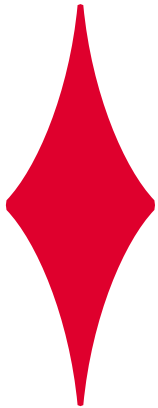


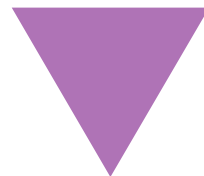
Paying Attention to
“CULTURE” in



International Commercial Arbitration

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**This paper is adapted from
remarks Mr. Slate delivered on
May 18 , 2004, at the 17th ICCA
conference in Beijing, China.**





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The subject of this address is “culture” and its impact on international commercial arbitration. We lawyers have often invoked “cultural differences” to mean a clash of legal processes—such as the different procedures used in civil and common law countries. More recently, “cultural differences” have been invoked by both civil and common-law practitioners to criticize—with some justification—the use by U.S. attorneys of litigation-style procedures in the arbitration forum that expand the time and costs of the arbitration process.

But another cultural development that has the pendulum swinging in the other direction seems to have gone virtually unnoticed. That is the growing impact of international norms on arbitration practices in the United States. The most recent example is the new American Bar Association/American Arbitration Association Code of Ethics for Commercial Arbitrators, which adopts the international neutrality standard for party-appointed arbitrators. Another example is the growing practice of U.S. companies of referring to the International Bar Association Rules of Evidence in the arbitration clause in their international contracts. These developments suggest that U.S. ADR practices are influenced by cultural elements in other parts of the world.

The trend toward a more uniform approach to international arbitration is also evidenced by the widespread enactment, in whole or in part, of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration by countries throughout the world, and the recently approved UNCITRAL Model Law on International Conciliation, which a number of countries have enacted.

While differences in conflict resolution processes have historically been discussed under the banner of “cultural differences,” we surely could all agree that “legal cultures” do not exist in an

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intellectual vacuum. Rather they are the products of the fundamental values of the society, based on history, language, and the perceptions of justice and social norms. Understanding these values has significant qualitative consequences for international arbitration, as the distinguished Mr. Ahmed El-Kosheri noted during the ICCA conference in Seoul in 1996. He went beyond the traditional legal perspective on “culture” to sound a salutary warning from the Arab world:

In general, the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration the continuing *attitude* of certain western arbitrators being characterized by a lack of *sensitivity* towards the national laws of developing countries and their *mandatory application*, either due to the *ignorance, carelessness, or*

to unjustified psychological superiority complexes, negatively affecting the legal environment required to promote the concept of arbitration in the field of international business relationships.

Mr. El-Kosheri’s candid observations state in non-legal language how critically necessary it is to be culturally sensitive. Indeed, the importance of cultural sensitivity has not gone unnoticed in the research of psychologists, anthropologists and scholars in international diplomacy and business.

Their research has led corporations to spend hundreds of millions of dollars learning about nuances in language, societal values and taboos in foreign nations in which they plan to launch business enterprises. Yet we in the international arbitration community have made little or no effort to be culturally sensitive to the parties to international commercial arbitration. At most, we may note civil and common law differences in the arbitration process. But we largely consider cultural differences in people to be unimportant, if we consider such differences at all. Then we cram the parties' dispute into the same conflict resolution machine.

We probably could all agree that arbitrators are obligated to render thoughtful, informed, reasoned awards that respond to the issues the parties have raised, in a way that the parties have confidence in the process and perceive it to be a useful and fundamentally fair process. (A recent

another language. Thus, we need to design guidelines to improve cross-cultural communications in arbitration and mediation.

(2) Nonverbal Miscommunications

The same is true with gestures, facial expressions and body language, which send different signals. Gestures that are innocuous in one culture can be considered highly insulting in another. We need to explore the use of nonverbal communication across cultures, and the impact that it may have in different situations during the arbitration and mediation processes.

(3) Cultural Mores of Negotiation and Mediation

Cultural mores influence the ways individuals from different countries negotiate and mediate. We should analyze these mores and the way people from different cultures perceive the negotia-

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study by the Global Center for Dispute Resolution Research found that the parties to international disputes most want “a fair and just result.”) To achieve this in international arbitration, more than intellectual rigor is required. It is also necessary for the parties to believe that they have been heard and understood in their cultural context. I submit that we in the international arbitration community must get beyond being enthralled with ourselves, move out of our professional comfort zones, and engage other intellectual disciplines to better see ourselves—so that we can learn what we are doing well and what we simply fail to see.

For example, here are some “cultural issues” that should be explored to improve the process of resolving cross-cultural conflicts.

(1) Verbal Miscommunications

Miscommunications and a lack of understanding are usually the causes of conflicts. They can also cause problems in the dispute resolution process. All cultures have verbal and non-verbal communication systems that reflect their values and customs. Words spoken by an American may not have the same meaning once translated into

tion and mediation processes, with a particular focus on the factors influencing the formation of a positive working relationship. These factors could include differences in the way time is perceived, the importance of social interchange as part of the negotiation process, how trust is developed, attitudes toward the size of the negotiation team, and cultural preferences for different negotiation and mediation techniques.

There is no single, universal model for negotiations. Many experts describe two models. The first model, called “low context,” is characterized by a verbal and explicit style of communication and is found in highly individualistic societies like the United States. The second model, called “high context,” is associated with nonverbal and implicit communication more typical of interdependent, collectivist societies, such as Japan and other Asian countries. These distinctions are oversimplified but they do highlight areas of conflict in intercultural encounters, specifically the negotiation process.

(4) Cultural Biases and Stereotypes

People from different countries hold different views of each other based on ethnicity, national

origin or race. The recent growth in international trade has necessitated the need for a better understanding of other cultures and their customs and expectations. To make progress and facilitate the resolution of cross-cultural disputes, arbitrators and mediators should be aware of the cultural biases the disputing parties may have about each other. They also need to understand how the arbitration or mediation process may be perceived by some parties to be biased against them. Neutrals need to be able to adjust the cultural impact of arbitration and mediation by offering a more dynamic process tailored to the parties in cross-cultural disputes.

(5) Religion and Politics

In some countries, religion is the very foundation of the government and its legal, social, cultural, political and educational practices. In others, religion is less important politically but could be important personally. The importance of religion and politics cannot be overstated since it can lead people to have negative perceptions of other religions. When a participant in arbitration or mediation has a negative view of the religion of another participant, whether due to political, historical or other factors, the dispute resolution process will be negatively affected. It is our duty to accommodate individual religious beliefs and promote long-term peace and understanding through effective dispute resolution methods.

Cross-cultural negotiations are inherently more difficult than intra-cultural negotiations, and thus are among the most intellectually exciting challenges in the field of dispute resolution. The Chinese, who share an illustrious 5,000-year-old history, a strong cultural identity, and a distinct set of common values, tend to favor indirect, nonverbal communication, while Westerners tend to use a direct verbal style. Westerners come straight to the point, while the Chinese place a higher value on ambiguity and tact and make significant use of implied meanings and nonverbal cues. It is basic to the Chinese negotiating style in business and in diplomatic negotia-

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tions to insist that the other party reveal its interests first and make the first offer. There is an amusing story of how former Secretary of State George Schultz, on knowing of this approach to negotiations, asked Vice Premier Yao Yilin of China about his views of India. The Vice Premier replied that he would be interested in hearing in Secretary Schultz’s views. This exchange was repeated over and over again until the appointed time of departure.

Many studies have shown that the Chinese are more likely to avoid conflict than are Americans. This difference is attributed to “culture”; but we should not stop there. It is vital to understand the reasons for this cultural difference so that we do not misinterpret these behaviors. For example, scholars suggest that the Chinese may misinterpret American aggressiveness as hostility, while Amer-

icans may misinterpret Chinese conflict-avoidance as not caring. It would be extremely valuable for international arbitrators and mediators to understand these differences and how they could affect an arbitration or mediation. This would enable them to adjust the process to vitiate misunderstandings.

Another difference between eastern and western cultures relates to the contractual relationship. China’s time-line is very long, with its past, present and future all fitting into a continuum. It should not come as a surprise that, for many Chinese, a contract cannot be made until the parties have taken the time to develop a relationship of trust. Then, when a contract is entered into, it is considered a flexible instrument embodying the spirit of cooperation and respect, and it must be constantly reinterpreted and re-applied. In the United States, by contrast, a contract finalizes a negotiation. But in China, it is merely the main document that provides the principles that will govern the parties’ long-term relationship. So, in China contracts are merely “letters of intent” or agreements that signal the beginning of further cooperation between the parties; sometimes these agreements never mature into final contracts. It

would be quite useful for this perspective to be understood by arbitrators and mediators where the dispute involves a contract with a Chinese party.

One of the most striking aspects of dispute resolution in China is the importance of mediation. To the Chinese, mediation (better known in China as “conciliation”) is a natural extension of Confucian ethics. Therefore, it has the longest history in Chinese tradition and it is the most pervasive form of dispute resolution in China. True, the use of arbitration is growing there as well, as China adjusts to being a major player in the world economy. However, the principles and goals of Chinese arbitration are similar to those in mediation and negotiation—that is promoting Chinese interests and long-term good relationships. Because conciliation and its tenets have been used for so long, international arbitrators often encourage the parties to an arbitration involving one or more Chinese parties to mediate. In Chinese arbitration, it is also not unusual for the arbitrator and the mediator to be the same person. There is no doubt that having the arbitrator serve as the mediator is highly efficient in terms of time and costs. But we in America assume that these roles are, to some extent, incompatible. Upon reflection, I’m not so sure, since the parties decide whether to use mediation and they are able to negotiate with each other outside the presence of the arbitrators. The Chinese simply have a culturally based perspective on this issue based on their lengthy experience.

It was Confucius who said, “Human beings draw close to one another by their common nature, but habits and customs keep them apart.” These examples of culture shaping the contours of dispute resolution illustrate the importance of learning about our cultural differences so that, at the very least, arbitrators and mediators can make conscious, informed and transparent choices that do not trample on parties who are different from us. Doing so will make international arbitration more successful. The success of the Hong Kong and Singapore Arbitration Centers exemplify this lesson. I believe they are successful because they blend Chinese and Western-style legal systems and because they better understand the cul-

tural context of the parties who bring their disputes there.

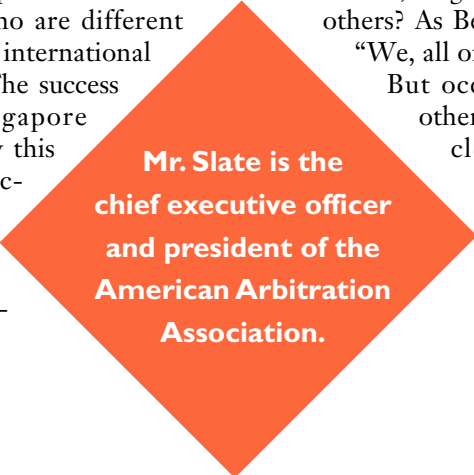
Legal purists may flinch at the suggestion that “non-legal” cultural factors should have any place in the field of international dispute resolution, finding them to be anti-intellectual and irrelevant. But I say, “Au contraire.” Arbitrators and mediators—and even advocates representing parties to international disputes—would gain by learning about the effect that cultural differences could have on arbitration, mediation and settlement negotiations. Such knowledge would assist arbitrators in drafting awards that the parties would respect, and also improve interactions between the arbitrators, counsel and the parties. Having culturally informed decision makers would not only give the parties confidence in international arbitration and ADR generally, it would enhance the prospects for the enforcement of arbitral awards by national courts.

I also believe that arbitral institutions should be culturally conscious. Many arbitral institutions, in recognition of the importance of language, have a multi-lingual staff and publish arbitration and mediation rules in multiple languages. The larger institutions have regional divisions with knowledge of the regional culture and maintain a list of multi-lingual neutrals.

So, if cultural consciousness has merit, what could be done to raise it? We could examine the subject more deeply for a better understanding of how culture affects international dispute resolution. We could provide cross-cultural training for arbitrators and mediators so that they can determine whether an international arbitration or mediation needs to be adjusted or refined to bridge cultural gaps. We also could hold conferences at which scholars and professionals in other disciplines could enlighten us about the effect of culture on the conduct of dispute resolution. Why not hear from economists, social scientists, linguists, business executives and others? As Benjamin Disraeli reminded us,

“We, all of us, live too much in a circle.”

But occasionally we should permit others with expertise into that circle. My firm belief is that in doing so, we will strengthen and improve the wonderful work that we are privileged to do. ■



**Mr. Slate is the
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