

Chapter 3

THE IMPORTANCE OF RECOGNISING CULTURAL DIFFERENCES IN INTERNATIONAL DISPUTE RESOLUTION¹

Karen Mills, J.D., FCIArb., Chartered Arbitrator

Everywhere we look we read or hear about Globalisation. But what exactly does it mean in our daily lives? For some businesspersons, it means the opening of international markets for goods, services, and operations. For the western labor force it often means export of jobs. For lawyers it means more cross-border transactions and disputes. For arbitrators and mediators it means more cultural variety in the disputes we seek to resolve. But for all of us it means, or should, nay **MUST**, mean the necessity to understand and accommodate diverse cultures and all their ramifications.

In this 21st Century we are encountering cultural diversity at every stage of our business and personal lives, particularly when any cross-border aspect is involved. For the dispute resolution practitioner, it pervades all negotiations, mediations and arbitrations. Perhaps above all other players in the world economy, it is incumbent upon us, as arbitrators and mediators, to be the most sensitive to these cultural nuances, as our mission to resolve disputes can succeed or fail according to how well we can understand and accommodate them. Thus keeping this kind of diversity in mind should become automatic and all pervasive in the international dispute resolution arena.

¹ This paper is adapted from a paper presented at the CHARTERED INSTITUTE OF ARBITRATORS, MALAYSIA BRANCH INTERNATIONAL ARBITRATION CONFERENCE, held in Kuala Lumpur, 31 March - 1 April, 2006.

I. WHAT DO WE MEAN BY “CULTURE”?

There are various aspects to what may be referred to as “culture”, the most commonly understood being national or ethnographic culture, the culture of the country or ethnic group to which each of the parties to a dispute or transaction belong and/or in which their business or project is located.

But there are other aspects of life which may be categorised as “cultures”. Most fields of business or industry have their own particular culture, and there is often a characteristic corporate culture which may differ from company to company. There is, of course, the religious culture attendant to each belief, which normally will differ at least in part from sect to sect or community to community. And let us not forget differences in behavior between genders, or gender persuasions, which may also be characterised as a form or culture.

There may be different cultural aspects of life found in different geographic areas or ethnic groups residing within a single nation. Urban dwellers very often behave differently from, and have different expectations than, inhabitants of rural or agricultural communities. Even within a single city residents of different areas may have different behavioral or cultural patterns.

In each of these aspects the differences from one such culture to another may affect their manner of negotiation, style of attire, diet and cuisine, degree of formality and conduct in interpersonal relations, manner of communication, corporate responsibilities and powers, respect for law and legal systems applied, role of and respect for government and its officialdom, attitude towards corruption, towards contractual obligations, borrowing, lending and other financial matters, importance of family, ways of building relationships of trust, view of conflicts of interest, values, concept of time, approach to truth, and many other matters.

Every time we enter a country or other environment different from our own, if we have any sensitivity at all we immediately begin to notice some of the characteristic differences in behaviour of the inhabitants of such new environment. Normally the first we notice are those that hit our senses: sounds (language, accent, intensity,

music), sights (style, formality and color of attire and decor, architecture, and natural attributes), or smells (food, tobacco, hygiene, burning incense or oils). In Indonesia it is the subtle but pervasive aroma of *kretek*, clove cigarettes that announces one's arrival on her shores. Even before we leave the airport we often begin to get an idea of the style of interpersonal relations: how aggressively or respectfully do people interact with each other, and with us: do they shake hands, bow, push and shove or queue, ignore or nod to strangers, ignore or help others in need; how much personal space do they afford; how affectionate are they towards their companions; how loudly do they speak, do they tend more to smile or to frown; do they eat or smoke casually in public; do they hit or scream at their children? How well do the children behave? These are the differences of which anyone traveling abroad would need to be blind or insensitive not to take notice. But these are only surface matters. To resolve disputes among cultures we must look far deeper.

Ethnic or cultural *faux pas* may be excusable for a tourist, shopper or casual acquaintance, but they can be extremely detrimental, even fatal, to one's purpose for a prospective business partner and worse for those of us who are seeking to resolve a dispute in one form or another. In order to do this we must earn the respect of all parties involved, which invariably involves affording to them, their culture and their laws, the appropriate form of respect customary within their community.

The *bottom line* is communication. What we say and do, how we dress and act are all means of communicating not only our own culture, but also our understanding of and respect for that of others, and will affect how we are understood and how seriously we are taken. In order to ensure we give the message we wish and are respected, we must first understand what our behavior communicates to others and also what theirs is communicating to us and how these communications reflect their political, ethnic and other cultural history and environment.

A French arbitrator may go to Switzerland, Belgium or perhaps even Germany, and conduct himself the same as he does in France, understanding the submissions, statements and behavior of the

parties the same as he would in France, without having to concern himself with outside study. However, when he goes to Malaysia, Japan, Brazil or Nigeria, for example, he would be well advised to learn all he can about the language, legal and political systems, ethnic breakdown and its cross-relations, and the business, religious and family culture and mores of the society in general. If he or she fails to do this, how can he or she possibly expect to gain real understanding of the dispute to be resolved, or even what is really being said or sought by the parties?

Let us have a look at some of the more important aspects of these cultural differences of which we need to be aware, and perhaps even do some advance study on, if we hope to be successful in achieving either amicable or enforceable adjudicated resolution of disputes in a cross-cultural situation.

A. Attire

The first thing that is noticed is one's attire, which often reflects the general attitudes of formality or class of the society, and may indicate religious or moral beliefs as well. While it is perfectly acceptable in Australia to wear shorts and casual shoes, even flip flops, often even in business meetings, and certainly while traveling, Asians often find it offensive even to sit on an airplane next to a noisy Aussie showing hairy legs, let alone discuss business with such a person. The most *chique* Los Angeles or Parisian style may call for the shortest mini-skirt imaginable, but to wear even a knee length skirt, or sleeveless blouse in a Middle East country will gain one no respect whatsoever. There is an age-old standard of *respectable* business garb and while some cultures have relaxed these expectations, it is always safer to dress conservatively, at least until you have tested the waters and understood what is *de rigueur* and what is not.

Even formal or official national dress may not always be appropriate. Acceptable attire for formal occasions in the West normally consists of a black suit, white shirt and tie, if not a tuxedo and white tie. In Indonesia a long-sleeved, colorful batik shirt is acceptable no matter how formal the occasion, and in the Philippines

an embroidered *Barong*, pineapple-fiber, shirt serves the same purpose. But it is unlikely that a diplomat from either of these countries would wear batik or *barong* to a black tie dinner in London, as Asians normally take the trouble to learn what is acceptable and what is not. Fijian men wear tailored skirts as business suits, and many Papuans wear nothing but *koteka* (penis sheaths). But what would a Japanese businessman in his suit think of such men were they to appear at a negotiation meeting in Japan in their national dress?

B. Manner of Address

Australians and to a lesser extent Americans tend to address everyone on a first name basis even upon first meeting them, or even on the telephone or in emails where they have not yet met. But in many other cultures, including most European ones, this is considered extremely bad form – insulting or demeaning, such familiarity not affording any semblance of respect. It could be fatal to a mediation if an Australian mediator were to commence the mediation referring to Asian and European parties by their first names at the outset. This practice could evolve over time if the mediation is progressing in an amicable and cooperative atmosphere and a sense of familiarity is created all around. But to start the ball rolling by calling Count Heinrich von Richter-Mulhausen “Hans” or ‘Tan Sri Dato’ Dr. H Mohammad Ibrahim bin Dato’ H. Samsuddin “Sam” could easily be taken as insulting and destroy the opportunity to gain the trust and cooperation so necessary for a mediator to succeed.

Italians use the third person, and the French the second person plural, when addressing superiors or anyone they do not know well, and improper use of the second person singular can be taken as an insult. There are at least three distinct levels of both Javanese and Balinese languages, the use of which depends upon the relative social status of the person speaking and the person being addressed.

In some cultures, such as American or Philippine, former ambassadors, or presidents, are referred to by such titles long after their term of office has expired, sometimes for the remainder of their lives. In others, to continue to use such term may be considered an

insult to their successors or a sign of ignorance of the current situation. In some European and Asian cultures, a long chain of titles before one's name is a show of respect. In other cultures such use is considered an affectation. And such titles may have different significance in different countries. For example "Esq." in the UK denotes landed gentry. In the United States it refers to anyone in legal practice, to the great bemusement of the British.

C. Dining

Countless cultural differences may be found in dining practices. Let us not explore differences in cuisine as were we to do so this Chapter could run on forever. Nor need we go into detail on dining etiquette. Suffice only to identify some of the questions one may be faced with when dining with colleagues, parties or clients of differing cultures.

When invited to dine at someone's home, does one bring a gift? What is appropriate? Clearly wine is not appropriate in most Islamic societies. Is one expected to be on time? Or just a bit late? When we sit at table do we wait for the host to begin eating before tasting any dish? Do we wait until everyone has been served before we begin eating? Do we await a prayer? Is it appropriate to make a toast? In some cultures the host's wife, or wives, serve the host and guests but do not join them at table, dining separately later on what is left over from the meal.

Do we serve ourselves or wait to be served? Do we share our food or eat only what is on our plate? Is it more polite to leave something on the plate, indicating that we have eaten to our satisfaction, or are we expected to eat everything we are served lest the host think we did not enjoy the food? Is it considered rude to add salt or a condiment? Is it impolite or a compliment to have a second helping?

What utensils are used and how? Fork and knife? Fork and Spoon? Chopsticks? Can we pick up the food with our hands? Be careful: in most eastern cultures one must never touch food with one's left hand, which is considered unclean.

Is it more polite to be early, on time or a bit late? How long do we remain at table, or in the premises, after the meal? While in some cultures it is normal to spend hours chatting after a meal, in others one is expected to leave immediately when the meal is over. In China an invitation will normally spell out the time, and one is expected to arrive, and leave, exactly at the times indicated. In Indonesia arrival time is very flexible and guests will often arrive as much as an hour, or more, late. But as soon as the meal is over, one person or couple will make their apologies that they must leave and immediately almost everyone else will leave as well. (“SMP” they joke, the abbreviation for the middle-level school but meaning: *sudah makan pulang*: “as soon as we have eaten we go home”).

D. Face

Probably the most important element in interpersonal relations in most of Asia, be they private, business or diplomatic related, is the matter of *face*, a concept sadly lacking, and consequently misunderstood, in the West. Almost every Asian culture values *face*, or respect of self and others demonstrating respect for us. Many western cultures seem to consider people insulting each other as an acceptable means of communication – in some places, such as New York and Paris, almost an amusing competitive sport. But even an unintentional insult to an Asian, particularly in the presence of any third party, can have a devastating effect on the entire future relationship with such person, possibly jeopardising the ability to do any business with him whatsoever. Use of first names precipitously is only one example. Losing one’s temper is another. Losing one’s temper loses face not only for the person against whom one is ranting, but also for the rantor. Losing one’s temper may lose the negotiation, or throw a mediation off track, altogether. Insulting a witness may be standard operating procedure in US courts, but in the international dispute resolution arena it can be extremely bad form indeed. In the West and parts of north Asia, such as Korea for example, mediators are taught to encourage the disputing parties to speak their minds, even scream at each other: get their anger off their

chest to clear the air so that they can focus on their essential substantive needs. But in parts of Asia, such as the Indonesian island of Java in particular, such a practice is almost certain to strike a death-knell for any chance to come to agreement, as it will only exacerbate the standoff.

To maintain one's face, and that of others, often requires silence, seen as the best alternative to making negative or assertive comments. Let us consider an hypothetical, but not at all uncommon, example: In an arbitration between a US company and an Indonesian one, each party presents a witness of fact. First comes the Indonesian witness, an aristocratic Javanese, who explains what he has seen precisely in an understated, polite manner. He is then cross-examined by an aggressive New York litigator who insults him, twists his words and, making him lose face, and completely unnerves him so that he becomes silent, fuming inside but ostensibly acquiescent to whatever the litigator thereafter may say (or shout). Then the US party puts on their witness, who tells a completely fictitious account of the same incident. The Asian arbitration counsel is polite in cross-examination and does not take him to task for lying, assuming the arbitrators will see through the facade. However, if the arbitrators are westerners who normally take things at face value and have not learned to be sensitive to the cultural aspects of this exchange, they will almost certainly believe the untruths of the western arrogant witness and ignore the truthful testimony of the Indonesian because he was so rattled by the way he was dealt with on the stand. They will interpret his embarrassment at the conduct of the aggressive litigator as indication of his own dishonesty. And thus so easily may complete injustice result. Insensitive arbitrators sitting before a mix of cultures proves far too often to be a recipe for all manner of injustice.

Western aggressive litigation practices are completely out of place in international arbitration, and even more so mediation. And yet they persist and continue to distort, or fail to serve, justice more and more every year.

E. Communications/Body Language

Some cultures eschew either negative or positive responses. The Japanese are extremely reticent to say “no”, as are most Indonesian cultures, such as the Javanese. Any expression of negativeness is considered bad form. The Javanese in fact will never admit to any negative opinion nor give negative criticism, a disparaging comment being considered a face destroying insult. Other cultures, such as some eastern European ones, avoid positive or enthusiastic reactions and invariably will give a negative response, decline or criticise, at least in the first instance.

Nodding one’s head is a classic example of an easily misunderstood gesture. In most of the West it is common to indicate assent by nodding one’s head up and down, or even uttering “um hmm” or similar. This will mean nothing in some other cultures, and in some it may even indicate the negative. In Turkey, Iran, Bulgaria and some Melanesian islands nodding the head up (in Melanesia usually accompanied by a slight “tsk” sound) means a definite NO. In much of Asia nodding, sometimes accompanied by “yes”, normally means: “I understand what you are saying, go on. . .”, but is often misinterpreted by westerners to indicate agreement, usually of each specific point nodded at. This misunderstanding has on occasion been known to cause considerable disappointment to western businessmen.

Another easily confused gesture is the mostly western custom of twirling the forefinger in front of one’s ear to indicate that someone is insane or unbalanced. But in certain cultures, such as that of Argentina, that gesture is common sign language meaning “telephone call for you”. One can easily imagine the result of misuse of this gesture in the wrong circumstances.

Even waving one’s hand can have different significance or impact in different cultures. While Americans might wave their hand, palm out, sideways to say goodbye, in much of Europe such a gesture indicates a negative answer, while to say goodbye they might wave their hand up and down with the palm down. But that latter gesture in Indonesia means “come here”, while in the West “come here”

would be indicated by a similar gesture but with the palm facing in or just “beckoning” with the forefinger, which latter gesture would be found demeaning and thus highly offensive in Indonesia and some other parts of Asia. Likewise pointing one’s finger at someone is often taken as an aggressive act. It is much more polite to point with one’s whole outstretched arm and hand.

Posture may also have an impact. For example, the western habit of leaning back and putting one’s feet up on one’s desk or table is considered extremely rude in much of Asia. Showing the bottom of one’s foot is taken as an insult to anyone the foot faces. Likewise standing with arms akimbo is quite a natural gesture for most westerners, but many Asians see this as an arrogant stance and may easily be offended by it.

While in England one must never turn ones back towards royalty. Showing one’s back to anyone may be considered an insult in much of Asia. Touching someone with one’s left hand is considered unclean in parts of Asia and the mid-East. Likewise touching someone’s head without asking permission may be considered an aggressive act, in some cultures amounting to an invitation to fight. In such cultures, even a masseuse will not touch the client’s head without first enquiring whether it is desired.

Smiling and silence can also have different meanings to people from different cultures. In much of Southeast Asia, particularly in Indonesia, simple courtesy dictates that people generally will maintain a smiling face, and smile and nod even to strangers when passing them on the street. Similarly, people will make pleasant small talk to strangers whom, by circumstance, one may encounter – in a shop, a waiting room or public transport, for example. In these cultures a scowling and closed face, and reticence to engage in polite conversation will be taken as rudeness, very bad form indeed, or perhaps covert intent. Conversely, some western cultures, such as the French, see gratuitous *chit chat* and smiling as signs of mental instability or suspicious attempt at confidence schemes. In some cultures preliminary *chit chat* and joking among participants in any meeting simply relaxes the atmosphere and allows things to commence on an amicable tone; whereas in others it is looked upon

as an attempt to divert attention away from the matters at hand and waste time, indicating a lack of seriousness.

F. Time

The concept of wasting time is also very much a western one. Time often has very different significance from one culture to another. The West primarily sees time as money, and saving time, being time efficient, is equated with cost efficiency. Delays, waiting for appointments, spending more time than necessary, doing anything unnecessary, all are considered as wasting time in the West. In many parts of Asia, Indonesia in particular, time can be a negotiating tool, or a means to give or withhold face. An Indonesian may let a visitor wait for an hour or more after an agreed appointment time, to unnerve the visitor and put him in an inferior position – make him lose face. Or he may arrive right on time to give face and show his respect or enthusiasm. Westerners made to wait, or worse, those that arrive to find that their counterpart has cancelled the meeting, see this as incompetence and lack of seriousness, and are usually very annoyed that they have been caused to waste their time. But the message is a matter of relative face and power, which the westerners often do not understand. Unfortunately the lack of understanding of urgency often results in losses for some Asians. The bureaucratic delays of Indonesian state-owned companies in making strategic decisions often results in such decisions being made too late, with attendant losses of business or lawsuits/arbitrations. The West says: “*strike while the iron is hot*”. Asia says: “*let the dust settle*”. How do we, as adjudicators, reconcile these contradictory philosophies? On the other hand, in other parts of Asia, such as China and Japan, strict punctuality is invariably expected – even demanded. Some Chinese companies have been known to force employees to stand in the corner, embarrassed in front of his co-workers, as punishment for arriving late to work.

G. Introductions

Most Asians invariably will shake hands upon meeting someone, whether that person is known to them or not. Introducing anyone encountered to those accompanying one in public is normal, even in great crowded receptions or similar. Westerners for the most part tend to ignore these pleasantries and speak only to those whom they know and to whom they have something to communicate. While the former may be considered aggressive and suspicious to westerners, the latter will certainly appear rude to Asians. On the other hand, many devout Muslim men are not permitted to touch any woman other than his own wife or mother, and thus may decline even to shake hands with any other woman. A woman mediator needs to understand this so as not to take it as an indication of hostility if a man will not shake her hand.

Then there is the complex issue of kissing as a greeting. This is uncommon in the common-law West, but quite normal and expected in much of Europe, the Mid-east and parts of Asia, where different nationalities seem to kiss a different number of times. Most of these cultures favor kissing on the cheek, but some will kiss on the lips. Indonesians generally kiss twice, once on each cheek, unless they are emulating the Dutch, who kiss three times, but these kisses are more often just “sniffs”, and the Indonesian word for “kiss” and “sniff” is the same.

Asians normally exchange business cards immediately upon meeting with people they have not met before, and it may be considered an embarrassing lapse of courtesy, or perhaps an indication of intention to hide one's identity or contact details, not to have a card at hand for the purpose. Westerners have started to carry business cards as well, but the practice is not yet particularly widespread, and failure to follow this almost universal procedure could reflect rather badly upon a professional seeking to assist in resolving a dispute.

H. Religion

One of the more important cultural aspects which may differ greatly from one group to another is the practices and tenets of religion.

It is essential that arbitrators and mediators, as well as anyone in negotiations or seeking to transact business with or involving people of different cultures, recognise and be sensitive to the dictates of the various religions embraced by the parties and/or other participants. French schools outlawed students from wearing Islamic dress. Will French arbitrators and mediators bar women in headscarves from appearing before them? In Indonesia and Malaysia, as well as in the Middle East, some of the most prominent lawyers, doctors and businesspersons are Muslim women, many of whom wear headscarves or full Islamic dress. How can a western mediator expect to be successful, or a western arbitrator expect to have any credibility, if they discriminate against such women?

Likewise, while in the West it is considered rude to wear hats indoors, Muslim and Hindu men, and of course Indian Sikhs, often wear headgear, particularly for formal occasions and important meetings, and some at all times when in public. These headgear may indicate their position or religious leaning, giving hints to others what level of respect to show.

Perhaps more important is the observation of prayer obligations. One western woman arbitrator advised this writer that when she sat in an arbitration in which an Islamic woman appeared as counsel, she had the good sense to make sure she called a break, of her own volition, at each prayer time, so that the woman could go and pray without having to be embarrassed by asking for time to do so. This is an example which every one of us should follow. We must be sensitive to the religious practices of the parties who appear before us, and facilitate the parties' ability to follow such practices as a matter of course, just as arbitrators or mediators of their own culture would do automatically. If not, we can cause resentment which can defeat our mission to find amicable or judicious resolution of disputes.

A particularly egregious such abuse experienced by this writer was in an arbitration in Jakarta, in which although the parties had waived the time limitations contained in the Arbitration Act, the chair nonetheless insisted upon scheduling hearings during the highest Islamic holiday, Idul Fitri, despite strong objection of all Indonesians involved. One lead counsel, a highly regarded lawyer of Islamic faith, was thus prevented from his annual practice of receiving dignitaries who normally come to his home to pay their respects, while other counsel and witnesses were thus unable to visit their forebears' graves and attend to their families on this highest of holidays. It was made clear that had they not appeared a default award would have been issued against them. Fortunately for the tribunal this was prior to 2001. Today such hubris and insensitivity could easily have unfortunate wider consequences. But unfortunately such biased conduct is still not recognised as sufficient violation of due process to warrant annulment of an award, at least not to the knowledge of this writer.

I. Truth

Just as is the case with time, different cultures may view the concept of *truth* differently. In Indonesia, an archipelago of more than 17,000 islands with over 250 languages and cultural groups, there are certainly different views and any arbitrator or mediator must of necessity be aware of the different characteristics of these in order properly to evaluate witness testimony. While a visitor to Indonesia, such as a foreign arbitrator, will see it as a single homogeneous culture, everyone living or working in Indonesia is aware of the vast cultural diversity, to the extent that one needs to know from which of Indonesia's hundreds of ethnic groups a person originates in order even to understand what he or she says. Javanese (from central and east Java, the most populous and principal island in the archipelago) are the most self-contained and courteous people in the world and will rarely give an open and full response to any question, for fear of offending someone. To a Javanese, truth is a commodity that can be a very dangerous weapon if it falls into the wrong hands. It cannot be used or shown outright, but must be skirted and danced with until

the hearer figures it out for him/herself. On the other hand, the *Batak* people (from the north of Sumatra, the largest and most diverse of the islands) are extremely outspoken and forceful, and will tell you exactly what they think without any ceremony. Other cultures fall somewhere in between or have their own idiosyncrasies. For example, the *Minangkabau* (or “*Padang*”) peoples of West Sumatra, enjoy a matriarchal society. Property is held by and bequeathed to the daughters so that the women rule the family. As a result the men can normally prevail only in the business arena and have been known to employ unconventional means to achieve success, and the more innovative such means the more respect he will win from his peers.

How can a mediator or arbitrator evaluate a statement, answer, or the conduct of a party or witness without understanding the cultural forces at work beforehand? And worse, how can the opposing party understand the real intention of such actions which to them may indicate the opposite of what is intended? The wise mediator or arbitrator must not only understand these differences but must be able, if necessary, to explain them to the parties in such a manner as not to insult nor be seen to patronise any of them.

J. Language

It is often said that language reflects culture and there are entire fields of study devoted to exactly this phenomenon. Leaving aside individual writing and speaking styles, the vocabulary, choice of words for different situations and structure of phrasing in any language may tell us a great deal about the culture which uses it. As mentioned above, some cultures use different terms of address depending upon their relationship with or relative social position to the person they are addressing. Other cultures which do not might generally be considered to be more democratic and “classless”. Also as mentioned above, use of negative terms also can be taken as a reflection of respect or lack thereof, or as a general statement as to the world overview of such culture. Indonesians rarely will answer “no” to any question. They may use the word for “incorrect” if an error is made in a statement. But if asked if they have seen, read or

done something which they have not, they will not answer “no”, but rather “not yet”. An 80 year old spinster asked if she has children will reply “not yet”. Similarly, the term “if” is used instead of “when” where discussing a planned action. This open-endedness, or uncertainty, reflects the Islamic philosophy that everything is in the hands of Allah. If asked if he or she will do something, most Indonesians will answer “Insha Allah”, *God willing*.

Such philosophy is often credited as the reason many Indonesians will take loans or purchase on credit when they have made no analysis or plan as to whether or how they will be able to repay. This, and the Islamic tradition of sharing ones wealth with the poor, may explain why for many years, and still occasionally continuing, courts have deemed it unjust to expect a party to repay a loan when they are unable to do so, particularly where the lender is a bank or party with far greater wealth than the borrower. While this inclination is not reflected in the law, which is for the most part adapted from Dutch Law, it has been quite prevalent in application.

Even in cultures which are closely related and share almost the same language, ethnic makeup and history, differences may be reflected in linguistic usage. One notable example is the differences between the Indonesian and Malaysian languages. The Indonesian language was adapted from Malay, the early trading *lingua franca* of the region, by Indonesian nationalists in the 1920's, to allow open communication among Indonesia's many cultures, each with their own language. But since the Indonesian and Malaysian languages have each evolved separately in the context of their own culture (Indonesian with the influence of Dutch, Javanese, Balinese and English, Malaysian with influence of English and Indian languages) and today there are differences which cause difficulty in communication and may even cause embarrassment. For example, the Indonesian word for veteran is the same as the English: *veteran*. In Malaysian the translation is the phrase: “*laskar tak berguna lagi*”, meaning soldiers of no further use. In Indonesian a maternity hospital translates directly as “*Rumah Sakit Bersalin*” while in Malaysian such a hospital is called “*Rumah Sakit Mangsa Lelaki*” or hospital for the victims of males”. A worse *faux pas* lurks behind the

term “*kelamin*”, which in Malaysian means one’s spouse, but in Indonesian refers to one’s sexual organs.

Even someone who has studied a language in the past may not have kept up with how it has changed over the years as a result of cultural, historical or political factors and changes, and *faux pas* in a language or culture in which we purport to be conversant may be far more embarrassing than those in a language or culture with which we are clearly not, and do not purport to be, familiar.

II. LEGAL SYSTEMS

A. Common vs. Civil Law

Another important aspect of cultural differences is found among the legal systems, in particular between the most prevalent ones: common and civil law.

The general theory of common law trials, which have lapped over to arbitrations and probably affect mediation technique by counsel as well, is that the facts should evolve during the course of the proceedings and it is up to the opposing counsel to extract a party’s evidence and determine its position; whereas in civil law each party is expected to make its case clearly and present its own evidence. These differences are apparent from the start, where civil law pleadings will generally state the entire case: the facts, the applicable law and the relief sought, while common law pleadings only give a suggestion of these points. Accordingly, a civil law trial or arbitration is conducted essentially upon documents, with oral hearings utilised primarily to establish procedural guidelines; and witness testimony necessary only to enable the judge or arbitrators to question a witness for clarification or, in the case of an opposing party, to try to discredit the witness in some way.

Discovery is non-existent in civil law courts and rather uncommon in arbitrations, left to the discretion of the tribunal or agreement of the parties. In common law trials the actual hearings are normally preceded by copious discovery and other preliminary applications and rulings, including virtually settling most questions of

law, prior to trial. Remember, in most common law trials it is the jury that decides the factual issues and thus meticulous rules of evidence are necessary to seek to ensure that the jury will focus only on those proper matters of fact presented to it and not be distracted or wrongly influenced by prejudicial materials. In civil law trials, as in any arbitration, there is no jury. At least in arbitration, the decision-makers are professionals with training and expertise in such adjudication and usually in the governing law, and therefore do not need to be shielded from irrelevancies or deceptive tactics, as presumably they can recognise these and disregard or sanction them appropriately. Foreign law is often considered a matter of fact to be pled and proved, an aspect that would be totally inappropriate in a jury trial.

Some of these trial procedures are extremely difficult to reconcile across the different legal systems. It is for this reason that arbitration becomes, and must be, the most appropriate forum for cross-border disputes that involve more than one legal system. Where each of the parties expect procedures to follow those with which they are familiar, but those procedures differ, only arbitration will allow a compromise situation, which can be worked out on a case by case basis among the parties, or rather their counsel, and the tribunal. The International Bar Association has tried to assist breaching this gap by providing its IBA Rules on the Taking of Evidence in International Commercial Arbitration, adopted in 1999.

B. Mediation Techniques

Likewise in a mediation, where the parties come from different legal systems, their expectations as to the role of the mediator may be vastly different. Some jurisdictions restrict mediators to a facilitative role only, while in others it is common for the mediator to take a more pro-active role in formulating suggested solutions. The mediator must understand the system or tendency in the home of the parties and give due respect to both, or all, in formulating the procedure to be followed. A mediator who simply dictates how things shall be done because that is the way he or she always conducts mediations, may not succeed, as one party may become

insulted or lose respect for the mediator, and simply walk away. Mediation is useless if the parties do not have confidence in and respect the wisdom, expertise and position of the mediator.

Cultural considerations may also affect whether parties will even attempt to mediate a dispute. While in many western jurisdictions mediation is so common that parties have no hesitancy in suggesting, or even insisting on, such attempt first, in many Asian jurisdictions suggesting mediation may seem a loss of face and/or an admission that the party does not believe its case is strong enough to win in an adjudicated procedure. The growing trend of court-annexed mediation should assist to allay this kind of perception. However, it is always advisable to provide for mediation as a condition precedent to arbitration or litigation when entering into a contractual relationship in the first place, to avoid any such perception of loss of face once a dispute arises later on. Voluntary agreement to mediate also frees the mediation from any restrictions and/or shortcomings of the applicable mandatory court procedures and, more importantly, from the necessity to choose a mediator from the court's roster, where applicable.

Mediators also might consider the attitude towards decision making which may differ from culture to culture. Some cultures have a strong sense of independence and both the government and its citizenry feel it important to make their own decisions and not be dictated by anyone else. This is certainly the case in Indonesia, the Philippines, and many other Asian jurisdictions. However there are others, many South American cultures for example, where they prefer to allow someone else to make decisions for them, perhaps so as not to have to take responsibility if such decisions do not bring the desired results. In the former case, clearly the mediator must take only a facilitative role, and allow the parties to direct the procedures insofar as appropriate, whereas a more proactive role will be expected, and appreciated, by the parties in the latter case, although they may not make that known.

Other differences between legal systems include the civil law concept that all contracts must be performed in good faith, the common law requirement of consideration, the divergent views on

sanctity of contracts and the way changed circumstances are dealt with in each. All of these expectations must be taken into consideration, and possibly explained in some detail to parties in a cross-system mediation or arbitration.

C. Corporate Culture – Powers and Responsibilities

Although most legal systems provide for establishment of some sort of limited liability legal entity, there may be considerable differences in how these are established, managed, taxed and regulated. Westerners, particularly those from common law jurisdictions, often tend to assume that any legal entity called a *company* or *corporation* will be essentially the same as the corporation to which they are accustomed, and not bother to delve any further. This can in some instances result in considerable error of law and sometimes miscarriage of justice. The chain of command and relative powers and responsibilities of each “corporate” organ may differ greatly from culture to culture, as may the administrative or reporting requirements or actions which are required to render corporate acts binding upon the company and/or third parties.

One such example in the experience of this writer did result in very serious miscarriage of justice and severe losses to the Indonesian populace where a tribunal, primarily comprised of Westerners, imposed fatal sanctions on the Indonesian Government for failing to order a state-owned limited liability company to withdraw a lawsuit it had commenced to seek redress against losses imposed upon it in an arbitration to which the same tribunal refused to join it as a party. Although the governing law was that of Indonesia, the tribunal refused to take notice of Indonesia’s Company Law, under which a shareholder does not have power to dictate actions of a company, its only power being the ability to appoint or remove directors, while the board of directors are by law required to act in the best interests of the company, not those of the individual shareholders. The foreign arbitrators would not read the newspapers provided by their hotel every morning, ignored both expert witness testimony and the governing law, and apparently thought: well, if the government is the

owner it can do whatever it wants and any law or practice to the contrary can't be right because it differs from what we know in the West. Whether one considers this as negligence, or only arrogance, it should be inexcusable conduct when arbitrating anywhere, particularly in a foreign jurisdiction with which one is not familiar.

D. Attitudes on Borrowing/Lending

Certain national, ethnic or religious cultures may reflect a difference in the parties' attitudes towards borrowing and lending, and understanding of their respective rights and obligations in that regard. For example, Islam does not permit interest to be charged. We are now beginning to see a great increase of Shariah banking transactions, which are structured so that the incentive of the lenders is in other forms. However, there may easily be situations which arise, which would indeed go to mediation or arbitration, where a loan agreement with an Islamic party borrower does call for interest and such borrower might fail to pay on religious grounds. Not only do financing lawyers need to create more flexible structures so that the lenders may benefit in a cross-culturally acceptable way, but mediators and arbitrators must be sensitive to these conditions and seek to find some other way for the lender's expectations to be fulfilled without causing the borrower to violate his or her religious obligations.

Some cultures even have a perception that it is wrong or unjust to force a borrower to repay its indebtedness when the economic situation has changed unfavorably, either personally for the debtor, in his region or in the world. Indonesia is probably the place where this attitude is most frequently encountered, as mentioned above, and it is the unfortunate fact that the Indonesian courts seem to take a similar view, having often declined to order debtors to repay their debts, not only in the wake of the economic crisis of the late 1990's, but even prior thereto. This may be related to the general principle of Islamic charity, where the wealthy are expected to share their wealth with the poor. It is surprising that banks are still generally reticent to call for arbitration in their financing documentation, having the perception

that arbitration necessarily means compromise. However some such cases do go to arbitration, and probably more to mediation. If we are not aware of the cultural background, it would be impossible to facilitate a solution to such a dilemma.

E. Cultural or Intellectual Bias

Pre-conceived notions, prejudices and opinions of an arbitrator will always threaten to color his impartiality and ability to see any matter at issue in a clear and balanced manner. We seem to be seeing this more and more where western arbitrators sit to adjudicate disputes between western and "*third-world*" parties, and it is something that all of us must be on constant guard against in our own attitudes.

There is, unfortunately, still a widespread prejudice on the part of many Westerners who perceive that developing nations' cultures are inferior to, and its citizens less intelligent than, their own countrymen or their own race. Some Asian cultures enjoy a similar perception of their own superiority, but as Asian arbitrators and mediators are far less commonly engaged for cross-border disputes, and as Asians generally tend to show courtesy and respect to everyone, the problem is less pronounced in these cases. A western arbitrator may pay greater credence to a western witness than to an Asian one, even where the local witness may be a recognised expert in his or her field. The western witness not only speaks the same, or a similar language, as the western arbitrator, but also approaches his analysis from the western point of view, even though this may be completely irrelevant to the project or contract at hand or the original intentions or perceptions of the parties. Our challenge is to guard against falling into this ethnocentric trap.

Likewise, several of the most successful western arbitrators, in their hubris, hold no respect for the laws of non-western countries and often tend simply to ignore entirely the law chosen by the parties to govern or, worse, opine it to be meaningless. This is unforgivable and, unfortunately, not often recognised as a valid ground to set aside their awards. The courts of any country are often suspected of being nationalistically biased. But court judgments will be subject to review

by a higher court, whereas an arbitral award invariably will not. Therefore, although we arbitrators have more freedom to allow our personal prejudices to govern, we must be very much on our guard against such a tendency precisely because there is no effective review of the awards which we render.

III. CONCLUSION

Arbitrators hold a unique position in international commerce. The jurisdiction with which we are vested often spans international cultures and a multitude of diverse laws and legal systems. And there is no appeal against what we decide. No judge in any court has such power or responsibility. It is thus our duty, if we accept an appointment to adjudicate a dispute involving a culture of which we are not conversant, to make every effort to familiarise ourselves with the cultural values and idiosyncrasies of the parties and the project venue if we are to ensure justice. And when governments or government-related bodies are involved, a study of the history, political environment and real power structure is also essential.

This responsibility seems to feed a growing trend among some western arbitrators to consider that international arbitration stands above the law of any individual jurisdiction, and that such arbitrators are more powerful than the governments and courts of the jurisdictions in which they operate, and are thereby qualified to make awards unencumbered by local laws, policies, politics and customs. But arbitrators are only human. And we must not forget that we, too, are fallible and not allow the position of power granted to us as arbitrators to create in us such arrogance as to eclipse the fact that we are still subject to the culture and laws of the lands in which we operate. When we enter into a culture which we do not understand, operating under laws with which we are not familiar, with an attitude towards respect for and compliance with such laws that is also alien to us, we can no longer rely entirely upon our own experience, judgment and instincts which have been forged in our own and similar societies.

Cultural understanding and sensitivity, or the lack thereof, is perhaps the single major cause of international disputes in the first place. Let us rigorously guard against falling into the same trap as does the western businessman who closes a deal in unknown territory without first doing his homework, assuming the rest of the world operates the same as his own culture and is then baffled when his venture runs into trouble. Without judicial review of our awards we are under a far higher obligation to be as diligent and vigilant as we are able, and exercise the most rigorous degree of sensitivity and scrutiny, to ensure that we fully understand both the situation presented and the parties' intentions, and do not become unwitting parties to manipulation, corruption or injustice.