How Legal Traditions (Still) Matter in International Arbitration

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On 23 February 2017, three prominent international arbitrators shared their views and experience on the controversial question of the influence of legal traditions on arbitrators and arbitral proceedings. Juliet Blanch, Bernard Hanotiau and Pedro J. Martinez-Fraga were interviewed by Oliver Caprasse and Claire Morel de Westgaver at an event jointly organised by Belgian arbitration institution CEPANI and US law firm Bryan Cave. Dirk De Meulemeester, President of the CEPANI, and Maria Gritsenko gave the introductory notes.

Arbitrator nomination and appointment

When it comes to the arbitrator selection process, mixed perceptions exist as to the importance of legal traditions. An arbitrator's legal background may be the subject of stereotypes. A classic example of such a stereotype is the scope of document production which counsel sometimes assumes can automatically be limited through the nomination of a civil law trained arbitrator.

It was noted that counsel tends to get excessively engrossed on the question of legal backgrounds. Although an arbitrator's legal training may be relevant with junior lawyers or litigators, more experienced arbitrators tend to understand both civil and common law – notwithstanding the fact that common law can be very different depending on the jurisdiction in question. The panel agreed that more weight should be given to a prospective arbitrator's experience and qualifications. For example, it was noted that there are cases that benefit from having a non-lawyer involved as arbitrator.

Advocacy and evidence

Advocacy style can be adapted based on the circumstances including the background and experience of arbitrators. If the arbitral tribunal is composed of three QCs, English Court style advocacy might prove more effective. However, given that tribunals, and in fact arbitrators themselves, are often of mixed backgrounds, a particular style might not necessarily be any more helpful.

As regards the conduct of cross-examination, it transpired from the discussion that common law trained lawyers might be better placed than civil law lawyers who generally do not receive such training. It was said that a well-conducted "QC style" cross-examination could be "a real delight". With regard to how arbitrators approach cross-examination, it was also noted that ultimately, arbitrators cannot extract themselves from who they are: cross-examining witnesses is generally more natural in Anglo-Saxon jurisdictions, meaning that how a document is being used and what it purports to prove is not always scrutinised in the same way by lawyers from across jurisdictions.

When asked about the influence of national legal systems on evidence, it appeared from the discussions that the scope of both documentary and witness evidence tends to be overly broad across the board, civil law and common law lawyers continue to differ in how they view and interpret a document. Generally, from the perspective of a civil law lawyer "the document speaks for itself". In contrast, a common law lawyer might feel the need to have witnesses introduce documents and examine witnesses in relation to the content of a document that would appear self-evident to a civil law lawyer. It was further advised that counsel often lose track of the two main purposes of cross-examination: impeachment and admission. In relation to bridging the gaps between different legal traditions on evidence, the safest option remains sticking with the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

Settlements

The panel testified that it is not unusual for parties to approach arbitrators to seek their preliminary views on liability but also sometimes on quantum. If the arbitrators engage in this process, this is always on the basis that the tribunal will not be bound by such preliminary views. In fact, parties will sometimes agree in writing not to challenge the arbitrator(s) and/or the ensuing award(s) on the basis that such preliminary views were given. The validity of such a waiver – which could in turn vary across jurisdictions – was questioned by the panellists.

Settlement in the context of arbitral proceedings is an area where the legal culture, in particular the seat of the arbitration, has an impact on the role of arbitration. The process by which arbitrators share their preliminary views on the dispute is more common in certain jurisdictions, such as Germany and Switzerland. Panel members expressed reservation about engaging in this process unless sitting in jurisdictions where such a practice is commonly accepted. In the same vein, the panellists discussed whether it is appropriate to suggest that option to parties, or whether it is preferable to consider it only when expressly sought by the parties.

Sua sponte

Another important topic, which led to very interesting discussion, was sua sponte actions by arbitrators. It emerged from the discussion that whether arbitrators may or should sua sponte raise questions of law may depend on many factors, including the seat of the arbitration, the applicable law, the legal background of the arbitrators and the public policy character of the norm. The principle of iura novit curia was cited as an example of rule relied upon by arbitrators to raise questions of law on their own initiative. Such rule tends to be inexistent in jurisdictions where parties are to prove the law.

Decision making process

Reference was made to the Spanish Supreme Court in the *Puma* case (Spanish Supreme Court 102/2017, 15 February 2017) where an award was set aside and two of three arbitrators were found professionally liable for excluding their fellow arbitrator from the deliberations. The panel noted that there were sometimes cultural differences in how arbitrators approached the decision-making process, including the deliberations. In this case, it remained to be seen what evidence of the exclusion of the third arbitrator had been adduced in the ensuing litigation.

In this context, it was noted that it is not uncommon in investment treaty cases to have an arbitrator seeking to further his or her appointing party's agenda – whether consciously or not. Only a minimal number of dissenting opinions come from arbitrators appointed by the successful party. It could, however, be argued that dissenting opinion statistics demonstrate effective selection of arbitrators, thereby proving that cultural background might indeed play a role in the arbitrator selection process.

The panel however was adamant that the issue was more likely one of personality or honest belief in different legal theories.

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