ILS 2 | Cultural Issues in International Dispute Resolution

International arbitration and, increasingly, international mediation, have become the preferred means of dispute resolution for many cross-border transactions. In addition to jurisdiction, venue and choice of law issues unique to international disputes, cultural issues should be considered. When parties, witnesses, advocates and neutrals come from different legal and cultural backgrounds, cultural dynamics can occur. Such dynamics can have substantive effects not only on the outcome of the dispute but on the business relationships among the parties. This panel will bring together international dispute resolution professionals from diverse backgrounds to share their experiences and perspectives on these issues.

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“Harmonizing Cultural Differences in International Dispute Resolution”
for the
National Asian Pacific American Bar Association
2021 National Conference

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International dispute resolution is unique in many ways. In commercial cases, there is no single body of law or supreme world court to issue global decisions, and there are myriad differences in the way business is done across various countries, regions and industries. Not only are there differences in legal systems
and business practices, but also cultural differences that can affect the outcomes of international commercial disputes. This article considers some of the cultural issues in international dispute resolution.

There are several different dictionary definitions of “culture.” One broad definition that would apply to “national culture” is “the customs, arts, social institutions, and achievements of a particular nation, people, or other social group.” (Oxford Languages). A narrower definition that might apply to a phrase such as “legal culture” is “the set of shared attitudes, values, goals and practices that characterizes an institution or organization.” (Merriam-Webster)

In international dispute resolution, both national and legal cultures can come into play. Clients and witnesses may come from different countries or regions of the world, with very different national cultures and business practices. The arbitrators and advocates may have been trained in the Common Law or Civil Law legal systems, and sometimes both. A tribunal of three arbitrators may include various combinations of Common Law and Civil Law neutrals. In arbitrations with Middle Eastern parties, Sharia Law and its practitioners may be involved.

**Common Law v. Civil Law Legal Systems and Traditions**

There are also inherent differences among legal systems, such as the dichotomy between the Civil Law tradition, which is statutory, versus the Common Law tradition, with its greater emphasis upon judge-made decisional law. There are no jury trials in Civil Law courts, and the judges play a more inquisitorial role. Differences in legal systems also lead to the evolution of different professional norms, strategies and behavior patterns among practitioners. It has been said that Civil Law practitioners rely more upon written briefs and statements, and tend to say less at hearings, while Common Law practitioners are more practiced at oral argument and examination of witnesses. British barristers and U.S. litigators get a lot of practice cross examining witnesses, whereas Civil Law practitioners are accustomed to written witness statements and document-based trials.

There are procedures in international arbitration that are not normally found in U.S. courts. Tribunals in arbitration are more likely to retain their own expert witnesses, a rare practice in U.S. courts. A procedure known in international arbitration as the “Hot Tubbing” of experts—where experts debate each other directly in front of the tribunal—is almost unknown in U.S. courts.

Even within the Common Law tradition, there are significant differences between British and American lawyers. A British lawyer may consider extensive witness preparation to be unethical, whereas a U.S. litigator might consider it tantamount to malpractice not to prepare a witness. A brief written by a British lawyer may have relatively few citations to court decisions, while a U.S. lawyer’s brief in the same matter is likely to be chock full of case citations and footnotes.

**Stereotypes and Confirmation Bias in International Disputes**

When confronted with cultural differences among businesspeople and legal professionals, it is easy to fall into stereotyping because stereotypes are a human attempt to compensate for inadequate information and insufficient time within which to make necessary judgments. In U.S. jury trials, lawyers sometimes resort to stereotyping prospective jurors during the *voir dire* process. They must make selections of the
jurors who will sit in judgment of their clients, based on scant information about the person, sometimes in a matter of minutes or even seconds.

“Stereotype” can be defined as “a widely held but fixed and oversimplified image or idea of a particular type of person or thing.” (Oxford Languages). Another definition is “Something conforming to a fixed or general pattern especially: a standardized mental picture that is held in common by members of a group and that represents an oversimplified opinion, prejudiced attitude, or uncritical judgment.” (Merriam-Webster).

Unfamiliarity can also breed stereotypes. During the first internet boom of the 1990’s and early 2000’s, cross-border high tech business increased, with some early difficulties. Among Silicon Valley lawyers, one heard quips such as: “In the U.S., negotiations end when the contract is signed. In some countries, negotiations begin when the contract is signed.” However, U.S. lawyers were not spared. Lawyers from other countries could be heard to complain about “the horrors” of discovery in U.S. litigation. The very word, “discovery,” can be met with disapproval in international arbitration circles, because it conjures images of intrusive and aggressive tactics, employed by swarms of U.S. lawyers armed with interrogatories and deposition notices. Some countries have even passed blocking statutes that make it a crime to facilitate U.S. discovery requests.

Other cultural issues surface when a business deal goes awry. Asian witnesses were sometimes deemed incredible because they hesitated to give direct answers to direct questions or look the questioner in the eye. Asian politeness and cultural reserve could be perceived as lack of candor. In the past, Asian companies were criticized for insufficiently documenting business transactions and financial records, or for corporate governance that gave too much power to their founders as opposed to an independent board of directors.

Confirmation bias, built on stereotypes, rests largely on anecdotal evidence from individual cases, as well as the subjective perceptions of the observers, who are participants themselves in the arbitration or mediation and thus hardly disinterested. Since arbitrations and mediations are largely private and confidential proceedings, no one can do a scientific study of whether people of one culture or another are statistically more likely to behave in certain ways. Thus, international dispute resolution decides the outcome of billions of dollars in disputes yet one of the key factors in the outcome, differences in national or legal culture among the participants, is difficult to study objectively or scientifically.

The danger of cultural stereotyping, whether generally or within the legal world, is that it can lead to misunderstandings, erroneous assumptions about the intentions of others, and negative prejudgments about the participants in an international dispute, undermining credibility and trust, whether deservedly so or not. In trying to resolve an international dispute, mutual mistrust is obviously a bad place to start if the parties seek a solution and hope to maintain civil relations with counterparties and their lawyers. Yet, in some cases it is perfectly sensible to be wary. Parties in a dispute are not always fair or trustworthy. It is important to remember, however, that cultural differences are often not the main underlying cause of disputes or strained relations between the parties. Instead, the same dynamics in any domestic legal dispute, such as conflicting financial self-interests, can be the underlying causes of the disputes.
International disputes do add another layer of challenges. The way that business is done varies from region to region and industry to industry, giving rise to differences in business and societal cultures and different expectations of trading partners. As mentioned above, legal traditions, systems and practices also vary among nations and regions, with differences in legal cultures not only from country to country, but sometimes even within the same country. Yet, in a world of massively globalized trade, commercial disputes inevitably occur, and commercial dispute resolution must be fair, efficient and reliable if the nations of the world are to trade with each other.

The Changing Landscape of International Dispute Resolution – New Members Join the Club
In the 21st Century, it is well to recognize the changing landscape of international trade and disputes. We have seen the rise of some Asian, Middle Eastern, Latin American and African economies, and multilateral trade among increasingly interdependent economies across the world. The recent semiconductor shortage resulting from the COVID-19 pandemic is a recent example of that interdependence.

The changing trade landscape inevitably affects the landscape of international dispute resolution, with cultural implications. As the economies of the former Third World have grown, companies from those regions have become more frequent and prominent participants in major international commercial disputes. They bring to those disputes different business and legal cultures, which now add to the historical mix of legal traditions.

Despite the changing business and legal landscapes, the world’s need for fair, efficient, reliable international dispute resolution remains unchanged. It is the central challenge of neutrals and practitioners to meet that need while finding ways to accommodate the increasingly diverse cultures of those involved in international disputes. How can this be accomplished when there is no central world authority to set international laws and norms of practice? One may look to the past and present for some of the answers.

During the modern age of globalization, Anglo-American and Euro-centric legal systems, principles and legal cultures have been the standard for resolving international disputes. They are likely to remain the template but require some adjustments. Common, widely recognized legal principles such as Due Process, the enforceability of contracts, rules to ensure the reliability of evidence, and the awarding of just compensation for damages, are recognized among the trading nations of the world. A workable international dispute resolution system could not exist without a set of commonly accepted legal principles and the international practitioners and neutrals possessing the integrity, knowledge and skills to apply those principles fairly and efficiently. As always, it is in the human factor that culture becomes relevant.

Efforts to Harmonize Differences Among Legal Systems and Cultures
As international dispute resolution has evolved, international institutions such as the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce – International Court of Arbitration (ICC-ICA), and the International Bar Association (IBA), have created model laws, model arbitration rules, and standards for the taking of evidence, many of which have been widely adopted by the nations of the world. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly called “The New York Convention”), has been
adopted in some form by over 160 countries. These measures attempt to harmonize different legal systems. The measures embody and advance unifying principles and seek to overcome not only systemic differences and business disagreements among parties, but cultural differences among disputants and practitioners.

Cultural differences in international disputes are rooted in history and legal traditions. It may seem curious at first that Asian and Middle Eastern countries even have Common Law or Civil Law legal systems, when both systems arose in Europe. History shows that colonialism and international trade spread those systems and the establishment of the rule of law in far-flung corners of the world. Once a legal system was exported to another country, however, that country often tailored the system to suit their national needs and interests. Over time, the legal systems evolved within different countries and regions, as diverging histories, local conditions and cultures modified the original systems. One need only compare the U.S. and British legal systems to see how different branches of the same legal tradition can diverge.

In order to anticipate and understand cultural differences in international disputes, it is wise to keep in mind the history that influences the parties, counsel and tribunals who are involved in attempting to resolve those disputes.

A Role for Lawyers in Blending Legal Cultures and Developing International Standards

It takes time or tectonic shifts for national cultures to evolve. In the modern age of globalization, national cultures that date back thousands of years have been thrust into a globalized market in which business is transacted across the globe in seconds. It seems unrealistic for those cultures to change quickly and adapt easily to an externally imposed set of cultural norms. However, legal cultures are a different matter.

One way in which differences in legal cultures can be harmonized is for international law practitioners to become more, well, international. International dispute resolution practitioners and neutrals learn their crafts in the national court systems and bar associations of their respective countries, whose legal traditions have some similarities but also some subtle and not so subtle differences. In a Hong Kong court, the lawyers bowed to the judge when he entered the courtroom. It is difficult to imagine that happening in a San Francisco courtroom.

Despite different legal traditions and cultures, the modern age of globalization has not passed by the international legal profession. Treaties between some nations have partially opened legal markets to foreign practitioners. Acceptance of international norms of practice are less obvious in a nation with a large bar. In such countries, the legal economy acts as its own ecosystem, with relatively little need for practitioners to venture abroad or to open their eyes to a different way of practicing law. Yet, it is virtually impossible for business lawyers to ignore globalization. Therein lies opportunity.

With over a million lawyers, for better or worse the United States is a net exporter of lawyers to the world. The United States also accepts hundreds, if not thousands, of foreign students into its law schools each year. Dual-qualified and multi-lingual lawyers serve to bridge the gaps between legal systems. Lawyers who are educated or practice overseas can become familiar with foreign national cultures and legal
systems, as well as to share with their new host countries and clients an international set of legal norms and standards.

Cross-pollination of the international legal market requires flexibility on the part of the national bars of each country and an open-minded attitude among individual practitioners, both foreign and domestic. A sense of protectionism or competition can easily arise between domestic and foreign practitioners in a tight legal market, but the possibilities of truly international law practices, as well as opportunities to provide more effective representation to clients engaged in international trade, should provide strong incentives to overcome such feelings.

**Cultural Dynamics in International Mediation**

Cultural dynamics play a different role in international mediation as opposed to arbitration. In a mediation, the parties must agree to their own negotiated solution. Human psychology and incentives thus play a significant role in the outcome, and the human decision-makers are often from different national cultures.

One’s view about the importance of cultural differences in international mediation might depend on one’s view of human nature itself; whether one believes that human beings are all basically wired in the same way, and that culture is the result of one’s upbringing and surroundings. If you separate twins at birth and raise them in very different cultures, they might recognize common genetic traits in each other, but they would be quite different culturally. On the other hand, the issues in a commercial dispute, whether international or domestic, tend to fall within a fairly narrow range of human concerns. Financial interests and business relationships brought the parties together to do business in the first place. Many of the same interests and concerns will be brought to bear when they try to reach a resolution of their business disputes. This is not to minimize the likelihood of sharp and sometimes extreme differences between parties to a dispute, but only to point out that they still have some common concerns and interests.

Cultural dynamics can sometimes exacerbate the frustration that the parties may feel with each other, because they may not understand why the other party is behaving in a certain way. Moreover, cultural differences may include differences in deeply ingrained expectations about what constitutes fair or ethical business practices. What constitutes outrageous behavior in one culture may be considered within the pale of acceptable business practices in another.

The cultural fluency of legal counselors and neutrals can ameliorate some of the cultural differences between parties in an international mediation. To be sure, one or both parties may have acted badly, and there may be real differences in positions or financial interests. Cultural differences, however, can add a destructive layer of animosity that impedes the communication that is essential to a negotiated resolution. Legal counsel and neutrals who are able to see both sides of a cultural divide can play constructive roles; they can minimize unnecessary cultural animosities and focus the parties more clearly on the practical and business realities of the dispute. This requires considerable tact; pointing out the other side’s view of things can make the counsel or neutral seem to be siding with the other side, especially to a confused and angry client who is under the pressure of a legal dispute.
Conclusion

The Scottish Formula One driver, Jackie Stewart, once said that speed should be irrelevant to a motorcar race driver. It seems counter-intuitive, but his insight may be applied to challenges in other professions. In a utopian legal world, cultural differences would become either a positive ground for improved mutual understanding, or irrelevant to the outcome of an international legal dispute by focusing instead on a set of shared legal and equitable principles. Cases would be decided based on harmonization of cultural differences, as well as universally accepted legal principles, reliable evidence, and mathematically precise logic. Until that idealized world comes into being, international law practitioners and neutrals must rely upon a widely accepted set of legal principles and norms, cultural fluency and flexibility, and the professional competence and integrity of the international legal profession, in order to continue working together to resolve international disputes.

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