

CROSS – CULTURAL ARBITRATION: DO THE DIFFERENCES BETWEEN CULTURES STILL INFLUENCE INTERNATIONAL COMMERCIAL ARBITRATION DESPITE HARMONIZATION?

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I. INTRODUCTION

Imagine an International Commercial Arbitration hearing. Imagine how the procedure of your International Commercial Arbitration works. Maybe you are already savvy and know of some international rules or you have looked up the UNCITRAL Model Law on International Commercial Arbitration to get a picture.¹ You are, for example, an Anglo-American plaintiff’s lawyer. Now imagine the other party to this International Commercial Arbitration. Where are they from? Let us say they are East Asian. So you assume the other party has read the same rules since you have agreed to the use of the UNCITRAL Model Law on International Commercial Arbitration. The arbitrator is French and

1. KAVASS & LIVAK, MODEL LAW OF INTERNATIONAL COMMERCIAL ARBITRATION: A DOCUMENTARY HISTORY (William S. Hein Company 1985); *UNCITRAL Model Law on International Commercial Arbitration*, U. N. Commission on International Trade Law (1976), available at <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm> (last visited August 27, 2002) (hereinafter UNCITRAL).

knows the rules quite well, mainly because she is the arbitrator. Now, as a plaintiff's lawyer you want to "start the show", when the French arbitrator tells you to limit your witness examination to 20 minutes each. Perplexed you protest, because this is not what you are used to, but the arbitrator will hear nothing.

What has happened? Differing expectations. In International Commercial Arbitration more than just the legal issues are issues. Whether procedure is agreed upon ad hoc, or institutional rules are used, expectations of the process may well differ from participant to participant.² Why? Divergence in cultural backgrounds. This paper argues that despite harmonization of procedural rules in International Commercial Arbitration, expectations of the process differ based on cultural background of parties or arbitrators. In order to overcome cultural barriers of this and other sorts, one should understand the differences and use them creatively.³ This paper is intended to shed light on some of the differences and thereby advocate understanding.

There are two caveats for this text. First, it must be clarified that the lawyers may well be better informed than the parties and the expectations may differ with increased experience and knowledge of background of other participants.⁴ Second, my analysis applies to both ad hoc and institutional arbitrations. The extent of the cultural influence on the process may differ. Institutional arbitrations usually have more clearly defined rules of procedure and tend to adopt a common approach for arbitrations, instead of a case-by-case determination.

"Every person operates in his or her own private world perceptual field."⁵ Culture is part of what creates this field. This paper discusses how the differences in culture influence the arbitral process. Notwithstanding the actual norms prevailing in the International Commercial Arbitration process, participants who may not know enough about this process (and who are basing their expectations on experience gathered within their own legal culture) are

2. Participant in this paper is used to describe both parties and arbitrators.

3. PHILLIP HARRIS & ROBERT MORAN, *MANAGING CULTURAL DIFFERENCES* 27 (1991).

4. With increased experience, the participants will schedule conferences in advance and discuss issues of preference and procedure in more detail, so that initial expectations based on one's own, or the other participant's cultures doesn't get the better of the proceeding. These issues often influence the choice of arbitrators. Malkom Wilkey, *The Practicalities of Cross-Cultural Arbitration*, in *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION* 79, 80 (Stefan Frommel & Barry Rider eds., 1999). The location of the arbitration can also be influenced by culture. For example, due to their cultural background Switzerland has arbitration rules advantageous for litigation against a foreign sovereign. Sigvard Jarvin, *Leading Arbitration Seats – A (Mostly European) Comparative View*, in *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION* 39, 52 (Stefan Frommel & Barry Rider eds., 1999); *see also* Cbernado Cermades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, in *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION* 147, 165ff (Stefan Frommel & Barry Rider eds., 1999).

5. *See* HARRIS & MORAN, *supra* note 3, at 29.

bound to face surprise. This cannot be an exhaustive treatment of the matter and will be a mere sample. To this end I will set a framework of reference based on Harris' and Moran's definition of culture and introduce three different levels of the concept 'culture'. Then this text will go on to show procedural differences in the main legal cultures (Common Law and Civil Law) and how these differences came about. Regionally based distinctions within these main systems follow. This analysis will not include differences in substantive law.

II. WHAT IS CULTURE ANYWAY?

This section will identify what makes culture and create a working definition. Some definitions, which can be found in dictionaries or sociologists' writings define culture as "the total pattern of human behavior and its products embodied in thought, speech, action, and artifacts and dependant of man's capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language, and systems of abstract thought."⁶ Others define culture as a complex of typical behavior and standardized social forms particular to one social group, or an atmosphere of social beliefs, preferences, expectations, and common principles.⁷

I will adopt Phillip Harris' and Robert Moran's definition. "Culture gives people a sense of who they are, of belonging, of how they should behave, and what they should be doing."⁸ It implies values and patterns that influence attitudes and actions.⁹ In short, it is that which makes one function on a very subconscious level.¹⁰

Culture can be separated into different subcategories. There are three analytical levels, which group together certain aspects of culture. The first level is called technical and is the unemotional, easily transferable part of culture, such as grammar of a language.¹¹ The second, so-called formal aspect refers to rituals both obvious and hidden,¹² such as taking off one's hat when entering a room.¹³ These rituals are learned by trial and error.¹⁴ Obviously, the hidden ones are not easily learned and one of differing culture will not easily admit to

6. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, A-K 552 culture 5(a) (3rd ed. 1966).

7. Horatio Grigera Naon, *Latin American Arbitration Culture and the ICC Arbitration System*, in *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION* 79, 117 (Stefan Frommel & Barry Rider eds., 1999).

8. See HARRIS & MORAN, *supra* note 3, at 12.

9. *Id.*

10. Insights into the workings of culture have been discovered by the behavioral sciences, i.e. sociology, psychology and anthropology.

11. See HARRIS & MORAN, *supra* note 3, at 39.

12. *Id.* at 39, 40.

13. This is a western cultural habit.

14. See HARRIS & MORAN, *supra* note 3, at 39, 40.

their effect. This level is prone to misunderstandings and is emotionally charged. The third level is the informal level.¹⁵ It describes automatic and almost unconscious responses.¹⁶ This level is also highly emotional and is only learned through modeling, *e.g.*, how males and females interact. These levels form the basis of culture.¹⁷

Culture influences many aspects of life, attitude, social organization, thought patterns, space requirements, body language, and time sense.¹⁸ Thought patterns bear effect on the process of reasoning, be it legal or otherwise. What is perfectly logical, self-evident and reasonable for one culture may be offensive, illogical, and unreasonable for the other. Cultural background strongly influences the legal systems and understandings.¹⁹ International Commercial Arbitration being an alternative legal instrument will be expected to be similar in goals and procedure to the legal system the participant is used to. Persons always expect what they are used to, to be the norm. Therefore, cultural backgrounds, by birth or education, also influences how people approach arbitration and what they expect of it in substance as well as in procedure and formalities. This expectation will in many instances be based on repeated experience in the person's cultural context.

While the substantive outcome in International Commercial Arbitration is not usually based on cultural expectation, procedure is. Substantive law and even basic norms will differ not only from culture to culture but also from country to country.²⁰ Laws are specific and while the expectation is that the decision is at least based on some legal principle, there is no expectation of one concrete and certain outcome.²¹ Procedure however, in its most basic form is expected to be the same based on continuous, substantially identical reoccurrence in one's own culture. Participants expect procedure as a part of the formal aspect of culture. A common law, Anglo-American Lawyer will most likely expect a highly adversarial approach, while a civil law East Asian will expect that an inquisitorial and conciliatory approach be taken by the arbitral panel and all parties involved. This basic difference plays out in the timing and ease of introduction of evidence, record keeping, and other examples further discussed below.

15. *Id.*

16. *Id.*

17. See generally the works of E.T. HALL, *THE SILENT LANGUAGE; THE HIDDEN DIMENSION: BEYOND CULTURE; AND THE DANCE OF LIFE.*

18. See HARRIS & MORAN, *supra* note 3, at 40-42.

19. See generally PIETER SANDERS, *QUO VADIS ARBITRATION* (1999).

20. Even the two common law countries, the United Kingdom and United States, differ widely on how much discovery is allowed.

21. This is not to mean that participants cannot be completely surprised by an outcome. Often a different legal principal was applied than expected.

Expectancy of a certain procedure is worth analyzing in light of the predominant legal systems. The arbitrator may be of a culture that expects the proceeding to be conducted in one way, while the parties may be prepared for another, their own way. What the main differences are and how exactly they can play out will be discussed below.

III. DIFFERENCES IN LEGAL CULTURE

Two legal systems or cultures are predominant in the world today: Common Law and Civil Law. Within these main legal systems, different regionally based sub-cultures exist, which maintain their own special traditions.²² This section will discuss the attributes of first Common and Civil Law, and then continue to describe local distinctions.²³ This paper will briefly sketch *infra* how these differences and distinctions arose and what purposes they serve in their respective environments.

Recent doctrinal writings indicate an increasing trend toward harmonization of international arbitral procedure.²⁴ For example, it is generally accepted that a person who has served as mediator or conciliator between the parties to the current dispute shall not serve as umpire.²⁵ Domestic legislation and procedures of international organizations concerning International Commercial Arbitration evidence this assessment further.²⁶ This text will focus on the remaining differences. Nevertheless, cultural differences are far from irrelevant today, because neither *ad hoc* nor institutional rules adopted by the parties answer all procedural questions.²⁷

A. *Common Law & Civil Law*

While rules, which have been agreed upon by the parties, give some guidelines for the procedure, the individual preference of the participants plays an important role. This preference relates to the cultural background of each

22. See generally SANDERS, *supra* note 19.

23. These attributes will be directed at procedure only.

24. See e.g., SANDERS, *supra* note 19, at 55; see also Lucy Reed & Jonathan Sutcliffe, *The "Americanization of International Arbitration?"*, 16(4) MEALEY'S INT'L ARB. REP. 37, (2001).

25. Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION (Stefan Frommel & Barry Rider eds., 1999). He limits this statement by saying that parties can still nominate the person if so desired.

26. Most modern international arbitration conventions such as the PCA rules on arbitration of environmental disputes, as well as the increasing adoption of the UNCITRAL model law into domestic law (or its use as guiding light), are only examples of increased harmonization of rules for arbitration. This is true for both institutional and *ad hoc* arbitrations, as discussed before.

27. See Christian Borris, *The Reconciliation Between Common Law and Civil Law Principles in the Arbitration Process*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION 1, 4 (Stefan Frommel & Barry Rider eds., 1999).

participant and influences all aspects of the International Commercial Arbitration, for example, choice of International Commercial Arbitration rules, arbitrators, location for the International Commercial Arbitration, and expectations in process and outcome.²⁸

Methodology of the approach makes the first difference, which impacts expectations, apparent. A Common Law lawyer expects an adversarial approach,²⁹ where the judge or arbitrator has a limited role. The adversarial approach manifests itself in all stages of the proceeding: notification, identification of facts, responsibilities of the parties, and so forth.³⁰ This system was created because of mistrust of judges, the smaller the roles of judges in the proceedings the easier for the parties to believe in the justice and fairness of the outcome.³¹ The Civil Law expects an active judge and an inquisitorial system.³² This distinction appears logical, based on the assumption that not a jury but the judge decides the case and hence needs to make sure he has all the information. In Civil Law countries, judges were not mistrusted. Their education made them experts in assessing a case correctly, while the juror, potentially a neighbor, was considered more concerned with his or her own interests and not trained to deal with important legal issues.³³

The second distinction between Common Law and Civil Law is that there is no clear division of interlocutory proceeding and hearing in Civil Law.³⁴ Common Law admits information of the pre-hearing stage only in exceptional circumstances. This separation can be explained by reference to the mistrust of judges and the jury system in Common Law countries once again. Where, as in Civil Law, the judge is also the fact-finder, he will get to know everything about the case regardless. There is no practical reason for a divorce of hearing and pre-hearing phase. In Common Law, the jurymen do not receive any information before the proceeding.³⁵ Therefore, all the information needs to be introduced to the jury again. Lawyers have to select and properly present information, because the jury is composed of laypersons, which might consider irrelevant evidence or fail to understand anything too complicated.

28. RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 52 (1999).

29. See Reed & Sutcliffe, *supra* note 24.

30. See GARNETT ET AL., *supra* note 27, at 53.

31. See Borris, *supra* note 27, at 6. In the U.S. judges were English and were disliked and the United States mistrusted authority, mainly because of the age of their democracy.

32. See BORRIS, COMMON LAW AND CIVIL LAW: FUNDAMENTAL DIFFERENCES AND THEIR IMPACT ON ARBITRATION, 78 (1994); see also Lucy Reed & Jonathan Sutcliffe, *supra* note 24.

33. See BORRIS, *supra* note 32, at 178.

34. See GARNETT ET AL., *supra* note 28, at 54.

35. They are not yet selected.

To illustrate the cultural impact at all stages of the proceeding, this paper will discuss the UNCITRAL Model Law on International Commercial Arbitration³⁶ in light of some specific expectations in the proceedings, differing between Common Law and Civil Law. This paper will treat only the UNCITRAL rules for this purpose due to their representativeness and their wide use.³⁷ These rules provide for great discretion in determination of procedure.³⁸

Most commonly cited differences that influence the expectations are:

- a) Whether the proceedings are oral or in writing;
- b) Discovery and pre-hearing procedure;
- c) Treatment of other witnesses, specifically parties and cross-examination; and
- d) Record keeping.

1. Oral or Written Proceedings

The UNCITRAL rule 24(1) leaves the decision whether to hold a hearing to the arbitral tribunal, unless parties agree otherwise. A hearing shall be held if a party so requests.³⁹ It is not stated which weight will be given to such pleadings and how much detail will be good practice depends on any given arbitrator's preference.

Under the Common Law, pleadings have little value, because the oral hearing is of most importance.⁴⁰ The fact finder has to be convinced during the "show", the proceeding of whatever nature.⁴¹ This can largely be explained by the need for persuasion of a jury of laypersons. Paper tends to be less persuasive than emotions and live testimony. In Civil Law all information has to be identified and provided in writing and often in excessive detail as soon as possible. This is evidenced by *e.g.*, the German Code of Civil Procedure § 296. A judge is not (should not be as easily) moved by emotion and a judge could extract the relevant facts more quickly from paper than from lengthy witness testimony and cross-examination.⁴² The Civil Law lawyer expects the documents provided to amply support the point of view, and the Common Law

36. See UNCITRAL *supra* note 1.

37. There are regional arbitration rules precisely because there are differences in culture. See SANDERS, *supra* note 3, at 13.

38. UNCITRAL, *supra* note 1, at § 19.

39. UNCITRAL, *supra* note 1, at § 24(1).

40. See Borris, *supra* note 27, at 6.

41. See Patouchi and Ian L. Meakin, *Procedure and Taking of Evidence in International Commercial Arbitration*, RDA/IBLJ 88 (1996).

42. The judge can ask a witness everything he needs to know when documents are not sufficient. Often this will be unavailable. Thus, the Civil Law judge prefers paper as a general matter.

lawyer is perplexed because of the lack of weight given to his advocacy by the Civil Law arbitrator.⁴³

2. Discovery and Pre-Hearing Procedures

The secondly impacted area of arbitral procedure is the pre-hearing stage, including discovery. The UNCITRAL rules provide in article 23(1) that parties should support their claims and defenses with all relevant documents, but are also allowed to use references to evidence to be submitted later only, unless otherwise agreed.⁴⁴ In other words, information must be provided, but the point in time is up to the party, so long as a reference to this evidence exists. In article 24(3), UNCITRAL requires all material submitted to the panel to be submitted to the other party as well.⁴⁵ This is the extent to which pre-hearing procedure is discussed in the Model Law.

Due to this freedom of procedure, culture has room to create expectations. In Common Law, discovery and pre-hearing procedure are considered one of the most important tools in dispute resolution (either judicial or through ADR).⁴⁶ Pre-hearing discovery is necessary in Common Law. The evidence needs to be neatly presented for the reasons discussed *supra*, which is impossible if the hearing is the first time the evidence is encountered by the parties. Thus, while attempting to receive as much information as possible before the hearing, the Common Law advocate will seek to delay rendering information to obtain a strategic benefit. With these considerations in mind, the advocate will submit evidence late and potentially upset the Civil Law arbitrator, who seeks prompt disclosure of all relevant information.

In Civil Law the obligation to disclose every relevant piece of information as soon as possible renders extensive Common Law discovery (partially) unnecessary.⁴⁷ For many Civil Law jurisdictions, such as Germany, discovery is also connected with privacy concerns.⁴⁸ In Civil Law there is no need to present the evidence the neat Common Law way. Evidence is presented over time and is reviewed by the judge regardless of when it becomes known. If any information appears to be missing, the arbitrator or judge will request it. Also depositions take on varying degrees of importance for Common Lawyer and Civil Lawyer. If the hearing is approached with the expectation of a deposition not being primary evidence, the conduct at the deposition (if they take place at all) is going to be different from the expectation of it being

43. Compare Lucy Reed & Jonathan Sutcliffe, *supra* note 24, at 11.

44. UNCITRAL, *supra* note 1, at § 23(1).

45. UNCITRAL, *supra* note 1, at § 24(3).

46. See Christian Borris, *supra* note 27, at 10.

47. *Id.* at 10ff.

48. *Id.* at 11.

equivalent to a witness statement on the stand. Preparation needs to be adapted, the lawyer has to take into account that the entire material will be reviewed and that withholding of information harms the case rather than helping it. In addition, a Civil Law arbitrator may even prefer a written statement to an oral one for reasons of efficiency,⁴⁹ as mentioned above.

3. Treatment of Witnesses

Treatment of witnesses is another area where cultural difference is most visible.⁵⁰ The UNCITRAL is silent on the matter. Several issues are implicated in the treatment of witnesses:

- 1) Whether a party can be a witness;
- 2) Whether the statements can be written;
- 3) Whether written statements are preferable over directly examined witnesses; and
- 4) Whether cross-examination should take place.

In Common Law a party may be called as witness, while the Civil Law does generally not allow parties to be witnesses.⁵¹ In Civil Law, the expectation is that the position of parties will be amply reproduced through other documents. In Civil Law, managers of a company are considered parties. Although the question whether a party can be a witness remains a distinction between Common and Civil Law, in International Commercial Arbitration it is a distinction without a difference. Practice has settled toward the Common Law approach.⁵²

Whether written witness statements are admissible depends on the procedure chosen, but largely, as in the UNCITRAL.⁵³ The inference drawn from a written statement depends on the legal culture of the arbitrator. In Common Law countries, due to the importance of the actual hearing and the separation of information gained before the hearing from information presented at the hearing, cross-examination remains the best tool to test witness credibility⁵⁴ and to bring out facts not otherwise presentable.⁵⁵ In Civil Law countries, the judge examines witnesses as to contentious issues. He, as the

49. See Reed & Sutcliffe, *supra* note 24, at III.

50. *Id.* at IV.

51. See Borris, *supra* note 28, at 15; see also Reed & Sutcliffe, *supra* note 24, at IV.

52. *Id.*

53. See Reed & Sutcliffe, *supra* note 24, at IV.

54.

54. See Lawrence Newman, *International Arbitration Hearings: Showdown or Denouement*, 5 TUL.J.INT'L & COMP.L. 393, 395 (1997).

55. See Christian Borris, *supra* note 27, at 13.

fact-finder and a professional, is deemed to assess the witness credibility by himself and only with reference to statements he deems important.⁵⁶ Although a difference between the two traditions, this point adds little to the point made *supra* concerning pretrial procedure.

The distinction in treatment for unwilling witnesses depends less on culture and more on country, the procedure what one needs to compel the witness differs.⁵⁷ These issues are related much more to substantive law and does not relate as strongly to culture. Hence, it exceeds the scope of this paper and will not be treated in more detail.⁵⁸

4. Record Keeping

The UNCITRAL does not mention record keeping. In the Common Law tradition, a reporter records the proceeding verbatim.⁵⁹ In the Civil Law system, the chairman usually takes notes of the witness statement in the manner in which he sees fit. The parties discuss these notes and supplement them to prepare a written summary.⁶⁰ A summary makes sense where the evidence is mostly documentary and witnesses are heard for specific information only. This method obviously reduces the impact of cross-examination in case it is conducted and can be the source of great dismay on Common Law lawyers, who rely on every word that the witness utters.

Although the above-mentioned differences in legal cultures factor into the proceedings, they are not the only issues to be considered. Within the predominant legal systems, further subdivisions exist.

The Common Law and Civil Law concepts and the respective conceptions of International Commercial Arbitration and legal culture have radiated throughout the world.⁶¹ The concepts are largely colonial remainders and can

56. *Id.*

57. In the United States, arbitrators can subpoena witnesses. In England, only the court may do so. In Denmark, the arbitral tribunal has to make a request to the court to subpoena, while in Belgium, the parties can ask a court themselves. See SANDERS, *supra* note 3 at 256f.

58. For an American case illustrating this point see *In Re: Application of Technostroy Export*, 853 F.Supp. 695 (S.D.N.Y. 1994). In this case arbitration took place in Sweden. The Russian party to the arbitration proceedings sought discovery in New York in connection with the arbitration. The American party objected on grounds that discovery in the place or arbitration was not available without the ruling of the arbitrator and that discovery must, if at all, be mutual. The court agreed on this basis. While this case shows differences from country to country, it is not truly culturally based. The Russian party was well aware of the differences and sought to use them in their favor.

59. See Newman, *supra* note 54, at 84.

60. *Id.*

61. *Id.*

be traced in individual tradition to the respective colonial powers and their legal systems.⁶²

B. Regional Cultures

Today, either Civil or Common Law influence most nations; nevertheless differences lay in the regional applications. This section discusses each culture and its distinction and the impact on the International Commercial Arbitration. The main cultures this paper refers to are Non-Arab African Countries, Latin American Countries, East Asian, and Arab Countries; e.g., Belgium for the former Congo, the Netherlands for Indonesia.⁶³

1. Non-Arab Africa

This section excludes Arab countries like the Sudan, because cultural differences in Arab Countries are considered together, due to the shared feature of Shari'a law.

There is currently no African distinctiveness in the procedural rules.⁶⁴ This however, does not prejudice certain culturally based expectations. In non-Arab Africa, a common dislike of arbitration is based on the perceived potential for the bigger bargaining power to abuse the freedom of contract and thus oppress the other party.⁶⁵ Countries in Africa are particularly well known for their dispute settlement processes that are conciliatory in nature.⁶⁶ African social values in conjunction with strong family units fostered this conciliatory environment rather than the (in comparison) more adversarial arbitration process.⁶⁷ Before colonialization every region in Africa had these conciliatory methods of dispute resolution, which were suppressed but not destroyed during the colonialization period.⁶⁸

In the francophone areas of Africa, International Commercial Arbitration was largely suppressed.⁶⁹ This might also explain the current lack of significant participation of African arbitrators in International Commercial Arbitration. As

62. For example, Belgium for the former Congo, and the Netherlands for Indonesia. See Phillip McConaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW.U.L.REV. 453, at ch. II. intro. (1999).

63. *Id.*

64. Roland Amoussou-Guenou, *Part IV – Francophone Africa*, in *ARBITRATION IN AFRICA* 269, 276, 277 (Cotran et al. eds., 1996).

65. See AMAZUA.ASOUZU, *INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES*, 14 (Cambridge University Press 2001).

66. *Id.* at 15.

67. *Id.* at 16.

68. *Id.* at 115.

69. See SANDERS, *supra* note 19, at chap. II intro.

Africa consists mostly of developing countries, International Commercial Arbitration is viewed with skepticism.⁷⁰

In traditional African alternative dispute resolution, little procedural uniformity can be found. Much of African tradition ADR is based on custom and thus, widely varies and is highly informal.⁷¹ There is for example no formal requirement of writing or record keeping in traditional African dispute resolution⁷² and a written agreement to arbitrate is today almost unknown.⁷³

This results, usually in much control of courts over procedure. Lawyers may have to get leave from a court for many things they would usually expect to be handled by the arbitral panel. In fact, the courts form an essential element of procedure and process in arbitration in Africa. Arbitral functions required under a law or treaty in Africa could, for the sake of efficiency, specialization and centralization be conferred to a court.⁷⁴

2. East Asia

Asia has a very distinct cultural approach to International Commercial Arbitration. Two important differences dominate the picture. First, the conception of Western Common Law and Civil Law (which form the basis of Asian legal systems as well) has certain assumption for the role of codes and contracts that are not shared in most of Asia.⁷⁵ The conceptions of the contractual or institutional rules for International Commercial Arbitration are thus approached (like any other contract or code) with different understandings of their meanings, although the terms may be clear. East Asian culture prefers non-confrontational methods of conflict resolution.⁷⁶ A typical example is Japan. Under a stable feudal regime, which lasted for more than 250 years until 1868 (Tokugawa period), the practice of law was not allowed. There was a strong communal system to promote amicable settlement of disputes and to suppress litigation. Litigation was condemned as a moral wrongdoing to the society and to the other party. A good judge was not supposed to give a judgment but to try to bring about a good conciliation. This tradition was deeply embedded in the people's mind and formed the dispute resolution culture in Japan,⁷⁷ as well as other East Asian Countries. The legal basis for modern

70. This skepticism is slowly declining. See David Butler & Eyvind Finsen, *Southern Africa*, in ARBITRATION IN AFRICA 193, 198 (Cotran et al. eds., 1996).

71. See ASOUZU, *supra* note 65, at 118.

72. *Id.* at 119.

73. *Id.* at 141.

74. *Id.* at 172.

75. See McConaughay, *supra* note 62, at 458.

76. *Id.*

77. See YASUHEI TANIGUCHI, IS THERE A GROWING INTERNATIONAL ARBITRATION CULTURE? AN OBSERVATION FROM ASIA, chapter I (Albert Jan van den Berg ed. 1998).

arbitration procedure was first established in Japan in 1890, with the enactment of the Code of Civil Procedure (Law No. 29, 1890), which substantially followed the German Code of Civil Procedure of 1877 as a model.⁷⁸ But even though Japan has modernized its arbitral practice, the mistrust of arbitration can still be felt in *e.g.*, the requirement of specificity of the arbitral agreement.⁷⁹ Another aspect of Japanese arbitration is the remaining tendency to structure an arbitration in a conciliatory fashion, *e.g.*, the default number of arbitrators is two, an even number as opposed to the otherwise chosen odd numbers.⁸⁰

And will approach International Commercial Arbitration with the same culturally based attitude.⁸¹

More than 120 years ago, von Jhering wrote about *Der Kampf ums Recht* (the fight for the right). Litigation is an arena where such a fight takes place. It is a moral wrong not to assert one's right. What I call the conciliation culture, on the other hand, is based on a diametrically opposed ideology. It stems from a deep mistrust in any pre-set rules of law and the concept of right as an absolute entitlement.⁸²

When a Western culture and a East Asian culture join for International Commercial Arbitration, the approach of the lawyers have to be adapted to the culturally based preference of the arbitrator. Overly confrontational behavior may lead an East Asian arbitrator to draw different inferences from a non-East Asian arbitrator.⁸³

The second important difference of culture influencing the arbitral procedure is confidentiality. International Commercial Arbitration is a loss of face for the East Asian party.⁸⁴ While Western culture prefers open proceedings, the East Asian party will prefer to keep it proceedings and most information confidential. These differences in preference will also influence how the proceeding will be conducted despite general and very loose norms about it in institutional rules and most International Commercial Arbitration contracts.⁸⁵

78. See Prof. Teruo Doi, *Japan*, in ICCA HANDBOOK chap. I (1)(1996).

79. *Id.* at chap. 1.

80. *Id.* at chap. I(3).

81. See SANDERS, *supra* note 19, at 64.

82. See TANIGUCHI *supra* note 77, at section (III).

83. See Urs Martin Lauchli, *Cross Cultural Negotiations with a Special Focus on ADR with the Chinese*, 26 WM. MITCHELL L. REV. 1045, 1076 (2000). Promotion of long-term relations and the preference for conciliation will always the guide the Chinese mediator.

84. See McConaughay, *supra* note 62, at 459.

85. The UNCITRAL is silent on the matter.

In CIETAC (China International Economic and Trade Arbitration Commission) for example, rules for arbitration are structured very differently from common western arbitration rules. The rules provide for no appellate process, which is usually common for international commercial arbitration institutions. Another difference, again showing the preference for conciliation is that the arbitral tribunal may conciliate if they so choose.⁸⁶ The last important difference in the Cietac procedure is the availability of a summary procedure for amounts below RMB 500.000 Yuan.⁸⁷ Many western lawyers find the CIETAC rules oppressive and unworkable.

3. Latin America

Latin America has a slowly disappearing hostile attitude toward International Commercial Arbitration.⁸⁸ Traditionally, Latin American countries developed theories such as the “Calvo” and “Drago” doctrines to prevent complete freedom of contract concerning international commercial arbitration.⁸⁹ A number of Latin American countries have modernized their arbitration laws or are in the process of doing so, mainly to attract international arbitration business.⁹⁰ Some countries modernizing their laws base their new arbitration legislation on the Model Law of UNCITRAL. This is the case in Brazil, Guatemala, Mexico, and Peru.⁹¹ Where International Commercial Arbitration is conducted, the arbitral panels have an even stronger stand during the proceeding than even ordinary Civil Law arbitrators would take. They act mostly without judicial assistance.⁹² A Latin American participant would thus expect strong control during the proceeding itself from the arbitrator. Latin American participants in International Commercial Arbitration would expect rather inflexible rules and may thus be surprised at International Commercial Arbitration, where the rules are so amendable toward party autonomy.⁹³ Nevertheless, Latin American courts maintain strong supervisory powers over

86. *Arbitration Rules*, China International Economic and Trade Arbitration Commission § 46 (1998), at <http://web.signet.com.sg/~arbiter/cietac2.html> (last visited September 5, 2002).

87. *Arbitration Rules*, China International Economic and Trade Arbitration Commission §64ff (1998), at <http://web.signet.com.sg/~arbiter/cietac3.html> (last visited September 5, 2002).

88. See SANDERS, *supra* note 19, at 39; see also Fernando Mantilla-Serrano, *Major Trends in International Commercial Arbitration in Latin America*, 17(1) J. INT'L ARB. 139 (2000).

89. See ASOUZU, *supra* note 65, at 413.

90. See ARTHUR D. HARVERD, *THE CONCEPT OF ARBITRATION AND ITS ROLE IN SOCIETY, THE COMMERCIAL WAY TO JUSTICE* (Geoffrey M. Beresford ed., 1997).

91. See Charles Robert Norberg, *Inter-American Commercial Arbitration-General Introduction to Inter-American Commercial Arbitration*, in ICCA HANDBOOK chapter 2 (1996).

92. See Mantilla-Serrano, *supra* note 88, at 141.

93. *Id.*

the arbitral process.⁹⁴ Party autonomy is not paramount like in the traditional Western World.

4. Arab World

Arbitration has an important role in the mentality, history, and customs of Arab Nations.⁹⁵ In contrast to other regional structures, the concept of International Commercial Arbitration in the Arab world is truly culturally based, (the basis is the Muslim faith.) because both Civil Law and Common Law have influenced different Arab countries.⁹⁶

The predominantly impacting factor is the Shari'a, the religious law for Muslims.⁹⁷ In Moslem Law the very concept of International Commercial Arbitration was disputed. There are two views on this topic: the first holds that International Commercial Arbitration is a form of amiable composition, conciliation.⁹⁸ According to this view, the number of arbitrators is even and a decision requires unanimity. The other sees it as judicial action with an odd number of arbitrators.⁹⁹ The Ottoman Empire adopted the conciliation approach.¹⁰⁰

In the Arab World, much like in Asia, International Commercial Arbitration is more similar to conciliation,¹⁰¹ because the focus is on the spiritual and the relationships not on an allocation of blame. A very important distinction is that it is expected that the Shari'a and its procedural requirements apply regardless of what the contract states.¹⁰² This is especially true for International Commercial International Commercial Arbitration because the Shari'a law has an element of international law. It applies regardless of the jurisdiction the Muslim is in, based on religion, transcending national boundaries.¹⁰³

Expectations of Muslim arbitrators and participants in specific parts of the arbitral procedure vary distinctly from Western approaches. The UNCITRAL provides for party autonomy, but in absence of an agreement, the number of

94. See e.g., Prof. Marco Gerardo Monroy Cabra, *Colombia*, in ICCA HANDBOOK.

95. See Abdul Hamid El-Ahdab, General Introduction on Arbitration in Arab Countries, in I ICCA HANDBOOK chap. 1.

96. See SANDERS, *supra* note 19, at 50. Common Law for Iraq, Jordan, Sudan and Civil Law for Algeria, Lebanon and Libya.

97. Although it contains only few references to arbitration.

98. See El-Ahdab, *supra* note 95, at chapter II.

99. *Id.*

100. *Id.*

101. *Id.* at 133.

102. It is further applicable extraterritorially.

103. See Austin Amisshah, Ghana, in ARBITRATION IN AFRICA 113, 128 (Cotran et al. eds., 1996).

arbitrators is three, not one.¹⁰⁴ A Muslim Lawyer from a traditionally religious country will expect that only one arbitrator is chosen. The Shari'a permits exceptions to the one arbitrator rule, but if an exception is permitted, the decision of the panel has to be unanimous.¹⁰⁵ In non-Arab cultures, the majority rule applies. This leads to different expectations in the choice of arbitrators and if there is more than one arbitrator a different expectation in the outcome (ay a close case has 5 arbitrators). The Arabic parties may well expect that at least one sees the other side, thus avoiding any result of the arbitration and encouraging a settlement.

Shari'a also limits the expectations of who can be an umpire. An Arab party will expect, in accordance with the Shari'a, that the arbitrator must be a male and familiar with the Shari'a,¹⁰⁶ while other cultures will not expect such limitations. UNCITRAL article 11 does not provide for qualifications or gender, but contains complete party autonomy. The Shari'a law, however, provides for much procedural freedom. The only requirements for Arbitration procedure are that the award must specify that the arbitrator heard the parties' arguments and that the proceedings took place in his presence.¹⁰⁷

The influence of Shari'a on International Commercial International Commercial Arbitration is however declining, since it does not apply where *e.g.*, international conventions supercede.¹⁰⁸

I will address these modern developments by contrasting the examples of Egyptian and Tunisian treatment of International Commercial Arbitration with what has been described so far. The Egyptian arbitration laws are inspired by the UNCITRAL rather than Shari'a, as it is the case in Saudi Arabia.¹⁰⁹ In the new Egyptian Legislation enacted in 1994 for example the application of the act is limited by territory, unlike earlier arbitral acts that were applied extraterritorially like in Shari'a. Arbitrators needed to be appointed in the instrument already under older legislation, the new legislation provides for party autonomy.¹¹⁰

In Tunisia, prior to 1993 only domestic arbitration was regulated. Again, the act is modeled on the UNCITRAL model law. The number of arbitrators needs to be uneven and the majority rule applies unlike prescribed in Shari'a

104. UNCITRAL, *supra* note 1, at § 10.

105. See SANDERS, *supra* note 19, at 51.

106. See generally Afchar, The Muslim conception of Law, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, vol 2 ch. I (1975); see also SANDERS, QUO VADIS ARBITRATION 51 (1999).

107. See Abdul Hamid El-Ahdab, *General Introduction on Arbitration in Arab Countries*, in IICCA HANDBOOK, chapter 2(4)(1996).

108. See Amissah, *supra* note 103, at 130.

109. ABDULHAMADEL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 155 (2nd ed. 1999).

110. *Id.* at 173.

Law, where unanimity is the norm.¹¹¹ Nevertheless, an inexperienced lawyer or layperson may still expect some of the commands of the Shari'a law to be universal, or at least the norm.

IV. USING THIS INFORMATION

Knowing the distinctions this paper has shown is helpful in every International Commercial Arbitration. However, knowledge is only the key, not the solution. Depending on the stage of the process, the solution is one of two things: either the choice of the right arbitrator or an initial conference.

The participants to International Commercial Arbitration should select an arbitrator according to his experience (both life and legal) and cultural background (not just nationality) to obtain a strategic benefit. What the 'best bet' concerning background and experience is depends on what the parties want to achieve.

An initial conference should take place regardless, to clear any misunderstandings before any further steps after the arbitrators are chosen. During the initial conference, not only should applicable law and location of the proceeding be discussed, but also the weight of specific forms of evidence, the treatment of witnesses, and the role of the arbitrator (whether he should be attempting conciliatory techniques where he sees the possibility, or whether such techniques would be regarded by the parties as bias). Depending on the cultures and backgrounds of the participants, the list of what should be discussed varies. This paper gives a useful set of possible considerations for each culture.

V. CONCLUSION

There are problems that rules do not solve.¹¹² Neither ad hoc nor institutional rules contain answers for all procedural questions that may arise in International Commercial Arbitration. On the contrary, as seen on the example of the UNCITRAL rules, these rules are often deliberately vague to avoid prejudicing the arbitral tribunal's discretion.¹¹³ There is a recognizable influence of culture even in the experienced lawyer or arbitrator. Despite harmonization of rules governing International Commercial Arbitration, increased globalization and perforation of information about other legal systems, this paper showed that culture continues to play a role.

111. See Habib Malouche, *Tunesia*, in VIICCA HANDBOOK, 2 (1996).

112. Lawrence W. Newman, *Pre-hearing Conferences – Cross Cultural Conflicts*, Address at Seminar at Baker & MacKenzie New York (November 25, 1996), in 8 WORLD ARB. & MEDIATION REP. 82, 87 (1997).

113. See GARNETT *supra* note 28, at 4.

This paper was intended to serve a guide for the unwary to begin to research what to expect and what strategy may be more successful with which culture. It is also intended to advocate initial conferences with all participants about their expectations to avoid embarrassing moments in the course of the International Commercial Arbitration. As stated in the introduction, this text attempted to create a new understanding and respect for the other cultures, an understanding that avoids judging others by one's own standards, because at one point the other's standards might be there to judge you. Preparation, insight, and respect are very helpful tools to avoid problems in cross-cultural International Commercial Arbitration.