

Party-Appointed Arbitrator Ethics and Ethos – Cross-Cultural Differences and How They Affect Arbitrator Behaviour in Rendering Arbitral Awards*

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Introduction

As cross-border commercial transactions become increasingly complex, inclusion of dispute resolution mechanisms in contracts has become part of contract drafting necessities, even a negotiating point, where parties look ahead into the future to obviate the economic impact of a protracted conflict between them. Arbitration as such mechanism has gained popularity over time as one of the more attractive options for business savvy legal counsels primarily because it is a private process that produces legal force and effect through an arbitral award that courts of most countries will likely enforce.

One of the components of international commercial arbitration—the arbitral award, is a binding award rendered by the arbitral tribunal after the proceedings had been finalized. Arbitral awards are generally not subject to review by the courts. However, there are instances when the court of the country where enforcement is sought will not recognize an arbitral award based on certain grounds. These grounds are set forth in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention of 1958. As most countries have acceded to the New York Convention of 1958, there is greater likelihood that national laws of the country where the arbitration proceedings were conducted or where enforcement of the arbitral award is sought have been aligned with the pro-arbitration

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leanings of the Convention. Article V of the Convention lists the grounds for refusing recognition or enforcement of an arbitral award, but even so, these grounds are exhaustive and are, for the most part, construed narrowly by the enforcing courts.¹

But arbitration is not without its limitations or its critics. Party autonomy in terms of tailoring the arbitration proceedings to suit the parties' needs, as one of the hallmarks of arbitration, may also become one of its pitfalls. As a component of party-autonomy, arbitrator choice and the composition of the tribunal are among the crucial powers reposed on the parties themselves. This power is very critical inasmuch as arbitrator bias is not one of the bases for nullifying an arbitral award² and regardless of a party's perception of arbitrator's behavior in the course of the proceedings, the arbitral award will be binding, absent any grounds for vacating or refusing recognition and enforcement thereof. On the other hand, it is likely that the arbitrator's perception of his role within the arbitration paradigm and how to manage the conflicting claims of the parties may shape the process and outcomes of the proceedings — e.g. whether or not a negotiated settlement is still possible even when arbitration has commenced; or whether or not the process will be perceived as “fair” by the parties, thereby reinforcing its likelihood of voluntary compliance with the award.

This paper delves into a comparative study of Asian and Western models of dispute resolution, arbitration in particular, and asks how cross-cultural differences affect arbitrator behavior. It proposes that arbitration styles differ across collectivist and individualist culture, without necessarily saying that one is better than the other, but simply that knowledge of the differences will help users of arbitration make informed decision in choosing their party-appointed arbitrators. It also proposes to conduct further research to address the issue of developing and/or reforming the arbitration infrastructure in Asia, particularly the Southeast

¹ Bernard Hanotiau and Olivier Caprasse, *Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention*, *Journal of International Arbitration*, (Kluwer Law International 2008 Volume 25 Issue 6) pp. 721 - 741

² Although arbitrator bias may be a ground for challenge, i.e. when either parties believe that “circumstances exist that give rise to justifiable doubts as to his impartiality or independence.” (Article 12, (2) UNICTRAL Model Law)

Asian region, to address the gap in international commercial arbitration to reflect the non-Western (or non-European) voice.

It draws from existing comparative studies of Western and East Asian arbitrator's role or perception of their roles within the arbitration paradigm, and how that affects the arbitration process, as well as research on how cross-cultural differences affect international arbitration in general. It also draws from existing empirical research comparing the collectivist and individualist perspectives in dispute resolution, as a general discipline, and juxtaposes these findings within the arbitration model.

Arbitrator Neutrality and Institutional Safeguards

The peculiar position of a party-appointed arbitrator (as opposed to the Chair arbitrator or the "neutral arbitrator") is such that while he has been appointed by one of the disputants, he is nonetheless expected to be "impartial and independent". While an arbitrator is an adjudicator and will ultimately render a binding award, he is also peculiarly a "member of the team" of the party that appointed him.³ This scenario notwithstanding, it is expected that an arbitrator will act objectively in applying the rules to the given set of facts and ensure that he exercises some restraint in his use of discretion to protect procedural and outcome integrity.⁴

Impartiality and independence are the cornerstones of procedural fairness that presumably ensure a fair and valid outcome. The UNCITRAL Model Law, adopted by or incorporated into national laws of most countries, provides that an arbitrator who is being considered for appointment is required to disclose to the parties "*any circumstances likely to give rise to justifiable doubts as to his impartiality or independence*".⁵ It is not only actual lack of impartiality and independence that are grounds for challenge and removal of an arbitrator but mere "circumstance that

³ T. Varady, J. Barcelo III, A von Mehren, *International Commercial Arbitration, A Transnational Perspective*, p. 279, 3rd Ed.; Citing Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 *Tex. Int'l L.J.* 59 (1995).

⁴ Susan D. Franck, *The Role of International Arbitrators*; *ILSA Journal of International & Comparative Law*, 2006. Available at SSRN: <http://ssrn.com/abstract=885381>.

⁵ Article 12 (1), Model Law.

gives rise to justifiable doubts as to his impartiality or independence.”

As one author succinctly puts it:

While parties may pick arbitrators with particular cultural and legal backgrounds and specific personal experiences, arbitrators also generally have an obligation to disclose those matters that would call into question their independence. Although all humans are inevitably influenced by the various experiences in their lives, in international arbitration, parties ask arbitrators to put aside biases – and fairly and impartially exercise their independent judgment to apply their expertise to the facts on the record and render a decision based upon the law.⁶

Arbitrator neutrality is the more quantifiable measure of impartiality, as for instance absence of family, business/professional ties (direct neutrality) and neutrality as to group affiliation, i.e. to belong to a different nationality, religion, or ethnic background (indirect neutrality).⁷ Intrinsically, however, impartiality may be considered as having a more “subjective status”, seen in light of party perception, i.e. “a person may lack neutrality in perfectly good faith” while impartiality is a product of purposeful behavior characterized by bad faith or malicious intent or gross negligence.⁸ On the other hand, arbitrator independence is almost always seen in light of the circumstances surrounding the behavior that shows or reflects independence.⁹ In ordinary terms, independence relates to lack of “improper connections” by the arbitrator, while impartiality speaks to a “prejudgment” of the dispute before all facts and evidence are on hand.¹⁰

⁶ *Supra*, Note 4; Citing Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and Greentree Financial Corp. v. Bazzle*, 41 CAL. W. L. REV. 1, 45 (2004); *George Day Constr. Co. v. United Bd. Of Carpenters, Local 354*, 722 F.2d 1471, 1474 (9th Cir. 1984).

⁷ Article 12, (2) UNICTRAL Model Law)

⁸ *Supra*, note 3 at 274; citing Giorgio Bernini, *Report on Neutrality, Impartiality and Independence, The Arbitral Process and the Independence of Arbitrators*, 31-37 (ICC ed. 1991).

⁹ *Id* at 273.

¹⁰ William V. Park, *Arbitrator Integrity: The Transient and the Permanent*, San Diego Law Review, Vol. 46: 629, 2009.

To alleviate the too esoteric angles of the two-fold ethical requirements of arbitrator impartiality and independence, arbitration institutions have developed codes of ethics and procedural rules that will govern arbitrator behavior. In effect, these institutional rules are to be seen as guidelines against which arbitrator conduct may be tested and not as definitive rules carved in stone. As has been said, arbitrator behavior showing impartiality and independence is tested in light of surrounding circumstances.

Concept of Culture within the Arbitration Context

How then does culture translate into or affect the manifested arbitrator behavior? Does the concept of culture impact dispute resolution mechanisms, either in process or outcomes?

In its usual context, culture is equated to "*refinements of a civilization,*" i.e. art and literature.¹¹ But the "*broader conceptions of culture, however, embrace factors such as relations, expectations and values of a group that shape how players in the group negotiate and resolve disputes.*"¹²

As espoused and broken down by one author, there are two dimensions to culture: general legal culture, on one hand, referring to national culture reflected in the legal system, that is, civil law and common law culture; and on the other hand, culture as embodied in "*shared norms and expectations*" that are produced over time by repeated dealings among legal participants to the process, i.e. legal actors like lawyers. According to Ginsburg, the culture of arbitration thus "*typically refers to the gradual convergence in norms, procedures and expectations of participants in the arbitral process.*"¹³ He cites the work of Professor Kaufmann-Kohler demonstrating the areas where convergence takes place, e.g. role of tribunals in procedural matters.

With the phenomenon of convergence in the "*norms, procedures*

¹¹ Amy, J.S., 2007. Consideration of "Contracting Culture" in Enforcing Arbitration Provisions. *St. John's Law Review*, **81**(1), pp. 123-172.

¹² Ibid.

¹³ Tom Ginsburg, The Culture of Arbitration, *Vanderbilt Journal of Transnational Law* (October 2003), 1 Vol. 36: 1335.

and expectations” in the arbitral process taking roots in a wide array of jurisdictions, it is possible for a country’s culture, whether the legal system or norms, to be adapted into what may be referred to as a “civilization” of arbitration. Co-opting a culture, in this sense, is by way of effects of one’s culture on arbitrator behavior in rendering arbitral award. But one can ask how strongly does this effect influence the process and the outcome? Is it possible to co-opt culture without in the least affecting the process and the outcome integrity? As an author notes:

*“Building a civilization of arbitration thus implies seeking high achievement, while maintaining cross-cultural encounters as a constituent (not peripheral) element. Xx The civilization of international arbitration should thus have a unifying global vision and coherent legal system, yet maintain exchange with other external or national legal systems.”*¹⁴

Recognizing that cultural attributes may strongly influence a legal system,¹⁵ thereby influencing substantive and procedural laws of a given country, studying such influences and making that information known to the public will allow arbitration users the opportunity to make informed decisions when exercising the party-autonomy benefit of choosing an arbitrator.

With the era of globalization and other jurisdictions clamoring to participate in shaping the discourse in international arbitration, adhering to purely Western or European insularism seems to be counterintuitive. It just seems to make sense to recognize legal pluralism as a legitimate option. The recognized gap in research, advocacy, and scholarship in arbitration infrastructure and quality as regards the Asian region is not surprising considering that empirical research to contextualize arbitration is mostly done using Western paradigms and demographics. Bridging this

¹⁴ Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 Penn St. L. Rev. 1227 (Spring 2009), citing Catherine Rogers, *The Vocation of the International Arbitrator*, 20 Am. U. Int’l. L. Rev. 957, 1020 (2005).

¹⁵ Lara M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 ILSA J. Int’l & Comp. L. 57.

gap will allow for the growth of an arbitration paradigm that reflects the cultural complexities of the Asian region. To recognize that cultural differences can and do impact the formal legal structure of a country through national and procedural laws that reflect its cultural values will pave the way for determining which aspects of the legal structure may be amendable to harmonization or to be retained under the rubric of legal pluralism and legitimate differences.

Conflict Resolution Styles— the Collectivist and Individualist

As shown by a wealth of research in the area of cross-cultural differences, it is almost a given that individualistic cultures reflect a leaning towards autonomy and distinguishing oneself from the rest of the in-group, an orientation that puts personal goals ahead of the goals of the group to which one belongs. In contrast, collectivistic societies are defined by social connectivity and interdependence with immediate members of the in-group with “*emphasis on collective goals, rather than personal goals* (Oyserman et. al. 2002; Triandis 1989, 1995).”¹⁶ Given this tension, one can ask if this characterization of culture translates to the decision making process or affects the conduct of an arbitrator when deciding a dispute before him.

It has been found in some research, however, that the cross-cultural differences between perceived collectivistic and individualistic societies do not exist in a vacuum, and in fact show nuances within each in-group.¹⁷

¹⁶ Takemura, Kosuke, Yuki, Masaki, Maddux, William and Ohtsubo, Yohsuke, Two Types of Collectivism: Intergroup Relationship Orientation in Japan and Intergroup Comparison Orientation in the US (September 2007). INSEAD Business School Research Paper No. 2007/54/OB. Available at <http://ssrn.com/abstract=1021242>.

¹⁷ Examples of collectivist behavior include “being concerned with the in-group's fate and giving its goals priority over one's own; maintaining harmony, interdependence, and cooperation and avoiding open conflict within the in-group; reciprocity among in-group members, who are related in a network of interlocking responsibilities and obligations; self-definition in terms of one's in-groups; and distinguishing sharply between in-groups and outgroups.” In contrast, features associated with individualism include having greater concern with personal than in-group fate and giving personal goals priority over in-group goals; feeling independent and emotionally detached from one's in-groups; accepting confrontations within in-groups; and defining the self independently of one's in-groups.” (Eun Rhee, James S. Uleman, and Hoon Koo Lee, Variations in Collectivism and Individualism by In-group and Culture: Confirmatory Factor Analyses, *Journal of Personality and Social Psychology*, 1996, Vol. 71, No. 5, 1037-1054)

According to one study comparing North Americans (US) and East Asians (Japanese), it was found that “*different types of collectivism may predominate in different parts of the world*”¹⁸. In a surprising finding, the authors determined that “*North Americans are no less group-oriented than East Asians.*”¹⁹ However, the nuanced study showed that “*while both cultural groups are highly group-oriented, the bases/motivations for group behaviors may predominantly differ.*”

What this means in practical terms is that regardless of one’s perceived orientation as a collectivist or individualist, the studies showed that benefits derived by the “actor” from the social orientation — whether as a collectivist or individualist — plays a role in the manifested behavior. This finding is reinforced in other related literature involving research relating to cross-cultural differences as it impacts international arbitration.

Internalizing External Expectations

Arbitrator decision-making process has not been a well-known subject of research as opposed to judicial decision-making process, where a wealth of research has shown that there is a direct relationship between the judge’s perception of his role as adjudicator and the decision-making process. It is believed that this relationship stems from the judge’s perceived external expectations ascribed to his role as a decision-maker and ultimately these expectations are internalized as a “*role morality that shapes and guides*” the judge’s conduct. Research shows that “*role morality*” drives a judge’s “*beliefs about the criteria which are legitimately a part of decision making.*” To give an example, these beliefs may include perceptions of attributes of what may be considered a “*virtuous arbitrator*”. Is an arbitrator supposed to “*reconcile disputing parties*” or simply to “*adjudicate between right and wrong*”? Among judges, it has been shown that “*role orientation*”, “*values*”, “*character of the environment*” affect “*judicial and sentencing behavior*”.²⁰

¹⁸ Supra, note 16.

¹⁹ Ibid.

²⁰ Shahla F. Ali, the Morality of Conciliation: An Empirical Examination of Arbitrator “Role Moralities in East Asia and the West (March 12, 2010). Harvard Negotiation Law Review, Vol. 16, Spring 2011. Available at SSRN: <http://ssrn.com/abstract=1569340>

It is not surprising then that research of this nature is primarily focused on judges and judicial processes, the court being the mainstream institution for settling disputes.²¹ It was therefore groundbreaking when, in 1991, 1992, and again in 2006, Christian Buhring-Uhle developed and conducted a survey “*examining how and why international arbitration cases are settled and the role, if any, that arbitrators play in the settlement process. The survey asked participants in international commercial arbitrations for their perceptions regarding how they view their role in promoting settlements and the way in which amicable settlements are facilitated.*”²²

Even Uhle himself recognizes the inherent limitation to the survey and must viewed as representing the "classical," or "Western style" practice only and expects that a parallel study concerning East Asian arbitrators should be conducted to complete the picture.²³ Answering this challenge, Ali Shahla drew from the survey used by Uhle and using a sample pool consisting of “*lawyers, in-house counsel, professors and arbitrators in East Asia and arbitrators from North America and Europe,*” Shahla sought answers to address two related issues, i.e. how “*diversity of culture and worldview give rise to distinct understandings and expectations regarding the role of arbitrators in promoting settlement?*” and “*are global economic and legal forces simultaneously harmonizing various approaches to arbitrator involvement in settlement proceedings?*”²⁴

Shahla’s research showed that:

²¹ The courts are considered “mainstream” perhaps because there is an odd comfort in the thought that “Judges derive their jurisdiction and authority from the state; whereas arbitrators derive their jurisdiction from parties.” Franck, Susan D., *The Role of International Arbitrators*. ILSA Journal of International & Comparative Law, 2006. Available at SSRN: <http://ssrn.com/abstract=885381>Citing Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and Greentree Financial Corp. v. Bazzle*, 41 CAL. W. L. REV. 1, 45 (2004); *George Day Constr. Co. v. United Bd. Of Carpenters*, Local 354, 722 F.2d 1471, 1474 (9th Cir. 1984).

²² *Supra*, note 20.

²³ *Id.*

²⁴ *Id.*

The result of both the in-depth interviews and the 115-person survey indicate that, while traditional notions of role orientation influence perceptions of what constitutes a "virtuous arbitrator," international dialogue and collective standard setting play an important role in harmonizing traditionally divergent approaches toward the arbitration process. The survey indicates that on the whole, arbitrators from Eastern and Western regions have largely congruent perspectives when it comes to their role in promoting settlement in the context of international arbitration. At the same time, arbitrators from East Asia report a slightly higher degree of involvement in assisting parties to reach settlement agreements. Because of the flexible structure of the international arbitration system based on a Model Law framework, procedural variation pertaining to differing preferences for conciliatory or adjudicatory approaches to arbitration can coexist with a relatively high level of substantive legal uniformity across regions.

In essence, Shahla's research concludes that regardless of the part of the region where arbitration is practiced, arbitrators have individual perceptions of "what it means to arbitrate" or to be a "good arbitrator" and these perceptions are influenced by ideas ascribed to "role-perception" and "virtue" which then translates to "contemporary practice". Nonetheless, region aside, the continuing "harmonization" of arbitration practice through "international commercial exchange" has ultimately allowed for an increase "arbitrator perceptions of the appropriateness of selected settlement interventions."²⁵

The findings from the surveys and interviews support the central theme of Shahla's research, i.e. that the importance placed on "settlement and relationship preservation" by arbitrators vary across culture or region and is reflected in "differing levels of emphasis" placed by the arbitrator on his role in the "settlement" of the dispute. On the other hand, where there is lesser variance on levels of emphasis, it was found that a higher level of "harmonization" exists as regards components of arbitration that touch on "international principles of arbitrator neutrality" that originates

²⁵ Id.

from “*international norms and guidelines.*”

Neutrality as an International Norm

While neutrality may be difficult to actually quantify, various arbitration institutions have tried by crafting their own rules to govern arbitrator challenge. Although these procedural rules have their peculiar permutations, they basically follow a theme, with varying degrees of emphasis on certain aspects.

The UNCITRAL grounds for challenging an arbitrator where perception of ability “*to exercise in independent judgment*” or “*justifiable doubts*” as to impartiality and independence “*touch on notions of proper behavior shared with other arbitral systems.*”²⁶ Take for instance the ICC Rules, which cover arbitrator independence but not impartiality; while the UNCITRAL Rules and the Model Law, the AAA/ABA Code of Ethics, the IBA Guidelines, and the LCIA Rules address both issues of impartiality and independence. Across the board, disclosure by the arbitrator of “*circumstances*” that may reflect lack of impartiality and independence is almost uniform amongst most major arbitration centers/institutions. Of note is the provision under the LCIA Rules and ICSID Convention addressing the nationality of an arbitrator where if the disputants are of different nationalities, no arbitrator from the nationalities of either of the parties may be appointed. In glaring contrast to that nationality rule bias, the UNCITRAL Model Law provides that, except when the parties expressly agree otherwise, “*no person shall be precluded by reason of his nationality from acting as an arbitrator.*”²⁷

Codes of Ethics crafted by various arbitral institutions have likewise elevated individual conceptions of “*morals*” and “*ethics*” into defined norms and standards, and play an important role in reigning in arbitrator conduct. However, it must be noted that these ethics rules do not form part of mandatory municipal laws and are therefore not binding unless the parties have expressly agreed that they form part of the

²⁶ William V. Park, Arbitrator Integrity: The Transient and the Permanent, San Diego Law Review, VOL. 46: 629, 2009.

²⁷ William V. Park, Arbitrator Integrity: The Transient and the Permanent, San Diego Law Review, Vol. 46: 629, 2009.

arbitration agreement or clause.²⁸

Cross-Cultural Differences and Arriving at the Arbitral Award

In most three-member tribunals, it is common for a party to choose an arbitrator of the same nationality “with the understanding that the party-appointed arbitrator will inform the tribunal of the appointing party’s legal and business culture” but choose a chair, or a sole arbitrator, as the case may be, of a different nationality from that of both parties. Specifically, the party-appointed arbitrator acts as a “cultural intermediary and translator.”²⁹ In the words of Prof. Ilhyung Lee of MU-Columbia, this is expected to “neutralize nationalistic favoritism.”³⁰

In a study conducted to explore “the effects of cultural difference on arbitrator decision making and the mechanisms leading to these differences,” researchers compared Chinese and American arbitrators to sample both Western and Asian arbitration styles. This study started on the premise that there are various factors that may influence arbitrator decision-making process. These factors include: “the gender of the grievant (e.g. Bingham & Mesch, 2000), the gender of the arbitrator (e.g. Caudill & Oswald, 1993), the age and experience of the arbitrator (Bemmels, 1993), underlying principles held by arbitrators (Bazeman, 1985) and attribution process (Bemmels, 1993).”³¹ But it nonetheless recognizes the fact that, as in other research, the sample group being studied is from Western demographics.

Current literature on cross-cultural attribution research shows that despite being provided the same set of information, individuals from different cultures may nonetheless give different explanations (Miller, 1984, 1987; Morris & Peng, 1994; Stevenson & Stigler, 1992; Choi, Dalal, Kim-Prieto, & Park, 2003). It is found that Americans tend to attribute

²⁸ T. Varady, J. Barcelo III, A von Mehren, *International Commercial Arbitration, A Transnational Perspective*, p. 300, 3rd Ed.

²⁹ Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator (with Survey Results)*, 31 *Fordham Int’l L.J.* 603 2007-2008.

³⁰ *Ibid.*

³¹ R. Friedman, W. Liu, C. Chen, S. Chi, *Chinese and American Arbitrators: Examining the Effects of Attributions and Culture on Award Decisions*, available at: <http://ssrn.com/abstract=728>

reasons to an individual's behavior because of his disposition (e.g. he is inherently unreasonable), while Asians tend to make more situational or contextual attributions (e.g. external factors caused the behavior — he had an accident which caused him to be late).³²

This particular study concludes that, as reinforced by other studies, arbitrator decision is influenced by attribution process, i.e. *“based on information at hand, and personal beliefs and motivations, people usually first interpret what causes outcomes and then they react to the outcome based on those causal judgments (Kelley & Michela, 1980).”*³³

Essentially, based on attribution theory, arbitrators would render an award, partly based on who caused or who created the problem that led to the dispute. The study shows that arbitrators render higher awards to the complaining party when presented with evidence showing that the problem was internally caused rather than when the action was externally caused. This occurred in both Chinese and American arbitrators³⁴

The study predicted and found that:

Chinese arbitrators punish bad performance more heavily than do American arbitrators. Second, we examine the effects of attributions on awards. Prior theory suggests that Chinese tend to have more external attributions for events, which should make Chinese arbitrators more lenient than American arbitrators. We find the opposite – that Chinese arbitrators have more internal attributions for poor performance than do Americans. Moreover, where evidence is mixed (evidence is provided for both internal and external attributions), American arbitrators pay more attention to external causes, while Chinese arbitrators pay more attention to internal causes.

Beyond the Arbitrator — Transforming Arbitration Structure in Asia

It seems that for an Asian jurisdiction to become an arbitral site of choice, (and hopefully appointment of an arbitrator from that region) it should follow European or Western legal paradigms, as for instance

³² Ibid.

³³ Ibid.

³⁴ Ibid.

English law and New York law being the preferred choice of law in arbitration clauses; London, Paris, New York and Geneva as most frequent seats of arbitration.³⁵ This may be particularly true of Singapore, for instance, which has become a leading arbitration hub in Asia by modeling Western-centric legal paradigms, and admittedly the only Southeast Asian country competing with arbitration centers in Europe and the West. It is proposed that without necessarily being co-opted by the European-centric or Western-centric legal paradigms, an Asian country may still develop its arbitration infrastructure to become an arbitration seat of choice.

Recognizing that cultural attributes may strongly influence a legal system,³⁶ thereby influencing substantive and procedural laws of a given country, such influences may be studied so that arbitration users are not surprised or become totally afraid of them that they shy away from culturally unfamiliar regions. For instance, procedural outcome may be based on cultural expectations of the legal actors,³⁷ e.g. whereas an American lawyer and English lawyer may have different standards when it comes to discovery procedures, for instance, despite both coming from common law legal culture, a civil law East Asian lawyer may expect a different approach based on an inquisitorial and conciliatory paradigms.³⁸

With commercial transactions expanding into Asia, arbitration will surely have international elements whether it pertains, for instance, to the nationality, background, and conception of justice by any of the parties. The cultural contexts within which these elements operate will likewise influence the synergy of the parties in that dispute resolution forum, as for instance in arbitration.³⁹ Indeed, cultural complexities and differences have been shown to affect arbitration quality as perceived by Asian and Western arbitrators. Christian Bühring-Uhle was the first to delve into the

³⁵ Loukas A. Mistelis for ITA, *Arbitral Seats: Choices and Competition* (26 Nov. 2010). Available at: <http://kluwerarbitrationblog.com/blog/2010/11/26/arbitral-seats-choices-and-competition/>.

³⁶ Lara M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 *ILSA J. Int'l & Comp. L.* 57.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Amanda Stallard, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 *Ohio St. J. on Disp. Resol.* 463.

issue of how and why arbitration cases in the West are settled, and what extent of the settlement process may be attributed to the role of the arbitrators. Again reflective of Western/European-centric perspectives, Uhle conducted his pioneering research using survey designs with European and American participants to international commercial arbitration. Building on Uhle's work, Shahla F. Ali conducted open-ended interviews between 2006 and 2007 to examine whether diversity and globalization influence the practice of international arbitration, this time, in East Asia and how.⁴⁰ In her own work, Lara M. Pair suggests that culture indeed plays a distinct influence even in the most experienced lawyer or arbitrator, this despite the continuous efforts to harmonize procedural rules governing international commercial arbitration; not to mention the deliberate vagueness of some rules meant to be international standards like the UNCITRAL rules, purposely to allow arbitral tribunals to exercise their discretion without prejudice. Notwithstanding the increasing globalization and dissemination of information on other legal systems, differences in culture have an effect and continue to play a role.⁴¹

I suspect that part of the problem for jurisdictions less likely to be chosen as arbitration seat is the lack of judicial precedents. When courts are faced with actions for interim measures during an arbitration proceedings or actions to enforce or set aside an arbitral award, the lack of experience as curial courts, the country not being the seat of arbitration, works against their working knowledge. There is a need to break away from this seeming vicious cycle of familiarity dependent on actual experience as curial courts. The courts, despite lack of experience, must nonetheless be actively engaged in educating themselves about the nature and nuances of arbitration so that when needed, they are able to facilitate the arbitration process. In her book *The New Legal Order*, Anne-Marie Slaughter speaks of "judicial comity" where judges from different jurisdictions are able to engage each other in a global dialogue to

⁴⁰ Shahla F. Ali, *Approaching Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West*, 28 *Rev. Litig.* 791 (2009).

⁴¹ Lara M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization*, 9 *ILSA J. Int'l & Comp. L.* 57.

understand specific cases and thereby learn from each other even on a level of “clashing” opinions as part of recognizing the other as “equals in a common enterprise.”

I submit that there is a gap in research, advocacy and scholarship in arbitration infrastructure and quality with regards to the Southeast Asian region. This gap is not surprising and may even be expected, considering that, “as a geographical entity, Southeast Asia is a very recent construct, which was unfamiliar to the world up to just sixty years ago.”⁴² With all the other economic and political challenges this region faces, improvement of its international arbitration quality may not be a top priority. However, with the advent of the coalition of the ASEAN (The Association of the Southeast Asian Nations), there is no better time than now to address this issue. I submit that there should be an arbitration paradigm that reflects the cultural complexities of this region. I propose that further research should be done by employing the critical methodology developed under the TWAIL (Third World Approaches to International Law) movement. According to Makau Mutua:

TWAIL is driven by three basic, interrelated and purposeful objectives. The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.⁴³

Although the use of the analytical tools developed under TWAIL to analyze a gamut of models is not unique,⁴⁴ its applicability to evaluate international arbitration quality in Southeast Asia specifically for the purpose of developing the region’s arbitration infrastructure in order to

⁴² Kevin YL Tan, *History and Culture: Complexities in Studying Southeast Asian Constitutionalism*, 5 *Nat’l Taiwan U. L. Rev.* 187.

⁴³ Makau Mutua, *What is TWAIL?*, 94 *Am. Soc’y Int’l. L. Proc.* 31.

⁴⁴ TWAIL tools had been used in analysis of issues involving indigenous peoples' rights within the current international legal system and third world perspectives of foreign investment, among others.

become a preferred arbitration seat of choice is novel.

The TWAIL movement is rooted in the seemingly sweeping antagonism towards the construction and universalisation of international law. The opposition is grounded on the argument that the West or Europeans have utilized the regime of international law to subordinate the non-European peoples and societies.⁴⁵ TWAIL's primary overt aim is to introduce new or alternative concepts into the international legal arena, beyond the existing traditional lexicon, using the historical approach as the primary tool to achieve this goal. The underlying goal for the introduction of new concepts is to address the missing pieces and biases in the current international legal system, which seems to exclude the non-European or non-Western perspective. A historical analysis of the development of the law itself is seen as the first track of the TWAIL discourse while the second discourse is to deconstruct the pervading concept of international law as a tool for “colonization or oppression.”⁴⁶ By so doing, the TWAIL movement aims to re-write traditional international law and transform it from a tool that paved the way for hegemonic regimes into a tool that provides the third world its own voice and allows it to become its own actors in the international arena.⁴⁷

In the same manner, by doing a historical analysis of the development of international arbitration laws in the Southeast Asian region, we can introduce new or alternative concepts into the international arbitration arena, beyond the existing traditional lexicon. This research, however, must go beyond mere “trenchant critique”⁴⁸ of the contemporary international arbitration regime and practice by merely reconceptualising and restructuring international arbitration practice to reflect the cultural complexities of the third world voice,⁴⁹ specifically, the Southeast Asian region. To recognize that cultural differences have an effect on the formal

⁴⁵ *Supra*, note 13.

⁴⁶ Seth Gordon, *Indigenous Rights in Modern International Law from a Critical Third World Perspective*, 31 *Am. Indian L. Rev.* 401 (2006-2007).

⁴⁷ *Ibid.*

⁴⁸ Andrew F. Sunter, *TWAIL as Naturalized Epistemological Inquiry*, 20 *Can. J.L. & Juris.* 475 (2007)

⁴⁹ David P. Fidler, *Revolt Against or from within the West? Twail, the Developing World, and the Future Direction of International Law*, 2 *Chinese J. Int'l L.* 29 (2003).

legal structure of a country through national and procedural laws that reflect its cultural values will allow for determining which aspects of the legal structure may be amendable to harmonization or to be retained under the rubric of legal pluralism and legitimate differences.

A 2010 Survey conducted by the School of International Arbitration sponsored by White and Case LLP sought to determine which factors, and at what rate, influence corporations' choices for seat of arbitration. At 62%, the most important factor is the formal legal infrastructure at the seat including both the national arbitration law, the track record in enforcing agreements to arbitrate and arbitral awards in that jurisdiction, and its neutrality and impartiality. With regard to the general infrastructure of a seat of arbitration, cost is the most important aspect that influences that choice of seat at 42%, followed by good transport connections at 26% and hearing facilities (including translators, interpreters and court reporters) at 21%. Cultural familiarity is also an important factor at 10%.⁵⁰ Building further on this research, I would like to explore how culture affects the formal legal structure of the Southeast Asian countries being compared and how arbitration users evaluate cultural familiarity as a factor in choice of arbitration seat, in general, and party-appointed arbitrator, in particular.

Most Southeast Asian countries have made efforts to harmonize their arbitration laws with that of existing international conventions and treaties, in hopes of obtaining competitive advantage as a seat of arbitration, thereby adding avenues of promoting economic development for each country. However, much remains to be done in catching up with international trends and best practices where international arbitration is concerned.

As has been stated, there is predominant literature that legal culture also affects procedural constructs of a country differently. Civil and common-law lawyers reflect this in their differences in procedural approach to dispute resolution, including in litigation. Although, in general, procedure is more relaxed in arbitration proceedings and is predominantly driven by party choice compared to litigation, the

⁵⁰ Loukas A. Mistelis for ITA, *Arbitral Seats: Choices and Competition* (26 Nov. 2010). Available at: <http://kluwerarbitrationblog.com/blog/2010/11/26/arbitral-seats-choices-and-competition/>

procedural law of the country where the arbitration takes place will be crucial when interim measures are sought by the parties during arbitration and thereafter during enforcement of an arbitral award. Given the close ties between legal culture and procedure, it is proposed that law existing purely to impede or cause delay in the arbitration process must be revisited, amended, or repealed; while laws that incidentally impede the arbitration proceedings but are in fact expressions of cultural or even societal values should either be maintained or re-evaluated for harmonization or assimilation.⁵¹

Ultimately, the further research should aim to push for policy and structural reforms that would improve arbitration quality and infrastructure in the Southeast Asian region. I argue that there should indeed be a third world paradigm to international arbitration that meets the needs and demands endemic to the region, e.g. the need for self-determination in terms of the development of “arbitration civilization” in this part of Asia by identifying which aspects of substantive laws and procedural norms of arbitration have been or continue to be influenced by culture.

⁵¹ See Philip M. Nichols, *Trade Without Values*, 90 *NWULR* 658.

Conclusion

In sum, although it is recognized that culture does influence arbitrator behavior, it is not a foregone conclusion. Inasmuch as arbitrators are products of their experiences and while acting as such arbitrator, may not be totally free from cultural bias, still being an arbitrator is an esteemed profession and repeat users of arbitration do believe that arbitrators play an important role as adjudicators. In recognition of arbitration's increasing level of sophistication across cultures, and mostly reflected in the growth in Asia, individuals who wish to become arbitrators submit themselves to rigorous trainings, some offered by arbitral institutions to which they wish to belong as members, as well as to the codes of ethics and procedural rules that confine their human "bias", attributed to cultural differences, to what may be considered as "reasonable." Bad behavior by an arbitrator during arbitration proceedings will of course not go unpunished by the parties that voluntarily trusted them to adjudicate their disputes. An arbitrator who violates his "duty of care" under the arbitration agreement or the institutional rules and codes of ethics chosen by the parties may be removed in a challenge proceeding. Ultimately, despite its nomenclature, a party-appointed arbitrator must remain neutral, i.e. show impartiality and independence, regardless of his cultural inclinations.