CLASH OF CULTURES IN ARBITRATION PROCEDURE: TOWER OF BABEL ANEW?

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One often hears that arbitration procedure provokes a 'clash of legal cultures'. Within such line of argument some claim that an 'Americanization' of arbitration is gradually occurring. And the thought sends shivers down the spines of proceduralists, particularly those of Latin American heritage.

I offer an alternative view: what is present is not *Americanization* but *Darwinization*. The point of the euphemism: albeit differences do exist, what is really occurring is a gradual process of accretion of an internationally accepted *modus operandi*.

Viewed this way, the process may well be characterized as *competition*. Competition in the market of ideas, fostered by arbitration. Domestic paradigms and practices are confronted and evaluated as to their success in achieving a specific goal. What goal? Whatever the case or relevant procedural step requires. And the lodestar is (are) the four 'Fs' John Barkett and Jan Paulsson refer to: Fair, Frugal, Fast, Foreseeable.[1] I would group them all under one heading: *efficiency*—understood as rendering quality arbitral justice in a cost-efficient manner.

Under such prism, from the international standpoint, domestic practices are used inasmuch as they succeed in achieving *a* need of the case at hand. So, for instance, if *in casu* written witness statements better achieve the goal of efficiency, they should be used. If, on the contrary, personal testimony is better suited, it is preferred. And mixed solutions are often observed.

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[1] John M. Barkett and Jan Paulsson, *The Myth of Culture Clash in International Commercial Arbitration*, p. 2.

Another (controversial) example is discovery. Whilst common law advocates may feel unarmed in presenting their case without discovery, civil law practitioners may deem it a (scandalous) intrusion into what they consider their business intimacy (some go as far as qualifying it as 'fishing expeditions'). From the international standpoint, practice strikes a balance between both concerns. A decaffeinated version of discovery is employed: production and exchange are followed in such a way that abuse and waste are limited, while achieving the goal of marshalling evidence.[2]

I could go on. However, the point has been made.

As usually happens, the colloquy on this topic may appear contradictory. Even heated. I suspect however that—correctly understood—there is much common ground. For instance, Nadia de Araujo intelligently posits that counsel and arbitrators should be mindful of the seat.[3] The point is well taken. It is also shared by John Barkett and Jan Paulsson who insightfully state that ignoring cultural diversity is perilous.[4] They argue in favor of 'cultural awareness' to ensure arbitration fairness.[5] A suggestion one could hardly take issue with.

Against the reticence of *lex loci* hardliners I have long posited that international arbitration procedure is best understood as distilling the lessons learned from (literally) centuries of activity of international tribunals. Hence, they should shed their (entirely domestic-sensibility related) concerns in favor of a method that fosters the worldwide Rule of Law. Otherwise, the Tower of Babel story will not be restricted to language, but also to law and commercial intercourse.

The point is so simple one could not be faulted for initially discarding it as banal. However, as Hazlitt warns, lessons of importance need to be re-learned by each generation. This is our case. The need to do without parochial concerns has been

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2 See Article 3.3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, International Bar Association, 1 June 1999.

3 Nadia de Araujo, *Clash of International Cultures in International Arbitration*, p. 2.

4 Barkett and Paulsson, p. 4.

5 Barkett and Paulsson, p. 9.

voiced for ages. With some irony,[6] it has been brought to my attention that Andrés Bello warned that:[7]

> *Los inconvenientes que bajo otros aspectos pueda producir la adopción de leyes i usos extranjeros, no tienen cabida en el comercio, que es cosmopolita en su espíritu, i cuyas necesidades, intereses i operaciones son unos mismos en todas las zonas i bajo todas las formas de gobierno. …*
>
> *Interesa en alto grado al comercio, que en todos los pueblos que tienen relaciones recíprocas, se asimilen, cuanto es posible, las reglas destinadas a dirimir las controversias entre los comerciantes.*
>
> *La uniformidad de la lei mercatoria sería, no solo un nuevo estímulo para las especulaciones, sino un nuevo lazo de amistad i unión …*
>
> [the problems stemming in other respects from the adoption of foreign laws and practices have no place in commerce, which is cosmopolitan in spirit, and which needs, interests and operations are the same everywhere and under all forms of government…
>
> It is an important interest of commerce that, among all peoples that engage in intercourse, the rules destined to solve the disputes between merchants be made similar, to the extent possible.
>
> uniformity of the lex mercatoria would not only be a new stimuli for dealings but also a new bond of friendship and union …]

Rather than obsessing over cultural differences, observers and practitioners would be better off understanding that *differences need not divide*. Viewed globally, the corpus of domestic practices provides a menu of options that parties and tribunals may choose from to tailor the best procedure for the case at hand. Justice *à la carte*.

The result is not only practical, but beautiful: rather than *dividing*, differences *unite*.

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6 The irony stems not only from the source of the suggestion (a Venezuelan national), but also from who brought it to my attention. I am indebted to Judge Narciso Cobo Roura for sharing it with me. Judge Cobo Roura is the current Chair of the Court for Economic Affaires of La Habana, Cuba. (*Presidente de la Sala de Justicia, Sala de lo Económico del Tribunal Supremo Popular, La Habana, Cuba.*)

7 Andrés Bello wrote such words in the newspaper *El Araucano* in 1833.