accommodating cultural differences in international arbitration. And this reminder:

Apparently, ends in themselves are far more universal than the roads taken to achieve those ends, for these roads are determined locally in the specific culture. Human beings are more alike than one would think at first (Abraham Maslow, *Motivation and Personality*, Harper Collins, 1970, p.6)

Resources: Cultural Difference in International Arbitration

Axtell, Roger, Do's and Taboos Around the World, (Wiley, John & Sons Inc.)

Axtell, Roger, Gestures: Do's and Taboos Around the World, (Wiley)

Axtell, Roger, Do's and Taboos Around the World for Women in Business (Wiley)

Carbaugh, Donal, *Intercultural Theory* at
http://eco.ittralee.ie/personal/theories_III.php#1.

Cremendas, Bernardo M, *Managing Discovery in International Arbitration*, Dispute Resolution Journal, (Nov. 2002-Jan.2003).

deBly & Mastoris, *Culture Clash: The importance of cultural differences in international mediations*, The Recorder (March 2007) at www.callaw.com.

Dr. Geert Hofstede™ Cultural Dimensions, <http://geert-hofstede.com>

Elsing & Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arbitration International 1 (2002)

GlobalEdge Resource Desk, <http://globaledge.msu.edu/ResourceDesk>

Goldhaber, Michael D., *Madame Le Presidente, A woman who sits as president of a major arbitral tribunal is a rare creature. Why?* American Lawyer FocusEurope (2004), www.americanlawyer.com/focuseurope/arbitration04.html.

International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration, www.ibanet.org.

International Business Etiquette and Manners, www.cyborlink.org.

Lew, Julian D. M., *International commercial arbitration: Harmonizing cultural differences*, Dispute Resolution Journal, (Aug. 1999)

Kutty, Faisal, *The Shari'a Factor in International Commercial Arbitration*, Berkeley Electronic Press, 2005
<http://law.bepress.com/cgi/viewcontent.cgi?article=4382&context=expresso>

Morrison, Conaway & Douress, *Dun & Bradstreet Guide to Doing Business Around the World*, (Prentiss Hall, 2000)

Pressey & Selassie, *Are cultural differences overrated? Examining the influence of national culture on international buyer-seller relationships*, 2 *Journal of Consumer Behavior* 4 (2004)

Slate, William K., *Paying Attention to "Culture" in International Commercial Arbitration*, *Dispute Resolution Journal*, (Aug-Oct 2004)

Stringer & Lusardo, *Bridging cultural gaps in mediation*, *Dispute Resolution Journal* (Aug-Oct 2001)

Wright, Walter A. *Cultural Issues in Mediation: Individualist and Collectivist Paradigms* at <http://www.mediate.com/articles/Wright.cfm>