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Towards a Transnational Legal Order: The Role of Culture in Commercial Arbitration in Africa

by F.K. Shako

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Towards a Transnational Legal Order: The Role of Culture in Commercial Arbitration in Africa

Florence Karimi Shako[1]

Abstract

International arbitration is gaining traction in Africa as an ideal method of dispute resolution for commercial disputes between parties from different jurisdictions. As cross-border commerce, trade and investment increases in the African continent, so does the potential of international arbitration. Although this is welcome economically, the convergence of culture creates unprecedented complexities when disputes arise. Although sometimes overlooked, culture plays a critical role in international arbitration as cases often involve parties from different countries. The author contextualises commercial arbitration in a transnational legal order as arbitration is increasingly viewed as a transnational system of justice. This paper further explores the meaning of culture and analyzes the manner in which culture undergirds international arbitrations in Africa, given this transnational context. The author argues that cultural considerations must be taken into account in order for international arbitration to survive in the long run in Africa. This paper analyzes cultural issues such as political and religious considerations, cultural biases and stereotypes, communication and language issues, inter alia. Within this analysis, the author highlights measures that could be put in place to ensure that these cultural issues are considered in African-related arbitrations in order to contribute to the greater success of the arbitral process.

Introduction

For many years it was fashionable to say that international commercial arbitration had come of age. That is no longer an appropriate observation. By now it has entered a mature and sophisticated middle age. Both the crises and the illusions of youth are past, and in the eyes of businessmen the creature has developed an identity and ability to solve problems that match the needs of the critical role it plays in world commerce today.[2] There is increased use of international arbitration as a method of dispute resolution for commercial disputes in Africa. In a continent where the perception of lack of commercial sensitivity by the courts is an issue, considerations such as costs, neutrality, expertise of arbitrators and finality have been pointed out as distinct advantages of commercial arbitration over the national court systems.[3]

International commercial arbitration involves parties from different countries, and this gives the arbitral process a transnational character. This means that there is a convergence of the cultures of parties from different jurisdictions in the arbitral proceedings. Law is understood as constituted in part by social norms, routines, customs and practices, and in part by hard

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[2] Richard J. Graving, 'The International Commercial Arbitration Institutions: How Good a Job Are They Doing' (2011) American University International Law Review, Volume 4:2, 319, 320

[3]Catherine Amirfar and Julien Fouret, 'The Current State and Future of International Arbitration: Regional Perspectives' (2015) International Bar Association Arb40 Subcommittee, 20

legal regulation. There are intricate relations between legal regulation and concrete, local, intimate social spaces.[4]

Few will deny the pervasiveness of cultural diversity in the world. Human diversity is the product of both individual idiosyncrasies and a multitude of external variables. In order to understand cultural diversity, one should strive to make valid generalizations regarding cultural groups, while at the same time avoiding irrational stereotypes. Fundamentally, cultural differences are nothing more than a rational and natural expression of the human experience. There is therefore no reason to suppose that one culture is more or less valid than any other.[5] The diverse cultures present in Africa are just as valid as the cultural practices found in other parts of the world. International arbitrators should regard the cultural differences present in Africa-related arbitrations as a natural expression of the human experience and not as 'backward' or 'inferior' to any other culture.

Arbitrators, as powerful decision makers, must understand this crucial role that reasonable cultural accommodation plays. Cultural variation is so vast, and normative values and taboos are so numerous that an arbitrator would be ill-advised to attempt to master any foreign cultural system. Indeed, many people struggle to master even their own native culture. Perhaps then, the better course of action would be to try to develop a framework for understanding and evaluating individuals from foreign cultures without necessarily trying to adopt their ways.[6] Therefore, international arbitrators do not have to adopt African culture but should strive to understand and be sensitive to the nuances it contributes to the arbitral process.

Critics posit that cultural clashes are mirages invoked to mask the real fight: that between the claimant and the respondent. They argue that when efforts are made to delay the arbitration process through procedural motions, they are a function of tactics, not tradition; positions are taken to try to build fundamental error into the arbitration process. Clothing such tactics as cultural is said to be disingenuous and that unmasked, they are designed to delay or upset an award, a strategy familiar to arbitrants from any state.[7] Critics further argue that as long as arbitral institutions, arbitrators, and arbitrants remain committed to a process that is fair, fast, frugal, and foreseeable, and execute on that commitment, claims of a culture clash in international commercial arbitration should be taken with a pinch of salt.[8] This paper analyzes the nuances created by cultural issues in Africa-related arbitrations that may affect the arbitral process even if the process is fair and fast and that arbitrators and parties should be cognizant of. The paper seeks to demonstrate that the cultural practices of the African people can and do influence international commercial arbitration and are not merely tactics or strategies to derail the arbitral process.

Part I of this paper contextualises commercial arbitration within a transnational legal order and analyzes international commercial arbitration as an evolving transnational system of justice. Part II examines the meaning of culture and the manner in which it undergirds African-related arbitrations. Culture in this context carries a dual meaning and refers to both

[4] Peer Zumbansen, 'Transnational Legal Pluralism' (2010) Transnational Legal Theory, Volume 1:2, 171, 172

[5] Timothy B. Cash, 'Cross-cultural Issues in International Commercial Arbitration' (1995) 3 Williamette Bulletin of International Law and Policy, Volume 3:117, 123, 127

[6] Ibid

[7] John Barkett, Jan Paulsson et al., 'The Myth of Culture Clash in International Commercial Arbitration' (2009) Florida International University Law Review, Volume 5:1, 3, 11

[8] Ibid

legal culture and societal culture. Part III argues that cultural considerations must be taken into account in order for international commercial arbitration to be successful and to survive in long run in the African context. Cultural issues such as political and religious considerations, cultural biases and stereotypes, communication and language issues, inter alia, should be considered. The paper examines measures that could be put in place to ensure these cultural issues are considered in African-related arbitrations in order to contribute to their greater success.

Part I

Transnational Legal Theory

Today, many regulatory areas can only be understood as instantiations of global norm creation. Supply chains that tie regional and global markets together, food safety and food quality standardisation regimes, internet governance, environmental protection, crime and terrorism are key examples of fast expanding spaces of individual, organisational and regulatory activity that evolve with little regard for jurisdictional boundaries but, instead, appear to develop according to functional imperatives.[9] International commercial arbitration is no exception and it continues to grow beyond borders. Parties involved in this arbitral process are often from different jurisdictions even if they choose a particular country as the seat of the arbitration. The cultures of the different parties underlie the arbitration and influence the manner in which parties engage. Further, the sensitivity of the arbitrator to the parties' culture or lack thereof also influences the process and perception of the outcome by the parties. Therefore, international commercial arbitration is increasingly recognized as a transnational system of justice.

Transnational law is a hybrid of international and domestic law; it is the law that governs the gaps between formal international law and domestic law. In our modern era, transnational law is law that moves back and forth from the international to the domestic and often back again, such as when one nation's legal solutions are 'copy-pasted' or 'downloaded or uploaded' to the law of another nation or to the international system.[10] Transnational legal process is also defined as a blend of domestic and international legal process, which internalizes norms from the interaction of international and domestic lawmaking authority.[11]

Legal sociology and legal pluralism, in particular, have long been developing tools to scrutinize the tension between official and unofficial norm creation, between hard and soft law, and between what at least in the West has often been depicted as a juxtaposition of state law-making on the one hand and private ordering or social norms on the other. This constellation prompted legal sociologists to investigate the correlations between law and other spheres of culture. There are hybrid legal spaces that cannot sufficiently be captured through references to local or national contexts. A distinctly transnational legal pluralist lens allows us to study such regimes not as entirely detached from national political and legal orders, but as emerging out of and reaching beyond them.[12] Dispute resolution through this transnational legal pluralist lens contains elements of the state law-making such as when

[9] Peer Zumbansen, 'Transnational Legal Pluralism' (2010) Transnational Legal Theory, Volume 1:2, 152
[10] Carrie Menkel-Meadow, 'Why and How to Study Transnational Law'(2011) UC Irvine Law Review, Volume 1:1, 110,111
[11] Ibid
[12] Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism'(2012-2013) Transnational Law & Contemporary Problems, Volume 21:305, 330

cases are submitted to the national court system and private ordering in the form of alternative dispute resolution. However, in the case of international commercial arbitration, there exists an open hybrid space where dispute resolution can take place within the confines of the national borders but yet transcending this space. From this socio-legal perspective in a transnational context, international arbitration broadens existing perceptions, functions and roles of the arbitrator and the parties. The arbitrator must be cognizant of the interrelation of the function of the law that governs the arbitration and the influence of the cultures of the parties.

Transnational law reflects and responds to these links between the domestic and the foreign. Philip C. Jessup has described transnational law as including public international law, private international law and any law that regulates actions or events that transcend national frontiers.[13] The description is very wide, covering matters that may arise in domestic courts or before various international tribunals and issues that engage rules from a combination of sources that are neither solely domestic nor international. The area of inquiry includes public law and regulation, private law, relationships to religious and kinship law, non-state rules of practice and commercial standardization, and general attention to custom and pluralism.[14] The focus of this paper lies in the analysis of the influence of culture and pluralism as it affects international commercial arbitration.

An emphasis on justice and accessibility supports this wide approach. Law is not solely about governments and institutions, but must serve society. The transnational perspective poses questions of accountability, inclusiveness, the definition of law and its function in the public interest, in a world in which public policy does not end at national borders. Throughout, the inquiry involves issues of justice and participation, dealing with the interactions of domestic and international systems, and the actual legal experience of cross-border reality.[15] It would be a great injustice if the arbitrator chose to ignore the culture of the parties to the arbitral process and this exclusion would lead to underlying tension or communication breakdown between the parties. The reality is that cross-border commerce, trade and investment is increasing in Africa and dispute resolution of disputes arising from these interactions must take into account the fact that public policy will not end at national borders.

Transnational law is an institutional framework for cross-border interaction beyond the nation state. In distinction of territorially organized national and international law, it is structured as a plurality of functionally specialized transnational law regimes, which in a pragmatic approach combine different governance mechanisms of private (norms, alternative dispute resolution, social sanctions) and public (laws, courts, enforcement) origin, where the latter are disembedded from their domestic context.[16]

The practice of international arbitral tribunals assumes a central role in the contemporary theory of transnational law. Arbitral tribunals can be organized in various ways, from so-called ad-hoc arbitration, where the contract parties appoint the arbitrators as a dispute arises, to institutionalized courts of arbitration, which administer arbitration proceedings according to standing rules such as the International Court of Arbitration of the International

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[13] Philip C. Jessup, 'Transnational Law' (1956) New Haven: Yale University Press, 4

[14] Maureen Irish, 'Transnational Law and Legal Education'(2013) Windsor Yearbook of Access to Justice, Volume 31:1, 215,217

[15] Ibid

[16] Gralf-Peter Calliess, 'Law, Transnational' (2010) Comparative Research in Law & Political Economy, Research Paper No. 35, 3

Chamber of Commerce. Ad-hoc arbitration and institutional arbitration have in common that no state officials are directly involved in the private dispute resolution process. As opposed to state courts, an arbitral tribunal under the UNCITRAL Model Law on International Commercial Arbitration, on which the procedural law concerning arbitration is based in many states, may not only apply state contract law, but also rules of law such as the UNIDROIT Principles or the Lex Mercatoria. Indeed, many arbitral awards apply such a-national rules.[17]

International commercial arbitration is therefore a transnational system of justice and provides a framework for cross-border justice in the commercial context. The culture, both legal and societal, of both parties undergirds African-related arbitration and transcends the national frontiers. This calls into question the meaning of culture in this transnational context.

Part II

Meaning of Culture

On one hand, the notion of culture contemplates culture in a legal sense. Culture in this context consists of shared norms and expectations produced by legal actors. Actors engaged in repeated interaction over time produce culture. Lawyers form an epistemic community, that is, a community of professionals with common training and expertise. This common training and expertise, combined with interactive practices, produces a common set of expectations. These expectations, in turn, shape behavior, though they are also subject to change as new norms arise. This notion emphasizes the dynamism of culture. It is culture as a product of law rather than constraint on law, an effect rather than a cause.[18]

There is increasing discussion of a culture of arbitration, a transnational culture common to practitioners, arbitrators and parties involved in arbitral practice. The culture of arbitration typically refers to the gradual convergence in norms, procedures and expectations of participants in the arbitral process.[19] A legal culture is a combination of procedures and concepts that constitute a network that, because of the commonality of usage, reduces the costs of interactive behavior. Culture becomes a kind of template for social interaction, and members of the same legal culture find it easier to work with each other than with outsiders.[20]

Legal culture is a culture of generality, which is expressed by its commitment to equal and universal application of rights and duties. In the special case of the international legal culture, this means a commitment to the principles of normative universality and normative equality. They are still to some degree aspirational and do not yet guarantee equal, or even equitable, apportionment of goods among all states or all persons; nor do they vaporize longstanding, stubbornly retained discriminatory practices against some states and persons. But the professed aim of the international legal culture is to advance universal equality of entitlement: both between states and among persons.[21]

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[17] Ibid
[18] Tom Ginsburg, 'The Culture of Arbitration' (2003) Vanderbilt Journal of Transnational Law, Volume 36:1335, 1337,1338
[19] Ibid
[20] Ibid
[21] Thomas Franck, 'The Legal Culture and the Culture Culture' (1999) American Society of International Law Proceedings, Volume 93, 272

On the other hand, societal culture implies values and patterns that influence actions and attitudes. Culture influences many aspects of life including attitude, social organisation, thought patterns and body language.[22] Thought patterns have an immediate effect on the process of reasoning, particularly legal reasoning. Therefore, what can be considered as completely logical, obvious and reasonable for one culture may be offensive and unreasonable for another. Cultural background strongly influences the legal systems and understandings of a people and therefore influences how people approach arbitration.[23]

Societal culture is a culture of differentiation, which emphasizes the exceptional quality of each particular society, whether it be a state, nation, race, religion or society. This exceptionality asks to be respected and preserved for its own sake. This also emphasizes rights not of persons but of groups, or of persons as members of groups whose rights are founded on group affiliation and not on individual personhood. Persons acquire rights as a consequence of their membership in such self-differentiating groups.[24]

As Hans Kelsen pointed out, any legal order that is based on a territory invariably consists of a combination of norms, some of which are valid for the entire territory known as the central norms, while others are valid for part of the territory only and known as local or partial norms. A wholly centralized legal order with no local norms is virtually impossible to set up. Conversely, a fully decentralized legal order with no central norm is simply inconceivable since a legal order must have at least one central norm to ensure the unity of the territory that acts as the basis of that order.[25] In the context of international arbitration, there is a convergence of cultures – both in the legal and the societal sense – which give rise to unprecedented complexities whenever disputes arise. To focus on legal culture alone is to ignore the impact of societal culture and vice versa. Regard must be had to culture in both senses and its impact on the arbitral process. In Africa, cultural considerations must be taken into account in international commercial arbitration without overstating legal or societal cultures as being at odds due to their emphasis on universality and differentiation respectively.

In understanding the role of culture in commercial arbitration, reference to culture means culture in the legal sense and culture in the societal sense. Culture is an important component in the success of international commercial arbitration in Africa and arbitrators must take into account the manner in which it influences the arbitral process.

Part III

Role of Culture in International Commercial Arbitration in Africa

In analysing the role of culture in international commercial arbitration in Africa, various cultural issues must be taken into account. These include the influence of having arbitrators trained in different legal systems, whether common law, civil law or Shari'a traditions, political and religious considerations, cultural biases and stereotypes, consideration of the

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[22] Nikola S. Georgiev, 'Cultural Differences or Cultural Clash? The Future of International Commercial Arbitration' (2012) 4,5

[23] Ibid

[24] Thomas Franck, 'The Legal Culture and the Culture Culture' (1999) American Society of International Law Proceedings, Volume 93, 272

[25] Charles Leben, 'Hans Kelsen and the Advancement of International Law' (1998) European Journal of International Law Volume 9, 292,293

importance of communication and language in different jurisdictions and the influence of patriarchy in Africa.

Legal Systems

The practice of international commercial arbitration, as its name suggests, involves the resolution of disputes between parties located in different countries and, in many cases, who come from vastly different cultures. As one might expect, counsel to parties in international arbitrations and members of these arbitral tribunals alike are commonly from different countries. Invariably, such cases also bring together attorneys trained in the different legal traditions of the common law and civil law.[26]

International arbitration produces a relatively efficient and cost effective remedy for international commercial disputes by eliminating many of the jurisdictional conflicts associated with multinational litigation. However, the international arbitration process poses significant challenges. Since the attorneys representing the disputing parties come from different legal systems, and the arbitral panel itself may also have diverse legal backgrounds, these participants come to the arbitration table with expectations and biases concerning the methods they will be using to sort out complex factual issues. For example, the uncertainty of whether the parties will be allowed to discover and exchange evidence before the hearing can be disquieting.[27]

The cultural aspect of a working legal system refers to the values and attitudes that bind the system together, and that determine the place of the legal system in the culture of the society as a whole. It is the legal culture that determines when and why and where people turn to law or government, or turn away. Legal culture also refers to those values and attitudes in society that determine what structures are used and why; which rules work and which do not, and why.[28] Law is not self-contained; it is culturally very specific. If a community wants to put through some program of drastic political and economic change, it must make drastic changes in its laws. If it wants to modernize, and especially if it wants to modernize fast, the legal system has to be radically altered, or even replaced.[29]

Because lawyers are ordinarily trained only in the laws of their own jurisdiction, they sometimes reflect a lack of awareness of what is going on in other countries and, in particular, in different legal systems. Yet if lawyers are to become engaged in international commercial arbitration, familiarity with other jurisdictions and different legal systems is clearly important. This is because such arbitrations will frequently involve participants and problems that come from the different legal cultures and traditions. Moreover, to understand the attractions, opportunities and advantages of commercial arbitration, it will often be important to be conscious of the alternative forms of dispute resolution available, principally in the courts of the jurisdiction where the parties are resident or where a dispute arises.[30]

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[26] Javier Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective' (2004) Chicago Journal of International Law, Volume 5, 303

[27] John W. Hinchey and Elizabeth T. Baer, 'Discovery in International Arbitration'(2000) Center for International Legal Studies, Salzburg Conference, King and Spalding, 2

[28] Lawrence M. Friedman, 'Legal Culture and Social Development'(1969) Law and Society Review, Volume 4:1, 34

[29] Ibid

[30] The Hon. Michael Kirby, 'International Commercial Arbitration and Domestic Legal Culture' (2009) Australian Center for International Commercial Arbitration Conference, Melbourne, 12

The legal systems in different countries across Africa vary, from civil law legal systems to common law legal systems to Shari'a law and hybrid jurisdictions. Due to the different origins of the legal systems, coupled with cultural differences ranging from Francophone, Anglophone and Lusophone backgrounds, arbitration takes diverse forms when the international laws and principles are imported into each individual country. Parties engaging in arbitration, in most cases seek to avoid the 'diversities' of the domestic legal system. Since all the parties involved in the arbitration, including the tribunal, may have a different background in their understanding of normative rules of arbitration, the divergence may give rise to legal uncertainty.[31]

Arbitrators must take cognizance of the legal system of the country in which the arbitration will take place. The predominant legal systems in Africa are the common law and civil law systems. Countries that have a common law legal system include Kenya, Uganda and other former British colonies, while civil law countries include Angola, Mozambique, Burkina Faso, Burundi, Democratic Republic of the Congo, Cote d'Ivoire, Gabon, Guinea, and Guinea-Bissau, inter alia. Some countries such as Botswana, Cameroon, Lesotho, Zimbabwe, Mauritius and South Africa have pluralistic systems that have both common law and civil law traditions.

Perhaps the most fundamental difference between the common law and civil law modes of dispute resolution lies in the manner in which evidence is presented to the finder of fact. In the common law tradition, testimony is presented to the finder of fact principally through oral testimony of witnesses, rather than in written form. The questioning of witnesses is also conducted by counsel for the parties; with each party having the right to have their counsel cross-examine witnesses directly in the presence of the finder of fact. In the civil law tradition, by contrast, evidence and testimony generally is presented to the finder of fact principally in written form. While oral testimony may be taken, the questioning of witnesses is conducted not by counsel, but rather by the court, which retains the sole authority to determine which questions will be put to the witness.[32]

The current standard practice in international arbitral proceedings seeks to strike a balance between the common law and civil law traditions. Witness testimony is generally presented in the first instance through written witness statements, which reflects the distinct influence of the civil law tradition. However, it is also generally well-established in international arbitration that any witness presented by a party must be made available to testify before the arbitral tribunal, with the opportunity for the opposing party to cross examine the witness, which reflects the common law tradition. Disputes also occasionally arise as to whether counsel should be given the opportunity to present oral arguments to the arbitral tribunal, whether in the form of opening statements at the outset of an arbitral hearing, or through closing arguments after the evidence has been presented.[33]

It is unlikely that the common law and civil law approaches to advocacy and proof will ever fuse into a single set of procedures for international arbitration. Nor is it desirable that they should. One of the great strengths of arbitration is its procedural flexibility, which permits the process to be tailored to the particular needs of each case. What is emerging is rather a

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[31] Collins Namachanja, 'The Challenges Facing Arbitral Institutions in Africa' (2015) Chartered Institute of Arbitrators Kenya Alternative Dispute Resolution Journal, Volume 3:2, Glenwood Publishers Limited, 147

[32] Javier Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions'(2004-2005) Chicago Journal of International Law, Volume 5:1, 309-310

[33] Ibid

consensus as to a range of procedural options available to the arbitrators and the advocates in each proceeding. While not every procedure in that range is suitable for every arbitration, there is increasingly widespread acceptance of this range as defining a set of procedures that are unlikely to be challenged as unacceptable or unfair by parties from either side of the increasingly less divisive common law - civil law divide.[34]

Another distinction between common law and civil law systems is discovery, i.e., the disclosure and exchange of evidence. Although discovery is increasingly common in international arbitrations, it is often a new experience for parties domiciled in civil law countries where such discovery is not permitted (or at least is heavily restricted) under local law. For such parties, the discovery process carries obvious risk. Companies in countries with a common law tradition are often accustomed to the concept of discovery in the litigation process, and thus may take precautions in their everyday business affairs, such as being careful what they put in writing, even in purely internal communications. For parties that have never been required to produce documents to litigation adversaries, however, such precautions are entirely alien, which leads inevitably to the risk that written communications may be produced that the author never dreamed would possibly make it into the hands of a litigation adversary.[35]

In African countries where Shari'a law applies in full or applies in personal status issues such as Algeria, Djibouti, Egypt, Eritrea, Ethiopia, Ghana, Somalia and Sudan, arbitrators have to be conscious of the effect of a Shari'a legal system on the arbitral process and enforcement of awards. National courts of a number of Islamic nations have refused to recognize foreign arbitral awards on domestic public policy grounds, including precepts of Islamic law. Interest or *riba* is a contentious issue in Islamic jurisdictions as Shari'a law prohibits *riba.*[36] The United Nations Commission on International Trade Law (UNCITRAL) *ad hoc* arbitration rules and the ICC International Court of Arbitration arbitration rules are silent on the issue of interest. The London Court of International Arbitration arbitration rules state that 'The Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal determines to be appropriate, without being bound by legal rates of interest imposed by any state court, in respect of any period which the Arbitral Tribunal determines to be appropriate ending not later than the date upon which the award is complied with.' The imposition of interest is not mandatory under any of these international arbitration rules. Instead, the rules are either silent on the issue or allow the tribunal to include interest at its discretion based upon the contract and applicable law. The net result for all of these procedural rules is the same. They neither encourage nor discourage the use of interest. As a result, the procedural rules of international arbitration institutions by themselves do not contravene Shari'a and will not invalidate an award's enforceability. It is only when an arbitration award contains interest that the award's enforceability is placed at risk.[37]

[34] Siegfried Elsing and John Townsend, 'Bridging the Common Law Civil Law Divide in Arbitration' (2002) Arbitration International, Volume 18:1, 7

[35] Javier Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective' (2004) Chicago Journal of International Law, Volume 5, 306

[36] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) Loyola of Los Angeles International and Comparative Law Review, Volume 28, 602-614

[37] Saud Al-Ammari and A. Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) The Journal of the London Court of International Arbitration, Volume 30, Number 2, 407

The classical rules under Shari'a law seriously restrict the ability to appoint arbitrators; candidates require the same qualifications as a judge, including being male and Muslim. The fact that these restrictions on gender are ostensibly derived from the Shari'a raise some serious issues regarding bringing uniformity between the Islamic law and international commercial arbitration. One of the advantages of international commercial arbitration is the freedom that parties have to negotiate their choice of law provisions. This choice does not exist when it comes to the Shari'a, according to Islamic jurisprudence. The very concept of a divinely inspired system of laws precludes the choice of any other law by the parties to a dispute. In fact, Qur'anic injunctions urge believers to have their disputes judged 'by what God has revealed.'[38]

There is now greater clamour to address the global issue of underrepresentation of women in international arbitration. A new era in the history of Saudi women was marked on May 10, 2016, when the Saudi administrative Court of Appeal in Dammam approved the appointment (or more precisely, did not object to it) of the first Saudi female arbitrator in the field of commercial disputes. This groundbreaking woman is Ms. Shaima Aljubran.[39] This is a positive indication of greater acceptance of women as international arbitrators in countries which apply Shari'a law. There is potential for more female arbitrators on an equal opportunity basis and this gender diversity will increase the legitimacy of the dispute resolution systems found in these countries.

International arbitrators must take into account the legal system of the seat of the arbitration in Africa and the manner in which that legal system influences the arbitral process. The legal system undergirds the arbitration and the manner in which the arbitral process will be carried out and the enforcement of the arbitral award. It also underlies the parties' expectations of the arbitral process.

Political and Religious Considerations

Culture is also political. The power dynamics and social hierarchies of a people are reflected in its distinctive way of life. Their web of ideas and belief systems, patterns of relationships, behavioural norms, and material products are, in fact, dynamics of power and divergent interests embedded in the institutionalised patterns of behaviour, relationship structures, productive processes, material products and symbolic meanings, which cut across a society's institutions and practices. From a cultural studies perspective, cultural politics is theorised as both the legitimation of social relations of inequality and the struggle to transform them.[40]

Arbitrators should be cognizant of the government bureaucracy in Africa as a political concern especially in matters that involve government institutions as one of the parties. This may even be complicated if the proceedings are in a government supported arbitral institution that is funded by the same government. Naturally, there is fear or bias or excessive bureaucracy due to power differences and influence that may defeat the need for arbitration. For instance, government proceedings acts may require special procedures for some aspects of the process and this may clash with the established international arbitration laws and

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[38] Ibid

[39] Mulhim Hamad Almuhim, 'The First Female Arbitrator in Saudi Arabia' (2016) http://kluwerarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/ last accessed on 29th September, 2016 at 6 p.m.

[40] M. Bahati Kuumba, 'African Women, Resistance Cultures and Cultural Resistances' (2006) Agenda, 20:68, 112

procedures. The concern may be real or perceived but there is need to ensure that the same is dealt with.[41] For arbitration to be successful the arbitrator should be impartial and be aware of the power dynamic and politics involved where the government or a parastatal is a party to the arbitral proceedings.

Another political concern is the perception of corruption. At times governments are also perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the process especially where there are its interests at stake and put forward the argument of grounds of public policy.[42] The arbitrator should guard against this perception and ensure that the arbitral process is not interfered with and should be free from political interference.

Other than the political considerations, arbitrators should consider the influence of religion on the arbitral proceedings and be sensitive and respectful to the religious beliefs of the parties involved. In Africa, there are various religions such as Christianity, Islam, Hinduism and traditional African religion. In some countries, religion is the very foundation of the government and its legal, social, cultural, political and educational practices. In others, religion is less important politically but could be important personally. The importance of religion and politics cannot be overstated since it can lead people to have negative perceptions of other religions. When a participant in arbitration has a negative view of the religion of another participant, whether due to political, historical or other factors, the dispute resolution process will be negatively affected. It is the duty of the arbitrator and the parties to accommodate individual religious beliefs and promote long-term peace and understanding through effective dispute resolution methods.[43]

It is essential that arbitrators who seek to engage people of different cultures to recognise and be sensitive to the dictates of the various religions embraced by the parties and other participants. A good example of the issues that can be faced is the observation of prayer obligations. In Africa for example, parties may observe the Muslim religion in certain jurisdictions. One western woman arbitrator sat in an arbitration in which an Islamic woman appeared as counsel, she had the good sense to make sure she called a break, of her own volition, at each prayer time, so that the woman could go and pray without having to be embarrassed by asking for time to do so. This is an example international arbitrators should follow. They must be sensitive to the religious practices of the parties who appear before them, and facilitate the parties' ability to follow such practices as a matter of course, just as arbitrators of their own culture would do automatically. If not, it can lead to resentment, which can defeat the mission to find amicable resolution of disputes.[44]

Another example in the African context is the need to respect traditional African religion, which may seem foreign to an international arbitrator and the parties involved in the arbitral process. It is important to respect religions that one may not necessarily subscribe to in order to be able to engage the parties and for the parties to be able to communicate. The best

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[41] Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (2015) Arbitration Institutions in Africa Conference, 22

[42] Ibid

[43] William K. Slate II, 'Paying Attention to International Commercial Arbitration' (2004) Dispute Resolution Journal, 100

[44] Karen Mills, 'Cultural Differences & Ethnic Bias in International Dispute Resolution: An Arbitrator/Mediator's Perspective' (2006) Chartered Institute of Arbitrator's, Malaysia Branch International Arbitration Conference, page 7

approach is to be respectful as most African countries have freedom of worship, which has resulted in religious diversity.

Cultural Biases and Stereotypes

For a businessperson, legal practitioner, negotiator, mediator, expert witness or arbitrator, the degree of sensitivity required invariably will delve far deeper than just surface attributes. Ethnic or cultural *faux pas* may be excusable for a tourist, but they can be extremely detrimental, even fatal, to one's purpose for those of us who are seeking to resolve a dispute in one form or another. In order to do this we must earn the respect of all parties involved, which invariably involves affording to them, their culture and their laws, the appropriate form of respect customary within their community.[45]

In the cultural sense, neutrality addresses the appearance of bias rather than its actual presence. While one might suppose that an arbitrator might be inclined toward the position of a party who shares with him the same language, culture, and general value system, this is not necessarily the case. Nevertheless, the appearance that bias might be present has given rise to the general practice of selecting a third arbitrator from a nation other than that of the parties to the proceeding. The term neutrality is also frequently used in the same sense as 'impartiality'. This is not a political or geographical test, but one of a state of mind. It is a test for the lack of impermissible bias in the mind of an arbitrator toward a party or toward the subject-matter in dispute. This is a subjective test, since it is difficult to directly measure. It is a test not for the appearance of bias, but for its actual presence. The presence of bias is inferred from the facts and circumstances surrounding the arbitrator's exercise of the arbitral function.[46] An arbitrator must be cognizant of the perception of impartiality of bias in the arbitration and show sensitivity to the cultures of both parties.

Africa has failed dismally to benefit from its ethnic diversity because of ethnic bias and favouritism. In many countries on the continent, these remain the main cause of conflict and under-development. The continent lacks dedicated leadership and strong democratic institutions, with the result that the character of governments has remained more or less unchanged, lacking in all-inclusive reforms that favour all citizens, irrespective of their ethnicity.[47] International arbitrators should also be cognizant of the ethnic diversity in Africa and ensure that they are not perceived as favouring one ethnic community over another as this could sabotage the success of the process. Parties may have underlying tensions due to these ethnic differences and the role of the arbitrator is to bring in a measure of neutrality as the impartial third party to the process.

Closely linked to cultural bias is the stereotypes that are present in African culture. Stereotyping involves a form of categorization that organizes our experience and guides our behavior toward ethnic and national groups. Stereotypes never describe individual behavior; rather, they describe the (sometimes perceived) behavioral norm for members of a particular group. Stereotypes, like other forms of categories, can be helpful or harmful depending on how we use them. Effective stereotyping allows people to understand and act appropriately in new situations. A subconsciously held stereotype is difficult to modify or discard even after

[45] Ibid
[46] Scott Donahey, 'The Independence and Neutrality of Arbitrators' (1992) Journal of International Arbitration, Volume 9:4, 32
[47] Richard Ilorah, 'Ethnic bias, favouritism and development in Africa'(2009) Development Southern Africa, Volume 26:5,705

real information about a person is collected, because it is often thought to reflect reality. If a subconscious stereotype also inaccurately evaluates a person or situation, we are likely to maintain an inappropriate, ineffective, and frequently harmful guide to reality.[48]

With respect to Africa, an oft-held general stereotype of the continent is that it is a place of danger, darkness, violence, poverty and hopelessness. Some Westerners view Africa as primarily a jungle or desert landscape where the people speak unintelligible languages. Africans are thought to live in rural areas, practice strange customs, and fight pointless battles against each other. These somewhat vague but decidedly negative stereotypes of Africa are founded on several myths that support the tone and message of the stereotypes.[49] Such stereotypes can and are extremely offensive to the African people and where an international arbitrator adopts them, this can have a detrimental effect on the arbitral process.

Communication

Successful international commercial relations depend heavily upon good communication. Parties that do not carefully observe cultural rules of communication risk insulting, angering or embarrassing the other side. Culture heavily influences both verbal and nonverbal communication.[50] Miscommunications and a lack of understanding are usually the causes of conflicts. They can also cause problems in the dispute resolution process. All cultures have verbal and non-verbal communication systems that reflect their values and customs. Thus, there is a need to design guidelines to improve cross-cultural communications in arbitration. The same is true with gestures, facial expressions and body language, which send different signals. Gestures that are innocuous in one culture can be considered highly insulting in another. There is a need to explore the use of nonverbal communication across cultures, and the impact that it may have in different situations during the arbitration processes.[51]

Cross-cultural communication occurs when a person from one culture sends a message to a person from another culture. Cross-cultural miscommunication occurs when the person from the second culture does not receive the sender's intended message. Communication does not necessarily result in understanding. Cross-cultural communication continually involves misunderstanding caused by misperception, misinterpretation, and misevaluation. When the sender of a message comes from one culture and the receiver from another, the chances of accurately transmitting a message are low. Foreigners see, interpret, and evaluate things differently, and consequently act upon them differently. In approaching cross-cultural situations, one should therefore assume difference until similarity is proven. It is also important to recognize that all behavior makes sense through the eyes of the person behaving and that logic and rationale are culturally relative. In cross-cultural situations, labeling behavior as bizarre usually reflects culturally based misperception, misinterpretation, and misevaluation; rarely does it reflect intentional malice or pathologically motivated behavior.[52]

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[48] Nancy J. Adler, 'Communicating across Cultural Barriers'(1991) International Dimensions of Organizational Behavior, 2nd ed.,5,6

[49] Amy E. Harth, 'Representations of Africa in the Western News Media: Reinforcing Myths and Stereotypes' http://pol.illinoisstate.edu/downloads/conferences/2012/1BHarth.pdf, 9

[50] Andrew Sagartz, 'Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court' (1998) Ohio State Journal on Dispute Resolution, Volume 13:2, 685

[51] William K. Slate II, 'Paying Attention to International Commercial Arbitration' (2004) Dispute Resolution Journal, 99

[52] Nancy J. Adler, 'Communicating across Cultural Barriers'(1991) International Dimensions of Organizational Behavior, 2nd ed.,2,3

Nonverbal communication plays a dominant role in the life of Africans. Much as the following nonverbal behaviours may be acceptable in some cultures, in traditional African communities, they are frowned upon: beckoning to someone, pointing at someone with one finger, looking someone straight in the eye, passing things, especially food, with the left hand, inter alia, are unacceptable. Most forms of nonverbal communication can be interpreted within the framework of the culture in which they occur.[53]

Language

Most languages spoken in Africa can be categorised into the language families of Afroasiatic, Nilo-Saharan, Niger-Congo, Khoe and Indo-European languages. There is a high linguistic diversity in Africa used for inter-ethnic communication. Language issues can pose a serious obstacle to settlement of the dispute. Important details in the arbitral process may be lost in translation and the deeper elements of the language such as colloquial expressions may be misinterpreted.

Further, from a practical perspective, where English-speaking parties to a matter are in a French-speaking country and the arbitral institution only operates in French, it is likely that they would prefer an institution elsewhere. For example, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) in Egypt only administers cases in English and Arabic: it neither handles cases nor avails its arbitral rules in French. Similarly, Cour Commune de Justice et d'arbitrage (CCJA) in Cote d'Ivoire only accepts French as the language of the arbitration, thereby presenting a potential challenge to English-speaking parties.[54]

Time

Culture has a great impact on the definition of time, and misunderstandings due to different perceptions of time can easily occur in cross-cultural business relations. Americans tend to worship time as a commodity that they do not like to waste. They believe 'faster' is better than 'slower'. Americans are often known as the world's fastest dealers.[55] In Africa, things are often done at a slower pace.

Two different orientations to time exist across the world: monochromic and polychromic. Monochromic approaches to time are linear, sequential and involve focusing on one thing at a time. These approaches are most common in the European-influenced cultures of the United States, Germany, Switzerland and Scandinavia. Japanese people also tend toward this end of the time continuum. Polychromic orientations to time involve simultaneous occurrences of many things and the involvement of many people. The time it takes to complete an interaction is elastic, and more important than any schedule. This orientation is most common in Mediterranean and Latin cultures including France, Italy, Greece, and Mexico, as well as some Eastern and African cultures.[56]

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[53]Cynthia Danisile Ntuli, 'Intercultural Misunderstanding in South Africa: An Analysis of Nonverbal Communication Behaviour in Context' (2012) Intercultural Communication Studies, Volume 21:2, 22

[54] Collins Namachanja, 'The Challenges facing Arbitral Institutions in Africa' (2015) CIArb Centenary Conference, 10.

[55] Andrew Sagartz, 'Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court'(1998) Ohio State Journal on Dispute Resolution, Volume 13:2, 689

[56] Tingqin Zhang and Hui Zhou, 'The Significance of Cross-cultural Communication in International Business Negotiation'(2008) Vol 3:2, International Journal of Business and Management, 2

Negotiators from polychromic cultures tend to start and end meetings at flexible times. Take breaks when it seems appropriate, be comfortable with a high flow of information, expect to read each others' thoughts and minds, sometimes overlap talk, view start times as flexible and not take lateness personally. Negotiators from monochromic cultures tend to prefer prompt beginnings and endings, schedule breaks, deal with one agenda item at a time, rely on specific, detailed, and explicit communication, prefer to talk in sequence and view lateness as devaluing or evidence of lack of respect.[57] In Africa-related arbitrations, the polychromic nature of communication should be used to contribute to greater success of the process.

Conclusion

It is a hackneyed cliché, but one well worth repeating, that economic systems and their characteristics are never static, but change in response certain imperatives taking place in the world. An indication of such imperatives unfolding today is the increasingly global nature of trade and investment issues that are constantly thrust into focus, with the result that attention is increasingly turned toward formulating uniform legal rules, forms and processes of general application that must be called into play within the emerging global community. In the sphere of international business contracts, the most notable feature of this phenomenon is the very rapid evolution of legal rules, practices and institutional arrangements for resolution of international business disputes by arbitration.[58]

As cross-border interactions increase, there is a need to pay attention to the convergence of cultures as disputes between parties from different jurisdictions arise. For Africa-related arbitration, the cultural issues analyzed above are of great importance and contribute to the success or failure of the arbitral process. International arbitrators ought to factor in both legal and societal culture to make international commercial arbitration in this transnational legal order effective in the long run in Africa.

[57] Ibid

[58] Samson Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' (1992), International and Comparative Law Quarterly, Volume 41, 388