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**Intercultural and Nonverbal Communication Insights For
International Commercial Arbitration**

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Intercultural communication has been defined as “communication between people of different cultures” (Rich and Ogawa, 1972, p. 24). Intercultural communication is an entire field of study within human communication (Morsbach, 1976; Jakobson, 1976; Ruben, 1977; Klopff, 1998; Richmond & McCroskey, 2004) The study of intercultural communication helps people understand how challenging communication can be when national, regional, religious, socioeconomic, age, and other cultural variables are dissimilar. Klopff and Park (1982) explained that people encode messages based on their cultural histories and experiences, while others will decode that same message using the communication tools at their disposals—their cultural relations, records, and overall experiences.

One only has to consult court case reporters—collections of cases from appellate courts—to learn that people from one culture frequently misunderstand (decode) messages sent from (encoded) other people within the same culture. When senders and receivers from different cultures communicate regarding valuable cargo and performance worth large sums of money, the potential for misunderstandings increases. Nevertheless, today’s communication technologies allow cross-cultural communications to occur with more ease and at lower costs than at any other time. Additionally, the economic systems of nations are intertwined to such an extent that widespread commerce and effective intercultural communication are necessary.

In the aftermath of the North American Free Trade Association and the World Trade Organization, economic health, if not survival, depends largely upon the success of intercultural communication between parties from different nations, who trade with each other. While a myriad of cultural differences may exist between contracting parties, a single perceived cultural difference—whether real or imagined—may result in major misunderstandings. Specifically, different national systems of jurisprudence utilize different legal jargon, assumptions, expectations, prohibitions and requirements. Differences between nations’ legal systems could result in tremendous uncertainty at best and distrust at worst between parties to international trade agreements. In fact, if a large sum is involved, one can reasonably expect that one party would sue the other in her native country, and the other would do the same in his country. This would be a recipe for an expensive legal nightmare, unless an early settlement or other creative solution could be agreed upon quickly. International Commercial Arbitration is needed because accidents, bad faith, and intercultural communication problems, among other things, continue to result in disputes in need of efficient resolutions.

The Two Dominant Legal Traditions

Uncertainty is often the prelude to distrust and dispute. It may manifest early when contracting parties are from nations with similar systems of jurisprudence, such as the United States and the United Kingdom. Uncertainty may exist, to an extent, when parties to litigation and their representatives are from different states within the United States. The most striking example of this within the United States is the law in Louisiana and the law in the other 49 states and commonwealths. Much of Louisiana’s original state substantive law was derived from the French civil law system of jurisprudence, as it existed at the time of the Louisiana Purchase. The remainder of the states derived their original law from the English common law system of jurisprudence, as it existed at the time of the Revolution. While this is interesting for conversational purposes, the 49 states have adopted some aspects of the French civil law system of jurisprudence, such as codes. Every state and the federal government now have compilations of statutory laws in codes. Likewise, Louisiana has gradually implemented common law features. For example, Louisiana now follows the fundamental common law policy of *stare decisis*—courts generally following principles of law from earlier cases when deciding cases

with substantially similar facts. This process of following law made in earlier appellate cases is supposedly how the law becomes common throughout a jurisdiction. In reality, state codes and the federal corollary bear little resemblance to the civil law codes, which were extremely brief and concise. Today, state codes and states' common law varies to extreme extents on many topics.

Uncertainty between parties to business agreements (contracts) often breeds disputes and ultimately financial losses for one or all parties to the agreements. For example, despite no wrongdoing, one or more parties may interpret another party to be in breach of an agreement, based upon conduct alone. Nonverbal communication indicating that a party cannot or will not perform according to the terms of a contract may legitimately result in the other parties refusing or failing to perform. It is common to see one or more parties to a contract, who believe other parties to be in breach of their agreement, halt performance in order to "cut their losses." Under the American common law system, this is known as anticipatory breach or repudiation. Certainly, in the event of a disagreement regarding one party's alleged failure to perform according to the expectations of the another party, both parties would want the dispute decided by the courts of his or her culture. That is unlikely, as increasing numbers of contracts between international parties mandate international arbitration. Increasingly, such clauses in contracts specify the location where the arbitration must be held.

Leon Trakman (2006) observed that "The International Court of Arbitration (ICA), the International Bar Association (IBA), and the International Chamber of Commerce (ICC), have relied greatly upon the two great legal traditions" (p.) discussed above—common law and civil law. However, he noted that William Slate, President of the American Arbitration Association, questioned whether the common law and civil law traditions were sufficiently pervasive to justify their dominant status in providing the superstructure for international commercial arbitration. Trakman revealed the vast scope of common law, civil law, and their worldwide lineage. He appeared to conclude that the two systems were sufficiently pervasive when he wrote that,

The common law was incorporated into legal systems across Southern, South East, and South West Africa. Elsewhere in Africa, in addition to the common law, civil law was incorporated by colonial France, Germany, Belgium, Italy, Spain, and Portugal. South America reflected predominately Spanish and Portuguese legal traditions, while the United States and Canada acquired English common law heritage. A common law legal tradition was also introduced into India and Pakistan. French and Dutch legal traditions have permeated through other parts of Asia, while a German legal tradition was incorporated into the Japanese and to some degree the Chinese legal system. Then there are states that occupy the hybrid space between common and civil-law traditions: Scotland, Quebec, Louisiana, Sri Lanka, and South Africa along with Israel's combination of common civil, and Talmudic law (p. 15).

Trakman, (2006) one of the few legal scholars who delves deeply into legal culture, argued that legal cultures are wider than legal traditions. He claimed that the source of legal cultures might depend on social, political or economic history. He also stated that a culture might result from social traits, such as businessmen doing business on the golf course. After explaining that legal cultures may differ with locale, time, and space, Trakman admitted that "given the complex public and private influences on the legal culture of international commerce, one may conclude that serious analysis of that culture is likely to be flawed" (p. 10).

International Commercial Arbitration

Disputing parties from different nations should not be able to force controversies into their preferred court system (i.e., shop for a friendly forum). Lawyers refer to the tendency of parties to choose friendly court systems as forum shopping.¹ Within the United States, there are moderately, if not well respected scholars of conflicts of laws, jurisdiction and venue (the latter two are often considered as part of the body of law known as civil procedure). However, enforceable and agreed-upon international laws regarding the available forums for disagreements were once difficult to understand, if international law even existed regarding the question at issue. This has been an area of law that has benefited greatly from one Alternate Dispute Resolution method known as international commercial arbitration. Sheldon Eisen (2006), an experienced international lawyer, wrote that “International disputes have long been the special province of arbitration (p. 34). While nonverbal communication may have limited importance in arbitration proceedings, it would be misleading to maintain that it has as much potential in arbitration proceedings as some maintain that it does in the context of jury trials.

International commercial arbitration has developed and benefited from two international goals—the private and public traditions (Trakman, 2006). That would not appear to leave much middle ground. The former is focused on harmonization of laws. The latter concentrates on reducing global barriers to trade. Considering that there is little uniformity of laws among the states, One public law victory was the 1946 General Agreement on Tariffs and Trade (GATT). Then in 1993, the WTO was formed. (Trakman, 2006). “The world has seen how arbitration has stopped being a private matter practiced in very few nations” (Cantuarias, 2008, p.148).

Nations and cities are soliciting international commercial arbitration. In a November 2004 Mondaq Business Briefing, Singapore made a strong pitch to become the major international commercial arbitration provider in the Asian region. The following information could be persuasive to many businesses.

“In Singapore, the IAA governs international arbitration. The IAA makes provision for the conduct of international commercial arbitrations based on the familiar Model Law on International Commercial Arbitration (“the Model Law”) adopted by the United Nations Commission on International Trade Law (“UNCITRAL”) and conciliation proceedings. It also gives effect to the New York Convention on the recognition and enforcement of foreign arbitral awards. While the U.N. Model Law is preferable to most parties, not all want to always be bound by it. Rather, the most attractive international arbitration sites appear to offer a variety of arbitration associations’ choices. London may be the exception to this, as the English apparently feel almost married to the English way. Apparently, the affinity for tradition has changed in England since 1980, when this author studied comparative law at Oxford. Intercultural communication with the English may be enjoyable or painful for Americans. Until an American determines which extreme applies, one should speak little, if at all and never ask for ice in a beverage. However, the Arbitration Act of 1996, which was consistent with the U.N. Trade Law

¹ Forum shopping does not require multinational parties. For example, assume that a Red Trucking Company vehicle collided with a car in Nebraska. The four occupants of the car were terribly injured. Assume Nebraska has a one-year statute of limitations for torts and does not allow punitive damages, whereas the Iowa, the state where the four injured people live, has a three-year statute of limitations for torts and allows punitive damages. Finally, Red Trucking has its principle place of business in a third state—Delaware—that has a two-year statute of limitations for torts and limits punitive damages to \$250,000 per person. If the injured people did not hire lawyers until one year after the collision, they will want to avoid the jurisdiction and venue of Nebraska, and they will try to successfully file the case in Iowa. On the other hand, Red Trucking will prefer Nebraska or in the alternative Delaware. Since the injured plaintiffs will probably file the case in Iowa, an example of forum shopping.

Model, and added liberal and accommodating features. This has helped London recapture much of the international litigation and arbitration share that it once held because of its location and skilled personnel (p. 2).

As if that were not enough, the advertisement thinly disguised as an article, added the following:

Singapore has welcomed international commercial arbitration from any nations.

It has purposely adopted “arbitration-friendly laws and an efficient judiciary where the courts protect and support the international arbitration process. When requested by a party, the courts have the power to: stay proceedings in court that are being carried out in breach of an arbitration agreement enforce foreign arbitral awards made in New York Convention countries enforce awards made in international arbitrations taking place in Singapore”

Granted, the verbal communication in the 2004 ad said one thing, but the nonverbal message between the lines appeared insidious. Apparently, the author’s skepticism was evidence of a character flaw instead of a systematic flaw, as Singapore has accomplished much of what it unabashedly coveted. Khoo (2007) reported that ICC data shows Singapore to be the preferred venue in Asia for international arbitration. Furthermore, it ranks sixth in the world.

South Africa, on the other hand, “should be a major centre for African commercial dispute resolution” but has failed to take a prominent place due to “lingering allegations of racism in the South African legal system” (Temkin, 2008, p. 7). The alleged form of racism in South African arbitration involves nonverbal and intercultural elements. Respected South African lawyer Des Williams said that “parties to a pending arbitration have been reported to “have postponed cases for the reason that the judge allocated was a black judge” (p.8). He acknowledged that the frequency of such occurrences has been low, but has adversely affected confidence in the system. The system may be part of the problem. Williams said the reports of racism have “reinforced perceptions that arbitration is a form of privatized litigation” (p.8). In most other nations, arbitration is just that.

The cultures surrounding international commercial arbitration are dynamic, for the most part. Nations are competing to attract the firms and organizations that are associated with it. One question that lingers is if international commercial arbitration firms are so beneficial to nations, why is the same not true for courts that can handle the same disputes? Both will bring in many professionals. Parties must pay court costs to use government tribunals, but the same is not true for international commercial arbitration proceedings. Court decisions are typically public while international commercial arbitration results are secret. Why all the love for international commercial arbitration proceedings and so little for more transparent government trials?

Conclusion

This article demonstrates that effective intercultural communication skills and nonverbal communication skills can be useful when considering the value and potential risks involved in doing business with international parties. However, effective intercultural communication skills are not inherently good or bad. Effective skills can help a con man wreak economic destruction on others. Effective skills may also help others enjoy wealth, health, and love.

When involved in an international business transaction, one would be well advised to draft an international commercial arbitration clause and insert it in the original contract. Otherwise, to use this remedy, the parties must agree to an ad hoc international commercial arbitration agreement. In such a situation, it is possible that one party will use an advantage that comes with the prospect of bringing repeat cases to the firm.

Finally, nothing in this article should be interpreted as commenting on mandatory binding arbitration clauses that banks, insurance companies, credit cards, automobile dealerships, and other businesses are inserting in consumer contracts. This author may examine them in future research.

References

- Armas, O. J. (2008) Learning the language of international arbitration. 16 *Metropolitan Corporate Counsel*, 10.
- Cantuarias, F. (2008). Seventh annual conference on legal & policy issues in the Americas: Problematic of international arbitration in Latin America. *Florida Journal of International Law*, 20, 147-178.
- Goodwin, J. (1996). Articulating the Inarticulable: 1 Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire, 38 *Arizona Law Review*, 739-761.
- Jakobson, R. (1976). Nonverbal signs for “Yes” and “No.” In L.A. Samovar and R. E. Porter (eds.). *Intercultural communication: A reader*. Belmont, CA: Wadsworth.
- Klopf, D. W. (1998). *Intercultural encounters: The fundamentals of Intercultural communication* (4th ed.). Englewood, CO: Morton..
- Meador, D. J. (1995). Transformation of the American judiciary. 46 *Alabama Law Review* 763-782.
- Morsbach, H, (1976). Aspects of nonverbal communication in Japan. In L.A. Samovar and R. E. Porter (eds.). *Intercultural communication: A reader*. Belmont, CA: Wadsworth.
- Peters v. Kiff*, 407 U.S. 493 (1972).
- Richmond, V. P. & McCroskey, J. C., (2004). Nonverbal Communication, in *Interpersonal Relations*. (5th ed.). : New York:Allen & Bacon..
- Ruben, B.D. (1977). Human communication and cross-cultural effectiveness. *International and Intercultural Communication Annual*, 4.
- Stein, E. (2001) : International integration and democracy: No love at first sight, 95 *American Journal of International Law*, *American Journal of International Law*, 489-534.
- Temkin, S. (2008). Racist view hits arbitration. *Business Day (South Africa)*, 7-8.
- Trakman, L. E. (2006). Legal traditions” and international commercial arbitration. *The American Review of International Arbitration*, 17, 1-42.