Kluwer Arbitration Blog

Making the Most of Diversity: In favour of Arbitral Liberalism

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The current quest for greater diversity in the world of arbitration has focused heavily on the proportion of women as well as different ethnic and cultural groups on arbitral tribunals, boards and committees of arbitral institutions, and, to a lesser extent, acting as lead counsel. Most recently, there have been timely demands to recognize and accommodate the needs of practitioners with disabilities. In contrast, less attention has been paid to whether the arbitral community has a sufficiently open culture of debate and discussion to welcome and absorb new voices and ideas. The ends of pluralism are not served by tweaking the demographic mix of practitioners yet expecting newcomers simply to submit to the prevailing rules and practices. All legal and academic communities benefit from a range of different opinions. The need for upholding that diversity is all the greater where the members of those communities are themselves diverse and likely to hold divergent views. In this post, we make a plea for a liberal culture that, in the best liberal traditions of free speech, encourages an open mind and open debate, where an argument is judged on its merits and not on who made it.

The theory and practice of international arbitration derive from the New York Convention, domestic legislation, the jurisprudence of courts and academic commentary as well as the demands and experience of practitioners and other users and stakeholders. In itself it is no bad thing that a measure of consensus has emerged. It would be disastrous if the courts of each state adopted radically different standards of public policy in applying the New York Convention. Nor would it benefit anyone if arbitral procedure differed materially according to the whims and prejudices of the arbitrator. Predictability is important in the law. By this token, any newcomer must expect to accustom himself with arbitral theory and practice. There is no need to reinvent the wheel. Nor should you presume to change something that you have not first understood.

And yet, however much certain bodies impose institutional rules or soft law instruments on it, arbitration belongs to no one, but is rather held in common by many. This was true in a bygone age when it was supposedly the preserve of retired English judges and French professors, and it is especially true today. The past decades have seen the rise of regional hubs, notably in East Asia, as well as the creation of new institutions and the rise of a new generation of practitioners in Asia, Eastern Europe, Latin America, the Middle East and Africa. Arbitration is polycentric. No single institution, law firm, group of law firms, or professional body can speak for arbitration as a whole. Nor is there a *de facto* single set of rules.

Respect is essential to any civilized debate. Good court etiquette can serve as a guide to arbitration

etiquette and more generally to the etiquette of arbitral debate. It is customary in Korea and to a lesser extent in England for counsel and parties to bow to the judge. Although they may not be happy with the decision, they do so out of respect for the institution of the court. This is not to say that the practice should be copied in arbitration, but if you have no respect for arbitration, you should probably not be advocating your client's case in that forum. Similarly, good etiquette requires advocates to treat their opponents with courtesy however harshly they argue on matters of substance. You may abhor the argument but should not abhor the person who makes it. These values apply as much outside the hearing room as inside it. You should not be intimidated by arbitral conventions and those advocating them, but nor should you dismiss them casually.

An open mind is essential. The fact that practitioners did something in a particular way yesterday does not mean that they should do it that way today, still less that they should do it again tomorrow. Arbitration should not be a stagnant practice but should accommodate what users want, need and even enjoy. Tradition, convention or "good practice" can be excuses for intellectual laziness and imposing the preferences of leading players over what users actually need. No one legal culture has a claim to unquestioned superiority over another. To a degree practice reflects this in combining some common law elements, such as extensive document production and witness examination, with a more civil law culture of written submissions.

Still, mainstream practice has recently come in for criticism for being supposedly in the thrall of a common law culture and a "big law" approach, involving protracted proceedings, excessive and onerous document production, relentless procedural applications, and merely disruptive arbitrator challenges *pour encourager les autres*. Those approaches will not do for every case and every party. Document production remains a particularly thorny subject among many civil law practitioners.

Success may have its roots in unexpected places. Apart from largely mythical English insurance lawyers who are proverbially under the spell of the English Civil Procedure Rules, most arbitration practitioners try to break with rather than adapt domestic court practice. Yet, the Gangnam Principles do just that. The name is a gentle nod towards the popular song "Gangnam Style" by K-Pop artist Psy. As the now unfortunate phrase would have it, the song achieved global *viral* success a few years ago, having been less than successful upon its release in Korea. In the video, the dapper, if mildly corpulent, artist leaps maniacally from side to side, balancing on alternate legs and brandishing an imaginary lasso, all to pounding electronic music. The macaronic Korean-English lyrics give a satirical take on life in Gangnam, an affluent district of Seoul.

It remains to be seen if the Gangnam Principles will prove a similarly popular Korean cultural export. Psy's hit inspired admiring imitations all over the world, even at MIT in Boston. Like the Prague Rules and institutional proposals for active case management, they offer techniques to manage delay and expense by tribunal interaction with the parties. The techniques draw on Korea's civil law culture and include shorter, frequent hearings in place of the more usual single, climactic evidentiary hearing. Each shorter hearing gives the arbitral tribunal the opportunity to work with the parties on whittling down the relevant and contentious issues. Other measures include witness conferencing for fact as well as expert witnesses and streamlined document production. The Gangnam Principles are an example of a possible solution from an unexpected source to a problem that affects users the world over.

Good ideas benefit everyone. The challenge is to ensure that they are given a fair opportunity to succeed. The arbitral community is more diverse than it has ever been, but it will not reap the

benefits, unless it is open to fresh thinking. No one who has a serious suggestion for improving the procedure should be turned away. This depends on free and open debate in which everyone both is and feels able to participate. No practitioner should claim superiority based on personal fame or legal heritage. However, maximum inclusivity in debates does not necessarily lead to a single universal solution. On occasion, people must agree to differ. There is no harm in this. In some cases, parties will prefer a heavyweight "big law" approach to a more conciliatory one. As stated at the outset, arbitration has no single centre, either legal or professional, and accordingly no single set of rules. A pluralism of approach is the predictable and welcome outcome. Arbitration is, after all, also known for its flexibility.

This entry was posted on Thursday, September 2nd, 2021 at 8:17 am and is filed under Arbitration Proceedings, Diversity, South Korea
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