DEALING WITH PRO SE LITIGANTS

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REFERENCES

Wisconsin Supreme Court Rules, Chapter 20, Rules 20:1.13, 20:2.4, 20:3.8, & 20:4.3

ABA Model Rules of Professional Conduct, Rules 1.13, 2.4, 3.8, & 4.3

Restatement of the Law Third, The Law Governing Lawyers, Volume 2, section 103

Wisconsin Formal Ethics Opinions E-93-3 and E-09-02

Kempinen, *Dealing Fairly with an Unrepresented Person,* 78 Wis. Law., Oct. 2005, 12

Kempinen, *The Ethics of Prosecutor Contact with the Unrepresented Defendant,* 19 Geo. J. Legal Ethics 1147 (2006)

OVERVIEW OF THE RULES

Dealing with an unrepresented person

SCR 20:4.3

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall inform such person of the lawyer's role in the matter. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

- Obligation arises when dealing on behalf of a client.
- Obligation applies to unrepresented party, not only unrepresented adverse party.
- Affirmative duty to inform the unrepresented person of the lawyer's role.
- Conditional prohibition on giving legal advice, except advice to secure counsel.
- Municipal prosecutor also governed by SCR 3.8(d) &(f).

ABA MRPC 4.3

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

- Conditional affirmative duty to correct misunderstanding of lawyer's role.

Organization As Client

SCR 20:1.13 (f)

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

- Conditional affirmative duty to explain identity of client.
- "When it is apparent" standard.
- The client is the organization acting through its duly authorized constituents.

ABA MRPC 1.13 (f)

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

- "Know or reasonably should know" standard.

Third Party Neutral

SCR 20:2.4

(a) A lawyer serves as a 3rd-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a 3rd-party neutral may include service as an arbitrator, a mediator or in such other

capacity as will enable the lawyer to assist the parties to resolve the matter.
(b) A lawyer serving as a 3rd-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a 3rd-party neutral and a lawyer's role as one who represents a client.

- Affirmative duty to inform an unrepresented person.

ABA MRPC 2.4 [SAME AS WISCONSIN RULE]

Special Responsibilities of a Prosecutor

SCR 20:1.0 (j)

A "prosecutor" included a government attorney or special prosecutor (i) in a criminal case, delinquency action, or proceeding that could result in a deprivation of liberty or (ii) acting in connection with the protection of a child or a termination of parental rights proceeding or (iii) acting as a municipal prosecutor.

- ABA MRPC do not include a definition of prosecutor.

SCR 20:3.8

(b) When communicating with an unrepresented person in the context of an investigation or proceeding, a prosecutor shall inform the person of the prosecutor's role and interest in the matter.

(c) When communicating with an unrepresented person who has a constitutional or statutory right to counsel, the prosecutor shall inform the person of the right to counsel and the procedures to obtain counsel and shall give that person a reasonable opportunity to obtain counsel.

(d) When communicating with an unrepresented person a prosecutor may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights, but a prosecutor, other than a municipal prosecutor, shall not:

(1) otherwise provide legal advice to the person, including, but not limited to whether to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights or how the tribunal is likely to rule in the case, or

(2) assist the person in the completion of (i) guilty plea forms (ii) forms for the waiver of a preliminary hearing or (iii) forms for the waiver

of a jury trial.

- Broader application than criminal cases.
- Affirmative duty to inform of role and interest.
- Conditional affirmative duty to notify of right to counsel, to notify of procedures for obtaining counsel, and to provide reasonable opportunity to obtain counsel.
- Specific guidance regarding what a prosecutor may and may not do.
- Exception for municipal prosecutors.

ABA MRPC 3.8

The prosecutor in a criminal case shall:

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

- Applies only in criminal cases.
- No affirmative duty to inform of role and interest.
- Affirmative duty to notify of right to counsel, to notify of procedures for obtaining counsel, and to provide reasonable opportunity to obtain counsel.
- Limited guidance regarding what a prosecutor may and may not do.

OVERVIEW OF CASES

2003-15 Failure to Supervise Assistant; Ex Parte Communication; Lack of Competence; Failure to Abide by a Statute

The attorney represented the father in a paternity action and in a guardianship case regarding his child. The attorney's assistant sent the child's mother, who was unrepresented at that time, a letter along with a copy of a court hearing notice in the guardianship case. The assistant's letter stated that the matter had been set for a pre-trial conference and that the mother's attendance was not required.

By allowing her assistant to give advice to the mother of the child in the paternity action and to communicate with this mother in a way that implied that the attorney was a disinterested authority, the attorney failed to supervise her assistant as required by SCR

20:5.3(a) and (b) and therefore violated SCR 20:4.3, which provides, in part that, when dealing on behalf of a client with an unrepresented person, a lawyer shall not state or imply that the lawyer is disinterested.

- Private Reprimand Summary, not a Supreme Court Decision.
- Case pre-dates the current rule and the affirmative notice obligation.
- Providing legal advice might include the words "your attendance is not required."

In the Matter of Swarts, 272 Kan. 28; 20 P.3d 1011 (2001)

On October 2, 1995, the Respondent charged a person with aiding and abetting first degree murder, possession of narcotics, and conspiracy to possess narcotics. The person was arrested and placed in jail. Four days later, and one hour before the first appearance, Swarts went to the jail and questioned the person. Respondent did not advise the person of his rights, and obtained incriminating statements. At the first appearance hearing, counsel was appointed for the person.

The Hearing Panel found that the Respondent violated KRPC 3.8 (c), which provides that a 'prosecutor in a criminal case shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.' In this case, the Respondent contacted an unrepresented, charged defendant and asked him to waive an important pretrial right--the right to remain silent.

The disciplinary agency also alleged that the Respondent violated KRPC 4.3, which provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The Hearing Panel found insufficient evidence to show that the Respondent implied that he was disinterested or that the person misunderstood the Respondent's role in the matter.

- Notably, no legal advice was given (Miranda Warning).
- Arguably, Respondent also failed to correct the person's misunderstanding.
- Applying the Wisconsin rule would result in a violation.

State v. Brooks, 200200792; 838 So. 2d 778 (La. 2003)

Brooks stood trial for second degree murder; the jury returned the responsive verdict of manslaughter. He was represented at trial, and in his subsequent appeal, which reversed and remanded the case. The state thereafter had one year in which to bring respondent to trial again. In the subsequent trial, Brooks moved to dismiss for the State's failure to bring him to trial within the year. The Court denied the motion.

At some point after the remand, the State learned that Brooks' counsel was not responding and likely would not be participating. Three months later, Brooks obtained new counsel. The Court suspended the running of the time limit during this three-month period, relying in part upon Louisiana's version of ABA MRPC 3.8.

> Louisiana imposes on a prosecutor the ethical duty to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, *and has been given reasonable opportunity to obtain counsel* . . . ." [Citations omitted] As a matter of that ethical constraint, the state could not push this case forward until the question of respondent's representation by counsel was settled. [The prosecutor] could not have communicated or bargained directly with respondent regarding her open plea offer while he was ostensibly still represented . . . .

- Sometimes, as in this case, whether someone is represented is unclear. Lawyers should clarify to avoid communication with a person represented by counsel.
- Sometimes, as in this case, the rules are a shield, not just a sword.
- This prosecutor attempted to clarify the matter; but being unsuccessful, she might have employed other strategies to keep the case on track without compromising ethical standards.

In the Matter of Pautler, 47 P.3d 1175 (Colo. 2002)

On June 8th, 1998, Pautler arrived at a gruesome crime scene where three women lay murdered. While at the scene Pautler learned that the killer was William Neal. Deputy Sheriff Moore was on the phone with Neal and listened to Neal describe his crimes in detail. Moore developed a rapport with Neal and continuously encouraged his peaceful surrender. Neal would not surrender without legal representation. After attempts to contact a lawyer who represented Neal in the past, Pautler offered to impersonate a PD, and those law enforcement agents at the scene agreed.

When Neal again requested to speak to an attorney, Moore told him that "the PD has just walked in," and that the PD's name was "Mark Palmer," a pseudonym Pautler had chosen for himself. Moore proceeded to brief "Palmer" on the events thus far, with Neal listening over the telephone. Moore then introduced Pautler to Neal as a PD. Pautler took the telephone and engaged Neal in conversation. Neal communicated to Pautler that he sought three guarantees from the sheriff's office before he would surrender: 1) that he would be isolated from other detainees, 2) that he could smoke cigarettes, and 3) that "his lawyer" would be present. To the latter request, Pautler answered, "Right, I'll be present."

Neal also asked, "Now, um, at this point, I want to know, um, what my rights are --you feel my rights are right now." Pautler did not answer the question directly, but asked for clarification. Neal then indicated he sought assurance that the sheriff's office would honor the promises made. Pautler communicated to Neal that he believed the sheriff's

department would keep him isolated as requested. Pautler did not explain to Neal any additional rights, nor did Neal request more information on the topic. In later conversations, it was clear that Neal believed "Mark Palmer" from the PD's office represented him.

The disciplinary agency charged Pautler with violating Colorado's version of ABA MRPC 8.4(c) and 4.3. The presiding disciplinary judge granted summary judgment against Pautler on Rule 8.4(c) [dishonesty, fraud, deceit, or misrepresentation]; the 4.3 charge went to a hearing board because the judge ruled that (1) whether Neal was represented, and (2) whether Pautler gave advice, were disputed questions of fact. The board subsequently found that Pautler violated Rule 4.3.

- Here, the intent was for Neal to misunderstand the prosecutor's role.
- Under Colorado Law, Pautler was a peace officer by virtue of his position in the DA's office. As such, he was authorized to carry a badge, carry a weapon, and to use lethal force, when necessary, to apprehend a dangerous felon.

McCallum v. CSX Transportation, et. al. 149 F.R.D. 104 (M.D.N.C. 1993)

CSX moved for a protective order and sanctions against plaintiffs' out-of-state counsel for improper *ex parte* contacts with its employees after this lawsuit was filed. The Court noted that a similar motion had been raised earlier by another defendant. In the earlier situation, the Court found that the plaintiff's counsel's investigator may have misled some of the employees concerning whom he represented, his role in the process, and the nature of the situation between the plaintiffs and the defendants by minimizing the fact that the investigator was trying to find evidence which would prove the interviewees' employer was negligent. The Court had imposed sanctions did not find all the contacts improper, but directed:

> Prior to the interview, the attorney or investigator must (1) fully disclose their representative capacity to the employee, (2) state the reason for seeking the interview as it concerns the attorney's client and the employer, (3) inform the individual of his or her right to refuse to be interviewed, (4) inform the person that he or she has the right to have their own counsel present, and finally (5) may not under any circumstances seek to obtain attorney-client or work product information from the employee.

- In this case, the presiding judge imposed standards in addition to those contained in SCR 20:4.3.
- Violations of the ethics rule can be the basis for sanctions in civil litigation.

In the Matter of Michelman, 202 A.D.2d 87; 616 N.Y.S.2d 409 (1994)

Michelman represented adoptive parents in a private adoption. Michelman discussed the nature and consequences of adoption with the biological mother, obtained background information from her, and prepared various documents to forward to the biological mother concerning her health, family history, and the history of the birth father. Michelman prepared and forwarded to the biological mother documents she would be required to execute after the birth of her child. Upon the birth of the child, Michelman prepared the surrender papers for execution by the biological mother, obtained medical information, and coordinated arrangements to obtain custody. Michelman's associate was present when the biological mother surrendered custody of the child. The associate advised the biological mother of the information contained in the affidavit of consent and supervised execution of the surrender documents.

The Court found violations of conflict of interest by representing and/or advising both adoptive parents and the biological mother in a private placement adoption, and dealings with an unrepresented person by giving advice to the biological mother.

- These seemingly contradictory theories (whether the biological mother was a client) suggest that either an attorney-client relationship might be imputed for conflict purposes, or the lawyer's representation of the adoptive parents was materially limited by the relationship with the biological mother.

Florida Bar v. Belleville, 591 So.2d 170 (Fla. 1991)

Belleville drafted documents for Bloch to purchase property from Cowan. Cowan was an elderly man, eighty-three years of age, who had a third-grade education. The various written documents Belleville drafted overwhelmingly favored Bloch. Cowan disputed that he ever agreed to some of the terms embodied in these documents. Although Cowan and Bloch had negotiated only for the sale of an apartment building, the documents stated that Cowan was selling both the apartment building and his residence. The referee specifically found that Cowan had no intention of selling his residence and did not know that it was included in the sale. Whether Belleville knowingly participated in his client's activities or merely followed the client's instructions without question was unclear. Belleville did not attend the closing. Cowan signed the documents without understanding their terms.

The referee recommended no discipline based on his conclusion that Belleville owed no attorney-client obligation to Cowan. The Court found a violation. It concluded that Belleville should have harbored suspicions about the documents he was preparing, because the documents established on their face a transaction so one-sided as to put him on notice of the likelihood of their unconscionability.

The Court imposed two duties to the unrepresented Cowan. First, the attorney must explain to the unrepresented opposing party the fact that the attorney is representing an adverse interest. Second, the attorney must explain the material terms of the documents that the attorney has drafted for the client so that the opposing party fully understands their actual effect.

- Here, the court imposes a duty to provide legal advice, which seems contrary to rule 4.3.

WHAT WE KNOW

Wisconsin's rules relating to pro se litigants (and other unrepresented persons) impose more duties than the ABA counterparts, and therefore more than other jurisdictions.

- SCR 20:4.3 contains an affirmative duty to inform the person of the lawyer's role.
- SCR 20:1.13 requires notice to the constituent "when it is apparent" that the interests conflict.
- SCR 20:3.8 applies to a broader range of lawyers than the ABA counterpart.
- SCR 20:3.8 contains an affirmative duty to notify the person of the prosecutor's role and interest in the case.
- SCR 20:3.8 provides more specific guidance about what a prosecutor may and may not do than is found in the ABA counterpart.
- Swarts, 272 Kan. 28, prosecutor not in violation of 4.3, but would be in Wisconsin for failing to advise of his role and interest in the matter.

Providing information to an unrepresented person may be construed to be providing advice.

- 2003-15 "your attendance is not required."
- Michelman, 202 A.D.2d 87, providing documents to biological mother.
- Belleville, 591 So.2d 170, drafting documents to be signed by an unrepresented person.

Noncompliance with the ethics standards may compromise the underlying matter.

- Swarts, 272 Kan. 28, conviction reversed based upon prosecutorial misconduct.
- McCallum, 149 F.R.D. 104, discovery sanctions imposed.
- Belleville, 591 So. 2d 170, transaction disputed in court.

Public policy sometimes comes into conflict with the ethics standards.

- SCR 20:3.8, the municipal prosecutor exception, handling the workload.
- Brooks, 838 So. 2d 170, honoring speedy trial rights.
- Pautler, 47 P.3d 1175, apprehending a dangerous person.
- McCallum, 149 F.R.D. 104, getting the truth from reluctant witnesses.
- Belleville, 591 So. 2d 170, justice and fair play.

A FEW PRACTICE TIPS

Look for practical solutions to problems.

- 2003-15, avoid gratuitous advice.
- Swarts, 272 Kan. 28, stay in your lane, let the investigators investigate.
- Brooks, 838 So. 2d 778, the prosecutor might have filed a motion with the court to clarify the counsel issue and move the case to trial.
- McCallum, 149 F.R.D. 104, use discovery procedures.

Involve the Court.

Call the Ethics Hotline at 608-250-6168.

Inns of Court
January 9, 2014 Meeting

1. United States company is in major litigation with a company from India. The case involves an alleged breach of contract by the Indian Company over failure to pay monies owed in a business relationship. The Indian company's two Indian representatives (who are mid-level employees) advise the court-ordered mediator that they cannot discuss the problems alleged with their employer's conduct. They vociferously argue with the mediator that the company has done nothing wrong and they can discuss only the most minor of settlements. After discussing with the mediator the comments of the Indian representatives, the representatives of the American company become offended and walk out of the mediation.

2. During contract discussions with Central European Company in furtherance of an earlier letter of intent, representatives of American Company present their standard contract, with twenty pages of terms and conditions, intended to formalize the parties' agreements to do business. The European Company representatives are alarmed by the American Company's insistence that the proposed contract agreement is "standard," not excessive and appropriately specific. The American Company's representatives interpret European Company's reluctance to work off the contract draft as an attempt to avoid the need to perform their contract obligations in a proper manner. Negotiations fail and no contract is signed. The American Company has sued the European Company for failing to negotiate in good faith. The matter is now in mediation.

3. A Federal court case involves non-party Taiwanese business people, with whom both parties in litigation sought to do business. The case involves a claim that one party negotiated with the other in bad faith simply to gain access to important business contact information in Taiwan. The Taiwanese witnesses had responded to email inquiries by both sides with answers that, if believed, are contradictory because they support both sides on the same point. The mediator asks both parties to explain what has happened. The Taiwanese business has told both sides that out of friendship, its representatives will testify at trial if asked to do so.

Gegios, Robert and Stephen Taylor, "Cross-Cultural Understanding: An Essential Skill in International Advocacy," *in* Alibekova, A., and Robert Carrow, Eds., *International Arbitration and Mediation From the Professional's Perspective* (Salzburg: Yorkhill Law Publishing, 2007).

Gegios, Robert and Stephen Taylor, "Cross-Cultural Understanding: An Essential Skill in International Advocacy," *in* Alibekova, A., and Robert Carrow, Eds., *International Arbitration and Mediation From the Professional's Perspective* (Salzburg: Yorkhill Law Publishing, 2007).

Cross-Cultural Understanding: An Essential Skill in International Advocacy

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Introduction

International arbitration inherently involves parties and arbitrators from different cultures. Culture is the:

> . . . set of distinctive spiritual, material, intellectual and emotional features of society or a social group and . . encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.[2]

Culture therefore determines how people interact and influence each other: cultural norms influence general notions of propriety and fairness. Effective international advocacy necessitates appreciation of the many and varied ways in which cultural constructions can affect resolution of a legal controversy. Regardless of the underlying facts, success in any tribunal depends upon convincing the decision-makers of the merit of the positions advocated. International arbitration therefore calls for adroit appreciation of cultural differences:

> What . . . parties fear is less the application of the adversary's substantive law than the application of foreign procedures, which are based upon the application of foreign language, foreign manners and foreign policies.[3]

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1 Kohner, Mann & Kailas, S.C., Washington Building, Barnabas Business Center 4650 N. Port Washington Road, Milwaukee, WI 53212, USA.

2 UNESCO Universal Declaration on Cultural Diversity 2002, Preamble; available at http://www.unesco.org/education/imld_2002/unversal_decla.shtml#1.

3 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 10.

Cultural considerations should be at the forefront of planning any aspect of international arbitration from the outset,[4] most notably the drafting of an arbitration clause, the selection of an arbitrator,[5] determining suitable procedural requests, and the optimal style of verbal and written advocacy. In short, successful international arbitration involves cultural management of the process from inception to final judgment. This paper discusses broad types of differences and how these may affect what is perceived as good advocacy, and looks at how counsel can use cultural sensitivity to advance their client's cause.

Cultural Differences, in Business and Law

Our culture shapes the way we see the world.[6] How we see the world shapes what we regard as proper, or important, and hence how we organize our society. Legal systems that have developed organically within a culture reflect the values of that culture.[7] The global commercial system is really a construct of two similar, sequentially-dominant cultures: Great Britain and the United States.[8] It is based on assumptions that contracts are binding and recourse to law is properly an early option. In short, it is a product of an individualistic,

4 While cultural awareness is essential to an optimally-drafted arbitration clause, the choice of law, location and rules etc., are not a focus of this paper.

5 Most institutional and *ad hoc* procedures now use a three-person panel, generally with each party appointing one arbitrator, and these then selecting the presiding arbiter. It is observed that where the choice is left by the parties to the ICC, the ICC has in recent years imposed a three-arbiter panel for all arbitration where more than US $1.5-million is in contention; see Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 92. This structure is therefore assumed.

6 Cultures are not coterminous with nationality, but tend to be ethnically and sometimes religiously defined. Cultures may co-exist, with the dominant one largely shaping the society. See Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, art 2(3); available at http://portal.unesco.org/en/ev.phpURL_ID=31038&URL_DO= DO_TOPIC&URL_SECTION=201.html. Culture evolves over time and from outside contact, though generally on a generational time scale; see Hewko, "Foreign Direct Investment in Transitional Economies: Does the Rule of Law Matter?" 4/1 *EECR* (Fall 2002/Winter 2003) 78. Individuals within a culture will vary in the degree to which they reflect cultural generalizations due to differing exposure to alien cultures and personality differences.

7 Slate, "Paying Attention to 'Culture' in International Commercial Arbitration", 59 *Disp. Resol. J.* (2004) 96; available at http://www.findarticles.com/p/articles/mi_qa3923/is_200408/ai_n9430961. Slate is the Chief Executive Officer and President of the American Arbitration Association.

8 Arbitration is an import to this paradigm of relatively recent vintage, and was largely a product of the continental European civil law system. Significantly, in recent years pressure by users has shifted arbitration towards a more adversarial and common law approach. This approach will likely be affected, and perhaps altered, by intensifying Asian economic power. Private arbitration providers can be expected to adapt to the changing demands from their clientele.

legalistic and short-term culture.[9] In other cultures, these values are dissonant, and the result is a different attitude to the conduct of commerce, and to dispute resolution.[10]

Business practices reflect cultural sensitivities and objectives, and hence are not universal. For example, in the United States, profit is seen as a legitimate goal, success in business can be measured empirically, and the work ethic is highly developed.[11] For the Japanese, the focus may not be on the pursuit of profit alone, but on human efficiency; the group is superior to the individual. In France, there may be more of an emphasis on moderating one's own freedom of action in order to avoid harming the interests of others, often expressed as a social compact.[12] This is not to say that a French or Japanese person does not seek to make profit. It is simply that as they may not necessarily see true return on investment as measurable solely by bottom-line financial gain, but rather as an amalgam of profit, long-term market position, and the welfare of all stakeholders in the venture, including the workforce, and even the local community.

As commerce is shaped by culture, so is law. Commercial law is designed chiefly to perform two functions: the creation of certainty in business transactions, and the resolution of disputes.[13] Dispute resolution and commercial regulation are outgrowths of conceptions of what is important to an individual, and in society. In a culture where a contract is absolute, interpretation on the basis of the language is not only logical, but also essential to establishing certainty in the marketplace. However, in many cultures, commercial accommodation requires trust, which can be created only by the gradual building of a relationship.[14] In such societies, a written contract is not always seen as a final embodiment of the accommodation.[15] The idea that words on paper could replace trust built through mutual understanding may appear ludicrous. Breach of obligations under a relationship duly grounded in trust may carry infinitely more severe consequences than a breach of contract.

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9 In this context, short-term means a focus on an individual transaction rather than a long-term, evolving business relationship.

10 In the modern world, many formerly authoritarian nations and developing economies have adopted entire legal codes, or copied large tracts of western law, particularly commercial law. Such imports inherently reflect the values of the originating culture and are unlikely to accord with those of the importing nation.

11 Poirson, *Personnel Policies and the Management of Men* (1989) 6, cited in Torrington & Hall, *Personnel Management: HRM in Action* (1995), at p 117.

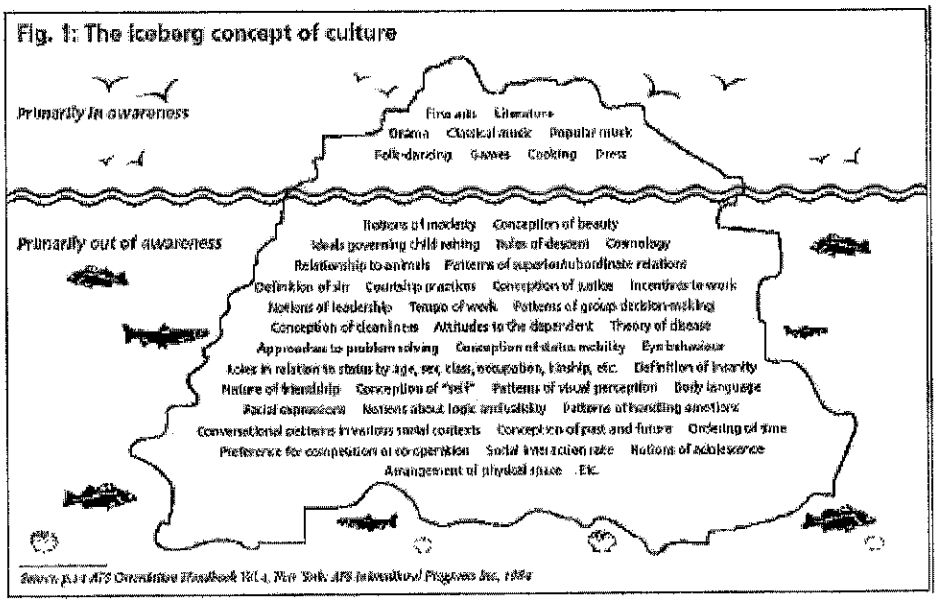
12 See Torrington & Hall, *Personnel Management: HRM in Action* (1995), at p 117.

13 The fundamental purpose of commercial law is "to maintain the commercial harmony, integrity, and continuity of society", see glossary available at http://www.commonlawvenue.com/Glossary/GlossaryA-D.htm.

14 "Seven Disciplines for Venturing in China", Deloitte Research (2005), at p 4, col. 1.

15 The Japanese have sometimes been characterized as averse to written contracts. Rather, certainty comes from "*giri*", a system of intertwining social and moral obligations. "In the event that parties under *giri* should fall into a dispute, then they will adopt a conciliatory and flexible concessionaire approach. The presence of *giri* might be incompatible with the nature of litigation and operate to inhibit a resort to legal resolution of disputes", see Yoshida, *The Reluctant Japanese Litigant: A New Assessment*, available at: http://www.japanesestudies.org.uk/discussionpapers/Yoshida.html.

Identifying Possible Cultural Differences



The diagram above indicates some of the concepts that combine to define a culture. Any attempt to proceed beyond such a neutral expression of the constituent elements of culture invites the risk of appearing to make unfavorable generalizations. Yet, cultural differences exist and cannot be avoided if international advocacy is to be as fair and effective as possible. As a result, some attempt, however flawed, to address means to predict where to start research into the optimal system of law, identity of arbitration nominees, and planning advocacy, is essential. Perhaps the seminal work to establish means of practically defining areas of difference between cultures is by Geert Hofstede, who defined four basic factors that serve as useful guides to individual and organizational behavior:[16]

- *Individualism*. Importance of self and nuclear family, with a high emphasis on individual rights v collectivist responsibility to a group, which may be tribal, ethnic, or defined by social obligations, and expectation that the rights of the group come first;

16 Hofstede's work has attracted academic criticism (as well as praise and usage) as to its method of data collection, focus on national rather than regional or ethnic groupings, and its simplicity and degree of generalization. However, Hofstede's tools are based upon empirical research, unlike many works in this field. It has been applied to a large number of cultures, produces a readily-comprehensible guide, and is readily accessible; see http://www.geert-hofstede.com/hofstede_dimensions.php. In any event, cultural indices are necessarily generalizations, and should be regarded as no more than starting points for additional inquiry.

- *Power Distance*. How accepting is the wider population of unequal distribution of power? An affinity for clear and enforced hierarchy and centralization and resulting discomfort with matrix and other confused authority systems;
- *Uncertainty avoidance*. Readiness with which new risks or radical change is accepted by members of a given society;
- *Masculinity*. Is visible achievement valued as the key determinant of respect, or does respect arise from evidence of underlying actions and their benefit to the wider community?

How these factors combine can have a significant impact on business practice. What is often overlooked is that these factors also affect attitudes to, and the means of, dispute resolution.

Hofstede's work provides a reasonably comprehensible means to categorize groups by attitudes to factors that directly affect government and commerce. These factors provide a rule-of-thumb guide to sources of difference between cultures that affect business, and shape attitudes to government and the law. The following chart shows common combinations of characteristics identified by Hofstede.[17]

Combinations of Attitudes of Risk and Hierachy from Hofstede

Power Distance ↑	Risk Propensity →
"Pyramid of People" Large power distance, dislike of risk, clear and enforced hierarchy: • France • Japan • Arab Nations	**"Family Type"** High power difference, willingness to take risks, deference to bosses: • China • India • Jamaica
"Well-Oiled Machine" Little tolerance of hierarchy, and risk averse: • Germany • Finland • Switzerland	**"Village Market"** Little tolerance of hierarchy but willing to take risks, affinity for *ad hoc* solutions: • United States • Britain • Australia

Hofstede later identified another factor central to attitudes and practice in dispute resolution and business: the length of term considered.[18] Asian nations, particularly the Chinese, Korean and Japanese peoples, often take long-term views of issues and see business relationships as larger than a single source of dispute. This may be related to their shared focus on the group rather than the individual, but it sets them apart from

17 Based, in part, on information in Torrington & Hall, *Personnel Management: HRM in Action* (1995), at pp 117–120 and http://www.geerthofstede.com/ geert_hofstede_resources.shtml.

18 Torrington & Hall, *Personnel Management: HRM in Action* (1995), at pp 118–121.

western societies, which often take a short-term, issue-based view of dispute resolution in the context of a business relationship.

In societies where rank is important, deference is expected, and "face" becomes critical.[19] Position must be accorded respect, and be seen to merit it. Accordingly, confrontation and public demonstrations of the error of another are avoided at all costs. Instead, language tends to be tangential and non-committal as opposed to direct. Further, the decision-maker frequently may not commit to negotiations, instead allowing others to act as intermediaries. Contracts are often regarded with suspicion, because their function is perceived to be primarily to support litigation, which is a form of public confrontation. If litigation is not favored, then the legal system as a means of dispute resolution will have lesser status than in most western nations. Further, alternative, non-public means to resolve disputes will develop. The Chinese tend to regard contracts as a starting point, almost the equivalent of an American letter of intent.[20] Some Europeans see a contract as an expression in outline, a guide for the commercial relationship to be completed by oral exchanges in the course of an on-going relationship.[21] This attitude poses problems for the textualist approach of Anglo-American law to commercial disputes.

Cultural difficulties are not confined to intercontinental dealings. Most of the commercial world speaks English, but in many different ways.[22] A classic example is the war-time discussion between Allied chiefs of staff regarding planning the invasion of the Continent. The British wanted to "table it", meaning to address it now; the Americans understood this as the intent to postpone consideration indefinitely. English is the dominant commercial language of India, but who knows what a "Himalayan blunder" is, or a "godown"?[23] Cultural differences bleed into differing linguistic uses. If the subject of the conflict is rooted in nuances of meaning, will someone not born to that language pick up on the nuance, and even if he or she does, will it be accorded the same meaning? This problem of erosion of meaning worsens if a translator is inserted. As the "game of Telephone" demonstrates, meaning changes in proportion to the number of people through whom the message passes. When a translator does not speak both languages as would a native speaker, further

19 "Face" is the degree of respect that an individual merits, and determines an individual's influence in society. Related western concepts are public standing, reputation, shame and humiliation, although these do not fully equate. In some cultures, such as China, it may well determine the outcome of a dispute. Chinese will sometimes cede ground (in private) to save face. Significantly, Chinese often prefer to resolve conflict with the maximum privacy: offering an opportunity to save face may be all that is required to avert costly proceedings. Conversely, if given no way out, the fight may be exceptionally vigorous. Companies as well as individuals can possess, or lose, face.

20 Schuster, *How to Manage a Contract in China*, available at http://www.connectionsmagazine.com/papers/4/19.pdf.

21 Keefer, "Partnerships with European Life Sciences Companies: Why Europe, Why Now, and How?", *Triangle Tech Journal* (2005), available at http://www.tcgbiopharma.com/news/TTJ_Keefer.pdf.

22 Legum, "Communicating Effectively with Foreign Clients and Lawyers", in Legum (ed.), *International Litigation Strategies and Practice* (2005), at p 11.

23 They refer to a catastrophic mistake, and a warehouse, respectively, see http://www.executiveplanet.com/business-culture-in/132249067379.html. This site has some good cultural tips for avoiding classic foreigner blunders in many countries.

distortion is added. For an advocate, therefore, control over the actual message received diminishes accordingly. Phraseology is often incompletely interpreted or inaccurately applied. Furthermore, some concepts do not translate from one language into another. "Face" is an inadequate encapsulation of the Chinese term "mianzi". The French term "protection de la vie privée" does not equate to the American concept of privacy. Good reasons are therefore required to choose arbitrators that are not native to the language of the advocate and, ideally to that in which the majority of the evidence is couched.

Politics is also a problem. Political pressure may stem from a sub-conscious affinity for a political sentiment that impinges on the case, or it may be overt. For nationals of some countries, taking a line hostile to a government may have significant consequences for the arbitrator, advocate, or party doing so.[24] Political views may differ between an *émigré* and a current national. Would an ethnic Chinese person brought up in France share cultural ties with ones brought up in California, Taiwan or mainland China? The large Chinese Diaspora has maintained such cultural ties over many decades of living outside China. But it is also likely that different political influences and some aspects of the culture of domicile have created divergence. Neither politics nor linguistic issues can be ignored.

Practical Effects of Cultural Differences

Individual Level Examples

Perhaps the simplest way to illustrate the differences resulting from culture is on the level of individual behavior, since each of us interacts with other members of society in the course of our everyday lives. In doing so, we gain an innate sense of how to behave, and what is acceptable in given circumstances.[25] For instance, a Korean may loathe presenting disappointing news, even to the point of suggesting that all is well when the opposite is true.[26] Such a person may place more importance upon the feelings (or "face") of the individual, and so try to avoid any chance of personal embarrassment. In Austria being late for a meeting is to be "zu spät", literally "too late".[27] In China, being late means that you are asserting your superiority, which in turn diminishes the face of the person with whom you

24 Although impartiality is required by all major international arbitration providers, this impartiality appears to address conscious bias. The prudent advocate will consider the possibility of unconscious affinities related to the issues. Further, choice of an arbitrator that must later withdraw for conflict of interest, or prompts another to do so, is likely to create delay, and may confuse the selection process, perhaps compromising the ability to persuade the final panel.

25 Hofstede's own definition of culture is the "collective mental programming that conditions peoples' values and perceptions", see Hofstede, *Cultures and Organizations — Software of the Mind: Intercultural Cooperation and Its Importance for Survivall* (2004).

26 See, eg, "South Korean Business Etiquette", available at http://executiveplanet.com/business-culture-in/ 132166234632.html.

27 See, eg, "Austrian Business Culture, Etiquette — Let's Make a Deal!" — Part 1, available at http://executiveplanet.com/business-culture-in/139442261578.html.

are to meet.[28] In Japan, presenters may be treated to regular comments of "yes" and to nodding, but this behavior does not necessarily mean assent, but indicates the audience is listening.[29] In general, a German may take time to address technicalities in great depth, and may be averse to rapid ad hoc solutions of the type proposed by American businesspeople.[30]

The list of idiosyncrasies is endless, and often amusing. However, in business and in advocacy, similar *faux pas* can be catastrophic. How many judges will have sympathy with a rude advocate? Moreover, such personal misperceptions are simply the most obvious symptoms of cultural difference.

At the Business Level

American negotiators frequently assume that their counterparts have the power to conclude a deal. To do so the Americans go straight to the point, breaking down the issues into "logical" categories to promote resolution of issues sequentially, until all aspects are resolved. They then typically adhere to deadlines, because strength requires the possibility of withdrawal if agreement cannot be reached, and because new tasks beckon. In the process, negotiation can become intense, but emotion is a sign of weakness.

A Chinese or Indian party faced with these tactics may be very confused.[31] He or she does not have the power to sign the deal without confirmation from his superiors. He or she has been afforded no chance to establish any kind of personal feeling of comfort with the Americans, because they launched straight into key issues and are emotionally restrained yet confrontational. Further, the Americans likely have broken out issues that are properly part of the wider picture and make little sense in isolation.[32] On the other hand, the other party is becoming very agitated about a deadline. This is arbitrary, and means only that they may become more susceptible to concessions as the time approaches. On the other hand, without a sense of rapport and mutual understanding, can any arrangement be relied upon to reflect well on him or her?[33] Sensitivity to foreign cultures, way of life and business practices may prove to be the most important aspect of doing business internationally. Such sensitivity is therefore just as essential to optimal arbitration. Arbitration exists because it is seen by companies as enhancing the operation of international trade: as such practitioners must accept and accommodate cross-cultural tools now widely applied by international business.

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28 See, eg, "China Window. The Best Way to China", available at http://www.china-window.com/china_business/doing_business_in_china/appointment.shtml. Worldlink-China News reported that a recent poll by China Youth Daily found 87 per cent of Chinese people found saving face an essential preoccupation, results available at www.worldlink-china.net/news_CWL.htm.

29 See, eg, "Asia Source. A Resource of the Asia Society", available at http://www.asiasource.org/business/2know/japan.cfm.

30 See, eg, German Business etiquette at http://www.executiveplanet.com/business-culture-in/1370890375 31.html.

31 See, eg, Chinese and Indian decision-making etiquette at http://www.executiveplanet.com/.

32 Chinese and Indian decision-making etiquette at http://www.executiveplanet.com/.

33 Chinese and Indian decision-making etiquette at http://www.executiveplanet.com/.

In the Approach to Law

Cultural impact extends beyond business practice. The same cultural factors can permeate decision-making in judicial and administrative functions. To fail to appreciate the perspective of an arbitration panel is to base argument and procedural practice on the basis of fundamentally flawed assumptions. There is no "one size fits all" model of advocacy for all nations.[34] For example, in a dispute on the meaning of contractual text, in the United States the assumption is that, where possible, the four corners of the document will define the expectations of the parties at signature, and therefore the meaning of the text in dispute.[35] In civil law the focus is not on expectations, but on evidence of actual consent by the parties.[36] Further, arbitrators may be from cultures where written contracts are road maps, to be fleshed out verbally as the relationships develop. In certain cultures, contracts may be little more than expressions of intent. An incorrect assumption as to the form and importance of a contractual arrangement can undermine an argument completely. As one Chinese commentator put it, "it is error to assume that the law will treat a [contract] breach in the same way in China" as it would in America.[37] In China it is wise to avoid seeking to force contracts contrary to social obligations, since these will seldom be respected by the signatory or enforced by the courts.[38]

Even in a proceeding governed by common law, if a majority of the arbitrators come from cultures that revere understatement and/or are hierarchical societies defined by public perceptions of status, classic common law adversarial tactics may be counter-productive. Blunt, to the point speech inherently risks showing someone to be clearly in the wrong, causing public loss of face. Acceptable means of communication minimize such humiliation. Thus disagreement tends not to be expressed directly. An advocate from such a culture is unlikely to express claims, interrogations, or advocacy in a direct and hostile manner. This is partly because of a view that to do so would be improper, but also because to do so raises the probability that the level of confrontation and bluntness of response will increase in proportion. To an American advocate, such understated advocacy may seem to signal a lack of confidence in the merit of the position taken. Thus it is essential to consider the response in the context of the origin and experience of the speaker, and of his or her audience.

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34 Perlin, "Chimes of Freedom: International Human Rights and Institutional Mental Disability Law", 21 *N.Y.L. Sch. J. Int'l & Comp. L.* (2002), at pp 423 and 426.

35 See, eg, The Law Encyclopedia, available at http://www.thelawencyclopedia.com/term/four_corners_rule.

36 Tetley, *Mixed Jurisdictions*: *Common Law* v *Civil Law* (*Codified and Uncodified*) Part II, VI (8); available at http://www.unidroit.org/english/publications/review/articles/1999-4a.htm.

37 Hou, "Negotiation in China — Stereotypes and Fallacies", 3 *ADRJ* (2000), at p 2.

38 A Chinese adage holds that a contract marks the opening of negotiations. It is in effect an "agreement to agree", in which the parties are stating that they wish to do business, that the goals in the contract are mutually desirable, and that the terms in the contract are an acceptable starting point for negotiation; see, eg, "Global Business Law Briefs", Baker McKenzie (2005), at p 1, available at http://www.bakernet.com/BakerNet/Resources/Publications/Recent+Publications/GlobalBusinessLawBriefs0405.htm. For an excellent summary of the Chinese concept of *guanxi* and its central role in business certainty, see "Seven Disciplines for Venturing in China", *Deloitte Research* (2005), at pp 4–5.

Influence on Arbitration

Arbitration is the most used means to resolve international private trade disputes — up to 80 per cent according to one commentator.[39] Arbitration, like litigation, involves legal analysis and argument conducted in order to reach a final decision based upon entitlement and equity. The definitions of entitlement and equity in international arbitration are, however, far less defined than in domestic litigation in developed legal systems. In practice, the process and procedure are a function of the clause demanding arbitration, the terms it stipulates, the body it names to conduct the process, and the views of the arbitrators eventually selected.[40] Typically, the arbitrators have considerable freedom to shape the process as well as to determine the result. If the parties fail to specify, the arbitrators may chose the applicable body of substantive law,[41] be it that of a nation, or of a less defined body of principles such as lex mercatoria.[42] Needless to say, this has the effect of throwing predictability to the wind, and should be avoided. Parties may also specify the procedure to apply any identified law,[43] or applicable rule system of any other body, or even design their own.[44] However, the likelihood is that agreement on a body of procedure alien to one party is unlikely to be reached absent a significant power gap between the parties.

The default procedural rules of the major international arbitration providers are couched in very general terms. For example, Article 15 of the ICC rules "leaves many details of the manner in which arbitral proceedings shall be conducted completely in the hands of the parties [in contract drafting] and the arbitrators."[45] The arbitrators must, however, abide by accepted trade usage.[46] While parties may contractually define rules of evidence, including discovery, in practice they "seldom do".[47] The ICC default position

39 Casella, "Informational Barriers to Trade: The Role of Networks", *Notes for the World Bank Annual Conference on Development Economics* (1999), at p 4.

40 Choice of law in the contract will of course influence substantive concepts heavily, but the law chosen will probably be filtered through the perspective of a different culture, producing a potentially very different meaning, and possibly substantive differences. For a good review of different views of common legal concepts between civil and common law in Canada, see Tetley, *Mixed Jurisdictions: Common Law* v *Civil Law (Codified and Uncodified)* Part II, VI (8); available at http://www.unidroit.org/english/publications/review/articles/1999-4a.htm.

41 The location of the arbitration is no longer the default determinant of the applicable substantive law, though it often remains a consideration. In practice, many seemingly odd grounds for choice of substantive law have been applied; see Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at pp 327–328. The lesson is to avoid this quandary by agreeing on the substantive law.

42 Craig, *et al.*, caution against the use of *lex mercatoria*, as it is ill defined and potentially unrecognized by nations, such as Great Britain, that may be required to enforce rulings; see Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000) 107, at pp 327–328.

43 See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art V.

44 ICC Rules, art 17. Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000) 107. Many countries, including Switzerland and Britain, have explicitly empowered arbitrators to set procedure to best match the task facing them, whatever the source (with the caveat regarding *lex mercatoria*).

45 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 295.

46 ICC Rules, art 17(2).

47 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 415.

grants arbitrators the power to establish facts by all available means; there is little constraint on the rules they can adopt.[48]

Thus, in most instances, the compromise position is that each party selects one arbitrator and the chosen arbitrators together select a third, the complete panel then defining the procedural rules for the arbitration. Therefore, in the majority of arbitral proceedings, the arbitrators impose their culture, albeit perhaps, unconsciously. International arbitration does "not embrace cultural influences on the problem at hand".[49] Yet the lawyers that craft the clause — and particularly those who select the arbitrators — can, if cultural sensitivity is employed, greatly enhance the chances of their case being prosecutable in a manner they would wish. The form of the proceedings covers both the choice of legal system (eg, civil law, common law or a blend of the two), and the manner advocacy is conducted within that legal structure.

Common Law v Civil Law

Arbitration is essentially a civil law construct in origin, while modern global international trade practice is predominantly a common law creation. Significant use of international arbitration by businesses from common law countries is a relatively recent phenomenon.[50] Significantly, the institutional providers of international arbitration are private institutions dependant on usage for revenue.[51] Global commerce was, and remains, dominated by corporations accustomed to the common law, and particularly its American variant. The result has been the increasing willingness to cater to the United States common law approaches.[52] However,

48 Tribunals outside of the United States generally do not have the power to compel production even of relevant documents in the possession of a non-party. Access will depend upon the law of the nation in which the documents reside, and the law of that nation on discovery; see Huleatt-James, Gould, *International Commercial Arbitration: A Handbook* (1999), at p 87. A backdoor method may now exist if a foreign party in possession of evidence outside the Unites States is subject to Unites States jurisdiction under minimum contacts principles. 28 *U.S.C.* para 1782(a) grants Unites States courts the discretionary power to compel production in such circumstances for use in a proceeding in a "foreign or international tribunal". A court in *Intel Corp.* v *Advanced Micro Devices, Inc.*, 124 *S.Ct.* 2466, (2004), held that any "interested person" (here a complainant in a proceeding before the Director General of the European Competition Commission), not merely parties, could be granted discovery where a dispositive ruling was reasonably contemplated. Further, the court rejected the notion that discovery was reliant on the document being discoverable in the foreign jurisdiction. This decision has not yet been tested regarding foreign-based arbitration. For a fuller summary, see Mullen, "Will Intel Open the Door to American-Style Discovery Abroad?", Pepper Hamilton LLP (2004), available at http://www.pepperlaw.com/pepper/publications_update.cfm?rid=514.0. A copy of the *Intel Corp.* v *Advanced Micro Devices, Inc.* opinion is available at http://www.supremecourtus.gov/opinions/03pdf/02-572.pdf.

49 Brainch, "No Argument", *Corporate Africa* (2003), at p 79.

50 Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions", 1 *CJIL* (2004), at p 1; available at http://www.mayerbrown.com/publications/ article.asp?id=1935&nid=6.

51 There is a view that the adoption of common law rules by international arbitration providers is a function not of a coming together of civil and common law minds, but the result of providers' competition for clientele; see, generally, Ginsberg, "The Culture of Arbitration", 36 *Vand. J. Transnat'l L.* (2003), at pp 1334 and 1335.

52 Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions", 1 *CJIL* (2004), at p 1.

civil law procedures remain, the result being a wide range of scenarios across the considerable divide between the two approaches.[53] Typically the result is some kind of hybrid, which signifies not convergence but bifurcation.[54] Even a compromise at a mid-point between common and civil law often surprises the parties: the common law party is generally unprepared for that discovery limited only to documents it already knows exist, and the civil law party is alarmed to discover that it is required to produce even these "confidential" business documents.[55] Thus the degree of tilt in the rules and mindset can be highly significant.[56]

Regrettably, arbitrators, lawyers, and people in general, tend to cling tenaciously to the concepts and practices of their own culture. Yet there are many "largely unbridgeable conceptual chasms between common and civil law" in the areas of pleading, testimony, discovery and the proper time for production of written argument.[57] "Counsel should be wary of their own — and their colleague's culturally conditioned conceptions" and the behavior that springs from these.[58]

The Middle East is an example of an area where dispute resolution mechanisms proliferate.[59] The result is a largely common/civil law mix, similar to that seen in international arbitration today. Rather than proving a benefit through increased flexibility, the result has more often been "basic inconsistencies and lower . . . predictability of outcomes".[60] It is not unreasonable to assume the same problem could bedevil international arbitration.

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53 Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions", 1 *CJIL* (2004), at p 1.

54 See Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions", 1 *CJIL* (2004), at p 2. Rubinstein notes that in most instances the limit of discovery is nearer to the more restrictive United Kingdom model than that of the United States, if discovery is allowed at all. An example of the United Kingdom style model is art 3(3) of the International Bar Association Rule on the Taking of Evidence in International Commercial Arbitration, available at http://archive.ibanet.org/PubNews.asp. Significantly, no provision is made for depositions.

55 Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions", 1 *CJIL* (2004), at p 3.

56 A side effect of divergent expectations is that United States companies anticipate future discovery and may try to limit documentation in tangible form on sensitive subjects. Civil law parties do not generally face discovery, and thus may keep records that an American counterpart would not create. The result could be a skewing of the apparent merits. Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions", 1 *CJIL* (2004), at p 4.

57 Hendel, "Transnational Litigation and International Arbitration: Cross-Cultural Reflections", *International Law News* (2006), at p 8.

58 Hendel, "Transnational Litigation and International Arbitration: Cross-Cultural Reflections", *International Law News* (2006), at p 8.

59 Historical informal peer arbitration mechanisms were largely supplanted by Western law. The Egyptian version of the French civil law system has heavily influenced modern law in the region, although many regions with links to Britain have retained or reinstituted elements of common law; *see* Nugent, "Impediments to Dispute Resolution and Firm's Competitiveness in the MENA Region", prepared for the Egyptian Center for Economic Studies workshop on "What Makes Your Firm Internationally Competitive" (2000), at p 9.

60 Nugent, "Impediments to Dispute Resolution and Firm's Competitiveness in the MENA Region", prepared for the Egyptian Center for Economic Studies workshop on "What Makes Your Firm Internationally Competitive" (2000), at p 9.

The difference is that lawyers have the power to influence the shape of international arbitration proceedings.[61] Forewarned should be forearmed: a culturally-aware counsel can do much to shape the form proceedings will take and build upon that by adapting to the mindset and expectations of his or her audience.

Other Cultural Influences

The more general culture of the parties and the arbitrators will also shape perception. Even with the most favorable procedure, if the manner of its prosecution is such that it offends the arbitrator's sense of propriety, then even the best advocacy may prove fruitless. Major corporations spend many millions to gain understanding of culture, languages and political trends, yet the arbitration community they employ has "made little or no effort to be culturally sensitive to [such companies when they are] parties to international arbitration".[62] Attitudes towards different cultural values are seemingly characterized by

> Ignorance, carelessness, or . . unjustified psychological superiority complexes, negatively affecting the legal environment required to promote the concept of arbitration in . . . international business.[63]

All cultures promote communication, and hence dispute resolution, according to their values and customs. Therefore, responsible arbitration in front of people from such cultures necessitates consideration of and adjustment to such concepts of dispute resolution.[64]

The significance of the differences is no less in a tribunal than in a business venture or negotiation. International arbitration has been criticized on a number of grounds, including the belief in many developing countries that it inherently favors western parties: "international arbitration . . . [is] a foreign institution imposed upon them with a heavy western bias".[65] It is not hard to see how such feelings arise. An arbitrator steeped in an indirect style of communication is just as likely to be offended by blunt aggressive advocacy as would a compatriot in a business meeting. Such an arbitrator may well interpret the advocate as hostile, not only to the other party to whom the speech is addressed, but potentially to the arbitrator as well. Furthermore, if the dispute is of a contractual nature, the arbitrator may view contracts as vague expressions of intent, in which case a departure from the text is not only acceptable, but logical in an on-going relationship. While choice

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61 Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions", 1 *CJIL* (2004), at p 8.

62 Slate, "Paying Attention to 'Culture' in International Commercial Arbitration", 59 Disp. Resol. J. (2004), at p 2; available at http://www.findarticles.com/p/articles/mi_qa3923/is_200408/ai_n9430961.

63 Slate, "Paying Attention to 'Culture' in International Commercial Arbitration", 59 *Disp. Resol. J.* (2004), at p 2.

64 The most used institution, the ICC, has arbitrators from over 170 countries, the vast majority of which have only one representative. Thus cultural differences are inevitable, see http://www.iccwbo.org/court/english/right_topics/court.asp .

65 Swartz, Paulson, "Confronting Political and Regulatory Risks Associated with Private Investment in Developing Countries" quoted in Bakovic, Tenenbaum & Woolf, "Regulation by Contract: A New Way to Privatize Electricity Distribution?", 7 *World Bank, Energy & Mining Sector Board Discussion Paper Series* (2003), at p 66.

of law may limit the degree of discretion, it does not change the fundamental concepts that will influence the vote. In such a circumstance, proper advocacy would seek to show entitlement based on more than just the written agreement.[66]

The job of counsel is to achieve the goals of the client. What then is the position of a western law firm whose most skillful counsel is female, sitting before a panel of advocates dominated by people from cultures that regard it as improper for women to perform such a role, or simply accord their views little or no weight? While it may be inconceivable in the domestic environment, the culturally (and probably client) sensitive approach may be to replace the advocate. The greatest oratory, if unheeded, serves no purpose and has no value: success requires a "practical understanding of how to use knowledge and skill to obtain an advantage over . . . disputants who are more naïve or less perceptive".[67] The dilemma — and obvious harm to the pursuit of gender-blind legal proceedings — is apparent.

Practical Considerations

Selecting Arbitrators

In most arbitrations each side appoints one arbitrator, and these then select a third to preside.[68] Thus:

> . . . selecting the arbitrators is probably the single most important stage in the proceedings. The conduct of the proceeding, and the ability of each party to receive a fair hearing, both depend on the selection of quality arbitrators.[69]

It is how each party appointee interacts with the other arbitrators that will determine how favorable the casting voice is likely to be.

> [C]ultural, linguistic, and professional training differences can entail substantial conflicts in approach and disagreements as the proper conduct of the proceedings.[70]

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66 The LCIA notes that in 2005, 43 per cent of parties were Western European, 16.5 per cent Far Eastern, and 13 per cent from the United States; see http://www.lcia.org/PRINT/NEWS_print.html. American parties appear to favor the AAA, or ICC, British parties the LCIA. Oriental parties favor Singapore (SIAC) and Hong Kong (HKIAC). In part this may be a reflection of belief that these venues are more in tune with their cultural norms.

67 Honeyman, "Patterns of Bias in Mediation", *J. Disp. Resol.* (1985) 1, available at http://www.convenor.com/madison/patterns.htm.

68 Parties employing institutional arbitration can leave the selection of arbitrators to the institution, stipulate the nationality of the arbitrators, or stipulate nationalities from which arbitrators may not be drawn by the institution. However, surrendering the choice of arbiters is the abandonment of a powerful influencing tool. If one nationality can be agreed upon, then that is a possible method to influence the culture of proceedings. Yet, in specialized arbitration this may reduce the pool of arbitrators with the necessary linguistic, technical or industrial knowledge. As Craig, *et al.*, note, over-specificity regarding the arbitrators in advance of the dispute can cause lengthy delays due to availability; see Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 92.

69 Rivkin, "International Commercial Arbitration: A Primer for United States Litigators", in Legum (ed.), *International Litigation Strategies and Practice* (2005), at p 176.

70 Carbonneau, "The Exercise of Contract Freedom in the Making of Arbitration Agreements", 36 *Vand. J. Transnat'l L.* (2003), at pp 1189, 1215.

In the vast majority of international arbitration, all arbitrators are under a duty of impartiality,[71] but many of the key influences on proceedings are questions not of partiality to a party, but to method and culture. The procedural rules do not decide a case in theory, though they may significantly advantage one party in practice due to familiarity, despite being theoretically fair. Thus the nature of the third arbitrator's preferences and attitudes is critical. He or she may tip the balance towards a more civil law approach. His or her preference for the style and order of advocacy may be critical to securing a majority ruling.[72]

Parties need to consider how the nominated arbitrators will interact. Generally, how well versed are they in the law selected? If one party is a national of that jurisdiction, the others may defer to his or her knowledge. Further, how well do the nominees speak the language of the applicable law and/or the majority of the evidence? Competency in a language is not fluency, the difference being the ability to comprehend the nuances as a local would.[73] If not truly fluent, an arbitrator may loose weight *vis-à-vis* others who do, or may simply interpret critical statements in a way not predicted by counsel, and hence contrary to the argument posed. The same may be true for reasons of disparity of understanding of technical or business practice details. Does the potential arbitrator have a background in the same form of law (civil/common) likely to best advance the client's issues and evidence? If not, will they be sympathetic to an opponents wish to weight procedure the other way, or be uncomfortable with the desired approach to advocacy? The gender issue, discussed above, may present similar dilemmas in the selection of an arbitrator. In effect, the objective should be to select the arbitrator most likely to be in the best position to work favorably with the other panel members. This individual may well not be from the same culture as the selecting counsel or party; rather, he or she will be culturally adept, enabling him or her to surmount expected cultural differences, as well as handle the technical and legal issues.

There is another aspect to this. If one can predict the basic type of arbitrator that one's opponents are likely to choose, there may be reasons that justify overriding the above guidelines, rendering cultural research and understanding particularly critical. For example, against a party from a hierarchical society that can be expected to nominate a party from the same culture, if one can locate an arbitrator of particularly exalted position,[74] it is possible that the other may defer to this person, overriding questions of expertise in the field.[75]

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71 See the rules of the ICC, LCIA and AAA (recently changed), mandating impartiality in all international arbitration.

72 Procedural freedom will always be constrained by the mandatory requirements of the chosen applicable law, though if a general body, such as *lex mercatoria*, is selected, these may in practice be few and far between; see Huleatt-James, Gould, *International Commercial Arbitration: A Handbook* (1999), at p 78.

73 Here, language refers to the version of the language in question — for example, a fluent American English speaker is not, for these purposes, necessarily fluent in Indian business English; see comments above.

74 It may be socially difficult for the other party to contradict views of such a panelist, however obliquely expressed. Such a nomination may also assist with enforcement, due to weight of (non-legal) obligation felt by the other party.

75 Expert knowledge does influence standing, but often not sufficiently to overcome other unrelated factors. It is true that not every person from a culture abides by its values, but typically anyone reaching the status required to become an international arbitrator will either have learned to conform or will be so exceptional in background as to have gained a reputation as a non-conformist.

Finally, it is wise to consider whether there are any political issues raised by the nationalities at play. Two arbiters from hostile nations may interact less successfully than would normally be expected, particularly if the subject matter impinges on the source of conflict.

Although, at the time of selection of arbitrators, the precise form of the argument and the evidentiary sources will probably not have been finalized, some sources and arguments should be contemplated. It is important, when considering selection, to focus on how these arguments and witnesses can best be exploited, and whether this will mesh with the culture of candidates, and with the likely culture of the other party's nominee. For example, is the strongest source of support for a party's most powerful arguments primarily oral or written? If oral, and likely to stand cross-examination, then the common law is most favorable, and a common law flavor to the rules and sensibilities of the panel may be desirable. If the strength of evidence lies in documentation, or the witnesses are potentially unpredictable, civil law may be a better option. If sources are balanced, the question may be what would the other party be likely to prefer? Common law lawyers are perceived to have a particular advantage if cross-examination is allowed because of the extent to which this skill is honed by practice, which is rarely available in civil law countries.[76] Where the evidence and issues favor neither civil nor common law structures particularly, then selection becomes an important tool to tilt proceedings towards counsel's strengths of experience and knowledge, and away from those of the opponent.

Selection of an arbitrator is a key tool for influence, and it should reflect a balanced weighting of the above considerations (which are not exclusive) in the light of the language, subject matter and evidence available. In essence, it is the opportunity to tailor the proceedings in the image of the participants and entitlements in the dispute. As such it should be approached as a critical element of the broader advocacy process.

There is one further aspect of the cultural makeup of the panel that may have a significant impact on client satisfaction. What is the proper purpose of an award to the prevailing party? In common law countries, which also tend to take a short-term, issue specific view of conflict and to be focused on individual rights, victory in arbitration is an absolute concept. Assuming one party sinned and the other is merely an innocent victim, the result should be complete redress of the injury and its consequences, without regard for whether any wider relationship can be salvaged. In addition, in some common law systems, particularly the British type, a party found to have entitlement will traditionally be awarded its costs, virtually in their entirety. In America, costs are less likely, but punitive awards are common. As has been noted above, in other countries arbitration is more nearly equated with mediation. The object therefore is to achieve the least harm possible in the light of the merits. In practice this may also be seen as part of a wider picture including the broader business relationships between the parties and witnesses, or of the dispute's impact on the wider stakeholders of each party, such as employees. Such an attitude is likely to produce shaded awards, rather than absolute ones. Further, the award may take a form best

76 Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions", 1 *CJIL* (2004), at p 6. It should be remembered that without depositions, live testimony is considerably less predictable than would be the case under standard American civil procedure.

calculated to lead the parties to overcome their differences on the particular matter at hand, and refocus on the past and future benefits offered by their relationship. Awards must be such that they are enforceable in the country with jurisdiction over the subject of the order.[77] However, "the arbitral award should not only do justice to the parties, but should be so drafted that justice is seen to be done".[78] The problem is that notions of justice are among the least consensual concepts internationally.

It is prudent to consider the nature of the hoped for, or feared, award when considering how potential arbitrators may think, and how they may interact with their fellow nominee. For example, if one is convinced of the overwhelming merit of a client's claim, a panel with a common law background may be more disposed to adopt a win-lose approach to the award as opposed to conciliatory objectives.

Procedural Requests and Practice

Once the composition of the panel is determined, the focus shifts from influencing the panel's makeup, and any predisposition to selecting appropriate rules, to ensuring the presentation of one's case is optimally tailored to the panel selected and the procedures it has imposed. The "governing principles of the ICC rules . . . [still] favor the continental approach" of civil law procedure, including the dominance of documentation.[79] If the procedural format tends towards civil law, common law advocates need to be cognizant that the role they will play will be less than they are used to serving.

In common law systems, counsel is effectively the equivalent of a medieval champion. The battlefield may have changed, and victory is achieved via argument, not force of arms, but essentially the principle is the same. Within a body of rules, the lawyer will try to gather evidence and marshal argument to maximize the rectitude of his client's position, using surprise and other procedural tactics when available, while at the same time aggressively denigrating the position of the other. The audience is familiar with the rules, but acts as an impartial ear, listening and deciding who is the more credible, but not taking part in the conduct of the advocacy.

In civil law systems, the judge often both gathers the evidence and decides what evidence to consider. The judge takes the detailed submissions which specify the legal premise and mode of proof each party proposes, and then characterizes the points of law applicable and evaluates the argument and proffered sources of proof. Digging for facts is primarily the judge's function, and the goal is to narrow the dispute down to the key issues as early as possible.[80]

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77 ICC Rules, art 35: ". . . and shall make every effort to make sure the Award is enforceable at law"; available at http://www-old.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf.

78 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 365.

79 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 427. Arbitration may be decided on the basis of documents alone per art 20(6) of the ICC Rules.

80 Civil law arbitrators have been criticized by common law proponents for a lack of diligence in getting to the truth stemming from a lack of a "party-like" direct interest to drive them to leave no stone unturned, and for a related tendency to take expert witness evidence at face value; see Huleatt-James, Gould, *International Commercial Arbitration: A Handbook* (1999), at p 75.

Further, when hearings are required, witness statements are elicited primarily by the judges, and requests to do so by counsel are likely to be seen as an attempt to taint the witness.[81] The lawyer is now not a champion, but more a guardian of rights. The lawyer suggests witnesses on whom the court may like to call, scrutinizes the court's actions and suggests lines of inquiry, calls attention to facts, and suggests additional questions for witnesses to the court. "We leave behind all traces of partisan preparation, examination, and cross-examination."[82] If this is the case, common law advocates who refuse to follow suit risk misjudging appropriate procedure and advocacy, resulting in poor representation of the client.

The rules governing counsel in arbitration may not be integral to the choice of law or venue, but are probably an unarticulated construct of the panel.[83] This raises the opportunity for the maladroit to invite disaster by simply acting as he or she is used to doing. British arbitrators are unlikely to greet tactics common in America with approval. An arbitrator from a civil law European country is likely to be even more dismayed. French practice, for example, requires a certain scrupulous sensitivity in court tactics.[84] To Asian eyes, even this may be on the adversarial side.

Furthermore, there is no default definition of the scope of privilege. In fact, notions of privilege vary greatly between nations, in part because the purpose of privilege also differs. In the United States the aim is to foster full and frank communication, generally safe from discovery. In civil law, the object is to protect professional confidences as a right of the lawyer, who determines what constitutes such a confidence.[85] On the other hand, American privilege extends to employees consulted by in-house counsel, whereas civil law privilege generally will not, a potentially critical consideration in commercial arbitration.[86]

The rules governing discovery and trial practice differ greatly between common and civil law systems. The principal characteristic of civil law systems is "full exchange before hearings of documents on which each party intends to rely";[87] "never underestimate foreign fear and loathing of American Discovery Practices".[88] Judges in civil law countries

81 Vagts, "Transnational Litigation and Professional Ethics", in Legum (ed.), *International Litigation Strategies and Practice* (2005), at p 29.

82 Langbein, "The German Advantage in Civil Procedure", *U. Chi. L. Rev.* (1985), at p 6, available at http://www.law.harvard.edu/publications/evidenceiii/articles/langbein.htm. Article 214 of the French Civil Code provides that "the parties must not interrupt, nor question, nor seek to influence witnesses who testify, nor address themselves directly to them, under pain of exclusion", quoted in Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 419.

83 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 27.

84 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 29. The French term is "*délicatesse*".

85 Rubinstein & Guerrina, "The Attorney Client Privilege in International Arbitration", 18 *J. Intl Arb.* (2001), at pp 591–599.

86 Rubinstein & Guerrina, "The Attorney Client Privilege in International Arbitration", 18 *J. Intl Arb.* (2001), at pp 591–599.

87 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 418.

88 Hendrix, "Ten Rules for Obtaining Evidence from Abroad", in Legum (ed.), *International Litigation Strategies and Practice* (2005), at p 105, r 1.

bear the bulk of the responsibility for bringing out the facts of the case. Pre-trial is not distinguished from trial, or clearly understood as a concept.[89] The whole American discovery process is frequently viewed as fishing for cause, and as distasteful in the extreme, and often as contradicting fundamental rights of privacy and confidentiality.[90] This is so even in common law England, where discovery is generally only available from parties, and then only of identified documents for which relevance can be justified in advance. Depositions are regarded as little more than exercises in intimidation and entrapment, to the point that they are almost unheard of in international arbitration.[91]

Not surprisingly then, a lawyer who requests discovery as if in Boston or Chicago is likely to suggest certain unfavorable notions in the minds of many foreign listeners. "Avoiding opprobrium, and rejection, on the grounds of fishing can be, in part achieved by avoiding incendiary terms, such as discovery, and by attempting to address the need for documents as specifically identified as possible".[92] However, a better approach is to embrace the method suggested by the procedural form chosen by the panel, which must be taken as an indication of the legal and other values to which the arbitrators subscribe. If they have chosen rules on the Swiss model, for example, it would be sensible to research Swiss practice: Swiss attorneys do not generally pose follow-up questions directly to a witness, but to the court which then reads them to the witness.[93] In China, witness testimony is almost always presented to the court in written form.[94] It is better in such cases to adapt to the approach suggested by the make-up, or expressed preference, of the panel.

In more general terms, if a civil law flavor has been adopted, consider the normal order of civil law procedure. Most civil law jurisdictions expect all documentation to be submitted before any hearing commences. In international arbitration some allowance for live testimony and introduction of documentation at trial may be granted, and may be acceptable, but it is still wise to play to the audience. Of course, doing so requires a common law lawyer to reduce or forego fundamental tenets of common law, such as the right of a party (by his chosen counsel in practice) to interrogate a witness to establish the truth of the matter.[95] The

89 Hendrix, cites examples for emphasis, including a declaration of a staff attorney at the Russian High Commercial Court that pre-trial discovery enables a party to obtain documents even before a complaint is filed, to facilitate the filing, *see* Hendrix, "Ten Rules for Obtaining Evidence from Abroad", in Legum (ed.), *International Litigation Strategies and Practice* (2005), at p 105.

90 Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions", 1 *CJIL* (2004), at p 2.

91 Craig, *et al.*, state that they are not aware of a single example of arbitrators ordering a deposition over the objection of one party, see Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 457.

92 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at pp 113–114.

93 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at pp 113–114.

94 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at pp 113–114.

95 Sheppard, "Techniques to Promote Efficient and Informed Decision-Making in International Arbitration: Confrontation of Witnesses and Prehearing Meetings of Experts", 15/4 *News and Notes from The Institute of Transnational Arbitration*, (2001).

ICC Rules also allow for direct testimony to be in narrative form when it does occur.[96] The broader question justifies this sacrifice: What is necessary to secure the desired result?

A civil law lawyer faced with common law arbitration needs to follow the same conceptual process, with reverse results. A beautifully collated and persuasive pre-trial submission is unlikely to offend a panel member, but it may also not persuade. For a common law lawyer, evidence needs to be proved up and tested in the crucible of a live hearing. Presenting too much up-front may also pre-arm one's opponent. In a common law proceeding, discovery, at least along English lines, is likely, and civil law-style complaints would represent an unjustified revelation of tactics in advance. Conversely, assuming that the panel will involve itself in the ascertainment of truth will lead to inefficient advocacy if the arbitrators view themselves as dispassionate observers in the common law style. Adversarial language and written advocacy will be expected, and their absence may be seen as suggesting a lack of conviction or merit. Since cross-examination is a skill that requires significant practical experience to master, it may be well worth the extra cost to retain a trial advocate, such as an English barrister, or an American trial specialist.

Whatever the cultural differences, the key is to approach procedural requests and the presentation of evidence in the light of a strategy tailored to the audience and its expectations and values. This must be reinforced by the way in which written and oral submissions are couched.

Style of Advocacy

Superbly tailored procedural behavior will be undermined if the content or gist of the advocacy contained conflicts with the notions of propriety or equity held by the panel. "The differences between the common law and civil law approach to disputes emerge at the very beginning of a case, with the formulation of the statement of claim."[97] In American notice pleading, the initial pleadings are an outline of the facts and the theory of the claim, which may change considerably as the process advances. In continental Europe, the first submission is generally a fully-developed articulation of the case. Furthermore, the European submission is assumed to be self-authenticating, and will be referred to as such during the hearing.[98] The arbitrator is assumed to be conversant with the submission at the start of the hearing.

For a civil law lawyer, these documents represent the heart of advocacy, yet for a common law lawyer, they are untested under oath and cross examination. However, to attack witness credibility before a civil law panel may only result in "the arbitrator[s] sympathize[ing] with the suffering of a witness whose testimony would otherwise have been discounted".[99] Ideally, the lawyer in such circumstances should rebut the witness' testimony in documentary submissions (including written testimony to the contrary). If cross examination is required, it should be reduced to the bare minimum, so as to highlight an inconsistency with the minimum of public humiliation to the witness.

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96 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (2000), at p 439.
97 Elsing & Townsend, "Bridging the Common Law Civil Law Divide in Arbitration", 18/1 *Arb.Int'l* (2002), at p 1.
98 Elsing & Townsend, "Bridging the Common Law Civil Law Divide in Arbitration", 18/1 *Arb.Int'l* (2002), at p 3.
99 Elsing & Townsend, "Bridging the Common Law Civil Law Divide in Arbitration", 18/1 *Arb.Int'l* (2002), at p 5.

The difference in approach also affects the way arguments are developed.[100] Common law lawyers explain their legal posture in detail in written submissions, focusing only on the key points during the hearing, often in a very different order from the written documentation, and in dialogue with the panel. A civil lawyer will usually scrupulously follow the order and form of the submission. Pleading for a civil lawyer is this presentation of legal argument, not statements of a claim and the reply at the outset of litigation.[101] Both lawyers will cite extensively. The common law lawyer will cite to prior cases, arguing that the facts are sufficiently similar to establish that the law is settled by precedent. The civil law lawyer cites to interpretations of the codes upon which he or she draws, often by academics rather than other courts. The wise counsel at arbitration will therefore weight his or her submission according to his or her audience, particularly as arbitrators, even under common law, are not bound by precedent (case or interpretation) to the same degree as a domestic court would be.[102]

Absent precedent, the scope for influence over interpretation of the chosen body of law is particularly broad; and it is likely that the most effective sources of persuasion will be those held in highest esteem by the majority of the panel. Again, if the panel is accustomed to civil law, it may be suitable to tailor oral presentations to the order of written materials submitted, and offer the panel an outline of the oral argument and authorities cited.[103] Civil law lawyers expect this and use it; therefore doing so increases their comfort level. It is essential to consider the role of counsel expected under the procedures adopted and in the cultures of the arbitrators, and to tailor organization, style and content to match. In part this will be a civil or common law question, and in part a function of the notions of advocacy held by each arbitrator.

Perhaps the least considered aspect of persuasion is that of non-legal influence. As discussed above, perceptions as to how people should communicate differ between cultures, regardless of whether a civil or common law approach is shared. What persuades an Austrian may do little for an Egyptian, a Chinese person, or a Chilean: yet all have civil law codes, if not traditions.[104] To return to an earlier argument, cultural values affect the internal levers of persuasion. Thus even the best argument may fail if it is made in a way that fails to convey its persuasiveness to the listener, or which is so laden with negative connotations that the argument is subsumed by negative reaction.

The importance of factoring in the nature of the evidence and its sources has been addressed regarding arbitrator selection and desired procedural posture; however, it should also be considered in preparing the initial statement of a claim. Generally, the first

100 Elsing & Townsend, "Bridging the Common Law Civil Law Divide in Arbitration", 18/1 *Arb.Int'l* (2002), at p 6.

101 Elsing & Townsend, "Bridging the Common Law Civil Law Divide in Arbitration", 18/1 *Arb.Int'l* (2002), at p 6.

102 The increasing publication of arbitration rulings sometimes acts as precedent, but variations in method and law undermines the applicability even within one provider. Further, publication is often only by consent of the parties, rendering the body of precedent of limited value.

103 Elsing & Townsend, "Bridging the Common Law Civil Law Divide in Arbitration", 18/1 *Arb.Int'l* (2002), at p 6.

104 For more on the origin of the legal systems of various nations, see Tetley, *Mixed Jurisdictions: Common Law* v *Civil Law (Codified and Uncodified)* Part I; available at http://www.unidroit.org/english/publications/review/ articles/1999-3.htm.

submission will not be complete in the civil law sense: it is likely to be only an outline of the nature and circumstances serving to initiate the action and the selection process.[105] Thus the procedure and audience are as yet unknown. However, an ill-couched claim may haunt any attempt at tailoring later. Consideration of how advocacy is likely to develop, in terms of potential arbitrators and process, is essential to ensure flexibility at a later stage. Before the second, more complete, submission is due, the parties should (subject to party challenge or institutional objection) know the identity of each nominee.[106] As the time between confirmation of identity and the full statement of claim falling due is limited, prior consideration of likely cultural aspects will be valuable. Since the identity of arbitration panel members is known before the claim is fully stated, it should be inconceivable that counsel would not seek to know as much as possible about the members' backgrounds and predilections. In a cross-cultural environment, this should include consideration of the legal system from which they come, and of the society that created it.[107]

Hofstede's factors represent a good starting point for determining tactics, supplemented by language considerations and current political issues. Hofstede's dimensions predict generalized broad characteristics from observed findings for each of his five dimensions. These can then be compared between nations to suggest areas where there may be differences.

Clearly there are individuals in both countries who do not share these traits, at all, or in the same degree as the average Hofstede's results suggest. Nevertheless, with this caveat, the predictions have proved remarkably resilient in such a sensitive area. The general tendencies suggested by readings at each end of the spectrum for Hofstede's five dimensions are summarized below.

Hofstede Dimension	Summary	Suggested Behavioral Traits[108]		Example Nations (5 Top)[109]	
		High	Low	High	Low
Individualism (IDV)	Self and immediate family v. group priority	My family and I first. Right to personal opinions and to dissent.	We — family or social network — first. Obligation to group determines freedom of action and identity. Face is often vitally important.	United States, Australia, United Kingdom, Netherlands, New Zealand	Ecuador, Panama, Venezuela, Columbia, Pakistan

105 Huleatt-James, Gould, *International Commercial Arbitration: A Handbook* (1999), at p 84.

106 Article 8(4) of the ICC Rule requires nomination in the initiating request and answer (the limited initial submission). Article 15.2 of the LCIA Rule states that the full statement should be provided within 30 days of confirmation by the LCIA of the identity of the panel.

107 In societies where the legal system is a new construct or import, this becomes more important still, because the legal system may reveal little about the cultural attitudes of that society.

108 The authors based this in part on "*Lectures in Intercultural Communication*", Griffith University, David Tuffley, convener, available at: http://www.cit.gu.edu.au/~davidt/cit3611/intercult_comm.htm.

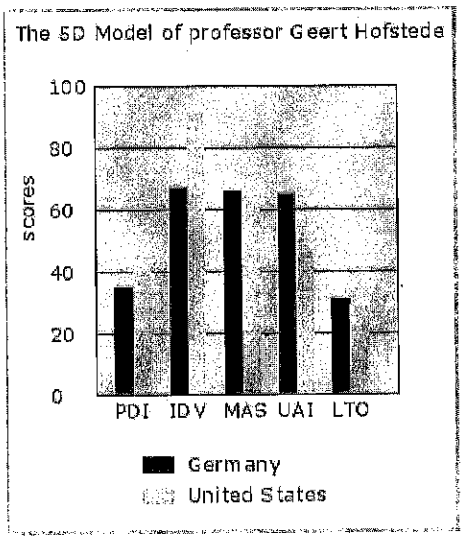
109 Source of rankings at http://www.clearlycultural.com/geert-hofstede-cultural-dimensions/individualism/.

Hofstede Dimension	Summary	Suggested Behavioral Traits[110]		Example Nations (5 Top)[111]	
		High	Low	High	Low
Power Distance (PDI)	How accepting of the unequal distribution of power are those lacking it?	Accept inequality. Hierarchy reassuring. Obedience is valued highly. Superiors often divorced from masses — difficult to cross gap.	Hierarchies minimal and circumventable. Equality is valued. Individuals have rights. Originality & innovation valued highly.	Malaysia, Guatemala, Panama, Philippines, Mexico	Austria, Israel, Denmark, New Zealand, Ireland
Uncertainty Avoidance (UAI)	Degree of discomfort from novelty, uncertainty and lack of clarity	Low stress tolerance. High work ethic, but preference for repetition not innovation. Aim to avoid failure, not outright success. Emotion is accepted, but conflict unsettling. Rules critical as source of certainty and confidence.	Result orientated — hard work not enough. Higher tolerance for stress. Emotions concealed. Rules inhibit action. Risk is tolerated.	Greece, Portugal, Guatemala, Uruguay, Belgium	Singapore, Jamaica, Denmark, Sweden, United Kingdom
Masculinity (MAS)	Achievement and success measure v. caring for others and quality of life	Male dominated, gender disparity. Driven, work first, approach. Status defined by show of wealth/position. Decisiveness valued, as is improvement over the competition.	Respect achieved through benefiting others. Consensus is highly valued. Compassion is highly valued. Conformism is rewarded. Little gender discrimination.	Japan, Hungary, Austria, Venezuela, Italy	Sweden, Norway, Netherlands, Denmark, Costa Rica
Long-term Orientation (LTO)	Big picture, inclusive long term perspective v. narrow view short term one	Long term, broader view of business relations. Pragmatic rather than legalistic attitude. Patient. Strategic view.	Short term, single issue focus. Emphasis on one "truth": legalistic approach. Impatient for results. Amenable to change.	China, Taiwan, Japan, South Korea, Brazil	Nigeria, Ghana, Philippine, Norway, United Kingdom

110 The authors based this in part on "*Lectures in Intercultural Communication*", Griffith University, David Tuffley, convener, available at: http://www.cit.gu.edu.au/~davidt/cit3611/intercult_comm.htm.

111 Source of rankings at http://www.clearlycultural.com/geert-hofstede-cultural-dimensions/individualism/.

Below is an example comparison of the results for Germany and the United States[112] Clearly, these:



cultures are most different in the degree of individuality (IDV) and attitudes to risk (UAI). In practice both are individualistic, but Germany possesses a greater element of group focus. Similarly, the German culture would seem to be less open to radical change or uncertainty than that of the United States. In practice the United States is one of the most accepting of change and the most individualistic cultures according to Hofstede. One could argue that the greater German emphasis on welfare mechanisms and the American acceptance of at will employment reflects this.

Hofstede identified four groups of cultures based upon commonality of the most salient dimension readings, although some members exhibit one or both more strongly than others. It is interesting to note that all of the countries with indigenous common law systems belong to one group. There is, of course, no suggestion that a high reading in any dimension is somehow indicative of better attributes than a mid-range, or low reading. The purpose is not to judge but to indicate possible sources of generalized differences between nations.[113] Quintessentially, the first source of value is to highlight the existence of cultural differences (whatever their nature). The second benefit is to suggest possible types of difference on a generalized basis, which can be used as a springboard for further research. The following table summarizes each of the four groups with shared characteristics.

112 Source avalable at http://www.geert-hofstede.com/hofstede_dimensions.php?culture1=34&culture2=95.

113 Hofstede is, perhaps, at his weakest when he asserts that all cultures within a nation will share dominant characteristics. This may be so where peoples have long intermingled, but appears less convincing where identities have been maintained. For example, the Scots and the English still appear to evince cultural differences, as may Highland and Lowland Scots; likewise Czechs and Slovaks, Tibetans and Han Chinese, etc. For, perhaps, the most strident criticism of Hofstede on these and other points, see McSweeney, "Hofstede's Model of National Cultural Differences and their Consequences: A Triumph of Faith — A Failure of Analysis", 55/1 *Human Relations* (2002), at pp 89–118. Against McSweeney, who does not base his critique upon empirical findings, Hofstede's work appears to have withstood two decades of commercial use by companies and consultants. Further, McSweeney does not offer an alternate predictive tool. Nevertheless, regional variations should be anticipated. Hofstede's own response can be read at http://www.geert-hofstede.com/dimBSGH.pdf.

	Dimension Mix[114]	General Characteristics	Sample Countries[115]
Well-Oiled Machine	Egalitarian and averse to risk	Reliance on rules, established procedures and a clearly stated structure. Do not tolerate distinctions of rank except where necessary for promoting efficiency.	Austria, Germany, Finland, Switzerland, Israel
Pyramid of People	Hierarchical and risk averse	Clearly defined hierarchy in which face or reputation is critical. Superiors make the decisions, but strong emphasis on clarity of instructions and constraint from rigid social rules.	Arab peoples, Argentina, Brazil, Chile, France, Iran, Japan, Korea, Portugal, Taiwan
Family Type	Hierarchical and acceptance of risk	Very deferential, decision making is in the hands of a few, who bear the responsibility. Loyalty and trust accorded to a boss with face. Open conflict strenuously avoided as threatens face. Often disputes resolved in private, face may be more important then profit.	Indonesia, China, India, East Africa, Singapore, Philippines, Malaysia, Jamaica
Village Market	Egalitarian and accepting of risk.	*Ad hoc* solutions often adopted due to a dislike of rules and notion that what is proven is best. High emphasis on innovation, at all levels. Willingness to adopt new approaches. The individual is the fundamental consideration for the solution of problems (human resources concepts come from these cultures).	United States, United Kingdom, Canada, Australia, Ireland, Norway, South Africa, Sweden, Netherlands

The significance of cultural differences in international arbitration is all-pervasive, but what questions should one consider in predicting how arbitrators will interact and view the proceeding? The following is a non-exclusive list of suggestions for consideration of

114 Long-Term Orientation (LTO) is not considered here, but generally applies primarily to countries which are in the family type, or the pyramid of people, both of which also exhibit high power difference. No comment is made on a causal linkage.

115 See Torrington & Hall, *Personnel Management: HRM in Action* (1995), at p 120, Table 6.2.

potential arbitrators, and for how a panel will view advocacy, including written or oral expressions in evidence. The questions are based upon Hofstede's observations.

Suggested Lines Of Inquiry into Cultural Differences	
Is the individual the rightful focus, or the community, or other group, and to what degree?	Is there great focus on the past, or is past practice viewed as something to be continuously improved upon?
What is the attitude to public conflict?	Is precedent seen as an inhibition on the ability of the decision-maker's scope of action?
Is "face" a significant concern?	Is radical change accepted or is gradual evolution the means to achieve the same end over time?
Is communication by direct speech or by nuance?	Is radical argument seen as unsettling?
If so, is offering a face-saving solution an option?	Is their a black or white view of conflict or one of shades of gray?
Is truth proved by rational, dispassionate investigation, or by live test under cross-examination?	Is conciliation a tenet of the society, or is there a win-lose approach?
Is oral testimony or written evidence preferred?	Is the goal to punish wrongdoing or to find the solution offering the least harm to interested parties?
Is aggression a proper means of establishing truth, or improper intimidation?	Is the proper scope of consideration limited to parties or properly inclusive of all stakeholders?
Is cross-examination seen as hostile *per se*?	Is business defined by short-term conflicts or part of a wider relationship?
What is the concept of privacy? Does this conflict with the concept of discovery — English, or United States?	How are contracts viewed, as final expressions, lose guides, or agreements to agree etc?
What are the attitudes to, and bounds of, privilege?	Are deadlines important?
Is lawyer contact with witnesses viewed as tainting?	Is profit motive accepted as the sole purpose of business?
Is deference to superiors expected?	Which is most valued, visible success or proven effect on the community?
In a deferential society, from what sources does key evidence come?	How important is decisiveness?
What are the sources of superiority?	What are the prevalent attitudes to gender?

Is rule by common law or civil law?	What is the attitude to age differentials?
Is law or tradition the source of business certainty (i.e. non "rule-by-law" rule sets such as *guanxi* or *giri*)?	Are there pertinent religious taboos?
Is the mindset legalistic or pragmatic?	

These representative questions may help signal possible appropriate cultural considerations relating to determining appointments and tactics for advocacy in different scenarios. They should be regarded as suggesting the initial focus and context of further research into the background of nominees or panel members, complementing inquiries into linguistic abilities, political issues and, most critically, individual background and experience.

In addition to promoting a better understanding of the audience, these generalizations should also assist in improving the use of evidence. For example, if the bulk of written evidence is from a country where direct language is avoided, how specific will the documents be? In common law systems, documentation usually addresses its intended subject reasonably directly. In other countries however, the contents are often lacking in detail, the message being conveyed by generalization and nuance of phraseology. Furthermore, even where documents are signed, the signatory may not be determined by knowledge of the subject matter, but by the importance placed upon the subject matter within the signing organization. This jars with the common law idea that the knowledge of the signatory is a significant determinant of the implications that can be drawn from it. If it is material to the case, the assumption is that the signatory would be called to testify to the document and its context. If the signatory would be unable to do so for lack of knowledge, then this link is broken, and the evidence may have greatly diminished persuasive power in international arbitration settings.

The need to apply cultural considerations to oral evidence is at least as great. Suppose a foreign witness is known to speak some French, and French is the language of the hearing. Is this witness in fact sufficiently fluent that he or she could comprehend legal French? Could the witnesses do so under live examination? Would the answers he or she gives carry the same force that they would in the witnesses' mother tongue? If not, and one opts for translation, the issue of meaning loss by translation arises, but also the other side may well attack the credibility of the testimony by asserting that the witness is in fact fluent, and is attempting to dilute the effect of cross examination by translational and linguistic inexactitudes. Even if technical linguistic fluency exists, in practice how well will the message be conveyed? What we speak is only part of what we say: delivery, gestures and mannerisms combine with words to convey a meaning in English, and much more so in many cultures, particularly those that avoid direct speech.

A fluent English-speaking Japanese witness is likely to use less direct expressions in accord with a cultural aversion to public conflict. Further, he or she is perhaps looking at the hearing as part of wider business relationships, which may be best served by downplaying any conflict in the hope of minimizing future fallout. In addition to

differences in phraseology, he or she is likely to apply indigenous delivery style, including use of pauses and accents. The result may convey a very different literal interpretation to a native-speaking audience. Further, that audience may draw inferences from non-verbal queues, such as eye contact, arm crossing and so forth. There may be no recognition that these have a completely different meaning in the culture, and mind, of the speaker. The result may be an assumption of disingenuousness, or other similarly harmful conclusion, where in fact none existed. If realized early enough, where the bulk of testimony poses such questions, a civil law approach weighted towards written documentation may be an appropriate goal in selecting arbitrators. However, where either not desirable, or not available, cultural awareness can provide options to mitigate the problem.

If a cultural divide is suspected, then education of the witness may suffice. This is not education in the sense of coaching (or from the civil law perspective, tainting), but ensuring that a third party, preferably well versed in the same culture, briefs the witness on the role, practices and implications of the tribunal. For example, what are the likely expectations of the panel regarding dress? If a panel member comes from a formal culture, a poorly (or inappropriately) dressed witness is likely to trigger negative connotations before speaking. Alternatively, the foreign witness may be uncertain as to the implications of testifying, or of even the purpose of foreign concepts, such as cross-examination, especially if "face" is significant. In other instances, cultural awareness can be applied both hostilely and defensively, the aim being to avoid disconcerting one's own witnesses, or to do exactly that to those of the opponent. For example, an Arab male may feel it inappropriate to be questioned by a female, whether she be counsel or an arbitrator, particularly on some subjects. In cultures where age gives status, a younger witness may be so deferential to a more senior querent that the answers given are excessively courteous, and largely devoid of content. Conversely, a younger questioner may be taken as an affront, leading to reluctance to divulge critical information. Before a civil law dominated panel, an assertive, almost aggressive tone employed by some party witnesses in the United States could have disastrous consequences if addressed to an arbitrator. If direct questioning is allowed, an experienced oral advocate is likely to be skilled in eliciting unwanted reactions from opponent's witnesses, without being blamed for incitement.

Awareness of generalized cultural characteristics offers a valuable set of tools for shaping the outcome of the arbitration. Cultural tools are potentially as powerful in resolving disputes advantageously as they are in negotiating international business arrangements. Thus they should be regarded as no less essential by advocates than they are by the major commercial organizations that employ them.

Conclusion

If the head of the American Arbitration Association, William K. Slate II, is correct, counsel in international arbitration expend little practical effort on developing and applying

cultural tools for influencing the outcome of arbitration.[116] Despite the fact that international arbitration affords counsel a unique ability to influence the nature of their audience, there is little discussion of this ability, let alone the means to achieve it.[117] Yet failure to do so effectively impacts the chances of success, and as such would appear professionally, and ethically, irresponsible.[118] If arbitration is to continue as the mechanism of choice for resolving the burgeoning number of international commercial disputes, clients need to perceive it as producing acceptable and consistent decisions. The ability of international arbitration counsel as a whole to advocate effectively on their client's behalf is essential to the consistent, and just, realization of such results. Thus the ability to influence proceedings and proactively tailor strategy to the unique cultural mix of each arbitration panel is indispensable to the continuing well-being of both advocates and arbitration.

116 Slate, "Paying Attention to 'Culture' in International Commercial Arbitration", 59 *Disp. Resol. J.* (2004) 96; available at http://www.findarticles.com/p/articles/mi_qa3923/is_200408/ai_n9430961.

117 Slate, "Paying Attention to 'Culture' in International Commercial Arbitration", 59 *Disp. Resol. J.* (2004), at p 96.

118 Rubinstein concurs in relation to the ability to, and critical importance of, influencing procedure, and the vital need to tailor advocacy to the procedure adopted, although he does not focus on the strategic application of cultural considerations at the selection stage; *see* Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions", 1 *CJIL* (2004).

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