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Transnational Challenges and Desired Ethical Standards in International Arbitration

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ABSTRACT *International commercial arbitration adapts to changing market forces and modifies itself according to the needs of end-users as it relies on the established and secure functioning of the Permanent Court of Arbitration (PCA). This paper intends to serve as a guide on expectations and successful strategies for parties and their legal representatives on the conduct of international arbitration in the context of cultural differences. The legal traditions of international commercial arbitration today originate not only from civil and common law jurisdictions but from the proliferation of arbitration associations and the influence of those who devise arbitral rules and procedures, serve as arbitrators and act as counsel in arbitration proceedings. However, knowledge of these distinctions is only the key and not the end solution.*

1. Introduction

An increasing trend towards harmonization of the international arbitral procedure[1] has benefitted both common law and civil law arbitral practitioners through the study of competing legal traditions.[2] Effectively representing clients in international arbitration remains undermined as parties and the witnesses come from different business cultures, as well as arbitrators who may hail from countries or regions differing from those of the parties. This subsequently creates cultural challenges in the arbitral proceedings. Modern international arbitration conventions, such as the PCA (*Permanent Court of Arbitration*) rules on arbitration of environmental disputes, as well as the increasing adoption of the UNCITRAL model law into domestic law, are examples of increased harmonization of rules for arbitration in both

* Insert author accreditation.
[1] Lucy Reed & Jonathan Sutcliffe, 'The Americanization of International Arbitration' (2001) 16(4) Mealey's Int'l Arb. Rep. 37.
[2] Julian D.M. Lew & Laurence Shore, 'International Commercial Arbitration: Harmonizing Cultural Differences' (1999) 54 Disp. Resol. J. 33.

institutional and ad hoc arbitrations. However, cross-cultural differences among end-users, lawyers, legal systems and legal cultures and their impact on commercial arbitration remain largely underestimated.

Beyond the traditional advantages, arbitration in the context of international joint ventures presents unique advantages given the cultural differences of the parties involved and enjoys remarkable stability, despite its diffuse nature, form, and expression. Furthermore, the eminently commendable principle by which national courts recognize and enforce arbitral awards, making it a suitable response to the whims of forum shopping, is undermined when awards are set aside in one national jurisdiction yet enforced in another.[3] This research explains the importance of understanding underlying cultural issues in international arbitration and the role of arbitrators, arbitration tribunals and arbitration trainers in ensuring cultural issues do not adversely impact arbitration outcomes. It describes the legal culture and legal tradition, which is followed by the differences which occur in arbitral proceedings, both in civil and common law jurisdiction. It further compares the arbitration law and procedures of civil and common law jurisdictions. It concludes that understanding cultural issues are an important element in the effective practice of international arbitration, similarly to legal and technical skills. Further, that issues arising from cultural differences must be studied both generally and specifically international. It makes recommendations for arbitrators, arbitration tribunals and arbitration trainers. The methods used for this research may also be applied to other international arbitration jurisdictions.

2. Legal culture in international commercial arbitration

A legal culture can be defined as a way of describing relatively stable patterns of legally oriented social behaviour and outlooks. The notion of a legal culture consists of aspects of a

[3] Hassan Afchar, 'The Muslim Conception of Law' in K. Zweigert and Ulrich Drobnig (eds), *International Encyclopaedia of Comparative Law* (1975) vol 2, Ch. I.

national culture that finds expression in their respective legal systems.[4] There are *three* culturally responsive reasons for international parties to enter into arbitration agreements, namely:

- *First,* as compared to a public trial, arbitration is a private and informal process. This less-publicized nature of arbitration compared to trial is important in allowing parties in dispute to save their reputations, particularly if either party's culture is averse to litigation or views lawsuits as bringing disgrace.
- *Second*, arbitration allows parties to choose their decision-maker, who is considered more neutral than a foreign court. For ventures which are operating in foreign countries, this neutrality of private arbitration is particularly since justice systems are perceived to be held captive to national interests.
- *Third*, prospects for successful resolution of conflict and the ultimate survival of the venture may be significantly improved by avoiding the ordeal of litigation.[5] Although it is generally less expensive than going to court, the cost of international arbitration is notoriously high.[6] However, this trumpeted achievement of high cost, international commercial arbitration proves as a disadvantage to the parties.

Furthermore, the legal culture can be broadly categorised into two, namely, civil law and common law culture.[7] Within these main legal systems, different regionally based subcultures exist, which maintain their unique traditions.[8] Friedman explains that a legal

[4] David Nelken, 'Toward a Sociology of Legal Adaptation' in David Nelken & Johannes Feest (eds.), *Adapting Legal Cultures* (Hart 2001).
[5] Steven R. Salbu, 'Parental Coordination and Conflict in International Joint Ventures: The Use of Contract to Address Legal, Linguistic, and Cultural Concerns' (1993) 43 Case W. L. Rev. 1221, 1228-29.
[6] Queen Mary University of London and School of International Arbitration, "2018 International Arbitration Survey: The Evolution of International Arbitration", <www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--- The-Evolution-of-International-Arbitration.PDF> (accessed 15 May 2020).
[7] Anita Bernstein & Paul Fanning, 'Weightier Than a Mountain": Duty, Hierarchy, and the Consumer in Japan' (1996) 29 Vand. J. Transnat'l L. 45 (discussing Japanese legal culture); Alain Lempereur, 'Negotiation and Mediation in France: The Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education' (1998) 3 Harv Negot L Rev 151 (discussing French legal culture); Christian Atais & Alain A. Levasseur, American Culture and Traditional Scholarly Order (1986) 46 La. L. Rev. 1117 (discussing U.S. legal culture).
[8] Pieter Sanders, 'Quo Vadis Arbitration? – Sixty Years of Arbitration Practice' (2000) 5 Unif L Rev ns 863, 866.

culture consists of the "attitudes, values and opinions held in society concerning the law, the legal system and its various parts."[9] Legal culture can be separated into *three different analytical subcategories* which group certain aspects of culture and form the basis of culture.

- *Level one* is categorized as technical. It is the unemotional and easily transferable part of the culture, such as the grammar of a language.[10]
- *Level two* is so-called formal and refers to rituals both obvious and hidden.[11] These rituals are learned by trial and error.[12] This level is emotionally charged and is more prone to misunderstandings because the hidden ones are not easily learned and one of the different cultures will not easily admit to their effect.
- *Level three* can be categorized as informal,[13] as this level is also highly emotional and is only learned through modelling. It describes the automatic and almost unconscious responses.[14]

Arbitration is considered a meeting point among different legal cultures, and it helps practitioners from different backgrounds to converge. And thus, over the past years, the relationship between 'legal culture' and the practice of international arbitration has received increasing demand. However, there are three divergent views on this. *The first* view suggests that this process has led to an emergent "international arbitration culture" fusing elements of the common law and civil law traditions.[15] The *second* view suggests that arbitration acts as a

[9] Eisenstein J & Lawrence M. Friedman, 'Law and Society: An Introduction' (1979) 73 American Political Science Review 558.
[10] Phillip R. Harris & Robert T. Moran, 'Managing Cultural Differences' 3rd ed. (Houston: Gulf, 1991).
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Siegfried H. Elsing & John M. Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration' (2002) 18 Arb. Int'l 59; Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' (2003) 36 Vand. J. Transnat'l l. 1313.

locus of conflict amongst traditions.[16] *Lastly*, arbitration has created competition among various players.[17]

3. Legal tradition in international commercial arbitration

Legal culture is wider than a legal tradition. The formal legal tradition displays the genesis and development of a legal system including its norms, doctrines, principles, standards, and rules of law. From the perspective of international commercial arbitration, legal traditions may be broken down into local, regional, and international traditions. *Local legal traditions* encompass the rules and practices of a state or local legal system, such as those embodied in a state's commercial code. *Regional legal traditions* include the laws and practices of regional organizations like the European Union (EU)[18] and the North American Free Trade Agreement (NAFTA).[19] *International legal traditions* include the various institutions adopted by a multitude of states, such as is embodied in the World Trade Organization (WTO).[20] Following are five different principles to gauge the legal tradition of international commercial arbitration.

- ***Consensual, i.e., the parties choose arbitration***.[21] The parties to the arbitration are free to select the nature, form, and operation of arbitration, whether its nature is ad hoc or institutional, whether its form is modelled on European, English, American or any other legal traditions, whether it is conducted primarily through oral testimony or written submissions, and whether it is impacted by a multi-or bilateral treaty or by discrete customary law influences.

[16] Lena Peters, Stefan N. Frommel & Barry A.K. Rider (eds.), 'Conflicting Legal Cultures in Commercial Arbitration. Old Issues and New Trends,' Uniform Law Review, Vol. 5, Issue 4, December 2000, p 865.
[17] ibid; Michael Kerr, 'Concord and Conflict in International Arbitration' (1997)13 Arb. Int'l 121.
[18] Joseph M. Lookofsky, *Transnational Litigation and Commercial Arbitration: A Comparative Analysis of American European and International Law* (Ardsley-on-Hudson, NY: Transnational Juris Publ. 1992).
[19] Leon E. Trakman, *Dispute Resolution under the NAFTA: Manual and Sourcebook* (New York: Transnational Pub., New York 1997); Leon E. Trakman, *Resolving Disputes Under Chapter 19 of the NAFTA in Doing Business in Mexico* (New York: Transnational Leg. Publ. 2004).
[20]Guohua Yang, Bryan Mercurio & Li Yongje, *WTP Dispute Settlement Understanding: A Detailed Interpretation* (The Hague: Kluwer Law International 2005); World Trade Organization Dispute Settlement Decisions: Bernan's Annotated Reporter, vols. 1& 2 (Lanham, MD: Bernan Press1998).
[21] Thomas E. Carbonneau, Lex Mercatoria and Arbitration (revised ed., Huntington, N.Y.: Juris Publ. 1999).

The parties presumably exercise their choices for distinctive reasons. These include the arbitrators' supposed commercial expertise beyond that of domestic courts of law, the perception that international commercial arbitration costs less, is more efficient and more "party sensitive" than courts of law, or simply to avoid relying on the laws and procedures of the legal system and the courts of one party. These reasons may be misplaced but they nevertheless are repeatedly invoked as bases for resorting to arbitration.[22]

- ***Parties have the option to make choices that can accommodate preferred legal traditions, while still not choosing domestic courts.*** For example, they may adopt a European-centric model of arbitration, such as that of the ICC, because it more closely resembles civil law traditions, even though it is international and does not replicate the proceedings followed by the courts in any one civil law jurisdiction.[23] Alternatively, parties may choose the English model of the London Court of International Arbitration (LCIA),[24] or the American model of the American Arbitration Association (AAA)[25] for much the same reasons,[26] along with local options, such as states arbitration before the Swiss Arbitration Association,[27] the Australian Centre for International Commercial Arbitration,[28] or China International Economic and Trade Arbitration Commission (CIETAC).[29] Party may

[22] Leon E. Trakman, 'The Efficient Resolution of Business Disputes' (1998) 30 Can. J. Bus. Law 321.
[23] European Convention on International Commercial Arbitration, 484 U.N.T.S. 364 (April 21, 1961).
[24] LCIA Arbitration Rules (2014) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx> accessed on June 3, 2020.
[25] AAA Commercial Arbitration Rules and Mediation Procedures (2013) <https://adr.org/sites/default/files/Commercial%20Rules.pdf> accessed on June 3, 2020.
[26] International Centre for Dispute Resolution (ICDR) of the AAA <https://www.icdr.org/index.php/rules_forms_fees> accessed on June 7, 2020.
[27] Swiss Chambers Arbitration Institution <https://www.swissarbitration.org> accessed on June 4, 2020.
[28] Australian Centre for International Commercial Arbitration, <http://www.acica.org.au/> accessed on June 1, 2020.
[29] CIETAC Arbitration Rules <http://www.cietac.org/index.php?m=Page&a=index&id=42&l=en> accessed June 4, 2020.

also choose to "domesticate" arbitration, such as by appealing to local customary laws and procedures.[30]

- ***How arbitration is conducted may reflect in varying degrees a particular legal tradition and more broadly, a preferred cultural orientation.*** The influence of the ICC Court in determining the form, content and authority of each ICC award reflects a tradition in which uniformity, consistency and authoritativeness in decision-making are prized.[31] However, the ICC also has a legal tradition that reflects many civil law values, including an ethical approach towards the analysis of law; a scientific method of law-making; an emphasis on principled decision-making and a deductive method of reasoning adopted by the Court.[32] This tradition can be contrasted to varying degrees with that of the American Arbitration Association in which decision-making is more piecemeal and *ad hoc*, where there is no unifying influence of an ICC-like Court, and where inductive reasoning from particular facts to general rules predominates in arbitral jurisprudence.[33] Arbitration in China (disputes with state enterprises before CIETAC), consists of a traditional blend between domestic and international rules and procedures and is influenced by local custom regarding the enforcement of arbitral awards are predominant.[34]
- ***Procedures associated with international commercial arbitration stand out more starkly when they are modelled on a particular legal tradition.*** For example, all other factors being constant, one may well expect to encounter less reliance on oral testimony before arbitration tribunals like the ICC than before an association like

[30] Leon E. Trakman, 'Appropriate Conflict Management' (2001) 3 Wisconsin L. Rev. 919.
[31] ICC Rules <https://iccwbo.org> accessed on May 30, 2020.
[32] Jan Paulsson, Jan, William W. Park, and W. Laurence Craig *International Chamber of Commerce Arbitration* (3rd ed., Oxford, U.K., Oxford Un. Press 2001).
[33] Laura Ferris Brown (ed.) *The International Arbitration Kit: A Compilation of Basic and Frequently Requested Documents* (Rev. 4th ed., New York: American Arbitration Association 1993).
[34] Priscilla Leung Mei-fun and Wang Sheng-chang *Selected Works of China International Economic and Trade Arbitration Commission Awards* (Vol. 2, Sweet & Maxwell Asia 1998).

the AAA where the examination and cross-examination of witnesses, including experts, are often extensive.[35]

- **The variations in the services provided by international commercial arbitration inevitably are impacted by the customer.**

4. Differences in arbitral proceeding due to legal culture and legal traditions (civil law and common law jurisdictions)

Although internal differences exist between civil and common law jurisdictions, some of the specific expectations can be observed during the arbitral proceedings. Within these main legal systems, different regionally based subcultures exist, which maintain their special traditions.[36]

4.1. Agreement to arbitrate

Due to different principles which prevail in the various systems, the formal and substantive requirements of an arbitration clause or agreement are still divergent. These divergences are highlighted, for example, in situations when the parties' intent to arbitrate is not embodied in an ad hoc clause or agreement, but maybe evidenced by the reference to documents of previous business relations between the parties; when the arbitration clause is incorporated into the contract by reference to a pre-prepared document(s) foreign to the instrument executed by the parties; and when the arbitration clause is inserted into standard conditions of contract prepared by one party. Within civil law countries, the trend is towards a narrow interpretation of arbitration clauses or agreements, requiring unequivocal waiver of the right of access to the judiciary.

The choice between ad hoc and institutional arbitration may be guided by different criteria in different States. The criteria embodying value judgments should be made known to

[35] Leon E. Trakman, 'Confidentiality in International Commercial Arbitration' (2003) 18 Arbitrational International 1.
[36] Pieter Sanders (n 8).

the parties when they are executing the arbitration clause or the agreement. Parties must agree beforehand on the system of appointment of arbitrators, with sensitivity to the differences between the legal systems involved. Some of the important issues include the following but not a conclusive list.

- It is important to highlight the possibility that the arbitrators' panel may wish to appoint a secretary (such practice, for example, is rather common in Switzerland).
- A major issue concerns the likelihood that arbitrators, rather than focusing solely on domestic laws, may be inclined to apply general usages of trade, or even the principles stemming from the elaborated doctrines of Lex mercatoria which is looked upon more favourably in certain countries (e.g., France and other Western and Eastern European countries) than in others (e.g., the U.K. and the U.S.).
- The nationality of the arbitrators.
- The fees that parties are expected to pay.
- The Code of ethics is used to guide the arbitrators' actions, especially when the arbitrators are appointed by the parties themselves.
- Careful valuation of administrative costs should also be made when facing administered arbitration, as such costs may differ greatly between the systems considered.
- Further, decisions ex aequo et bono or by arbitrators acting as "amiable compositeur" (these two expressions being now generally equated despite differences still traceable in historical perspective) are generally accepted in Continental Europe; yet the same is not true for the U.K. and the U.S.

Careful analysis of the scope of arbitrability should always be carried out beforehand. Selection of the place of arbitration should be made keeping in mind the features of local legislation which almost inevitably are likely to have a bearing on the arbitral proceedings. For

instance, the U.S., and Switzerland, have reduced the procedures to set aside awards to the barest minimum. The U.K. and several other European countries tend to adopt a "middle of the road" position. Means of recourse are generally provided under the other systems considered, but the specific grounds for setting aside the award differ greatly under the numerous domestic laws.

4.2. Decision-making

In international arbitration, while referring to cultural differences in the decision making, the initial point must be the selection of decision-makers i.e., arbitrators. Various eminent former judges from common law jurisdictions have been employed by the new international arbitration centres, such as Seoul, Dubai, or Kazakhstan, to augment their arbitration tribunals, as it is believed that an ex-senior judge has all the necessary skills and abilities which a good arbitrator needs, such as impartiality, reasoning, case, and evidence management, etc.

On the other hand, jurisdictions with underdeveloped legal systems don’t consider a judge as they feel that judges simply judicialize the process. Moreover, the parties do not trust judges properly to address technical and complicated subject matters. Many civil law jurisdictions, such as China or Austria, prefer their top arbitrators to be academics who have not necessarily practised law. The familiarity of their publications gives comfort to the parties at the time of selecting, which is like the former judge’s previous decisions under common law. In the Asia Pacific region, parties also look for other qualities, such as mediation accredited arbitrators as it is not uncommon for a party to seek decision-makers to stay arbitration proceedings and act as mediators where appropriate. This is especially so in smaller arbitrations with a sole arbitrator, but it is virtually unimaginable in countries like those in Europe, or the USA.

4.3. Statements of the case

Statements of a case can be described in terms of form and content. When addressing form, there are differing views as to the best way to introduce a case. Statements of the case simply set out the cause of action, the facts giving rise to that cause of action and the remedy sought. There is a limited narrative and nil or very few documents. The foremost purpose is to identify the issues involved in the said dispute, which are then supported and addressed by way of evidence. Generally, there is a claim, defence, or counterclaim, reply and occasionally a rejoinder.

Civil lawyers, such as *French* and *German* practitioners, prefer memorials which are narrative statements of the case and include supporting documents, *witness statements and evidence*. This effectively benefits the arbitration by requiring parties to carry out much of the necessary work before commencing proceedings. Conversely, English and American lawyers are accustomed to use memorials and bestow with the requirement for any form of disclosure or discovery. In systems that rely predominantly or exclusively on written advocacy, it would result in several rounds of memorials replying and expanding on previous submissions. By contrast, common law systems, such as Australia and *Singapore*, often rely on traditional pleadings.

4.4. Oral or written proceedings

The UNCITRAL rule 24(1)[37] leaves the decision whether to hold a hearing to the arbitral tribunal unless the parties agree otherwise. A hearing is held if a party so requests. It is not stated which weight will be given to such pleadings and how much detail is required but depends on any given arbitrator's preference.

[37] UNCITRAL Arbitration Rules <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> accessed on May 12, 2020.

Under the common law, pleadings have little value, because the oral hearing is of most importance.[38] The factfinder must be convinced during the "show", the proceeding of whatever nature.[39] 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.

However, under civil law, all information must be identified and provided in writing and often in excessive detail as soon as possible, since it is evidenced. For example, as per the German Code of Civil Procedure § 296,[40] a judge should not be as easily moved by emotion, and it is presumed that a judge could extract the relevant facts more quickly from paper than from lengthy witness testimony and cross-examination. Although the judge may further ask a witness everything he needs to know when the documents are insufficient, often this may not be unavailable. Thus, the civil law judge prefers paper as a general matter. Here, the civil law lawyer expects the documents provided to amply support the point of view, and the common law lawyer is naturally perplexed because of the lack of weight given to his or her advocacy by the civil law arbitrator.[41]

4.5. Discovery and pre-hearing procedures

The UNCITRAL Rules provide in article 23(1)[42] that the parties should support their claims and defences with all relevant documents but are also allowed to use references to evidence to be submitted later unless otherwise agreed.[43] In article 24(3),[44] UNCITRAL

[38] Christian Borris, 'The Reconciliation Between Common Law and Civil Law Principles in the Arbitration Process' in Stefan Frommel & Barry Rider (eds.) *Conflicting Legal Cultures in Commercial Arbitration* (Kluwer Law International 1999).
[39]Paolo Michele Patocchi and Ian L Meakin, 'Procedure and the Taking of Evidence in International Commercial Arbitration - The Interactio of Civil Law and Common Law Procedures' (1996) 1996 Int'l Bus LJ 884.
[40]German Code of Civil Procedure
<https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html> accessed on May 21, 2020.
[41] Lucy Reed (n 1).
[42] UNCITRAL Arbitration Rules (n 37).
[43] ibid r 23(1).
[44] ibid.

requires all material submitted to the panel to be submitted to the other party as well.[45] Culture also has room to create expectations due to this freedom of procedure.

In common law, discovery and pre-hearing procedures are considered one of the most important tools in dispute resolution (both in judicial proceedings and alternative dispute resolution).[46] However, pre-hearing discovery is necessary for common law. The evidence must be neatly presented for the reasons discussed above which are 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 submits their evidence late and it potentially frustrates 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 unnecessary.[47] For many civil law jurisdictions, such as Germany, discovery is also connected with privacy concerns.[48] Unlike the common law jurisdictions, there is no requirement of presenting the evidence neatly under civil law. 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.

Further, depositions take on varying degrees of importance for common and civil law lawyers. Preparation needs to be adapted, the lawyer must consider that the entire material will be reviewed and that withholding of information harms the case rather than helping it. Besides, a civil law arbitrator may even prefer a written statement to an oral one for reasons of efficiency.

[45] UNCITRAL Arbitration Rules (n 37) r 24(3).
[46] Borris (n 38) 10.
[47] Ibid 10.
[48] Ibid 11.

4.6. Case presentation

Cultural differences exist in the way that cases are presented at trial or final hearings. One such distinction concerns witnesses of the fact. Many jurisdictions do not permit any coaching of witnesses in the preparation of trial. For example, in England and Wales, coaching a witness is prohibited and amounts to professional misconduct**.** Lawyers are not permitted to prepare the witnesses on what should be said or to attempt and persuade the witness into changing their evidence. In contrast, witness familiarisation is encouraged by both the Bar Council and the Court of Appeal, to ensure witnesses are at ease as much as possible before their hearing and are not disadvantaged by ignorance of the process in which the hearing works. However, in jurisdictions such as Italy and the US states, it would amount to negligence not to coach and rehearse evidence with a witness. Likewise, the Swiss Rules states that any person may be a witness in the arbitration and it is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses or potential witnesses.[49]

The extent of the trial varies as many jurisdictions prefer closing submissions to take the form of written submissions, after the trial. This is also a tendency of civil jurisdictions, which are accustomed to paper-heavy trials. Questions are put to the parties following receipt of those closing submissions. This may delay the timing of the issuing of any award, but it permits parties to reflect the evidence and make detailed submissions on their respective cases. In common law jurisdictions, such as Hong Kong and New York, prefer all matters to be dealt with orally at trial unless there is insufficient time to deal with closing submissions orally. This provides for a more interactive and dynamic hearing. Of course, this also presupposes a culture where trial advocates are trained and accustomed to oral, adversarial advocacy and directly reflect the cultural differences imported directly from litigation.

[49] Swiss Rules of International Arbitration ("Swiss Rules") <https://www.swissarbitration.org/wp-content/uploads/2021/06/Swiss-Rules-2021-EN.pdf> accessed on 25 June 2021.

4.7. Treatment of witnesses

Treatment of witnesses is another area where cultural difference is most evident,[50] although UNCITRAL is silent on the same. Some of the issues associated with the treatment of witnesses are as follows:

- Whether a party can be a witness
- Whether the statements can be written
- Whether written statements are preferable over directly examined witnesses
- Whether cross-examination should take place.

For example, arbitrators in the U.S. and the U.K. (common law jurisdictions) are allowed to administer oaths of witnesses. On the contrary, in France (civil law), pursuant to Article 1467 of the Code of Civil Procedure (applicable to domestic arbitration and extended to international arbitration), the arbitral tribunal may hear any person providing the testimony, but witnesses are generally not sworn in. 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 of whether a party can be a witness, remains a distinction (without a difference) between common and civil law and over the years, the practice has settled toward the common law approach.[51]

Generally, UNCITRAL Model Rules are followed, but it also depends on whether the procedure chosen allows admissibility of the written witness statements.[52] The legal culture of the arbitrator determines the inference drawn from a written statement. In common law countries, due to the importance of the actual hearing and the separation of information gained before the hearing from the information presented at the hearing, cross-examination remains

[50] Reed (n 1) at IV.
[51] ibid.
[52] Ibid.

the best practice to test witness credibility,[53] as it introduces facts that were otherwise not presentable.[54] On the other hand, in civil law countries, the judge examines witnesses concerning contentious issues. The judge acts as the factfinder and a professional, who is deemed to assess the witness credibility by himself and only regarding statements he deems important.[55]

The distinction in treatment for unwilling witnesses depends less on culture and more on the country, the procedure of what one needs to compel the witness differs. In the United States, arbitrators can subpoena witnesses. In England, only the court may do so. In Denmark, the arbitral tribunal must request the court to subpoena, while in Belgium, the parties can ask a court themselves.[56]

4.8. The standard of proof

Regarding the standard of proof, there are many varying views on what standards should be applied or whether one should be applied at all. Common law jurisdictions spend much time debating the appropriate standard of proof. Where civil matters are considered, the balance of probabilities applies. However, there is disagreement where allegations of fraud or corruption occur. It is important to raise the standard of proof to match the seriousness of the alleged act and to lower the standard of proof, to prima facie where some interim or conservatory order is sought.

In contrast, most continental European countries hold that no standard of proof is applicable, but the alleging party must prove their case to the judge or arbitrator. This gives more scope to the decision-maker, but conversely, it gives the losing party more ground when challenging an award.

[53] Lawrence W Newman, 'International Arbitration Hearings: Showdown or Denouement' (1997) 5 Tul J Int'l & Comp L 393.
[54] Borris (n 38) 13.
[55] ibid.
[56] Pieter Sanders (n 8).

4.9. Evidence

The way parties choose to submit their statements of the case has an impact in terms of disclosure or discovery. Soft law has sought to harmonise these different approaches to presenting documentary evidence.

The IBA Guidelines[57] were designed and proposed to bridge the general civil and common law approaches. However, civil lawyers have not necessarily found them to have the desired effect. The Prague Rules[58] offer a variety of options that are more palatable to civil lawyers familiar with the memorials approach.

The aversion to documents is traditional in the U.S. Mistrust of lengthy and detailed affidavits, originally drafted by the lawyers then sworn by witnesses, is equally traditional in other systems. The drafting of affidavits by the lawyers themselves may even be regarded as unethical under certain domestic laws. The powers of arbitrators to obtain evidence are strictly linked with procedural rules prevailing under the systems considered. Ultimately the issue touches upon the status of the arbitrators, which is, in turn, drawn from the general qualification of arbitration as such in the framework of the applicable legal rules. The powers thus conferred, however, are ultimate to be construed considering the law applicable to the arbitration agreement together with the law governing the arbitration itself (*lex arbitri*).

A court in the civil law country does not aid compel a party for the attendance of a witness or the production of a document as per the contract. Thus, under the systems in which arbitrators do not have, either directly or through the courts, any power of coercion, their obligation to render the award is de facto contingent upon both parties carrying out a modicum

[57]IBA Guidelines and Rules <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed on May 21, 2020.
[58] Prague Rules <https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf> accessed May 30, 2020.

of procedural activity. To counterbalance this inherent weakness, the arbitrators may draw presumptive evidence from the conduct of the parties during these proceedings.

4.10. 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 way he or she sees fit. The parties discuss these notes and supplement them to prepare a written summary.[60] A summary is helpful where the evidence is mostly documentary, and witnesses are only heard for specific information. This method reduces the impact of cross-examination, in case it is conducted, and could common law lawyers, who rely on every word that the witness utters.

Moreover, bulk records tend to become overwhelming, with ensuing logistical problems affecting both the cost and the duration of the proceedings, as well as the time that arbitrators must devote to familiarizing themselves with the file.

4.11. Legal privilege

Legal Privilege goes hand in hand with disclosure. Privilege is a common law concept and there is a fundamental right to withhold documents from evidence on the basis that they contain confidential information between the lawyer and client. Even within common law jurisdictions, there are subtle distinctions within terminology and cover, such as “litigation privilege” or “lawyer work product”, developed by case law. The civil law jurisdictions do not have a concept of privilege per se. There are concepts of lawyer confidentiality, but these amount to restrictions on lawyers from disclosing information. These are sometimes conflated but, under the common law, privilege is the sole property of the client and therefore can only be waived by the client.

[59] Newman (n 53).
[60] ibid.

4.12. Expert evidence

While civil law countries prefer the expert to be appointed by the arbitral tribunal, in common law jurisdictions experts are often appointed by the parties and they appear as formal witnesses. According to a specialized opinion:

> "the trend in international arbitration is to rely on party-appointed experts rather than tribunal ones, although there have been important suggestions and possibly more recent trends to the contrary."[61]

Many arbitration statutes and institutional rules allow the parties to appoint their experts and permit the appointment of experts by the tribunal. In principle, parties should be able to submit expert reports on whatever topic they consider to be necessary, while tribunals are not obliged to appoint an expert even though they have the authority to do so. In international arbitration, practice has shown that it is difficult to choose either system for general use, each case has different needs, depending on which the tribunal must choose the best option: party-appointed experts or tribunal-appointed experts.

An expert may be appointed by a party, or the tribunal and such appointment is governed by the law of the seat. Various national legislations[62] as well as the UNCITRAL Model Law[63] and institutionalised rules,[64] give the tribunal the power to appoint an arbitrator unless agreed otherwise by the parties.

An expert's duty should be to aid the arbitral tribunal, although we talk about a party-appointed expert or a tribunal-appointed expert. Both party-appointed and tribunal-appointed experts should have the same duty of independence and impartiality and even though we may identify advantages and disadvantages for both types of experts, it can be made to work

[61] Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration,* (Kluwer Law International; Kluwer Law International 2012) pp. 885 – 976.
[62] The Arbitration and Conciliation Act 1996 (IN) s 26; Arbitration Law No. 138 of 2003 (JP) art. 34; Federal Law No. (6) of 2018 of Arbitration (UAE) art. 34.
[63] UNCITRAL Model Law (n 37) art. 26.
[64] The Singapore International Arbitration Centre (SIAC) Rules (2016) r 26; LCAI Rules (2014) art. 21, ICC Rules on Arbitration art. 2; IBA Rules on the Taking of Evidence in International Arbitration (2010).

properly to add value to the case because a professional and well-prepared expert will always add value to the case regardless the person who appointed him.

From the parties' point of view, an expert appointed by them and not by the tribunal might be preferable because he or she may comprehensively analyse their problems and taking into consideration that the communication may be more direct and efficient. However, tribunal-appointed experts will be preferred by the parties who might not be willing to pay huge costs on an expertise report.

From the expert's perspective, it might be preferable to be appointed by the parties and not by the tribunal. He may have better communication with the party which appointed him, and, in this way, he would have access to all documents and explanations needed. Furthermore, even though being a party-appointed expert implies a higher fee, it is important to build a relationship with the parties in a way that allows him to keep his independence in presenting his thoughts and opinion.

While analysing the Arbitral Tribunal's perspective, we may conclude that the Tribunal prefers an expert appointed by itself because the expert would take a decision based on a single and clear report, rather than two opposing reports. However, in complex cases such as those involving engineering and technical problems, party-appointed experts might be chosen by the tribunal because they may be more technically prepared than the experts from the Tribunal's list and they have the necessary knowledge to produce a complex and technical report.

4.13. Conduct of counsel during the proceedings

The conduct of counsel during the proceeding goes beyond the realm of the procedural rules of the arbitral proceedings. These proceedings rely on forensic habits and tactics from concrete professional experiences, rather than legal and conventional rules governing the

arbitral proceedings.[65] However, misunderstandings and conflicts may occur unless a mutually satisfactory modus vivendi[66] is achieved among the parties and the arbitrators.

4.14. The award

The New York Convention is the central instrument when discussing the recognition and enforcement of foreign arbitral awards. Given the large number of state parties to the Convention (166), there is significant harmonization of arbitration rules in common and civil law countries. Generally, courts in common law and civil law jurisdictions have a pro-enforcement bias, meaning the grounds for refusing enforcement are applied narrowly. Also recognized across legal traditions is that the party resisting recognition and enforcement of an awards bear the burden of proof of showing that one of the Convention's exceptions apply.

In common law countries, the enforcement of an award requires that judgment be entered upon the award. Consequently, the judgment, not the award, is enforceable. On the other hand, in civil law jurisdictions, an arbitration award is enforced by a declaration of enforceability, meaning the award itself is enforced.[67]

5. Conflicts of interest and disclosures

The established institutions have eluded adopting formal, systematic, clear, and objective rules, relying instead on vague standards of "independence"[68] or "impartiality" and requiring arbitrators to submit their list of potential conflicts of interest.[69] For instance, ICC contend that compelling disclosures will increase the administrative burden of arbitrators, the

[65] Giorgio Bernini, 'Cultural Neutrality: A Prerequisite to Arbitral Justice' (1989) 10 Mich. J. Int'l L. 39.
[66] Modus vivendi is a Latin phrase that means "*mode of living*" or "*way of life*". It often is used to mean an arrangement or agreement allowing conflicting parties to coexist peacefully, either indefinitely or until a final settlement is reached.
[67] For instance, the award needs an exequatur in some civil law countries. Ihab Amro, *Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries* (Cambridge University Press 2013) p. 70-71; United Nations Conference on Trade and Development, 'Dispute Settlement: 5.7 Recognition and Enforcement of Arbitral Awards - The New York Convention' (2003) <https://unctad.org/system/files/official-document/edmmisc232add37_en.pdf> accessed on June 5, 2020 p. 21.
[68] ICC Rules of Arbitration (n 31) art. 7 (1); UNCITRAL Rules of Arbitration (n 37) art. 9.
[69] *Al-Harbi v. Citibank, N.A. and Citibank, A.S.* 85 F. 3d 680 (D.C. Cir. 1996).

arbitral tribunal, and may also lead to increased challenges and motions to disqualify, both at the early and later stages of arbitral proceedings.[70]

The International Bar Association (IBA),[71] along with AAA, (working with the American Bar Association and the International Institute for Prevention and Resolution of Dispute Resolution) developed formal, specific, and relatively clear rules and guidelines for disclosures and definitions of possibly objectionable conflicts of interests. The IBA Guidelines on Conflicts of Interests for International Arbitration[72] which were drafted over a multi-year period, with a transnational committee membership, are especially instructive in the creation of three separate and specific lists of potential conflicts, with different suggested actions applied.

5.1. Red List

- It consists of two parts:
    - **Non-waivable 'red list':** The items on the non-waivable 'red list' are clear.[73] They include obvious cases like where the arbitrator has a significant financial or personal interest in one of the parties or the outcome of the case. In such situations, a potential nominee should not accept the appointment; *and*
    - **Waivable 'red list':** The waivable 'red list' situations include where (i) a close family member of the arbitrator has a significant financial interest in the outcome of the dispute; or (ii) the arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.

[70] Model Rules of Professional Conduct (ABA, 2006) model r 1.12. <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_12_former_judge_arbitrator_mediator_or_other_third_party_neutral/> accessed on June 2, 2020; Carrie Menkel-Meadow, Lela Love, Andrea Schneider and Jean Sternlight, *Dispute Resolution: Beyond the Adversarial Model* (Aspen-Kluwer, 2005).
[71] IBA Guidelines and Rules (n 57).
[72] ibid.
[73] These situations include: (1) identity between the party and arbitrator; (2) arbitrator has a controlling influence on parties or entity with direct economic interest; (3) significant personal or financial interests in parties or outcome of the case; and (4) arbitrator or firm regularly advises the party or its affiliate, and the arbitrator or firm from which it derives significant financial income.

5.2. Orange List:

- It gives rise to justifiable doubts about the arbitrator's impartiality or independence which must be disclosed to the parties.[74]
- Dissatisfied parties may make a "timely objection" – 30 days under the guidelines – or be "deemed to have accepted the arbitrator".[75]

5.3. Green List:

- It consists of situations where there are "no doubts" as to the arbitrator's impartiality and thus, presumably minimises unmeritorious disqualification applications.
- The green list includes where:
    - the arbitrator has previously expressed an opinion on an issue arising in the arbitration, but not focused on the case at hand;
    - the arbitrator has contact with another arbitrator or with counsel for one of the parties (e.g., same membership in professional association or organisation).

This attempt to specify concrete situations and their appropriate response also allows some discretion in its interpretation and is open to future modification. The IBA guidelines represent a thorough multicultural approach to the most common kinds of conflicts of interest. However, ICC does not adopt or formally support the IBA standards.

6. Ethical standards and neutrality of an arbitrator

[74] These include where (i) the arbitrator's previous services for one of the parties or other involvement in the case; (ii) the arbitrator's current services for one of the parties; (iii) the relationship between an arbitrator and another arbitrator or counsel.

[75] IBA Guidelines (n 57) pg. 27, para. 3: "The orange list thus reflects situations that would fall under General Standard 3a, with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a)." "Timely objection" is defined under General Standard 4(a) as "30 days after the receipt of any disclosure by the arbitrator, or after a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator".

Arbitration in the international commercial arena[76] is a legal creature of several core values and practices. The core concepts of international arbitration consist of the consent of the parties in their substantive contracts to this process of dispute resolution, truthfulness, fairness, independence, loyalty, procedure (by accepting institutional tribunal rules or crafting ad hoc rules of proceedings), decision-makers, the place, language[77] and a signatory nation to the New York Convention for ease in the enforcement of the arbitral award in any other signatory nation's courts.[78] While parties may not be truly willing participants in such systems, they still opt for it because they "need" to gain a reputable and usually trustworthy enforcement mechanism, as well as to avoid the expense and complexity of litigation alternatives in the international arena. For the most part, parties and their lawyers have greater choice about the processes of dispute resolution in arbitration than in litigation. Arbitration awards are typically confidential unless the award is challenged in a court proceeding or it is published in one of the new arenas of arbitration transparency, as in investment disputes, some labour disputes, and by some of the international tribunals.[79] However, in practice, core concepts have cultural and national legal differences as well.

The bigger international tribunals like the ICC, the LCIA, and ICDR (the international arm of the AAA)[80] assisted in the selection of arbitrators by making lists of experienced experts available. The majority of established international tribunals have developed rules of procedure and practice that recognize a core concept of arbitration (impartiality of the decision-maker).[81] They also differ in how they define and enforce standards such as disclosure requirements of

[76] Carrie Menkel-Meadow, 'Professional Responsibility for Third Party Neutrals' (1993) 11 (9) Alternatives to the High Cost of Litig.; Menkel-Meadow, 'Ethics in ADR Representation: A Roadmap of Critical Issues'(1997) 4 (2) Disp. Res. Mag. 3; Menkel-Meadow, 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' (2002) 56 U. Miami L. Rev. 949.
[77] Catherine Rogers, 'Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration' (2001–2002) 23 Mich. J. Int'l L. 341, 358–373.
[78] ICC Rules (n 31) art. 27.
[79]Jack Coe, Jr. 'Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation and NAFTA Leadership' (2006) 54 Kansas L. Rev. 1301.
[80]ICDR (n 26).
[81]Alan Scott Rau, 'Integrity in Private Judging' (1997) 38 S. Texas L. Rev. 485.

past or present relationships (parties, experts, counsel and substance) and what constitutes acceptance of a "conflict of interest" or a waiver by the parties (both explicit or implicit by failing to contest appointment within the requisite number of days).[82]

Making an agreement or consensus on what the ethical regulations should be is quite difficult because the specific content of rules governing these issues can vary in domestic legal systems, based on a different background or foundational values or approaches of different legal systems. As listed below, some authors[83] attempted to identify a "core set of ethical values" in international arbitration[84]:

- Lack of bias i.e., impartiality/neutrality
- Disclosure of potential conflicts of interests/grounds for "justifiable doubts" about impartiality
- Competence (i.e., representing competent cases; including the jurisdictional issue as well, such as Kompetenz - Kompetenz)
- Truthfulness to the tribunal and other parties
- Loyalty (towards clients, degrees of zeal in representation)
- Independence
- Conflicts of interest – degrees of knowledge, relationships (economic and personal) with parties, counsel, experts, witnesses, other potential clients, law firm partners, company structures, both parents and subsidiaries
- Preparation of witnesses and evidence (contact rules with parties, witnesses, "coaching")
- Disclosure/discovery of evidence and information

[82] It is widely known in international arbitration circles that selection of the arbitrator is one of the most important parts of the process; Alan Scott Rau, *Integrity in Private Judging*, 38 S. Texas L.Rev. 485 (1997).
[83] Menkel-Meadow (n 76).
[84] Rogers (n 77).

- Presentation of evidence.[85] The controversies surrounding cultural differences in ethical standards, differences in evidentiary rules and traditions from different legal systems also spawned a demand for and literature about advocating some uniform standards. The IBA has promulgated such Rules of Evidence for International Arbitration which can be agreed to by the parties either in their substantive contracts or in subsequent agreements to arbitrate or in Terms of Reference, setting out the rules and procedures of a particular arbitration.
- Attorney-client (or any other) evidentiary privileges (what can be inquired into in an arbitration proceeding and what is protected information).[86] For example, there are national (domestic) law differences in whether lawyers can be asked to disclose various communications with non-clients (different definitions of protected secrets) and internal information within corporate or organizational representation settings.
- Communication, including ex parte communication with parties, other arbitrators, parties, witnesses, and experts.
- Fees/Compensation/Expenses.
- Availability/ Diligence (in person, scheduled sessions, completion of awards, incapacity).
- Fairness in the conduct of proceedings.

[85] Charles N. Brower, 'Evidence Before International Tribunals: The Need for Some Standard Rules' (1994) 28 Int'l Law. 47. Like the controversies surrounding cultural differences in ethics standards, differences in evidentiary rules and traditions from different legal systems also spawned a demand for and literature about advocating some uniform standards. The IBA has promulgated such Rules Of Evidence for International Arbitration which can be agreed to by the parties either in their substantive contracts or in subsequent agreements to arbitrate or in Terms of Reference, setting out the rules and procedures of a particular arbitration

[86] Rogers (n 57); For example, there are national (domestic) law differences in whether lawyers can be asked to disclose various communications with non-clients (different definitions of protected secrets) and internal information within corporate or organizational representation settings.

- Justness (responsibility for "just" decisions; adherence to legally mandatory standards or other principles (parties' contract, common business usage, *lex mercatoria);* reasoned awards, not arbitrary or corrupt.
- Confidentiality (of proceedings, to parties, to others; conflicting mandatory disclosure rules, as in reporting of crimes or other malfeasance).
- Special duties/obligations of party-appointed arbitrators.
- Transparency including clarity of conduct of arbitration and rules for publicity of awards.
- Duties to the institutional tribunal, such as reporting misconduct of other arbitrators, parties, etc.; diligence, honesty, participation, governance, grievances, etc.
- Institutional liability/responsibility for ethical infractions or other irregularities in the arbitral process i.e., selection, the conduct of proceedings and awards.

Non-neutral arbitrators do not necessarily threaten the nature of arbitration as traditionally envisaged, provided that the same rules apply, by mutual agreement of the parties, to all appointees, in full transparency and without hidden discriminations. Any lack of independence due to cultural hurdles, conceivable in principle, should be acknowledged beforehand and accepted. Furthermore, it should not adversely affect the basic principles and the workability of arbitral proceedings. With regards to impartiality, the acceptance of possible deviations must be reduced to the barest minimum. The system of neutral arbitrators is based on a clear and unconcealed favour towards the appointment of neutral arbitrators, however, in contemporary practice, this is not necessarily true in all instances, especially when the parties themselves are public entities or the State itself.

7. Standards of ethics in international commercial arbitration: purpose and need

At present, there is a split between arbitral tribunals and the arbitral institutions which sponsor and administer international commercial arbitration. Ethical guidelines, either as a

separate document, or as an addition to their procedural rules of arbitration (or mediation) are declared by the International Bar Association, the American institutions (AAA/ABA/CPR) and a few other regional institutions such as Hong Kong, Milan, and the Santiago Chamber of Commerce sponsored arbitral or dispute resolution tribunals. In earlier efforts, the Stockholm Centre abandoned its efforts to craft ethical guidelines, citing the kind of legal cultural differences discussed above.[87] The ICC and the LCIA, as two of the major and most utilized arbitral institutions, have not drafted or approved separate statements of ethics for arbitrators or representatives (lawyers and other participants in the process), while continuing to include vague standards of "impartiality" or "independence" and self-disclosure of conflicts of interest of the arbitrators in their rules for arbitrations.[88]

More importantly, to the extent that the major tribunals are largely responsible for the core procedural rules (with a great deal of convergence and a small amount of divergence and choice among institutions) that characterize international commercial arbitration, drafting, approving, and publicizing good practices and core ethics would serve both a practical and symbolic function of demonstrating a public commitment to fairness and quality control of the process. Like all the procedural rules of these tribunals, rules of conduct, ethics, and conflicts of interest are "default" rules –they can be changed, modified, or rejected by parties electing arbitration in their initial agreement to arbitrate or even in consensual agreements during the negotiation of Terms of Reference. When standards of ethics and disclosure are clear, transparent, and dealt with early in the process (during arbitrator selection and screening), it tends to eliminate the later challenges (in court enforcement proceedings) which are more costly to the parties and dangerous to the legitimacy of the entire system.[89] At the institutional level, most of the world's tribunals of international arbitration would commit themselves to the

[87] Stockholm Institute's Ethics Project on Hold, Mealey's Int'l Arb. Rep. No. 9–12 at 12 (December 1994).
[88] ICC Rules of Arbitration (n 31) art. 7 (2).
[89] Alain A. Levasseur, 'Legitimacy of Judges' (2002) 50 Am. J. Comp. L. 43, 48-50.

highest standards of practice, especially in an international legal order that is increasingly seeking transparency, fairness, and multi-culturally accepted justice in all its legal institutions.[90]

8. Conclusion

With the evolution of the institutions under competitive pressures, expectations have increased and created a demand for a "culture" of common practice. It is the culture in the internal sense, a product of law rather than something that explains the outcome or constrains the process. The arbitration culture can be facilitative, encouraging effective communication and an efficient arbitration process. As the culture of arbitration evolves, it will be interesting yet difficult to try to determine which outcome occurs.

Conducting an initial conference with all the participants clears the misunderstandings and their expectations, before any further steps after the arbitrators are chosen. It includes discussion on the applicable law, the location of the proceeding, the weight of specific forms of evidence, the treatment of witnesses, and the role of the arbitrator. Depending on the cultures and backgrounds of the participants, the list of what would be discussed varies accordingly.

The participants to International Commercial Arbitration should select an arbitrator according to his or her experience (both life and legal) and cultural background, not just nationality, to obtain a strategic benefit. The ‘best bet’ concerning background and experience depends on what the parties want to achieve. Preparation, insight, and respect are considered helpful tools to avoid problems in cross-cultural International Commercial Arbitration. The arbitrators themselves assert the dignity of their function as per the circumstances prevailing in each case, however, non-neutral arbitrators would not trespass definite limits of fairness and honesty. The arbitrator should not act as a servant of the appointing party otherwise the

[90] John K.M. Ohnesorge, ‘The Rule of Law’ (2007) 3 Annu. Rev. of Law Soc. Sci. 14.1-14-16; B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge Univ. Press, 2004).

proceeding would lie outside the realm of arbitration as traditionally known. Moreover, the culture of arbitration would be betrayed wherein the dispute is settled through the confrontation of the parties reserving no role whatsoever to any third subjects acting in a quasi-judicial fashion. Thus, this process cannot be termed or considered as true arbitration.

In the USA, counsel unavoidably incorporates some attributes of the American-style advocacy under an ICC arbitration. Conversely, European and South American trained arbitrators who serve on AAA panels in the United States often add a distinctly civilian flavour to those proceedings, for example when they insist that the parties rely less upon oral testimony and have greater resort to written pleadings.[91] Negative stereotypes are also often unduly attenuated. For example, despite the traditional criticism that CIETAC subsumed international commercial arbitration within its domestic political and legal system, CIETAC has modified its rules and procedures specified to comply with international arbitration standards. There are problems that rules do not solve.[92] Neither ad hoc nor institutional rules contain answers for all procedural questions that may arise in International Commercial Arbitration. Further, to the extent that arbitral institutions (like the ICC) do not specify standards of some kind (as required disclosures and conflicts of interests) and the grounds for the decision of challenges to their arbitrators, they are inviting "second-guesses" of further litigation in efforts to challenge the enforcement of an award.[93] On the contrary, the UNCITRAL rules are often deliberately vague to avoid prejudicing the arbitral tribunal's discretion. A recognizable influence of culture can be observed with an experienced lawyer or arbitrator as well.

The cultural element represents a powerful force that influences the development of transnational arbitration, in parallel with the forces of globalisation. To achieve a fair and just

[91] Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about Our Allegedly Contentious and Litigious Society' (1983) 31 UCLA Law Review 4.
[92] Lawrence W. Newman, 'Pre-hearing Conferences - Cross-Cultural Conflicts' (1997) 8 World Arb. & Mediation Rep. 82, 87.
[93] Hall Street Associates L.L.C. v. Mattel Inc., No. 06-989 (U.S. Supreme Court, argued November 7, 2007).

result in international arbitration, more than intellectual rigour is required, it is also necessary for the parties to consider that they have been understood in their cultural context. The driving force of globalisation has succeeded in achieving a high level of global participation in arbitration and the harmonisation of arbitration laws and institutional rules. It might be hypothetically true that the global arbitration culture could be nurtured across countries.

In international arbitration, institutions could adopt measures to raise arbitrators' awareness of the danger of imputed bias in cases involving parties from vastly different cultural backgrounds in order to minimise the impact of any imputed cultural bias on case outcomes. In reality, it does not seem that viable in the near future. The theory of procedural convergence is not necessarily reflective of an emergent international arbitration culture.

The complex array of cultural differences isn't recognized while generalising international commercial arbitration. Just as the international business community has much to do with the changing legal traditions of international commercial arbitration, so too do different governments, arbitration centres and even individuals have much to do with changes in these traditions. To ensure that choices about what process to use and which institution to pick as the administering tribunal are well informed, standards of ethics should be as clearly delineated as the current procedural rules. There are legal cultural variations in the presentation and preparation of cases, but those differences have not prevented each of the major tribunals from crafting rules of procedure that serve as the default (or selected) rules when parties specify a particular institution. These days, sophisticated representatives and litigators may look for ways to challenge an award if they disagree with a final award. This article contends that specifying and enforcing clear standards of practice and ethical behaviour (with assumed waivers if institutional standards have been met) should increase the likelihood of enforcement of an award. Despite the harmonization of rules governing international commercial arbitration, increased globalization, and perforation of information about other legal systems,

this article showed that culture continues to play a role. Arguably, the phenomenon of convergence is not driven primarily by cultural factors, but a rational cost-benefit calculation, given harmonisation of rules governing international arbitration and perforation of information across jurisdictions. The future of international arbitration will continue be influenced by the combined forces of globalism and localism.