Cultural differences or cultural clash? The future of International Commercial Arbitration

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Introduction

International Commercial Arbitration has expanded rapidly in the last decade. Arbitration has been seen by many as a meeting point for different legal cultures, where practitioners from diverse backgrounds create new practices.\(^1\) In the broad literature concerning international settlement of commercial disputes, most of the attention has been focused towards conflict of interests and to conflict of laws. Hence, little has been published about the conflict of cultures or in broader term – “cultural differences”, which has a significant importance that many businessmen and practitioners undervalue, but which can be a very significant factor in the arbitral process. The enactment of codes, laws and guidelines that regulate international commercial arbitration have been drawn upon the Common and Civil Law systems, where the doctrine of freedom of contract and procedural rules governing arbitration hearings are at the centre point of creating legal culture. However, there are several questions that arise here.

Firstly, to what extent are the rules and practices of international commercial arbitration influenced by the Civil and Common Law? Secondly, does that influence dictate the arbitration practices and approaches?\(^2\) Thirdly, which areas of the arbitration process are impacted? Lastly, is there a real cultural clash or is it all assumptions or strategies to hinder the arbitral process?

This essay provides a critical overview of the cultural impact in International Commercial Arbitration and seeks to determine if the worlds’ prominent legal systems influence the arbitration process. To illustrate the argumentation, the essay is divided into six sections.

Part I of this essay defines culture and its relationship with international commercial arbitration. Part II analyses the differences in legal culture in international commercial arbitration perspective. Part III investigates the Common and Civil Law traditions in relation to international commercial arbitration. Part IV evaluates the procedural approaches adopted by Common and Civil Law lawyers and judges with special reference to the UNCITRAL Model Law. Part V considers whether these approaches represent cultural differences or cultural clash referring to the IBA Rules on evidence. Part VI highlights the cultural sensitivity and considerations to be adopted by the various actors in International Commercial Arbitration and suggests possible ways to improve and accommodate those issues, following by a thorough conclusion on the topic.

Part I
Defining culture and the relationship with International Commercial Arbitration

All over the world, societies’ values, understandings and performances vary, often in terms of geographical locations or language differences. The communalities that tie different societies into larger groups of similar understandings are called culture. Over the past half century, there were plenty of definitions and theories related to what culture is and how and why it differs. One of the latest definitions comes from Erez and Earley⁴ as a summary of the most valuable points from previous academic works:

“The shared knowledge and the meaning systems use a particular group of people that are objective and subjective”.

In addition, culture implies values and patterns that influence actions and attitudes.⁵ Culture influences many aspects of life including attitude, social organisation, thought models, body language and time sense.

Thought patterns have immediate effect on the process of reasoning, particularly the legal one. Therefore, what can be considered as completely logical, obvious and reasonable for one culture may be offensive and unreasonable for the other.⁶ Thus, cultural background strongly influences the legal systems and understandings. People always expect that the norm is what they are used to. Therefore, cultural backgrounds, by birth or education, also influence how people approach arbitration and what they expect of it in substance, as well as in procedure. International Commercial Arbitration as an alternative legal instrument will be expected to be similar in objectives and procedure to the legal system the participant is accustomed to. Such expectations however will in many instances be based on repeated experience in the person’s cultural context.

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⁶ Ibid
Although the substantive outcome in International Commercial Arbitration is not usually based on cultural expectations, procedure issues are. Substantive Law and even basic norms will differ not only from culture to culture, but also from country to country. Given that laws and rules are specific, and expectation is that the decision is at least based on some legal principle, there is no prospect of one concrete and certain outcome. Procedure, however in its most fundamental form is expected to be the same, based on substantially identical reoccurrence in one’s own culture.

In order to further analyse how culture can influence International Commercial Arbitration and to facilitate the analysis, the next section will evaluate the differences in legal culture, as a starting point for the discussion.
Part II
Differences in Legal Culture

The essence of a legal culture may be formally expressed in a variety of codes, statutes and judicial decisions which are set out in the principles and rules of law governing arbitration, but also articulated by the opinions of jurists through which that law is extracted, interpreted and applied.\(^7\) In this sense, the development of a legal culture may follow religious, political, or social patterns, or a combination of all three.

It may also be seen in the response of social values that are ascribed to law, such as the interpretation of law in a fair, clear and efficient manner.\(^8\) An important perspective of a legal culture however relates to the attitudes towards law of the international business community in regards to cost, impartiality and reliability of national courts, or the attitudes of legislators to the regulation of international business through domestic legislation.\(^9\)

Shaping the scope of a “legal culture” is difficult process. However, given that arbitration is based upon party consent, examining how that consent occurs in practice within distinct business environment is important in understanding how the culture of international commercial arbitration operates.\(^10\) On the other hand, understanding how law impact on culture and culture upon law have also a significant importance on the operation of each in relation to the other in the context of international commercial arbitration. Nevertheless, the term “cultural differences” is particularly broad, vague and ambiguous like the very concept of “culture” itself. As discussed above, culture refers to a set of collective values, traditions and behaviors of certain people or professions, which distinguishes them from the other groups. This definition obviously entails elements of differentiation and therefore of potential conflicts. Between professional groups (i.e. judges, attorneys, consultants, in – house

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counsel), different shared values may also result in “cultural clash”, even on a domestic level, and all the more so in international relations. For example, domestically a French "avocat" engaged in commercial practice, in the same situation, may well react differently from a French "Avocat aux Conseils" (in – house counsel).\textsuperscript{11}

Obviously, it is even more likely that a “cultural difference” appears in an international arbitration case between an English Q.C., a French judge and an American litigator.

While the common understanding of international arbitration in a singular expression generalizes “the concept” of arbitration, it is questionable whether such “single” concept exists. Despite the common features, differences between arbitration categories must be drawn, such as commodities, maritime, “classic” commercial arbitration – whether institutional (such as ICC) or \textit{ad hoc} and arbitrations involving a State. In fact, with regard to the notions of arbitration, hidden or obvious “cultural differences” do not only separate countries, but also professional groups and indeed individuals. More importantly, such differences inevitably affect the treatment given by judges, lawyers and legislators to a series of questions, such us that of the qualities required by or the powers of an international arbitrator. Whatever the different views may be on the nature, function or contents of the arbitral process, one essential aspect should be born in mind – i.e. the specificity of “international arbitration”. Hence, the ignorance or incapacity of various practitioners to properly appreciate this essential feature – “internationality” and draw the consequences therefrom, underlines many cultural differences, in vast fields of transborder commercial relations, notably in the settlement of disputes. To draw the importance upon the above, a vital obstacle to international understanding (whether at the stage of negotiating an international contract or that of settling an international dispute) lies in the tendency of many or most practitioners to think along national lines in regards to the different practices, procedures and laws, or in their habit to transpose to transnational situations their national methods and solutions, or to attempt to impose them on foreign parties. The modern

evolution in favour of the arbitral process can be said to have been made possible only through a growing realization of that international specificity. It should be noted however that great progress has been achieved with this evolution, despite the traditional resistances, which in some parts of the world remain strong. Examples of such differences may be found in practically all aspects of arbitration and in particular regarding the choice of the arbitrator and most importantly, his role and independence.\footnote{See Collier, J. and Lowe, V. (2000), “The Settlement of International Disputes: Institutions and Procedures”, Oxford: Oxford University Press;}
Part III
Common Law and Civil Law traditions and their interaction with International Commercial Arbitration

The fundamentals of a legal culture lay upon two legal systems that are predominant in the world today – Common Law and Civil Law. In addition to these main legal systems there are different regionally based sub-cultures that exist, which can be characterized with their own special traditions. This section will evaluate a thorough discussion on the characteristics of Common and Civil Law, by analysing the influence on rules and practices of international commercial arbitration.

A common stereotypical perception is that international commercial arbitration rules derive from a combination of Civil and Common Law. To some extent, this is true as at a formal level, international arbitration codes and practices have developed out of these legal traditions, being partly incorporated by organisations such as ICC.\(^\text{13}\) Their persistent impact upon modern arbitration is reinforced by the realization that traditional business interests served by arbitration have converged at the leading trading cities of Europe and North America, where the Civil and Common Law systems are predominant. Furthermore, the influence of Civil and Common Law is apparent, as the major international arbitration institutions, such as the ICC and the LCIA are located in Paris and London respectively.\(^\text{14}\) Nevertheless, an important fact is that international commercial arbitrators are drawn significantly from Common and Civil Law jurisdictions.\(^\text{15}\)

The Civil and Common Law systems are certainly more global in reach as they were incorporated into the legal systems of colonial countries. For example, Common Law was embedded in the legal system of India and Pakistan,\(^\text{16}\) whereas Civil Law was promulgated in East Asia\(^\text{17}\), particularly in Japan, but also to some extent in the Chinese private law.\(^\text{18}\)

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\(^{14}\) See Collier, J. and Lowe, V., supranote 12
\(^{15}\) Ibid.
Despite the fact that Common and Civil Law were dominant in the formation of many regional legal systems, it should not be ascertained that international commercial arbitration has simply reproduced a combination of these two traditions. Both Common and Civil Law vary distinctly from country to country, as well as over time. Legal traditions however have evolved and have been significantly impacted by domestic political, economic and social forces and by the creation of local and regional arbitration institutions, such as in Dubai (DIFC-LCIA), Bahrain (BCDR-AAA) and Cairo (CRCICA), or those further afield, such as the ICDR, which enormously diminished the historic influence of both Common and Civil Law traditions. In addition, the transformation of societies has caused fundamental changes in local legal traditions, pushing for demands on the old economic systems. This is particularly evident from the transformation of arbitration to accommodate a changing political-economic system, such as the significant role now played by China’s International Economic and Trade Arbitration Commission (CIETAC) in international commercial arbitration. Nevertheless, parties are able to choose among different types of international commercial arbitration, and thus tailor their choice of own diverse needs and preferences.

Therefore, a question arises as to whether the Common Law and Civil Law systems really influence the arbitral process and approaches, and if so, how?

To illustrate this argument, the next section will thoroughly analyse the approaches taken by both judges and lawyers with Common and Civil Law background.
Part IV
Common Law and Civil Law approaches

As discussed above, the fundamentals of a legal culture lay upon two legal systems – Common Law and Civil Law. Thus, the majority of practitioners (lawyers) and judges training background is based upon these two legal systems. This section will analyse the impact of both legal traditions on the arbitration practices and approaches by lawyers and judges. To illustrate the cultural impact at all stages of the proceedings, this essay will discuss the UNCITRAL Model Law on International Commercial Arbitration in light of some specific expectations in the proceedings, distinguishing between Common Law and Civil Law.

A common lawyer will most likely expect a highly adversarial approach to be taken by the arbitral tribunal and all parties involved, whilst a civil lawyer will expect an inquisitorial and conciliatory approach. This basic difference plays an important role in the timing and simplicity of submission of evidence, witness statements, record keeping and other important examples further discussed below. In addition, the arbitrator, due to his cultural background may expect the proceedings to be conducted in a way that the parties might not be prepared for. Thus, the expectancy of a certain procedure, the main differences and how exactly they can play out is worth analyzing in light of the predominant legal systems.

There are different principles that govern the international commercial arbitration. While rules, which have been agreed upon by the parties, provide guidelines for the procedure, the individual choice of the participants plays an important role. This relates to the cultural background of each participant and influences all aspects of international commercial arbitration, such as the choice of arbitration rules, arbitrators, location of the international

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commercial arbitration and expectations in the process and the outcome. Two approaches will determine the methodology that has impact on the expectations.

The first difference is apparent. As stated above, a Common Law lawyer expects an adversarial approach, where the judge or arbitrator has a limited role. The adversarial approach is evident in all stages of the proceedings: notification, establishment of facts, duties of the parties, and so forth. This system was created following mistrust in judges, as the main aim was to minimize their role in the proceedings, thus increasing the trust of the parties in the judicial system and the outcome.

On the contrary, Civil Law lawyer expects an active judge and an inquisitional system. This characteristic appears rational, based on the presumption that the judge decides the case and hence needs to make sure he has all the information required. In Civil Law countries, judges were not mistrusted, as their education prepares them to expertly assess a case, whereas the juror was considered more concerned with his or her own interests and not trained to deal with important legal issues.

The second approach distinguishes between Common Law and Civil Law in that, there is no clear division of interlocutory proceedings and hearing in Civil Law, while Common Law admits information of the pre-hearing stage only in exceptional circumstances. Once again, this fact can be explained by reference to the mistrust of judges and the jury system in Common Law countries.

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23 See Garnett et al, supra note 21, at 53
26 See Boris, C., supra note 24, at 178
Another important fact is that in Civil Law, the judge is also the fact-finder; hence he must know everything about the case. In Common Law, the jury does not receive any information before the proceedings as they are not yet selected. Hence, all the information needs to be introduced to the jury again. As a result, lawyers must carefully and properly present information, because the jury is composed of non experts, which might consider irrelevant evidence or fail to understand complicated materials.\footnote{See Boris, C., supra note 24, at 179}

As mentioned above, the UNCITRAL Rules will be analysed due to their representativeness and wide use\footnote{See Harris, P. and Morran, R.(1991), “Managing Cultural Differences”, Houston, TX, Gulf 27, at 13} in order to understand the impact on specific expectations in the arbitral proceedings, distinguishing between Common Law and Civil Law. Hence, the rules provide for great discretion in determination of the procedure.\footnote{See UNCITRAL, at supra note 12, at S19} The most common differences that influence the expectations cited by various actors are:

- If the proceedings are oral or in writing
- Discovery and pre-hearing procedure
- Treatment of other witnesses, specifically parties and cross examination; and
- Record keeping

In order to specifically understand the impact of each of the above, they will be discussed and analysed as follows:

a) Oral or Written Proceedings

The UNCITRAL Rule 24(1) leaves the decision whether to hold a hearing to the arbitral tribunal, unless parties agree otherwise. Hearings shall be held if a party so requests.\footnote{See UNCITRAL, at supra note 12, at S24(1)} It is unclear which weight will be given to such pleadings and how much detail will be good practice, as it depends on any given arbitrator's preference. In Common Law, oral hearing are more important as opposed to pleadings, which have little value.\footnote{See Boris, C., supra note 23, at 6} The fact-finder has to
be convinced during the proceedings. This can largely be explained by the need for persuasion of a jury or non experts. Thus, paper tends to be less persuasive than emotions and live testimony. On the contrary, in Civil Law all information has to be identified and provided in writing and often in excessive detail as soon as possible. Germany is one of the prime examples, which evidence the above in the Code of Civil Procedure. The judge can ask a witness everything he needs to know when documents are not sufficient. Often this will not be the practice and thus, a Civil Law judge will prefer a paper as a general matter. The Civil Law lawyer expects the documents provided to amply support the point of view, thus the Common Law lawyer may be perplexed, because of the lack of weight given to his advocacy.

b) Discovery and Pre-hearing Procedures

The other impacted area of arbitral procedure is the stage of pre-hearing along with discovery. The UNCITRAL Rules provide in Art. 23(1) that parties should support their claims and defences with all relevant documents, however they are also allowed to use references to evidence to be submitted later, only unless otherwise agreed. In other words, information must be provided, however the point in time is up to the party, as long as a reference to this evidence exists. Art. 24(3) of the UNCITRAL require all materials submitted to the tribunal, to be submitted to the other party as well.

The extent to which the pre-hearing procedure has been discussed in the Model Law is exhausted by the articles conferred above.

Due to this freedom of procedure, culture creates room for expectations. The discovery and pre-hearing procedure are considered one of the most important tools in dispute resolution in

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35 See UNCITRAL, at supra note 12, at S 23(1)
36 See UNCITRAL, at supra note 12, at S 24(3)
Common Law\textsuperscript{37} and thus, pre-hearing discovery is necessary. Therefore the evidence needs to be neatly presented for the reasons discussed above, which is impossible if the hearing is the parties’ first encounter with the evidence. While attempting to receive as much information as possible before the hearing, the Common Law lawyer will seek to delay rendering information to obtain a strategic benefit. With these considerations in mind, the lawyer will submit evidence late and potentially upset the Civil Law arbitrator, whose primary objective is the prompt disclosure of all relevant information and evidence.

In Civil Law the obligation to disclose every relevant piece of information as soon as possible renders extensive Common Law discovery (partially) unnecessary.\textsuperscript{38} An important fact however is that in many Civil Law jurisdictions, like Germany, discovery is associated with privacy concerns.\textsuperscript{39} In Civil Law there is no need to present the evidence as precise as in the Common Law. Thus, evidence is presented in due course and is reviewed by the judge regardless of when it becomes known. The arbitrator or judge will request any information that appears to be missing.

In addition, depositions take on varying degrees of importance for Common Lawyer and a Civil Lawyer. If the approach to hearing is with the expectation of a statement not being primary evidence, the conduct at the deposition stage (if it takes place at all) is going to be different from the expectation of it being equivalent to a witness statement on the stand. Preparations need to be adopted, thus the lawyer has to take into account that the entire material will be reviewed and that withholding of information harms the case rather than helping it. Additionally, a Civil Law arbitrator may even prefer a written statement to an oral one for reasons of efficiency,\textsuperscript{40} as discussed above.

\textsuperscript{37} See Christian Borris, supra note 23, at 10
\textsuperscript{38} Ibid, at 10
\textsuperscript{39} Ibid, at 11
\textsuperscript{40} See Reed and Sutcliffe, supra note 34, at III
c) Treatment of Witnesses

Treatment of witnesses is the third area where cultural difference is most apparent. The UNCITRAL is silent on the matter. A number of issues are implicated in the treatment of witnesses, such as whether a party can be a witness, whether the statements can be written, whether written statements are preferable over directly examined witnesses and whether cross-examination should take place.

In Common Law a party may be called as witness, while the Civil Law (generally) does not allow parties to be witnesses. In Civil Law, the expectation is that the position of parties will be amply reproduced through other documents. An important fact in Civil Law is that managers of a company are considered parties. Even though the question whether a party can be a witness remains a distinction between Common Law and Civil Law, it is not a matter of a difference in International Commercial Arbitration. The approach adopted lean toward the Common Law. Whether written witness statements are admissible depends on the procedure chosen, but largely, as dealt with in the UNCITRAL Model Law. Therefore, the inference drawn from a written statement depends on the legal culture of the arbitrator.

In Common Law jurisdictions, cross-examination remains the best tool to test witness credibility and to bring out facts not otherwise presentable. This is due to the importance of the actual hearing and the division of information gained pre-hearing from information presented at the hearing. In contrast, in Civil Law jurisdictions, the judge examines witnesses as to controversial issues. Since he is the fact-finder and a professional that is deemed to assess the witness credibility, consideration on the merits are drawn with reference to statements he deems important.

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41 See Reed and Sutcliff, supra note 34, at IV
42 See Boris, supra note 23, at 15; see also Reed and Sutcliff, supra note 34, at IV
43 Ibid
44 See Reed and Sutcliff, supra note 34, at IV
46 See Boris, C., supra note 23, at 13
d) Record Keeping

The UNCITRAL does not mention record keeping. The Common Law tradition requires a reporter that records the proceeding accurately.\textsuperscript{48} In the Civil Law system, the chairman usually takes notes of the witness statements in the manner in which he sees appropriate. The parties discuss these notes and supplement them to prepare a written summary.\textsuperscript{49} A summary makes sense where the evidence is mostly documentary and witnesses are heard for specific information only. This method reduces the impact of cross-examination in case it is conducted and can be the source of great dismay on Common Law lawyers, relying on every word of the witness.

Although the above mentioned differences in legal cultures have direct impact on the proceedings (based on the concept of legal training and background of judges and lawyers), there are many other issues to be considered. Additionally, there are further subdivisions that exist within the predominant legal systems. The Common Law and Civil Law traditions and the respective notions of International Commercial Arbitration and legal culture have spread throughout the world.\textsuperscript{50} Hence, these concepts are largely reminders of the colonial system and can be traced back in individual traditions. Therefore an important question arises as to whether the above discussion represent issues of cultural differences or if real cultural clashes exist?

Answering this question seems rather complicated and requires a detail legal analysis in cultural perspective, which will be evaluated in the following section.

\textsuperscript{48} See Newman, supra note 45, at 84
\textsuperscript{49} ibid
\textsuperscript{50} ibid
Part V
Cultural differences or cultural clash?

Ignoring cultural diversity is a dangerous issue for arbitrators and for the arbitration process itself. The fact that two lawyers may be trained in systems, where they have developed different skills is one matter, and an arbitrator that adopts a procedure that favours one of them is another matter. When establishing procedures, arbitrators must understand their impact on the parties and ensure that due process is not compromised. On the other hand, efforts made to delay the arbitration process through procedural actions cannot be classified as a legal tradition, approach or cultural understanding, but are mere function of tactics. Same applies when arrangements are made to construct fundamental error into the arbitration process. Thus, such tactics encompass cultural myth that is dangerous and unfair and can significantly impact the overall arbitral process.

Consistent with the discussion about culture impact on the proceedings, it can be determined that the discovery stage is the focus for ultimate cultural clash, simply because Common Law lawyers rely on it and Civil Law lawyers reject it. However, important development in this area is the IBA Rules on Evidence promulgated in 1983 creating uniformity over both traditions.

Despite that the 1983 IBA Rules established a firm platform for uniformity, they have been rarely used, as Civil Law lawyers invoked their right under the 1983 Rules to restrict disclosure of documents to those that were exchanged between the producing party and a third party. In addition, there was a restriction imposed on the production of internal documents Due to this restriction, Common Law lawyers were refusing to use the 1983 Rules, and consequently the rules were abandoned by practitioners.

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52 See Art. 4, 1983 IBA Rules of Evidence, Ibid.
In 1999, IBA Rules on Taking of Evidence were amended with the main aim to reach a consensus between the Common and Civil Law world on the matter concerning the production of internal documents, subject to specific disclosure demands. Accordingly, Art. 3.1 of the 1999 IBA Rules provide that each party “shall submit” to the tribunal and the other parties all documents available to it on which it relies. Art. 3.2 state that “within the time provided by the tribunal, a party may submit a request to produce that satisfies certain specificity requirements”.53

The development of IBA Rules 1999 is specifically contrasted in Art. 3.4, which stipulates that “the producing party shall produce to the tribunal and the other parties all documents requested in its possession as to which no objection is made”. However, if the producing party has objections, they must be made in writing and within the time ordered by the tribunal.54 The reasons for such objections shall be any of those set forth in Art.9.2 as provided by Art.3.5. Another approach taken by the 1999 IBA Rules concerns the issues arisen in documents, witness statements or expert reports, where parties are allowed to submit additional documents that they believe have become relevant and material as per Art. 3.10.

Thus, it can be concluded that the 1999 IBA Rules on Taking of Evidence did not resolve a clash in cultures, but tackled a fundamental issue of fairness in the arbitration process. The main aim was to ensure that there is a process in place to identify documents not produced yet, but which might affect the outcome of the proceedings, hence giving equal rights to fair treatment of the parties.

Another rumoured cultural clash involves the manners and fairness of cross-examining a witness. As discussed above, the presence of a witness in a hearing, rather than on paper, has been a bias of a particular legal tradition not a long time ago. Nowadays however, the suggestion that hearings are to be held solely on the basis of witness statements is a rare

53 Art. 3.3, provides that the request shall contain a description of a requested document sufficient to identify it, or a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist.
54 The 1983 IBA Rules on Evidence did not provide for objections to a request to produce.
factor and is most likely limited to situations where there are no disputed issues of material fact. Arbitrators are required to request the appearance of witnesses who have given statements, so that they might be questioned by the adversary lawyer. After the witness claims ownership of the witness statement and is tendered for examination, the interrogating lawyer may conduct an examination that goes beyond the witness statement.\textsuperscript{55} Some lawyers may object to the scope of the cross-examination. However, the objection cannot be solely identified as a cultural clash; hence it can be treated as misapplication of a rule of evidence.

Accordingly, it can be argued that the concept of fairness should permit arbitrators to give right to the examining lawyer to test the credibility of the witness, so that they can further explore the knowledge of the witness on the subject matter or a particular issue. Thus, the appropriate description for the objection of the examination cannot be called a cultural clash, but can be easily identified as arbitration tactic to hinder the process.

The above discussion raise an important question as to what should be done to overcome these issues, so that the arbitral process remain fair and just, and retain parties’ confidence in the international dispute resolution forum. The following section will discuss the considerations that should be adopted by the various actors in the arbitral process, followed by a thorough conclusion on the topic.

\textsuperscript{55} See Newman, supra note 45, at 84
Part VI
Culture sensitivity and considerations

Most parties to the international arbitral process seek a fair and just result. It is often said that justice must not only be served, but seen to be served.\textsuperscript{56} In practice, in the arbitral context, this means that the parties must (insofar as possible and consistent with fairness and 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. There are several foreseeable situations where an Arbitral Tribunal may become sensitive to different cultural issues. Thus, the entire arbitral process can be threatened of being manipulated for tactical advantage. Striking a proper balance is going to be difficult - all the more so where the arbitrators and lawyers have no understanding of 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 – Many people from different backgrounds (ethnic, national, racial) often have predisposed consideration regarding each other’s cultures, customs and attitudes. This could erroneously however translate into a perception of bias in an Arbitral Tribunal, which does not reflect the culture of one or more of the parties. Arbitrators (nonetheless lawyers) need to be aware of such considerations and adjust their approach accordingly. Thus, this can be achieved through variety of methods, including cross-cultural training for better awareness and so forth, the propositions discussed below.

- Politics and religion - These factors may play an important part in the relationship between the tribunal and the parties. The role of the arbitral tribunal should include awareness of potential issues that might affect the parties, and if such issues arise, the tribunal can use the process dynamically (through different methods of communication and/or motions) to

\textsuperscript{56} See R v Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER 233) - a leading English case on the impartiality and recusal of judges. It is famous for its precedence in establishing the principle that the mere appearance of bias is sufficient to overturn a judicial decision. It is also famous for the quoted aphorism "Not only must Justice be done; it must also be seen to be done."
avoid the negative impact (especially when arbitration is taking place in culturally sensitive jurisdictions [or involves parties from], such as the Middle East and Asia).

- Miscommunication (verbal and non-verbal) - Words spoken can often acquire a very different connotation when interpreted. The signs of facial expressions and gestures can sometime send the wrong signals, and thus must not be undermined. Miscommunications or lack of understanding is usually the most important cause of problems in the process of international arbitration.57 Different cultures have different verbal and non-verbal communication systems. Thus, words spoken by French may well not have the same meaning once translated into another language.58 Guidelines need to be designed to improve cross – cultural communication in international arbitration. These should include rules and/or norms to be followed reflecting translation standards, cultural habits explanatory guides targeting particular jurisdictions, timings and so forth. In addition, where clash occurs, the role of the arbitral tribunal should encompass methods of mediation to resolve particular issues. This can be achieved by ways to “break the ice” in particular situations (especially disagreements between the parties on certain matters).

- Cultural precepts for negotiation – How business is conducted in different cultures may reveal stark differences. In the 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 behaviour in the way business is done (for example, most of Western Europe – heavily documented, some other parts of the world – less documented). On the other hand, cultures such as the Chinese, favour indirect, non – verbal communication rather than the direct verbal style of the Westerners. On the contrary, Westerners typically come straight to the point, which Chinese may see as untactful.59 Certainly, there have been dramatic changes over the past decade with contracts in the Middle East and Asia becoming much

more detailed and heavily negotiated than was previously the case. However, the arbitral tribunal needs to be sensitive to such potential differences of approach that could easily be interpreted otherwise as a lack of evidence to substantiate particular position. The approach taken by the arbitral tribunal should encompass familiarity with the intention of the parties in their dealings with each other.

Additionally, in order to ensure feasibility of the International Commercial Arbitration as an independent, fair and truly alternative dispute resolution process, the following steps may be taken:

- Arbitral Institutions should be culturally sensitive. They should have multi-lingual staff, and ensure that their rules and publications are accessible in multiple languages
- International Commercial Arbitration should be promoted as the ADR process amongst various business communities, through local or regional arbitration institutions, by providing information as to the benefits and solutions of this type of dispute resolution
- Cross-cultural training for arbitrators is essential. In England for example, all judges are required to undergo such training to learn about the cultures and customs of people who may well appear before them. Therefore, such policy should also be adopted for all International Arbitrators to benefit the cultural diversity and awareness.

The above proposals are mere minimum and cannot be an exhaustive list. However, if small steps are being taken and various approaches in the context of culture sensitivity accommodated by the different actors in the arbitral process, the future of International Commercial Arbitration can be seen as more stable, thus ensuring trust and confidence in parties bringing their case to an arbitral tribunal.
Conclusion

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. However, there are problems that rules do not solve. Neither ad hoc nor institutional rules contain answers for all procedural questions that might arise. On the contrary, as seen from the UNCITRAL Rules above, these rules are often deliberately vague to avoid prejudicing the arbitral tribunal’s discretion. There is a recognizable influence of culture even in the experienced lawyer or arbitrator. In order for International Commercial Arbitration to become truly the dispute resolution process of choice, it must overcome concerns regarding cultural sensitivity.

Despite harmonization of rules governing International Commercial Arbitration, this essay has shown that culture continues to play role, most notably in the approach to the arbitral process. By analysing the predominant legal systems (Common Law and Civil Law) and the approach taken by both lawyers and judges however, it has been concluded that some areas of the arbitral process cannot be identified as a culture clash, but are mere product of arbitration tactics to hinder the whole process.

Hence, a question arises, as to whether change in practices (and perhaps rules) is necessary and if so, how it can be achieved?

There are many arguments that the concerns raised above should be taken seriously and therefore change is necessary. Thus, the lack of change risks undermining the perception amongst some users of International Commercial Arbitration as a “fair and just” process. Nevertheless, cultural sensitivity plays a vital role not just in the proceedings, but simply in the understanding of each other perceptions and expectations in the arbitral process. Therefore it can be concluded that “cultural differences” must be born in mind of all businessmen and practitioners, as they play key role in the arbitral process.

61 See Garnett, supra note 21, at 4