Kluwer Arbitration Blog

Arbitrators Don’t Speak Esperanto: The Difficulties and Dominance of English as a Procedural Language in Arbitration

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The claim that arbitrators do not speak Esperanto may seem so obvious that it should not be stated at all. The artificial language was conceived in the late nineteenth century by Ludwik Lejzer Samenhof as a simple, neutral language that was not tied to any one culture. People of different national and ethnic groups would be able to adopt it in international or intercultural relations without any of them having the linguistic, cultural and political advantage of speaking their own language and imposing it on others. A common language held out the hope of a common understanding. These days the study of Esperanto, with perhaps only a few hundred thousand speakers globally, is a largely esoteric pursuit, mainly the preserve of obscure idealistic societies. The Vatican may have approved it for use in masses, but it certainly does not figure in the statistics of leading arbitral institutions.

Yet arbitration might be thought the paradigm case for the adoption of Esperanto. Arbitral apologists tirelessly highlight its unique strengths as a neutral forum of dispute resolution, welcoming to users of all nationalities and legal cultures. Supporters of the admittedly controversial *lex mercatoria*, such as the late Emmanuel Gaillard, would even argue that it should develop not only transnational procedural practices but also distinct standards of public policy and principles of substantive law that do not originate in any single national legal system. To break the fetters of domestic legal practice, a common language that transcended national boundaries, might seem the necessary next step. Only then could users participate on a level playing-field.

To users from the same or closely related cultures – legal, political or economic – there will often be an obvious choice of procedural language. Even beyond domestic arbitration, for example, where a German party brings claims against an Austrian party in a Zurich-seated arbitration, everyone involved may be happy to adopt German as the language of arbitration. Given similarities in their civil law cultures, the parties will also likely be less concerned to give up peculiarly national legal rules and practices in the proceedings. However, arbitration also aspires to be the preferred forum for users from very different legal cultures and parts of the world. The institutional statistics suggest that, as the notionally global language, English stands in for Esperanto as the procedural language of choice. For example, SCC statistics for 2020 record that well over 40% of proceedings were conducted in English, while the ICC statistics for 2019 record that 79% of awards were rendered in English, indicating that English was the language of the proceedings.

This is an effect of the dominance of English as the *lingua franca* of the global economy as well as the preponderance of common law in international contracts and the success of London and U.S.

law firms in commercializing arbitration. More broadly, it may also reflect the geopolitical and cultural dominance of some anglophone countries. These factors are not immutable. In particular, there is no strictly legal advantage in civil lawyers' adopting English because it is almost never the original language of their laws and jurisprudence. In 20 years' time, a piece such as this may focus more on Spanish and Mandarin than English, just as 40 years ago it would have attached greater weight to francophone arbitration.

English is no neutral Esperanto. It is the product of a rich history or histories in different parts of the world and is spoken differently, to widely differing standards, and with varying levels of success across the globe. Legal English is the product of a long tradition of common law jurisprudence and legislation. English cannot divest itself of a millennium of legal usage to meet the needs of disparate arbitration users. The occasionally grumpy civil lawyers who bemoan common law rites of document production and cross-examination in arbitration, might consider that the predominance of English facilitates those very practices: there are well-established names for them. They may be referred to without the inconvenience of prior translation and the awkwardness that often afflicts translated legal terms. The German word "Prozessstandschaft" – where a person pursues the claim of another person, for example, as an assignee – is off-putting to any German speaker without legal training. It is hard to translate and must be propped up with a barrage of footnotes and examples if it is to be used in anglophone international arbitration. In contrast, to talk, in a similar context, of the assignment of claims among assignors and assignees has a more familiar, if deceptively simple, ring to it, and so the discussion drifts towards English law principles.

Wider economic and cultural trends explain the dominant role of English in arbitration, but the choice of a common language does not of itself ensure effective communication. How can English operate as the language of international proceedings? The subject would provide rich pickings for linguists, but a few tentative thoughts are sketched here. To a degree, arbitration English has emerged as a distinctive largely non-technical, mid-Atlantic form of legal English. By the standards of legal usage, it is quite informal. It is encountered in the memorials of leading international law firms, in the usage of arbitrators and counsel who routinely deal with them professionally, and the reports of the major arbitral institutions. English and U.S. terms appear side-by-side: briefs are filed, "direct examination" replaces "examination-in-chief", but equally case management conferences are held and "applications" has the edge on "motions". It is sufficiently friendly and accessible not to frighten off non-native speakers, but also so idiomatic as to be hard to imitate.

Nonetheless, it is imposed on those who have not mastered the idiom. Witness statements, especially by non-native speakers, are often more heavily edited by counsel than the witnesses, with just one or other unidiomatic phrase left to give a flavour of the witness's true locution. Expert reports are similarly edited, unless by major consultancies or accounting firms whose style resembles that of international law firms. The role of hearing interpreters is rather overlooked. Arbitrators and counsel usually stop at forming a vague impression that the interpreters were "good" or "bad". Yet, it concerns access to justice that some language groups might be better able to participate in proceedings because of the better pool of available interpreters, while others are disadvantaged. However, the issue is rarely raised.

Where harmonization is impossible, subsets of English or Englishes, as linguists would have it, emerge. This goes beyond the petty banality of law firm style guides requiring London associates to leave out the U from "colour" because a dispute is governed by New York law. For example, the

English of the Zurich arbitration scene with its slightly academic Germanic ring is generally of a good standard but also distinctive in having evolved with only limited involvement of native speakers. Nor have the anglophone international firms made their mark in Switzerland, where they are barely present, as they have in Paris and Frankfurt. Swiss lawyers draft at one remove from the jargon of their anglophone counterparts. Such separation engenders fragmentation. Just as a barrister would struggle with the linguistic transition from the High Court in London to an *Ur*-Swiss M&A dispute in Basel, his Swiss colleague might shy away from an old-fashioned English shipping arbitration – and not just because Switzerland is landlocked.

Where linguistic challenges prove insurmountable, users fall back on what they can say rather than what needs to be said. This often happens when arbitrators are required to apply the law of a jurisdiction with which they are not familiar and whose language they do not speak. For example, in an English language arbitration, the main contract may be governed by Ukrainian law. The arbitrators, who may be Swiss, French and Czech, will then have to resolve questions under local law, not only of contract law but perhaps also of corporate or tax law tangential to the contractual dispute. Rarely are the translated authorities and expert opinions sufficient for this, especially if the lead law firms representing the parties do not have Ukrainian lawyers in their team. The common practice is to fall back on the contract, which is usually in English, and decide the case as narrowly as possible.

Less significantly, counsel and arbitrators may be constrained in deploying their full range of reference. It is proverbial that baseball and cricketing allusions do not travel. Finding a common denominator can prove difficult. The painfully limited jokes in James Bond films provide a topical illustration. Aside from the obvious difficulty that a series based around a two-dimensional vigilante loner is unlikely to inspire any great wit, only the most basic and sometimes crudest jokes will be comprehensible to a global audience.

The difficulties of language in arbitration cannot be reduced to a poor knowledge of foreign languages among users. The number of practitioners who can conduct proceedings in two languages is considerable and the number who can do so in three small but not negligible. Even so, the challenge remains that most practitioners are inescapably confronted with foreign languages much of the time. Practitioners must be sensitive to the difficulties of a polyglot world. It is no solution merely to plough on in some form of English. Regrettably, many arbitrations are conducted as if English were indeed Esperanto. Perhaps the proposition that arbitrators do not speak the language is so obvious as to have been overlooked.

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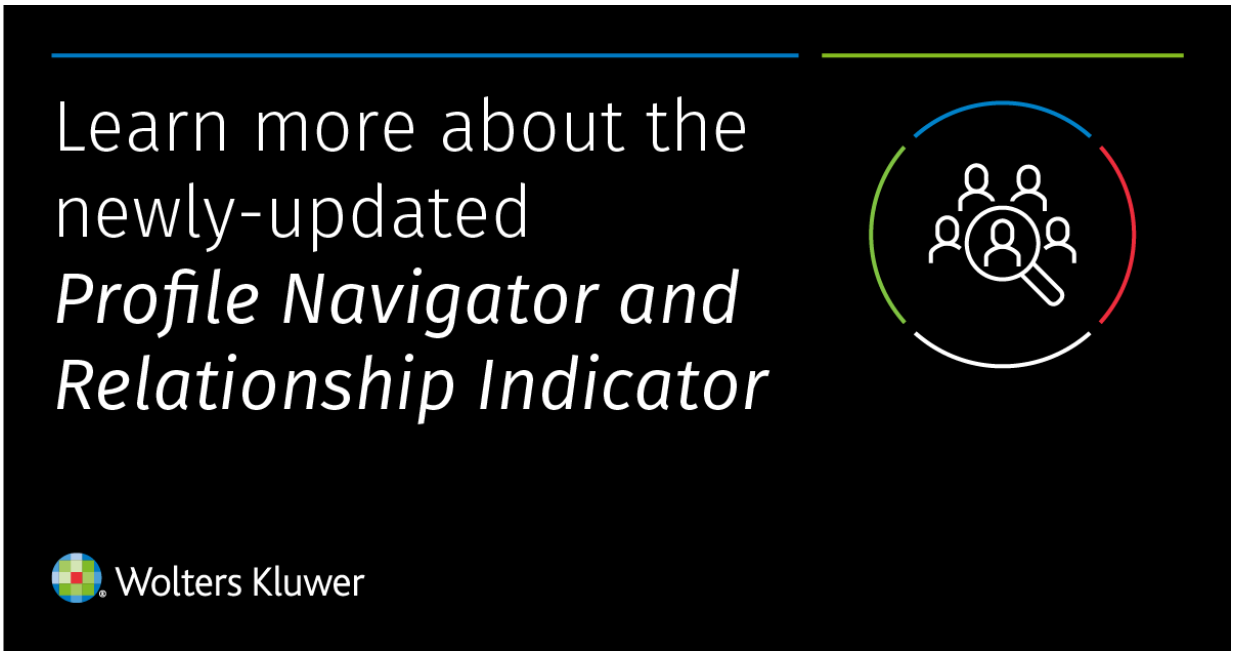

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