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Cultural Aspects of International Arbitration

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The real voyage of discovery consists not in seeking new landscapes, but in having new eyes.

Marcel Proust (French novelist, 1871–1922)[1]

I. Arbitration. Culture. Types of Culture

Culture is a way of perceiving the surrounding world,[2] which is happening on the subconscious level.[3] According to P. Harris and R. Moran, there are three parts of culture: technical level (language as a system of signs and its grammar), formal level (rituals, obvious and hidden society rules, for example, use of the social occasion to discuss business), informal level (automaton and unconscious responses, interactions between people in particular groups, for example, calling a person by a first name).[4] Therefore, cultural backgrounds, whether by birth or education, influence how people interact with the arbitration.[5]

Term 'culture' was firstly used by the Roman orator Cicero: "cultura animi" literally means 'cultivation of the soul'.[6] As a default rule, 'cultivation of the own soul' appears to be the most right in individual perception, which creates different biases with the division of people on ours and the others. Such a way of thinking is called "ethnocentrism".[7]

The term 'legal culture' was firstly used by Lawrence Friedman in his article 'Legal culture and social development' in 1969. In the following monograph by him, legal culture was defined as ''a part of general culture consisting of attitudes and values about and towards law, which affects the constitution of relation with the law and consequently influences the position of the legal system in society''.[8] Nowadays the term 'culture of international arbitration' is used.

International arbitration is named so due to the presence of the foreign (international) element. In different situations, this foreign element could be defined in different ways.[9] For example, (i) it could be a foreign subject, (ii) the relations could be aimed at the foreign object, and (iii) the constitutive fact could take place abroad.[10] Nevertheless, it is a complicated task to reach a universal definition of the foreign element, which would be appropriate for most countries.[11]

According to article 1(3) of the Model Law on International Commercial Arbitration, arbitration is international in three situations.[12] First, if the place of business of the parties is in different States. Second, if either the place of arbitration is outside the state where parties have their places of business, or if any place where a

substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is outside a state where parties have their place of business. Thirdly, arbitration is international if the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[13] Therefore, international arbitration is always about the involvement of elements of different cultures and foreign to each other value systems.

There are some reservations that should be made. While discussing the cultural divergence in international arbitration, the focus is often made on only legal differences,[14] but not on the social and cultural differences affecting the arbitration. Different people from the same culture are, nevertheless, also different. Cultural information transferred via publications and news is not neutral and often based either on politics or some commercial considerations.[15] Culture is a constantly evolving mechanism, and all observations should be regularly updated.

Although cultures could be similar, differences between them are contained in the values that the cultures are shared.[16] According to Geert Hofstede, there are several main types of values: the relationship between the individual and the group, the tolerance of uncertainty, the acceptance of power inequality, the gender roles and the long versus short-term orientation.[17] Masculinity shows the evaluation of the personal achievements, contributions, or capacities[18] and readiness to talk about them - that potentially might have an effect on the line of behaviour in arbitration. Uncertainty avoidance figure indicates the attitude toward the future - when uncertainty could be reduced either by detailed preparation or by the accent on the personal relationship rather than the core of the problem (which, as an example, can lead to the readiness of the parties to engage in the settlement negotiation). For example, in Germany power distance index is 35,[19] whereas in Russia, for comparison, it is 93.[20] That means that unequal distribution of power (and recourses) are more accepted in Russian society than in Germany. Therefore, it might have an effect, for example, on the critical evaluation of the statements made during arbitration proceedings by experienced and well-recognised experts.[21]

Moreover, according to cultural anthropologist Edward T. Hall, there are high context cultures and low context cultures.[22] In the low context cultures, there is a presumption that the listener does not know anything and all information should be shared from the beginning.[23] North American countries, Scandinavian countries, as well as Germany, are examples of low-context cultures.[24] Logic, analysis, orientation on actions, and individual are the main features of it.[25] On the contrary, in high context cultures such as Japan, China and Arab countries, cultures are more intuitive and concerned with individuals. The main presumption is that the person already knows the context and does not need too much information.[26] Being too direct could be understood as impoliteness, accent is made on the indirect verbal communication.[27]

Closer to international arbitration, there were some studies concerning the preferred way of dispute resolution between different cultural groups.[28] North Americans choose the adversarial proceedings, while mediation was a preferred option for the people from Hong Kong and Spanish participants.[29] In the Netherlands and Canada as individualistic cultures interest in negotiation and compliance was less than in collectivistic Japan and Spain.[30] Nigerians and Canadians advocated for the use of negotiations in dispute resolution, but the first group consider threats as an effective tool in the negotiations.[31] Hong Kong Chinese were considered less likely to use threats in dispute management than Israeli study participants.[32] In Germany, Lebanese Arabs and Turkish Kurds were more tended to informal solutions to the conflicts based on traditions or morality in compassion to legal formal solutions of German citizens.[33]

Interestingly, due to its ‘international’ nature parties might be expected to hide their ‘shedding home-grown habits and prejudices’[34]. This British-Hindu style of conflict resolution is in the middle between the conflict avoidance of Asian cultures and direct confrontation and competition of the American style.[35] In the Philippines, shaped with a combination of Chinese, Spanish, and U.S. models, the strategy is to address the problematic issues indirectly in order not to avoid them, but to preserve a present relationship.[36] In comparison, India is also a highly - collectivistic culture society, but closer to the British approach to problem-solving.[37] All of these demonstrate that cultural background is an integral feature of international arbitration.

One of the most shared positions contenting the culture now is the connection of the cultural background of arbitrators to the political legitimacy, accuracy and fairness of the outcome of the case.[38] Cultural neutrality is a characteristic usually expected from the good arbitrator and the good council.[39] It requires the understanding of differences in legal systems applicably to the substance and procedure, multiplied by the absence of the assumption that one of the systems is better than the others.[40] Yves Derains, former secretary-general of the ICC Court, named this combination of 'knowledge and humility[41].

Nationality, social and political background, education, and religious beliefs of arbitrators are often discussed in conjunction with neutrality and diversity issues.[42] If the situation concerns the stereotypes about a certain group as prejudice on the side of an arbitrator, it should be considered as an absence of neutrality. For example, in the case *In re The Owners of the Steamship Catalina and The Owners of the Motor Vessel Norma*[43] the arbitrator based his opinion on the quality of evidence on his experience of interaction with people from particular countries: he considered Italians and Portuguese as less trustworthy people than Norwegians.[44] After this accident, the arbitrator was removed. However, this example is not about the absence of 'basic cultural education', but about the prejudice against a certain nationality group.

Sometimes different backgrounds could lead to different expectations from the arbitral process and, what might be dangerous, biases that are against the party itself. Forcing the parties to adopt a foreign position for them is not a good decision, therefore, cultural compromise should be found.[45]

II. Cultural Sensitivity of International Arbitration

As well as the world in Gunther Teubner's view is seen as ''global Bukowina'' with its society fragmentation and perspectives of global law,[46] as the cultures in the modern world are seen with their divergences with steps to globalization. However, total unification of the cultures is not only unachievable but also is undesirable: as Soviet author of the 1920s and 1930s, Ilya Ilf wrote: "the most important thing in science fiction novels was radio. The happiness of mankind was expected from it. Well, we got the radio, but we haven't got happiness''.[47]

Cultural divergence may lead to different expectations of the parties. Due to the high level of systematisation in the institutional arbitration, the effect of divergence might be more tangible in the ad hoc arbitration, but that is dependent on the experience of parties' representatives and arbitrators. Due to the difficulty of choosing the correct starting point of comparison, arbitration institutions are usually compared. Among the factors to compare different arbitration institutions, there are: location and legal tradition, diversity of staff, a background of the service users, arbitrators, most frequently involved counsels and experts, language and administrative structure.[48]

Despite the fact that international arbitration is, as it follows from the term itself, *inter national*, it is still dependent on the national rules of relevant states. Sometimes such local requirements have some cultural specific and are unpredictable from the neutral person's perspective. Thus, a Lebanese-French arbitrator Ibrahim Fadlallah introduced an example of a case when an American lawyer was subject to the criminal proceedings because he was not admitted to the bar in Egypt but still acted as a counsel in arbitration there.[49] Almost all Arab advocacy laws required to have a bar admission to have a right to represent parties in legal proceedings, although the aim to attract more users of commercial arbitration diminishes this trend.[50]

As one of the effects of globalisation, the work of Western lawyers in the developing countries with their belief that their own legal system represents civilised law as it should be, as well as the western education of local lawyers have an impact on forming legal theory in the young states.[51] Politic al conflicts and civil rights movements of the 1960 and 1970s led to the ideas of 'legal independence' in sense of the own values in the legal systems of their countries.[52] For example, in Saudi Arabia, before[53] the law was passed to prohibit the application of foreign law, foreign jurisdictions and foreign arbitration.[54] At the same time, general principles of lex mercatoria have started gaining recognition in the post-colonial countries, mainly due to the neutral status of the academy, supporting these ideas.[55] Undoubtedly, there was a criticism of this concept, which was used sometimes to depart from the norms of the local laws.[56] Nevertheless, general principles brought by lex-mercatoria became widely recognised by the international arbitration community.[57]

The market for services also has a certain influence on the development of the culture of international arbitration in developing counties. As Yves Dezalay and Bryant G. Garth stated, ‘‘according to one Arab, the ICC thinks ‘‘Arabs are all together, while Europeans are neutral with respect to other Europeans outside their country’’’.[58] This quote symbolises the frequency of appointments of the western arbitrators in the disputes with non - western parties, which can lead to the question of the acquittance with their legal culture.

Tendency to harmonisation and uniformity of the different approaches could be seen in the almost universal adoption of UNCITRAL Model Law on International Commercial Arbitration,[59] the popularity of the IBA instruments (IBA Rules on Evidence, the IBA Rules on Conflict of Interest, IBA Rules for Party Representation, etc).[60] Additionally, most arbitrators are qualified not only in their home jurisdictions but have some experience of studying, working and living abroad, which is also an additional argument for their cultural «adaptation» to globalised approaches and practices.

In the book by Won L. Kidane, the stories concerning the unsuccessful cross-cultural communication in international arbitration are summarised.[61] Among other observations, the author mentioned that the wrongful general belief that some countries are not able to conduct arbitration hearings due to the lack of infrastructure lies in the perception that disputes have a technological solution, which is not true.[62]

‘Foreign’ experience will not lead to separate adaptation of purely foreign values, but in theory, will create a combination of own and foreign ‘settings’ with the understanding of their underlying ideas. Thus, the constant interaction of the different norms combines its own ‘auto - constitutionalization’.[63] The mix of cultures in international arbitration creates and constitutionalises a culture of international arbitration.

Some theorists claim that the culture of international arbitration does not exist due to the focus of various studies on aspects of divergent legal cultures in international arbitration.[64] Among the reasons, the absence of homogeneity between arbitrators and the absence of common tradition are named.[65] These two reasons are about the same - absence of a shared background and identical values. However, values could be different even within the representatives of the shared background, and vice versa. On a more general level, in Western culture, the roman legal principle ‘pacta sunt servanda’ dominates, which makes the consideration of all the pre-contractual discussions unnecessary.[66] On contrary, in Eastern tradition ‘‘situational and circumstantial considerations’’ could prevail over the contractual terms.[67]

Cultural issues are diverse. It is possible to claim that each country has its own specific features. The human brain is often trying to categorise everything, and some studies of perception process differences of participants in different countries were conducted. Thus, Jos Hornikx and Hans Hoeken examined cultural sensitivity to the expert evidence.[68] In their comparison of France and the Netherlands based on the power distance in culture, it was acknowledged that expert evidence was relatively more effective in France due to its recognition that some people have more power than others, while in Dutch tradition equal distribution of power is more important.[69] Also, the difference in the perception of the quality of the evidence was made in connection with to the attitude to the distribution of powers in culture.[70] As a second point, it was established that Dutch participants were more sensitive to the quality of the expertise, which was connected to the system of education. The reason that in France education is teacher-centred rather than student-centred with the subsequent possibility to criticise the information received from authority.[71]

In another study conducted by Jos Hornikx and Margje Ter Haar, the German and Dutch cultures were compared. Towards the attitude to the uncertainty Dutch culture has less uncertainty avoidance than the German.[72] Claims supported by high-quality evidence are more helpful in reducing the level of uncertainty, therefore, as was confirmed by Jos Hornikx and Margje Ter Haar study,[73] for Germans quality of expert or statistic evidence would be more important.[74]

All these studies were based on a comparison of Western countries with Greek analytical thinking style.[75] That was done in order to show that there are some differences in perception between the very similar initial data of Western countries and to rebut the conclusions of the idea[76] that similarities of analytic reasoning of the successors to the ancient Greek philosophers.[77] Consequently, differences in reasoning could be observed even in inter-European arbitration.

Therefore, despite the initial scepticism towards 'western' general principles recognised by the international arbitration community, they are now accepted almost everywhere. It was concluded that power-distance or uncertainty avoidance as the characteristic of the culture can result in the assessment of the evidence in arbitration. The distribution of power in society influences the ability to criticise the experts, whereas necessity in certainty correlates with the quality.

III. Impact of the Unconscious. Cultural Miscommunication in Arbitration

In Waring's expression, the world view is the society perceived with a specific glass colour, when everyone is convinced that their colour is correct.[78] It could be possible to analyse which colours of the glasses others wear, but difficult to estimate our own beliefs separated from us. One of the reasons why the cultural background is so important to us underlies the terror management theory, according to which culture, religion, and society rules appeared as a response to the conflict between the instinct of self-preservation and the awareness of the inevitability of death.[79]

Sometimes objects in the glasses could be seen differently than in reality. Three types of blinders could lead to errors in cognitive thinking: informational blinders, cognitive blinders and attitudinal blinders.[80] The last group is characterised by the influence of the cultural and legal experience of the person on the decision-making process. In the monographs edited by Tomas Cole, two examples are provided.[81] The first one describes the brain's measured activity while listening to candidates' speeches during the presidential elections. The intuitive part of the brain was triggered, and the deliberative part remained inactive[82]. Second, more attributable to the international arbitration, showed how the specialisation of the arbitrators (either brokers or manufacturers) unconsciously led to a sympathetic outcome for the affiliated group in the experiment[83].

Therefore, the subconscious emotional brain system can provide responses that will be not accurate.[84] Arbitrators and parties to the arbitration are humans; consequently, they are subjected to unconscious errors in their behaviour and decision-making. A study, conducted by R. E. Nisbett and T. D. Wilson in 1977, showed that people could not analyse the processes lying behind their cognitive thinking.[85] Such effect is known as 'bias blind spot', when the person believes that only others could be affected by the cognitive blinders[86]. '*In a world of stubbornly heterogeneous legal cultures*',[87] these blinders are duplicated with the cultural aspect of thinking.

Among the examples of awareness of the factors that play during the arbitration, procedures are conscious perceptions of some factors without considering their substantial influence.[88] One of the examples of this perception was the tasks given to the group to walk a bit after the language proficiency test when the words used were relevant to specific age groups without reference to slowness.[89] However, it has some effects on the recorded results, which were supposed to illustrate the unconscious influence on discretionary behaviour.[90]

In the modern globalised world, the process of harmonisation is robust, and some perceptions of unavoidable cultural effects might be wrong. Suppose one has a negative experience during the arbitration proceedings due to the cultural background of the participant, for example. In that case, it could potentially have an emotional link in the brain, connecting a bad experience with a cultural issue. Such a connection, studied by Russian - Soviet physiologist Ivan Pavlov, is named in the literature as association bias.[91] Even though such a connection might be logically wrong, the study of potential controversies is still required to avoid all possible doubts in this regard.

Despite the established procedure in the institutional rules, not all the procedural aspects are regulated.[92] This gives rise to the expectations of parties based on their legal cultural background. Understanding the aspects of the psychological influence of cultural differences can help to control the processes of the unconscious 'cultural invasion and manipulation'.[93] For the arbitrator, a correct cultural evaluation of the situation is also necessary for making a right and fair decision. Thus, in the English case *Balraj v. Balraj*[94] concerning the divorce of Indian residents it was noted that it is difficult for the judge 'to grasp the prospects'

of life to estimate all the potential hardships as a result of divorce,[95] and it is a too high requirement for the judge to step in one' shoes.

Communication and behavioural aspects derive from the culture. Data suggest that way of thinking itself may be shaped by the language,[96] whereas the ability to persuade others is very often built on the similarities.[97] As Won L. Kidane explains, in English it is possible not to specify the gender of your interlocutor, in Chinese past, present and future can be described by the same verb.[98] Therefore, linguistic diversity can potentially lead to misunderstandings.[99] As K. Avruch and P. Black noted, understanding the language without understanding the culture might play a bad joke on people.[100] Non-verbal communication can also be a source of potential miscommunication due to different cultural backgrounds. Thus, nodding and affirmative noises in Indian culture mean active listening and not agreeing.[101]

From the business perspective, cultural adaptation is also an instrument for conquering new markets.[102] KFC, McDonald's, and Volkswagen use local versions of their products, local staff and local language in promoting their products in China.[103] A direct transfer of the corporate culture without the changes can lead to substantial business loss (Peugeot's exit from the Chinese market).[104]

A substantial business loss could also be created by the cultural miscommunication in the dispute resolution sphere. Apart from the fact that it can escalate conflict and lead to more resource-consuming dispute resolution proceedings, in case of necessity in the translation of documents, it will require time and money, and also potentially contain some loss of the meanings initially present in the document or oral statements.[105] As an illustration, live translation of witnesses from Chinese to English could be discussed. Usually, there are two types of translation offered by the translators: literal translation and translation of the meanings.[106]

Therefore, cultural backgrounds might potentially lead to one of the cognitive blinders and create problems in cross-cultural communication. Apart from maintaining relationships among the participants of dispute resolution processes, it could also cause additional expenses and time investments in case of escalation of the conflict.

IV. Conclusion

International arbitration is a sphere of close interaction between representatives of different cultural backgrounds. These differences might impact the preferred type of dispute resolution in the particular culture. The cultural topic is closely connected to the diversity and neutrality issues. Moreover, cultural backgrounds might potentially lead to one of the cognitive blinders and create problems in cross-cultural communication, including additional expenses and time investments.

As a result, it is possible to conclude that cultural background might impact the perception of the arbitration process by the parties, counsels, arbitrators and other persons involved into arbitration proceedings. Therefore, cultural aspects should be taken into account to ensure the most equitable outcome. Among the ideas of «breaking the ice» between cultures are increasing multiculturality of the arbitration institutions, promotion of regional arbitration centres, and cross-cultural training for arbitrators, in line with the general promotion of international arbitration itself[107]. Some studies on cultural topics were already made, and a bigger research stratum is ahead.

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