

Fall 2009

## The Myth of Culture Clash in International Commercial Arbitration

John M. Barkett

Jan Paulsson

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>



Part of the [Other Law Commons](#)

---

Online ISSN: 2643-7759

### Recommended Citation

John M. Barkett & Jan Paulsson, *The Myth of Culture Clash in International Commercial Arbitration*, 5 FIU L. Rev. 1 (2009).

Available at: <https://ecollections.law.fiu.edu/lawreview/vol5/iss1/5>

This Article is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact [lisdavis@fiu.edu](mailto:lisdavis@fiu.edu).

# FIU Law Review

---

Volume 5

Fall 2009

Number 1

---

© 2010 by Florida International University

## **The Myth of Culture Clash in International Commercial Arbitration\***

*John M. Barkett*

*Shook, Hardy & Bacon L.L.P.  
Miami, Florida*

*Jan Paulsson*

*Michael Klein Distinguished Chair  
University of Miami Law School*

### I. INTRODUCTION

International commercial arbitration is conducted today with a broad consensus as to many important features. Through successive editions, the leading arbitral institutions have refined their rules in a manner that seems ever convergent. The 1999 International Bar Association (hereinafter “IBA”) Rules on the Taking of Evidence in International Commercial Arbitrations<sup>1</sup> contain a remarkable series of effective compromises with respect to key issues of procedure that seemed irremediably controversial just two or three decades ago. The United Nations Commission on International Trade Law (hereinafter “UNCITRAL”) Model Law<sup>2</sup> has been a great success, finding its way into the statute books of countries in all stages of development and in all corners of the world.

---

\* This article was originally presented at the Florida Bar International Law Section 8<sup>th</sup> Annual International Law and Arbitration Conference on February 12, 2010, in Miami, Florida.

<sup>1</sup> INT’L BAR ASS’N RULES ON THE TAKING OF EVIDENCE IN INT’L COMMERCIAL ARBITRATIONS (1999), available at <http://www.intbar.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf>.

<sup>2</sup> U.N. Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006* (1985), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

Against this backdrop of apparent universalism, it is paradoxical that voices are heard to say that the legitimacy of the international arbitral process is put into question as a result of a clash of cultures. “Is international commercial arbitration fair?” Losing arbitrants might say, “no.” But let’s put losing parties aside for a moment. Does one’s cultural background control the answer to this question? Is there a clash of cultures that undermines the integrity of the arbitration process? Does the national origin of a party affect the perception of fairness of the arbitration process?

We doubt it. Internationally active businesses which seek to rely on the arbitral process share the same fundamental objectives. To them, arbitration must be what we call the four F’s:

- Fair,
- Frugal,
- Fast, and
- Foreseeable.<sup>3</sup>

These objectives transcend cultural differences.

To make our point, we consider below the topic of “culture clash” as it touches on various features of the arbitral process. Readers of our analysis are invited to ask themselves whether there is really any room to contend that the merging international consensus as to best practices hides large pockets of resistance created by cultural differences.

## II. FORMATION OF THE ARBITRATION CLAUSE IN COMMERCIAL CONTRACTS

Arbitration clauses exist in contracts because contracting parties have elected to utilize a private dispute resolution process rather than rely on a national court to resolve contract disputes. A contracting party’s culture does not dictate that any potential disputant enter into such an agreement. Commercial and jurisprudential pragmatism controls that decision.<sup>4</sup>

---

<sup>3</sup> By foreseeable, we do not mean to suggest that a prospective arbitrant should be able to anticipate the outcome of an arbitration, but rather, in addition to being fair, fast, and frugal, the arbitral process itself should be sufficiently predictable that prospective arbitrants know what they are getting into when they agree to arbitrate.

<sup>4</sup> National courts may be populated by inexperienced, unqualified, or, in some countries, corrupt judges. Local judges may favor domestic parties over foreign parties. *Ex parte* contacts with judges, permitted in some countries, could, if not undermine, perceptions of due process. Foreign business entities may receive an unsympathetic ear from local judges. Fact-finding processes may be limited. Appellate processes may permit *de novo* review of facts and also may take years. Arbitration may be the only fair way to address disputes that might arise.

Contract formation issues may be affected by culturally developed predilections. The number of arbitrators and how they are appointed can be the subject of protracted negotiation. Choice of law issues, selection of the seat of arbitration, and nationality criteria for arbitrators might be added to this list. While cultural views may impact the negotiation of an arbitration clause, they do not control it. Business persons, whether from the same country or different countries, look for ways to make deals. Arbitration clauses – addressing a dispute that may never arise – are not going to prevent them from doing so. Whatever their country of origin, business persons will confront and resolve arbitration process questions perfunctorily, as a function of past experience, or premeditatedly, but in the end doing the deal will trump all cultural differences. The arbitration clause will be agreed upon.

If a dispute later arises, cultural issues on the formation of the tribunal will yield to the agreed-upon process. Whether ad hoc or administered, the arbitration will eventually proceed and a tribunal will emerge, hear evidence, and render an award.

### III. SO WHERE ARE THE CULTURE CLASHES?

Cultural clashes are mirages invoked to mask the real fight: that between the claimant and the respondent. When efforts are made to delay the arbitration process through procedural motions, they are a function of tactics, not tradition. When positions are taken to try to build fundamental error into the arbitration process, they are as well. Clothing such tactics as “cultural” is disingenuous. Unmasked, they are designed to delay or upset an award, a strategy familiar to arbitrants from any state.

To be sure, clashes occur. If there is a London seat in an international arbitration where lawyers are fighting “tooth and nail,” it is more likely that the law firms involved are both from London, where reputations might be viewed as on trial. On the other hand, if there is a London firm on one side and an Athens firm on the other, it is more likely that each will be polite and courteous to shed good light on their respective English and Greek cultures. Counterintuitively, familiarity may foster feral behavior, while cultural diversity may prevent it.

Just as certain is the recognition that ignoring cultural diversity is perilous to arbitrators and the arbitration process.

Two lawyers may be trained in systems where they have developed very different skills. An arbitrator adopts a procedure that favors one of them. There will likely be a bitter participant who may be disadvantaged, prompting the client to retain additional or other counsel.

For example, civil-law-trained lawyers do not typically conduct cross-examination in their national courts. However, it is now routine that cross-

examination is permitted in international commercial arbitration. Nonetheless, in an arbitration between an arbitrator from a common-law background and one from a civil-law background, should the tribunal's earliest procedural order provide that cross-examination will be permitted at the hearing on the merits? If a tribunal waits until the hearing to make this procedural determination, might the tribunal affect the substantive outcome of an arbitration? This is not an example of a cultural clash. It is an issue of simple procedural fairness. In establishing procedures, arbitrators must understand their impact on the disputants and ensure that due process is not compromised.

Or consider this example. A manufacturer of products sold throughout the world utilizes a form contract for its distributors calling for arbitration in the event of a dispute where the seat of the arbitration is within the country of the distributor. Assume a distributor in England and one in France. Each is terminated. Each believes that the contract was not followed by the manufacturer. And each invokes the arbitration clauses. Assume there is no dispute over the translation of the contract's terms. One would like to think that the dispute will be resolved procedurally and substantively in the same manner under the same contract and that only any material difference in facts might affect the outcome.

We know, however, that the English arbitration will be handled differently than one in France, even if the manufacturer uses the same counsel in both arbitrations. This is not, however, because of a clash in cultures. Rather it is because of choices made – or relative positions of strength – at the time of contract formation that dictate the dispute resolution procedures to be followed.

#### IV. "DISCOVERY" AND THE PRODUCTION OF DOCUMENTS

But what of "document discovery"? Is this not the focus for the ultimate culture clash? Common law-trained lawyers rely on it; civil-law-trained lawyers reject it. Yet the IBA Rules on the Taking of Evidence have triumphed over both traditions, creating uniformity where there had been discord. Yes, the IBA Rules represent a compromise in traditions. But they are intelligent compromises borne of sixteen years of experience, with the first edition of the IBA Rules on Evidence promulgated in 1983.<sup>5</sup>

---

<sup>5</sup> See "IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration," available at [http://www.asser.nl/Default.aspx?site\\_id=13&level1=14433&level2=14443](http://www.asser.nl/Default.aspx?site_id=13&level1=14433&level2=14443).

The 1983 IBA Rules had been rarely used. Civil-law lawyers invoked their right under the 1983 Rules to restrict disclosure of documents to those that were exchanged between the producing party *and* a third party. Internal documents of a producing party were off limits in production.<sup>6</sup> Not surprisingly, common-law lawyers resented the restriction and resisted the use of the 1983 Rules. For this reason and perhaps because the arbitration world may not yet have been ready for *any* document disclosure obligations, the 1983 IBA Rules on Evidence gathered dust on most arbitrators' and lawyers' shelves.

By 1999, however, the civil and common-law worlds reached a consensus that internal documents should be made available for production subject to specific disclosure demands and that as a matter of arbitration fairness, document disclosure obligations on arbitrants should be increased. Thus, Article 3.1 of the IBA Rules provides that each party "shall submit" to the tribunal and the other parties "all documents available to it on which it relies."<sup>7</sup> Under Article 3.2, within the time provided by the tribunal, a party may also submit a request to produce that satisfies certain specificity requirements but was no longer limited to documents that passed only to third parties.<sup>8</sup> Article 3.4 provides that within the time ordered by the tribunal, the producing party "shall produce" to the tribunal and the other parties "all the documents requested in its possession, custody, or control as to which no objection is made."<sup>9</sup> If the producing party has objections, the objections are to be made in writing and within the time ordered by the tribunal.<sup>10</sup> Article 3.5 provides that the "reasons for such objections shall be

---

<sup>6</sup> Article 4 of the 1983 IBA Rules of Evidence required each party to produce all "documentation on which such party desires to rely," but permitted requests for production only as to a document relevant to the dispute provided that the document was "identified with reasonable particularity" and provided further that the document "passed to or from such other party from or to a third party who is not a party to the arbitration."

<sup>7</sup> INT'L BAR ASS'N RULES ON THE TAKING OF EVIDENCE IN INT'L COMMERCIAL ARBITRATIONS Article 3.2 (Int'l Bar Ass'n 1983).

<sup>8</sup> *Id.* Under Article 3.3, the request "shall contain": a description of "a requested document sufficient to identify it, or a description "in sufficient detail (including subject matter) of a narrow and specific requested category of documents" that are "reasonably believed to exist"; a description of how the documents requested "are relevant and material to the outcome of the case"; and a statement that the documents requested are not in the possession, custody, or control of the requesting party, and the reason why the requesting party assumes the documents requested are in the possession, custody, or control of the producing party. *Id.*

<sup>9</sup> *Id.* at Art. 3.4

<sup>10</sup> INT'L BAR ASS'N RULES ON THE TAKING OF EVIDENCE IN INT'L COMMERCIAL ARBITRATIONS Article 3.5 (Int'l Bar Ass'n 1983). The 1983 IBA Rules on Evidence did not provide for objections to a request to produce. See INT'L BAR ASS'N SUPPLEMENTARY RULES GOVERNING THE PRESENTATION AND RECEPTION OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (May 28, 1983), available at <http://www.asser.nl/>.

any of those set forth in Article 9.2.”<sup>11</sup> After receipt of objections, under Article 3.6, the tribunal “in consultation with the parties and in timely fashion,” then considers the request and the objections.<sup>12</sup> Article 3.10 allows parties to submit additional documents “which they believe have become relevant and material” as a consequence of the issues raised in documents, witness statements or expert reports or in other submissions of the parties.<sup>13</sup> The 1999 IBA Rules on the Taking of Evidence did not resolve a clash in cultures. It resolved an issue of fundamental fairness in the arbitration process: ensuring that a process was in place to identify documents not produced yet which may be outcome determinative or materially affect the outcome of a proceeding.

## V. EXPERTS

Tribunal-appointed experts historically raised the potential for a clash in cultures. Common-law lawyers were fearful that an expert appointed to assist a tribunal would, in effect, become the decision maker. Civil-law lawyers were not accustomed to the use of party experts testifying to support a party’s position.

The 1983 IBA Rules on Evidence placed the subject of experts within the scope of the “Arbitrator’s Powers.”<sup>14</sup> They did not provide for party-

<sup>11</sup> *Id.* Article 9.2 states in pertinent part that the tribunal shall exclude “from evidence or production” any document “for any of the following reasons”: (a) lack of sufficient relevance or materiality; (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable; (c) unreasonable burden to produce the requested evidence; (d) loss or destruction of the document that has been reasonably shown to have occurred; (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling; (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or (g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.” *Id.* at 9.2. Under Article 3.7, in “exceptional circumstances,” if the “propriety of an objection” can only be determined by review of the document, the tribunal may determine that it should not review the document and instead may, after consultation with the parties, appoint an impartial expert “bound to confidentiality” to review the document and report on the objection. If the objection is upheld, the expert “shall not disclose” to the tribunal and the other parties “the contents of the document reviewed.” *Id.* at 3.7.

<sup>12</sup> The tribunal “may order” the producing party to produce the requested documents in its possession, custody, or control “as to which the tribunal determines” that (i) the issues that the requesting party “wishes to prove are relevant and material to the outcome of the case,” and (ii) “none of the reasons for objections set forth in Article 9.2 apply.” *Id.* at 3.5.

<sup>13</sup> INT’L BAR ASS’N RULES ON THE TAKING OF EVIDENCE IN INT’L COMMERCIAL ARBITRATIONS Article 3.10 (Int’l Bar Ass’n 1983).

<sup>14</sup> Article 7 of the 1983 IBA Rules on Evidence, the Arbitrator was given the following powers: “to appoint experts to assist him or to give expert evidence or reports in the arbitration; and “to regulate the right of the parties to call expert witnesses and to make provisions with regard to their activities and the presentation of their evidence.” INT’L BAR ASS’N RULES ON THE TAKING OF EVIDENCE IN INT’L COMMERCIAL ARBITRATIONS Article 7 (Int’l Bar Ass’n 1983).

appointed experts. The 1999 IBA Rules specifically provide for party-appointed experts.<sup>15</sup> Moreover, as to tribunal-appointed experts, which were allowed without qualification in the 1983 IBA Rules on Evidence, the 1999 IBA Rules require the tribunal to consult with the arbitrants first before considering the appointment of a “Tribunal-Appointed Expert.”<sup>16</sup> The 1999 IBA Rules again allowed lawyers from a variety of legal traditions to reconcile differences in those traditions in ways intended to advance the goals of fair notice and fair process for all disputants. Had a genuine clash in culture existed, the 1999 IBA Rules could have never been adopted or enjoyed the success they have achieved.

## VI. WITNESS STATEMENTS AND THE SCOPE OF CROSS-EXAMINATION

Another purported culture clash involves the propriety of cross-examining a witness on topics that are “beyond the scope” of the witness’s witness statement.<sup>17</sup>

Arbitrators are wont to require the appearance of witnesses who have prepared witness statements so that they might be questioned by the adversary lawyer.<sup>18</sup> After the witness claims ownership of the witness statement and is tendered for examination, the interrogating lawyer will conduct an examination that might go beyond the witness statement. If an American

---

<sup>15</sup> Article 5.1 of the 1999 IBA Rules on the Taking of Evidence states that a party “may rely on a Party-Appointed Expert as a means of evidence on specific issues.” INT’L BAR ASS’N RULES ON THE TAKING OF EVIDENCE IN INT’L COMMERCIAL ARBITRATIONS Article 5 (Int’l Bar Ass’n 1999). Article 5 continues by requiring expert reports and gives the tribunal the right to order Party-Appointed Experts who have submitted reports “on the same or related issues” not only to “meet and confer on such issues” but also to “attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports, and they shall record in writing any such issues on which they reach agreement.” *Id.*

<sup>16</sup> Article 6.1 of the 1999 IBA Rules provides: “The Arbitral Tribunal, after having consulted with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert report after having consulted with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.” INT’L BAR ASS’N RULES ON THE TAKING OF EVIDENCE IN INT’L COMMERCIAL ARBITRATIONS Article 6.1 (Int’l Bar Ass’n 1999). Article 6 also requires expert candidates to disclose conflicts, allows parties to object to the proposed tribunal-appointed expert, gives the tribunal-appointed expert the right to request relevant and material information from a party, allows parties to see the report of the tribunal-appointed expert and respond to it, and allows parties to have the tribunal-appointed expert appear at a hearing and be subject to examination on issues raised in the parties’ submissions or in the expert reports made by party-appointed experts. *Id.*

<sup>17</sup> The presence of witnesses in a hearing “live” instead of only “on paper” may, at one time, have been a bias of a particular legal tradition, but today the suggestion that hearings be held solely on the basis of witness statements is the rare one most likely limited to situations where there are no disputed issues of material fact.

<sup>18</sup> An arbitrator is likely to discount the witness statement otherwise.



lawyer is presenting the witness, an objection is likely to be raised to the scope of the cross-examination.

The objection is not the product of a culture clash. It is the product of a misapplication of a rule of evidence. American judges are given wide latitude in the scope of cross-examination in support of the goal of securing the “just, speedy, and inexpensive” determination of every action.<sup>19</sup> Rule 611(b) of the Federal Rules of Evidence applicable in the United States district courts permit inquiry not only on matters covered in the direct examination but also into matters affecting “the credibility of a witness” and specifically provides that the examination.<sup>20</sup> A witness statement is just that: a statement of what the witness has to say about a matter within contours established by the lawyer advancing the statement on behalf of an arbitrator. The witness may have much more knowledge than embraced by the paragraphs of a statement. Fairness dictates that arbitrators permit, without appropriate boundaries, the examining lawyer to test the credibility of the witness and to explore what else the witness knows on the topics in controversy. Arbitration tactics, not a culture clash, is the apt description for the objection that should be easily resolvable by an informed tribunal.<sup>21</sup>

## VII. ATTORNEY-CLIENT PRIVILEGE

The privilege that protects attorney-client communications from disclosure to third parties varies throughout the world. In the United States, it is a fundamental precept: communications protected by the privilege do not have to be produced and can, under certain circumstances, still be protected where they have been inadvertently produced.<sup>22</sup> Privileged communications in France are even more sacrosanct, generally being considered non-

---

<sup>19</sup> FED. R. CIV. P.1.

<sup>20</sup> Under the Federal Rules of Evidence applicable in the United States district courts, cross-examination “should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.” FED. R. EVID. 611(b) (2009).

<sup>21</sup> It is obviously prudent for a tribunal to make clear in a procedural order that if a witness statement is a surrogate for “direct examination,” the cross-examination is not intended to be limited to the scope of the witness statement if the witness otherwise has knowledge or to test the credibility of the witness.

<sup>22</sup> Rule 502(b) of the Federal Rules of Evidence provides that an inadvertent disclosure of a privileged document does not result in a waiver of the privilege if the holder of the privilege or work product protection “took reasonable steps to prevent disclosure” and the holder “took reasonable and prompt steps to rectify the error.” Rule 502(d) also permits a federal district court to enter an order protecting a party from a waiver claim if a privileged document is advertently produced in the litigation.

waivable in order to make it impossible for oppressive rulers to coerce clients into making a waiver.<sup>23</sup>

Unlike the United States, where in-house counsel enjoy the privilege where they are providing legal advice, in-house counsel communications are not privileged or have very limited protection in France, throughout the European Union,<sup>24</sup> and in many countries throughout the world. In an arbitration where a French in-house counsel and an American in-house counsel are both testifying, the French lawyer may have to testify about legal opinions while the American lawyer is entitled to invoke the attorney-client privilege.

We acknowledge that this phenomenon may give rise to many labels, including “culture clash.” But we think that legal rules that govern the conduct of a lawyer-witness in a country are different in kind from “cultural” rules of that country. The clash here will be between counsel in argument before the tribunal over what is fair. The prudent tribunal will have to be very thoughtful in evaluating the applicable law, the materiality of the testimony, the advantage or disadvantages that might be created by different solutions, all with an eye to insuring fundamental fairness in the proceeding.

---

<sup>23</sup> Lawyers have been a thorn in the side of kings, emperors, and other potentates throughout history in France. They have fought without arms to keep rulers out of their business to preserve an independent bar. This tradition is reflected in the French Bar’s Harmonized Regulations (Règlement Intérieur Harmonisé des Barreaux de France) which, much like Rule 1.6 of the Model Rules of Professional Conduct in the United States, prohibit disclosure of a client’s confidential information. There is a major difference, however, in the two rules. In France, a breach of this duty to a client can give rise to a criminal offense under the French Criminal Code.

<sup>24</sup> See *Akzo Nobel Chemicals Ltd. v. Comm’n of the European Cmty.*, 2007 E.C.R. T-125/03, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:NOT> (while recognizing the “legal professional privilege” (LPP), confirming a prior ruling, *AM & S v Commission* [1982] ECR 1575, by holding that the LPP applies only “to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment.” In response to an argument that *AM & S* should not be followed because of a greater recognition since 1982 of the application of the LPP to in-house counsel communications, the Commission responded: “[A] comparative examination of laws shows that a large number of Member States still exclude in-house lawyers from protection under LPP. In addition, in certain Member States, the issue seems not to have been decided unequivocally or definitively. Furthermore, various Member States have aligned their regimes with the Community system, following upon the judgment in *AM & S*. Secondly, such an examination shows that a considerable number of Member States do not allow in-house lawyers to be admitted to the Bar or Law Society and, accordingly, do not recognise them as lawyers established in private practice. In fact, in a number of countries, to be a lawyer employed by a person who is not a lawyer in private practice is incompatible with the status of ‘avocat’. Moreover, even in countries which do permit this possibility, the fact that in-house lawyers are admitted to a Bar or Law Society and are subject to professional ethical rules does not always mean that communications with such persons are protected under LPP.”). *Id.* at ¶ 17.

## VIII. DUTY TO PRESERVE

In the United States the duty to preserve is a well-established principle. Litigants in U.S. courts understand that they have an obligation to preserve relevant documents after a complaint is filed or before a complaint is filed once a decision has been made to bring litigation or once a prospective defendant reasonably anticipates litigation.<sup>25</sup> Depending upon the level of culpability and the prejudice associated with the failure to keep documents, a party in U.S. courts guilty of “spoliation” can face a number of sanctions, including an adverse inference instruction where there is a jury acting as the trier of fact.<sup>26</sup>

Articles 9.4 and 9.5 of the IBA Rules on the Taking of Evidence address the adverse inference. If a party “fails without satisfactory explanation” (1) to produce any document requested in a request for production or (2) to make available any other relevant evidence, including testimony, to which, in either case, the party has “not objected in due time,” or if a party “fails to produce any document” or “fails to make available any evidence, including testimony,” ordered to be produced by the tribunal, the tribunal “may infer” that such document or such evidence “would be adverse to the interests” of that party.

No tribunal will apply an adverse inference without serious consideration of the factual circumstances and the likelihood of prejudice by the non-existence of particular documents. In an arbitration between a U.S. party and a party from a country where there is no duty to preserve and relevant documents have been not maintained or have been discarded, it is conceivable both that the latter party will have no or very few documents while the U.S. party could be the subject of a lengthy and expensive document production, and that the outcome of the case may be impacted by the absence of contemporaneous records of the actions of witnesses. What is a tribunal to do if the party missing the documents had no duty to preserve them under that party’s national law and the circumstances do not suggest an intentional spoliation to avoid their production in a future arbitration?<sup>27</sup>

---

<sup>25</sup> The Pension Comm. of the Univ. of Montreal Pension Plan et al. v. Banc of Am. Sec., LLC et al., No. 05 Civ. 9016, slip op. at 11-12 (S.D.N.Y. Jan. 15, 2010).

<sup>26</sup> *Id.* at 15-21.

<sup>27</sup> For a peek into how a court addressed the absence of records by ASUSTEK Computer, Inc. and ASUS Computer International (ASUS), Taiwan based companies, see *Adams v. Dell*, 621 F.Supp.2d 1173 (D. Utah 2009). ASUS did not archive emails and depended on employees to individually preserve emails that had any long term value. This practice resulted in an allegation of spoliation of material evidence for which sanctions were sought. The magistrate judge held: “ASUS’ practices invite the abuse of rights of others, because the practices tend toward loss of data. The practices place operations-level employees in the position of deciding what information is relevant to the enterprise and its data retention needs. ASUS alone bears responsibility for the absence of evidence it would be expected to

Culture clash? We prefer “cultural awareness” to ensure arbitration fairness. There are limits to rules. Arbitrators have to always be sensitive to, and demonstrate an acute understanding of, differing legal obligations, and the impacts they might have on the administration of justice.

#### IX. CONCLUSION

If international commercial arbitration were a closed shop reserved to Western lawyers and arbitrators, we could talk about a true clash of cultures because parties from excluded populations would harbor distrust of a process dominated by persons with whom they do not identify (and whom they do not trust to have empathy for their conduct and posture).

But this is a simple matter of common sense and human decency. As the arbitral process has become global in its reach, new participants demand opportunities to participate in the process – indeed to shape it – rather than accept its consequences in silence. No one can seriously imagine that the process could thrive, or even survive, as a closed shop. International institutions not only have recognized the importance of open, collaborative, and diverse membership, they have embraced it. One example: in its 2008 intake of seven new members, the London Court of International Arbitration selected a sole Westerner (from Sweden), the rest being nationals of Argentina, Egypt, Korea, India, Iran, and Russia. Other similar examples could be given.

As long as arbitral institutions, arbitrators, and arbitants remain committed to a process that is fair, fast, frugal, and foreseeable, *and* execute on that commitment, claims of a culture clash in international commercial arbitration should be taken with a pinch of salt.

---

possess. While Adams has not shown ASUS mounted a destructive effort aimed at evidence affecting Adams or at evidence of ASUS' wrongful use of intellectual property, it is clear that ASUS' lack of a retention policy and irresponsible data retention practices are responsible for the loss of significant data.” *Id.* at 1194.