

Cultural Differences & Ethnic Bias in International Dispute Resolution
An Arbitrator/Mediator's Perspective

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by

Karen Mills
J.D., F. C I Arb, F. S I Arb, F. HK I Arb.
Chartered Arbitrator

KarimSyah Law Firm

Level 11; Sampoerna Strategic Square, Tower B
Jl. Sudirman Kav. 45 - 46
Jakarta, 12930, Republic of Indonesia
Telephone: (+62-21) 577-1177
Telefax: (+62-21) 577-1947
E-mail: kmills@cbn.net.id

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Karen Mills
KarimSyah Law Firm
Jakarta

Globalisation! How many times a day do we read or hear the term? And what exactly does it mean in our daily lives? For some, businesspersons, it means the opening of markets for goods, services, and operations. For workers 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.

And this diversity of culture expresses itself at every stage of business and even personal life when any cross-border aspect is present. For the dispute resolution practitioner, it pervades all negotiations, mediations and arbitrations. Of all 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 can succeed or fail according to how well we fulfil that role.

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 belong and/or in which their business or project is located.

But there also may be different cultures in different fields of business or industry, or depending upon the religious beliefs of the parties, or even between different genders, or gender persuasions.

There may be different cultural aspects of life found in different areas in a single nation, or even different ethnic groups within a single nation. Urban dwellers very often behave differently from, and have different expectations than, rural or agricultural denizens. 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, 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, 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 denizens of such new environment. Normally the first we notice are those that hit our senses: sounds (language, accent, intensity, music), sights (style and color of attire and decor, architecture, natural attributes), or smells (food, tobacco, hygiene, burning incense or oils). Even before we leave the airport we often begin to get an idea of the style of interpersonal relations: how respectfully do people deal with each other, and with us; 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?. These are the differences of which anyone traveling abroad would need to be blind or insensitive not to take notice.

For a businessperson, or legal practitioner: negotiator, mediator, expert witness or arbitrator, the degree of sensitivity required invariably will delve far deeper than just these surface attributes. Ethnic or cultural *faux pas* may be excusable for a tourist, but they can be extremely detrimental, even fatal, to one's purpose 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 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 is being communicated to us, not only directly by others but also how their 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 behaviour of the parties the same as he would in France, without having to concern himself with outside study. However, when he comes to Malaysia, or goes to Japan, Brazil

or Nigeria, for example, he would be well advised to learn all he can about the legal system, the political system, the ethnic breakdown and its cross-relations, the business, religious and family culture and mores of the populace in general.

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 an amicable or enforceable adjudicated resolution in a cross-cultural situation.

Attire

The first thing that is noticed is one's attire, which often reflects the general attitudes of formality or class of the society. 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 rigeur* and what is not.

Even formal national dress may not always be appropriate. Formal attire 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 fibre, shirt serves the same purpose. But it is unlikely that an Indonesian diplomat would wear batik 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 their national dress?

Manner of Address:

Australians and to a lesser extent Americans tend to address everyone on a first name basis even upon first meeting them. But in many other cultures, including most European ones, this is considered extremely bad form - insulting or degrading, and 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 off the bat. This practice could evolve in time if the mediation is progressing in an amicable and

cooperative atmosphere. But to start the ball rolling by calling Count von Herkenschlepper "Hans" or Haji Mohammad Abdurrachman Suryahadikusumo "Kus" 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 stature of the person speaking and the person being addressed.

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 in the west. Almost every Asian culture values *face*, or respect of self. Westerners seem to consider 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 in 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 is extremely bad form indeed.

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 expert witness, an aristocratic Javanese Doctor, who explains the situation truthfully 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, completely unnerves him so that he becomes silent and seemingly 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 do not see the need to be sensitive to all 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. 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 just such 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 justice more and more every year.

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 decline or criticise at least in the first instance.

Nodding one’s head is another example of an easily misunderstood gesture. In 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 to other cultures, and in some it may even indicate the negative. In some Melanesian islands nodding the head up, sometimes accompanied by a slight “tsk” sound, means a definite NO. In 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 caused considerable disappointment.

Posture may also have an impact. For example, the western habit of putting one’s feet up on one’s desk or table is considered extremely rude in much of Asia.

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 *chitchat* and smiling as signs of mental instability or suspicious attempt at confidence schemes. In some cultures preliminary *chitchat* 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.

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 make him lose face. Or he may arrive right on time to give face and show his enthusiasm. Westerners made to wait, of 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 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?

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.

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 can reflect rather badly upon a professional seeking to assist in resolving a dispute.

Religion

One of the more important cultural aspects which may differ greatly from one group to another are 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 and wear 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?

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 throughout the last weeks of the Islamic fasting month, Ramadan, and also right through the highest Islamic holiday, Idul Fitri, despite strong objection of all Indonesians involved. One lead counsel, a highly regarded lawyer, 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. Fortunately for the tribunal, this was prior to 2001. Today such arrogance and insensitivity could easily result in anti-western violence. 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.

Truth:

Just as is the case with time, different cultures may view the concept of *truth* differently. In Indonesia, an archipelago of over 15,000 islands with over 300 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 party or 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) 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 Bataks (from north Sumatra) 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.

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 indicate the opposite of what is intended? The wise mediator or arbitrator must not only understand these differences but must be able to explain them to the parties in such a manner as not to insult nor be seen to patronise any of them.

LEGAL SYSTEMS

Common vs. Civil Law

Another important aspect of cultural differences is found in the legal systems, in particular 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 position and evidence; 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 primarily upon documents, with oral hearings 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 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 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 plead and proved, an aspect that would be totally inappropriate in a jury trial.

Some of these trial procedures are extremely difficult to reconcile. 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.

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.

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 also a very good reason to provide for attempt at mediation when entering into a contractual relationship in the first place, so that there can be no such perception of loss of face since the mediation becomes a contractually mandatory condition precedent to bringing an arbitration or litigation. Voluntary agreement to mediate also frees the mediation from the restrictions and/or shortcomings of the court's mediation rules, procedures and, more importantly, roster of court-approved mediators.

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.

Corporate Culture - Powers and Responsibilities

Although most legal systems provide for some sort of limited liability company, 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.

One such example in the experience of this writer did result in very serious miscarriage of justice and losses to the Indonesian populace. In an arbitration over a tri-partite contract, one party, a state-owned company, was not joined in the arbitration. The tribunal, primarily comprised of westerners, decided the matter despite the jurisdictional objection that all three parties needed to be involved, and cancelled two contracts to which the unjoined company was a party, thereby depriving that company of considerable property and revenue. The unjoined company, having no other recourse, brought a case in the local courts to seek redress and obtained a temporary restraining order against enforcement of the award, either directly or by a second arbitral reference which the claimant sought to bring against the government itself on the basis of its relationship with the state owned companies. In this case, and at this time, still under the Suharto regime, the state-owned company involved was one of the richest and most powerful in the country and the government had never been able to control it, despite many attempts to do so.

Under Indonesia's Company Law, 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 tribunal ordered counsel for one of the government ministries to force the company to withdraw its case and lift the restraining order, disregarding submissions showing that the government had never been able to control this company, and that it did not have power to force the company to withdraw its suit, which would be contrary to the company's interests. The tribunal ignored the government's submissions as well as the dictates of the governing law, violated the restraining order, issuing a final and binding award. The Indonesian participants had no choice but to respect the restraining order and thus were not able to appear nor plead their case at all. This not only resulted in a windfall for the claimant of over 10 times its investment, but saddled the Indonesian populace with over US \$ 500,000,000 of debt, with no attendant benefit received whatsoever.

The tribunal had refused to 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.

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 are 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. A mediator or arbitrator must be sensitive to this 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, and it is the unfortunate fact that the Indonesian courts seem to take a similar view, having almost consistently 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.

Bias: Intellectual Corruption

As my colleague, Professor Rashid, has so eloquently pointed out in his paper, 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.

There is, unfortunately, still a widespread prejudice on the part of many westerners who perceive that third world cultures are inferior to, and its citizens less intelligent than, their own countrymen or their own race. 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. Our challenge is to guard against falling into this ethnocentric trap.

Likewise, also as pointed out by Professor Rashid, many western arbitrators, in their arrogance, hold no respect for the laws of non-western countries and often tend simply to ignore entirely the law chosen by the parties 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 judgements 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.

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 idiosyncrasies of the parties and the project venue. And when governments or government-related bodies are involved, a study of the history and political environment is also essential.

Arbitrators hold a unique position in international commerce. The jurisdiction with which we are invested often spans international cultures and a multitude of diverse laws and legal systems. No judge in any court has such responsibility. Part of that responsibility is to ensure that corrupt practices cannot take hold of the arbitral process, and that natural justice, or due process, is meticulously observed. Where arbitrating in a culture with which we are not familiar, it is not an easy task to identify deceit or corruption and deal with it in an effective way. We must exercise the most rigorous degree of sensitivity and scrutiny so as not to fail.

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 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 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, and particularly those with a history of corrupt practices, we can no longer rely entirely upon our own judgement 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 not fall 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 to ensure that we do not become an unwitting party to corruption or injustice.

Jakarta, 30 March, 2006

Karen Mills

*J.D., F. CIArb, FSI Arb F HKI Arb
Chartered Arbitrator*

KarimSyah Law Firm

Level 11, Sampoerna Strategic Square, Tower B
Jl. Sudirman Kav. 45 - 46, Jakarta, 12930, Republic of Indonesia
Telephone: (62-21) 577-1177
Telefax: (62-21) 577-1947
E-mail: kmills@cbn.net.id
Website: www.KarimSyah.com