Kluwer Arbitration Blog

In Search of Civilization – Uncovering Overlooked Manifestations of Homogeneity in International Arbitration: Accent and Language

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Civilization is a progress from an indefinite, incoherent homogeneity toward a definite, coherent heterogeneity.

Henry Spencer

International arbitration professionals are a strikingly homogenous population, as our recent 360 degree overview demonstrated. The demographic markers typically used to arrive at this conclusion are age, race, gender and national origin. While these fundamental indicators merit continued interrogation and attention, additional factors that have received less attention in the diversity discourse to date provide further insight into the social structure of the international arbitration practitioner population. Expressions of homogeneity that are less frequently discussed but may nevertheless constitute significant barriers to entry include language, accent, academic background and lifestyle. They are but some of the many different factors that contribute to the unconscious bias against members of our community that perpetuates homogeneity in international arbitration.

The Lingua Franca of International Arbitration

Despite the linguistic diversity of international arbitration stakeholders, the available statistics overwhelmingly identify English as the *lingua franca* of international arbitration, in both investor-State and international commercial arbitration proceedings. In 2022, 64% of ICSID cases were conducted in English, 7% in Spanish and 2% in French. Mindful that parties are permitted to select the language of arbitral proceedings, as well as the fact that investor-State arbitration by its very nature brings together parties of different nationalities, the dominance of English is noteworthy.

This becomes even more striking when viewed in conjunction with the regional distribution of parties, particularly mindful that it is possible to accommodate multiple languages within arbitral proceedings. Notably, the PCA records in its Annual Report for 2021 that the hearing in *Mason*

Capital LP and Mason Management LLC v The Republic of Korea was conducted in both English and Korean, with interpretation.

The 2022 ICSID annual report notes that "*[t]he largest share of cases registered in FY2022 involved States in South America (22%), followed by States in Eastern Europe and Central Asia (20%). New cases were evenly spread among Central America and the Caribbean, the Middle East and North Africa, and the Sub-Saharan Africa regions (12% each). South and East Asia and the Pacific region, and Western Europe accounted for 8% each. A further 6% of newly registered cases involved States in North America.*" Therefore, the parties' expression of language preference is not necessarily consistent with the regional identities of the arbitrating parties. This can be attributed to a variety of factors, notably to English being the vehicular language in international transactions, where parties routinely have different mother tongues.

On the commercial arbitration front, ICC statistics for 2020 show that 80% of awards were rendered in English. The HKIAC's 2021 statistics reveal that of arbitrations commenced in 2021, 78.7% of arbitrations were conducted in English, with 5.5% conducted in both English and Chinese, and the balance of 15.8% in Chinese. Further, the SCC's 2021 statistics indicate that English was the language of the arbitration in more than 40% of cases, with the balance conducted in Swedish. Regrettably, numerous other major arbitral institutions are silent on the language of the arbitration in relation to their respective caseloads. Absent such data, it is impossible to obtain a fuller picture.

The importance of English in international arbitration should also be seen in the context of the general spread of English – described by Tsedel Neeley in the Harvard Business Review as the "*fastest-spreading language in human history*" – across the globe. However, languages are not neutral and each is accompanied by its own cultural baggage. The dominance of English in international arbitration is important because of its affinity with the common law. A preference by parties and tribunals for the use of English in arbitral proceedings may translate into a preference for a common law style of advocacy and pleadings, for example. Promoting linguistic heterogeneity may therefore encourage the emergence of different styles of advocacy. This in turn may boost diversity amongst international arbitration professionals by changing perceptions of the desired profile of an international arbitration professional.

Navigating the Accent Hierarchy

The spread of English arguably reflects the cultural and political hegemony of a number of anglophone countries. This becomes apparent when looking at intra-language discrimination. Polish linguist Anna Wierzbicka describes the internal cultural baggage of English and the coexistence of what she coins "Anglo English", i.e. American English, British English and Australian English, as well as other varieties of English: Nigerian English, Indian English and Singaporean English. Notably, she argues that "*English as a language of international communication is closer to Anglo English as opposed to the latter varieties.*" [1)]

The dominance of the English language in international arbitration is accompanied by a hierarchy of accents in which such English is spoken. Discriminating against an international arbitration practitioner on the basis of their accent may be characterised as a form of national origin discrimination, and may therefore be considered to contribute to the uneven distribution of

arbitration practitioners and arbitrators across nationalities. Anecdotally, certain accents are perceived by tribunals and parties as more authoritative and legitimate than others, and there seems, unsurprisingly, to be a preference for native English speakers. But what does a native English speaker sound like?

The social capital of a number of anglophone countries effectively translates to a preference for an American, British or Australian accent over an Indian or Nigerian one, despite English being a widely spoken official language in the latter countries. In other words, even when spoken by speakers with the same level of fluency, certain accents are deemed crude while others are perceived as refined. This phenomenon has been described, in a different context, by Economic Times columnist Sandip Roy, who observed that "*if 'rock-star economist' Thomas Piketty spoke with a heavy Gujarati accent instead of a sexy French one, his literature festival appearances would be far less packed*."

Further, discrimination on the basis of accent is not confined to accents from a specific country. Taking British English as an example, research by Levon, Sharma and Ilbury on behalf of The Sutton Trust identified a "*hierarchy of accent prestige*", with the so-called 'Queen's English' or 'BBC accent' remaining dominant. Accent is regarded as a key indicator of socio-economic status and numerous social factors, including age, gender, sexuality, and more. Specifically, working class accents and ethnic minority accents were the lowest ranked accents among research responders, with 25% of professionals reporting that they had been mocked, criticised or singled out in work settings due to their accent.

These are but two of the many elements that may be viewed as impediments to diversity in international arbitration. However, the purpose of our publications on this topic is not simply to list sources of discrimination. Rather, it is to advocate for viewing diversity in international arbitration more holistically and encourage arbitral institutions to engage in the collection of further data to better inform the diversity debate. Focussing on specific forms of diversity, while extremely important, may by necessity lead to other forms of diversity being overlooked. As a result, a significant degree of homogeneity persists amongst practitioners despite attempts to improve diversity by targeting specific facets of diversity.

The answer to this problem is not to create a series of separate initiatives focussing on different variables. Rather, the answer lies in understanding diversity in intersectional terms. By developing awareness of lesser known forms of potential discrimination and challenging the perception that there is a fundamental preference for certain 'ideal' arbitration practitioners or arbitrators, we can reframe the diversity debate along broader lines. By creating parameters based on parties' actual requirements, ideally informed by data – as opposed to vague and loaded ideas of reputation and competence – we can create a more robust discourse on the need for diversity. Only by doing so can we hope to reach civilization.

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?1 Wierzbicka, Anna, 'The "Cultural Baggage" of English and Its Significance in the World at Large', *English: Meaning and Culture* (New York, 2006; online edn, Oxford Academic, 1 Sept. 2007), Section 9.6 English in the world Today.

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