McNAIR CHAMBERS
INTERNATIONAL COMMERCIAL LAWYERS

Cultural sensitivity and International Arbitration – Khawar Qureshi QC[1]

- **What is the culture of International Arbitration?**
- **What are the cultural considerations which International Arbitration should be sensitive towards?**
- **Is change necessary? If so, how can change be brought about?**

Background

International Arbitration is viewed by many international commercial parties as the dispute resolution process of choice. Whether undertaken through the rules of an institution (such as the ICC, LCIA, DIAC) or on an ad hoc basis, the key advantages of International Arbitration are considered to be cost, speed, finality, confidentiality, neutrality and informality[2].

Conferences in New York and Dublin recently marked the 50th anniversary of the New York Convention 1958 ("NYC") which was intended to reduce the scope for Arbitral Awards to become the subject of lengthy legal battles in domestic Courts at the enforcement/execution stage[3]. For parties in certain parts of the world (where the NYC is not being given the effect that many believe it should), this "end game" is the most frustrating part of the process[4].

After all, there is little point in pursuing an arbitral process (which many see nowadays as being at risk of becoming no more than a slow/costly and cumbersome alternative to Courts) if financial recovery is unlikely. Much attention is therefore presently being focused upon cost, delay and reducing the scope for Domestic Courts to be deployed for the purposes of de-railing the arbitral process and its result.

Perhaps unsurprisingly, the issue of culture in the context of International Arbitration has received relatively little attention.

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[2] The first recorded reference to arbitration in the Muslim world is contained in the Treaty of Medina of 622 AD which nominated the Prophet Mohammad as the arbitrator of any disputes arising thereunder.

[3] See also the IBA/UNCITRAL Joint Report (June 2008) based upon a 10 year survey of State practice vis enforcement of arbitration awards pursuant to the NYC.

[4] For the Qatar context, see the very recently published article by Talal Al-Emadi Qatar Arbitration Law: some central issues (2008) Int. A.L.R 69.

What is the Culture of International Arbitration?[5]

This question is generally framed in terms of the difference between the civil law (inquisitorial approach) and the common law (adversarial approach). Most of the time, further analysis of this question might (at best) yield an illustration such as the seemingly aggressive US parties approach (using methods such as a direct verbal style), compared and contrasted with the approach of, for example the Chinese parties who tend to favour indirect, nonverbal communication. Discussion seldom progresses beyond this level on this question.

However, International Arbitration practitioners will be aware of the growing impact of International norms on arbitration practices throughout the world. For example, the increasingly widespread adoption of the UNCITRAL Model Law on International Commercial Arbitration will (in the long term at any rate), lead to greater uniformity of approach to the arbitral process as between different States, even where they possess different legal cultures. Moreover, efforts being made towards harmonization vis-à-vis Arbitral Procedure (such as the IBA Rules on Evidence, the IBA Rules on Conflict of Interest for Arbitrators) will also, in time, enhance predictability and uniformity of approach – all vital for international arbitration users.

Nevertheless, whatever the force of the arguments may be with regard to excessive Domestic Court interference/lack of support or cost and delay in the international arbitral process, and notwithstanding steps towards greater uniformity of approach in the arbitral process, there have been increasing concerns expressed by various parties (including most recently (in June 2008 regarding the alleged absence of formal Arab representation at ICCA Conference) the ARAB ASSOCIATION FOR INTERNATIONAL ARBITRATION), to the effect that the international arbitration arena is lacking in cultural sensitivity.

The accusations raised include the alleged failure of international arbitral institutions to promote and/or accommodate individuals from regions including the Middle East as Arbitrators. The result, some say, is that International Arbitration as a process is dominated by Anglo-Saxon/North European lawyers whose reference points are their own legal cultures and tradition. Indeed, it is revealing to note that, more than 10 years ago, (at the 1996 ICCA Conference in Seoul); the distinguished Arab International Arbitration Specialist Mr. Ahmed El-Kosheri sounded a note of warning as follows:

> *"In general, the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration…the continuing attitude of certain western*

[5]For examples of some (limited) academic discussion on this issue, see Cultural considerations on International Construction Contracts (J. Constr. Eng and Mgmt. Vol. 129 Issue 4 (pp.375-381); Tom Ginsburg "The Culture of Arbitration (2003) 36 Vanderbilt Journal of Transnational Law; Chinese and American Arbitrators "Examining the effects of Attributions and Culture on Award Decisions" Friedman, Liu, Chen and Chi (2004); and International Arbitration and the Islamic World: The Third Phase (AJIL) Vol. 93 No. 3 pp 643-656 (Charles Brower and Jeremy Sharpe)

arbitrators being characterized by a lack of sensitivity towards the national law of developing countries and their mandatory application, either due to the ignorance, carelessness, or to unjustified psychological superiority complexes, negatively affecting the legal environment required to promote the concept of arbitration in the field of international business relationships."

Whilst the specific complaint (allegedly overriding applicable law on the basis of disregard for the same) may have diminished (because arbitrators are increasingly alive to this question and/or aware that problems may arise at the enforcement level), a far from uncommon complaint in this context regarding International Arbitration is along one or more of the following lines (and reflects a complaint made recently by the In House Counsel of a very well known International user based in the Middle East):

"The arbitrators don't understand how we do things in our part of the world – hardly any of them have any connection with or understanding of our legal system, traditions or culture. We don't feel that they take the trouble to understand our perspective. We really wish there was a better alternative."

Of themselves, such comments might simply be a reflection of "sour grapes" – parties finding some reason to criticise a process which they feel is outside their control or delivers a result which does not reflect their wishful thinking. If that were the only (or predominant basis) for such comments, they would be easy to explain away.

Nevertheless, there are some who contend that international arbitration as a process has yet to attain the position of possessing its own distinct culture. It is argued that International Arbitration as a process has been the product of a "cut and paste" exercise with reference to the Common Law and Civil Law Court legal systems[6]. It is mainly for this reason (so it is said), that the "cultural baggage" and mindset which prevails within the international arbitration process is homogenous.

Another reason (it is said) why international arbitration has yet to become as culturally sensitive as it evidently must be to assuage concerns in this regard is that "non-legal" cultural factors are derided as having little or no place in the field of international dispute resolution. Such a standpoint is, with respect, gravely misconceived. No less a person than Confucious observed that "Human beings draw closer to one another by their common nature, but habits and customs keep them apart". It is precisely because cultural context is vital that arbitration centre's such as HKIAC (Hong Kong) and SIAC (Singapore) have been so successful. Indeed, it is perhaps also in some part due to recognition of the need for cultural accommodation that the London Court of

[6] See for example the London Maritime Arbitrators Association (LMAA) Arbitration Rules (prevalent in many shipping related agreements). Most international users react with concerned surprise when told that the Rules expressly refer to the English High Court Civil Procedure Rules for arbitral procedure matters such as Disclosure.

International Arbitration (LCIA) has, for the first time in its 100 year history, ventured outside the UK and teamed up with the DIFC to set up the DIFC LCIA Arbitration Centre in Dubai.

What are the cultural considerations which International Arbitration should be sensitive towards?

Most parties to the international arbitral process seek a fair and just result (unless of course they happen have a hopeless case!). However, it is all too often said that "Justice must not only be done, but must also be seen to be done". What this means in practice in the arbitral context is that parties must (insofar as possible and consistent with fairness/equality of arms) feel that they have been heard and understood in a manner consistent with their cultural context.

The difficulty is how to translate the concept of "fair and just" (which should be uncontroversial) into practice in the arbitral process. It is all too easy to envisage situations where an Arbitral Tribunal may become too sensitive to such issues, and thus find its process being manipulated for tactical advantage.

Striking a proper balance is going to be difficult- all the more so where the arbitrators/lawyers have no resonance with the cultural context of the parties.

Some of the key cultural considerations which the International Arbitral Process must be sensitive to include the following:

- **Cultural bias and stereotyping** – whether we admit this or not, people from different backgrounds (ethnic, national, racial) often harbor predisposed standpoints regarding each other's cultures, customs and attitudes. It is not difficult to see how this could erroneously translate into a perception of bias vis an Arbitral Tribunal which does not reflect the culture of one or more of the parties. Arbitrators above all need to be aware of such considerations and adjust their approach accordingly.

- **Politics and religion** - unfortunately these factors may also play a part in the dynamic which is the relationship between the Tribunal and the parties. The role of the Tribunal should include awareness of potential issues and using the process dynamically to avoid such issues affecting the process negatively (a simple illustration of this might be persuading the parties to shake hands with each other at the beginning of the hearing, and taking other steps to "break the ice", as well as making the atmosphere less confrontational).

- **Mis-communication (verbal and non-verbal)** - Words spoken can often acquire a very different connotation when translated. Body language, facial expressions and gestures can sometime send the wrong signals.

- **Cultural precepts for Negotiation and Mediation –** How business is done in different cultures may reveal stark differences. In the not too distant past, a nod and a handshake were often the only evidence to signify that an agreement had been reached. Even now, some jurisdictions reveal very clear patterns of behavior in the way business is done (for example, most of Western Europe – heavily documented, some other parts of the World – less documented). Indeed, there have been dramatic changes over the past decade with contracts in India, the Middle East and Africa becoming much more detailed and heavily negotiated than was previously the case. However, the Tribunal needs to be alive to such potential differences of approach, which might easily be interpreted otherwise as a lack of evidence to substantiate a particular position.

Is Change necessary? If so, how can such change be brought about?

If the concerns which have been referred to above are taken seriously (and there are strong arguments to indicate that they should be), change is necessary. The absence of change risks undermining the perception amongst some users of International Arbitration as a "fair and just" process. Steps to effect change may include the following:

- Arbitral Institutions should be culturally sensitive. They should have multi-lingual staff, and ensure that their rules and publications are accessible in multiple languages
- Regional arbitral centre's should be supported and promoted. For such centre's to succeed, they must be on a par with International Arbitral institutions in terms of credibility, ease of use, professionalism and service. Such centre's should maintain lists of multi-lingual potential arbitrators from the region, and others from more international backgrounds
- Cross-cultural training for arbitrators is essential. In the UK for example, Judges are all required to undergo such training to learn about the cultures and customs of people who may well appear before them. There is no reason why similar training should not be required for International Arbitrators
- Promoting greater understanding and awareness of International Arbitration as a process in legal and business communities. Institutions such as the International Chamber of Commerce seek to engage with this process, but much more needs to be done

Concluding Observations

International Arbitration as a process has moved forwards at a very rapid pace in the past decade, in terms of greater understanding and acceptance within the International User community. The challenges ahead include dealing with issues such as cost, delay, and enhancing Domestic Court support (and reducing Domestic Court interference). If International Arbitration is truly to become the dispute resolution process of choice, it must also overcome concerns on the part of some that it is culturally exclusive. There are signs that Arbitral Institutions and Arbitrators are beginning to take heed of such concerns.

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