Kluwer Arbitration Blog

Does The "Culture" Of International Arbitration Serve Its Users?

Tomas Vail (Freshfields Bruckhaus Deringer LLP) · Friday, June 26th, 2015 · Institute for Transnational Arbitration (ITA), Academic Council

The 27th Annual Workshop of the Institute for Transnational Arbitration ("ITA"), which took place on June 17-18 in Dallas, Texas, examined "Subconscious Influences in International Arbitration". The Workshop was organized by co-chairs José Astigarraga of Astigarraga Davis (Miami), Professor Margaret Moses of Loyola University Chicago School of Law (Chicago) and Luke Sobota of Three Crowns LLP (Washington, DC).

In keeping with the theme, an illuminating panel, featuring a keynote speech by Professor Jeffrey J. Rachlinski of Cornell University Law School, focussed on the influence of human psychology on decision-making by arbitrators and empirical studies reflecting such influences.

Another key theme, however, emerged during the course of the Workshop: Is there a "culture" of international arbitration? If so, has it developed through careful, deliberate analysis or simply through habit such as the adoption of common law and/or civil law litigation practices?

Such questions have been and continue to be considered within the arbitration community, and were recently touched on by Professor Emmanuel Gaillard's discussion of the "Sociology of Arbitration" during the 29th annual Freshfields Arbitration Lecture.

Two panels of the ITA Workshop, one on procedural flexibility and one on advocacy and arbitral decision-making, addressed this recurring question.

Procedural Flexibility

First, a panel composed of Noradèle Radjai of Lalive (Geneva) and Fabiano Robalinho Cavalcanti of Sergio Bermudes Advogados (Rio de Janeiro) introduced the issue by examining whether, in the light of certain widely accepted practices, international arbitration truly offers procedural flexibility.

Whilst parties to an arbitration are often free to agree on the procedure to be followed (as reflected, for example, in Article 19 of the UNCITRAL Model Law on International Commercial Arbitration), they may not act on the opportunity to tailor procedural rules to fit the needs of each case.

Indeed, although certain aspects of arbitral procedure appear to be widespread in practice, there is a demonstrated discrepancy between the *experiences* and *preferences* of some practitioners. The 2012 Queen Mary/White & Case International Arbitration Survey on "Current and Preferred Practices in the Arbitral Process" demonstrates the following examples:

– **Submissions**: A sequential exchange of two rounds of submissions by each party is the norm, even though some practitioners would prefer wider use of only one round of submissions and simultaneous exchange to save on time and costs.

– **Witnesses:** Use of witness statements, party-appointed experts and questioning at the hearing by counsel are the norm, even though some practitioners do not find party-appointed experts to be vastly more effective than tribunal-appointed experts and would prefer tribunals be more involved in questioning witnesses.

– **Document production:** Requests for document production are the norm, even though some practitioners, particularly those with a civil law background, would prefer stricter (if any) disclosure and tend not to consider that documents obtained through document production materially affected the outcome of the case.

Why don't more practitioners tailor the arbitral procedure to meet their preferences? Are certain procedural aspects of international arbitration more widespread because they are a "necessary evil" or simply adopted as part of the "culture" of international arbitration?

One panel attendee, a London barrister, noted that more deviation from procedural norms could give rise to a later challenge to the award on procedural grounds. He also observed that a common culture among arbitration practitioners often arises as a result of shared mentors and training.

Another attendee, a Swiss arbitration counsel, suggested that the tribunal has the duty to maintain procedural flexibility, as a proposal by one party to deviate from a norm would likely be interpreted by the other party with suspicion. This view was echoed by a US-based arbitrator, who noted that it was the tribunal's responsibility to convince the parties to adopt certain procedures, such as applying the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

Reflecting on the role of (proliferating) arbitration guidelines, one panel attendee, a US arbitration counsel, observed that as more litigators become involved in arbitration there would be greater reliance on such guidelines.

Radjai closed the session by observing that guidelines may serve as a "lowest common denominator" or middle ground between parties from different legal backgrounds, and querying whether the parties might not be better off starting with a clean slate to formulate their arbitral procedure.

Advocacy and Arbitral Decision-Making

Another panel, moderated by Doak Bishop of King & Spalding LLP (Houston) and composed of Andrés Jana of Bofill Mir & Alvarez Jana (Santiago), June Junghye Yeum of Clyde & Co LLP (Singapore and New York), David Brynmor Thomas of Thirty Nine Essex Street Chambers (London) and Laurent Lévy of Lévy Kaufmann-Kohler (Geneva), focused on the subconscious influences on advocacy and judging which might arise from differing national and legal backgrounds.

Lévy opened his remarks by citing a phrase often attributed to French Prime Minister Édouard Herriot: “Culture is what is left when everything else is forgotten.” In a similar vein, Brynmor Thomas observed that, in respect of international arbitration culture, practitioners behave based on what they learned first.

Lévy noted that there is now clearly an international arbitration culture as reflected in a consistent approach to advocacy – although he added that skilled advocates are chameleons, able to adapt their styles of advocacy to the different legal backgrounds of tribunal members and skilled arbitrators should similarly be able to adapt to the backgrounds of the parties.

Echoing comments from the previous panel, Jana observed that arbitrators were suspicious of idiosyncratic arguments and approaches to arbitration, valuing certainty and predictability in proceedings.

Reflecting on Bishop’s question as to whether an arbitrator’s background would influence how witness testimony is received, Lévy cited the principle of *testis unus testis nullus* (“one witness is no witness”) and observed that the principle continues to apply in parts of the Arab world. Lévy further noted that French court procedure tends not to give much weight to witness statements and, in civil litigation matters, only allows witness statements where there is a low value in dispute.

Yeum agreed that there is a culture of international arbitration, but noted that Asian users of arbitration often fail to understand that culture. She described an arbitration where the parties had differing understandings of their document retention obligations, and queried whether it would be proper for the tribunal to sanction the party which was less experienced in international arbitration.

Yeum also noted that other cultural norms might conflict with the culture of international arbitration as it is commonly understood. For example, Western arbitration practitioners emphasize the value of an individual’s honesty, whereas aspects of Asian culture focus on loyalty and the needs of the community. Differing cultural values therefore need to be taken into account in arbitration practice.

An Answer?

The question regarding a “culture” of international arbitration and how it has come about was present throughout the Workshop, although most directly addressed in the two panels described above.

The commonly expressed view was that there is indeed a “culture” of international arbitration. But in order for international arbitration to continue to serve its users, practitioners need to challenge themselves to make sure their approaches continue to meet the parties’ needs, whether in respect of arbitral procedure, advocacy or otherwise. This will become more and more important as new users increasingly get involved in international arbitration.

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This entry was posted on Friday, June 26th, 2015 at 11:19 pm and is filed under Advocacy, Arbitration, Conference, UNCITRAL Model Law
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