SPEED AND EFFICIENCY OF ARBITRATION

ICC Prague Arbitration Day (26 February 2018)

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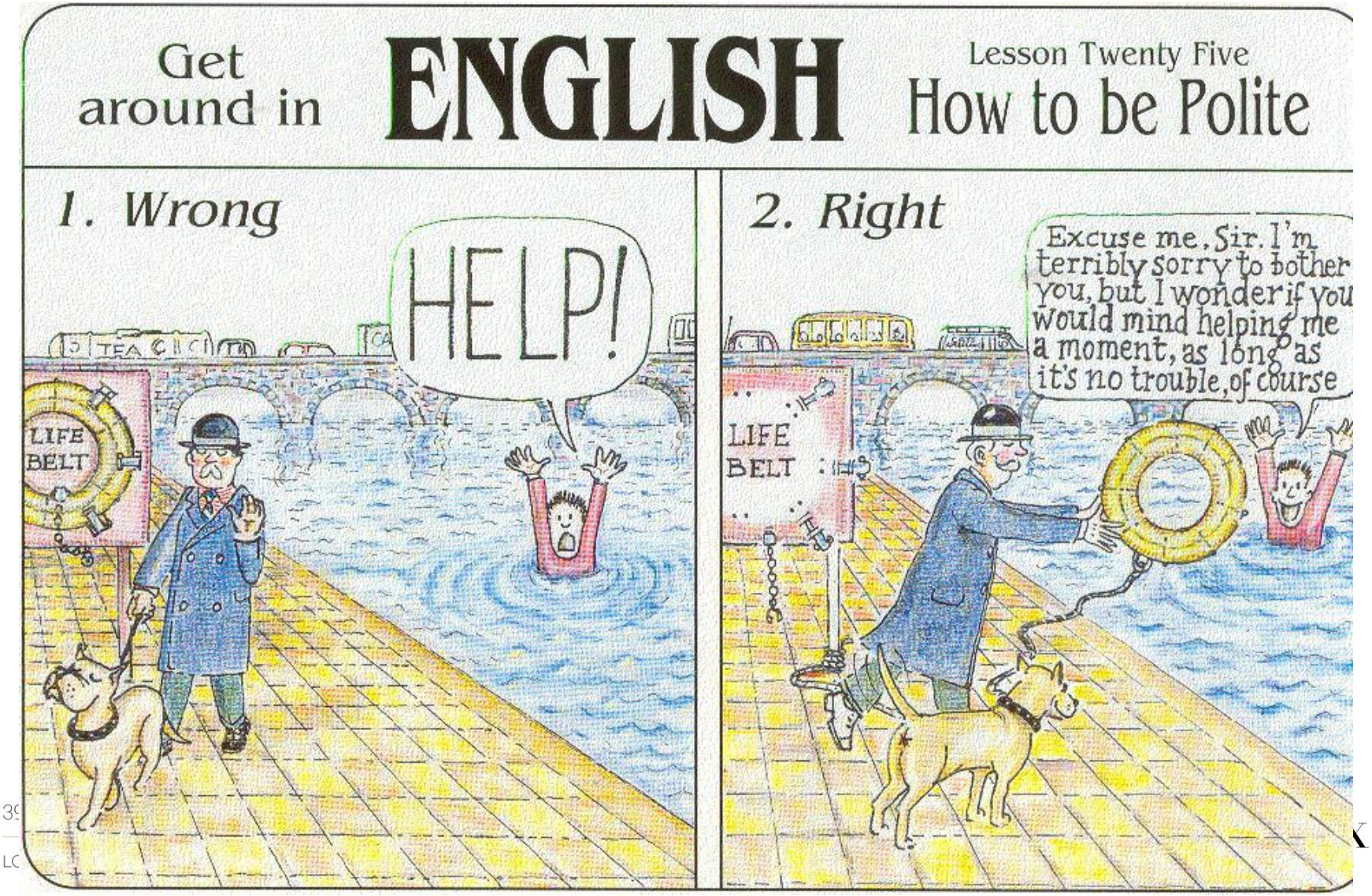
BREXIT
TALES

Importance of Culture



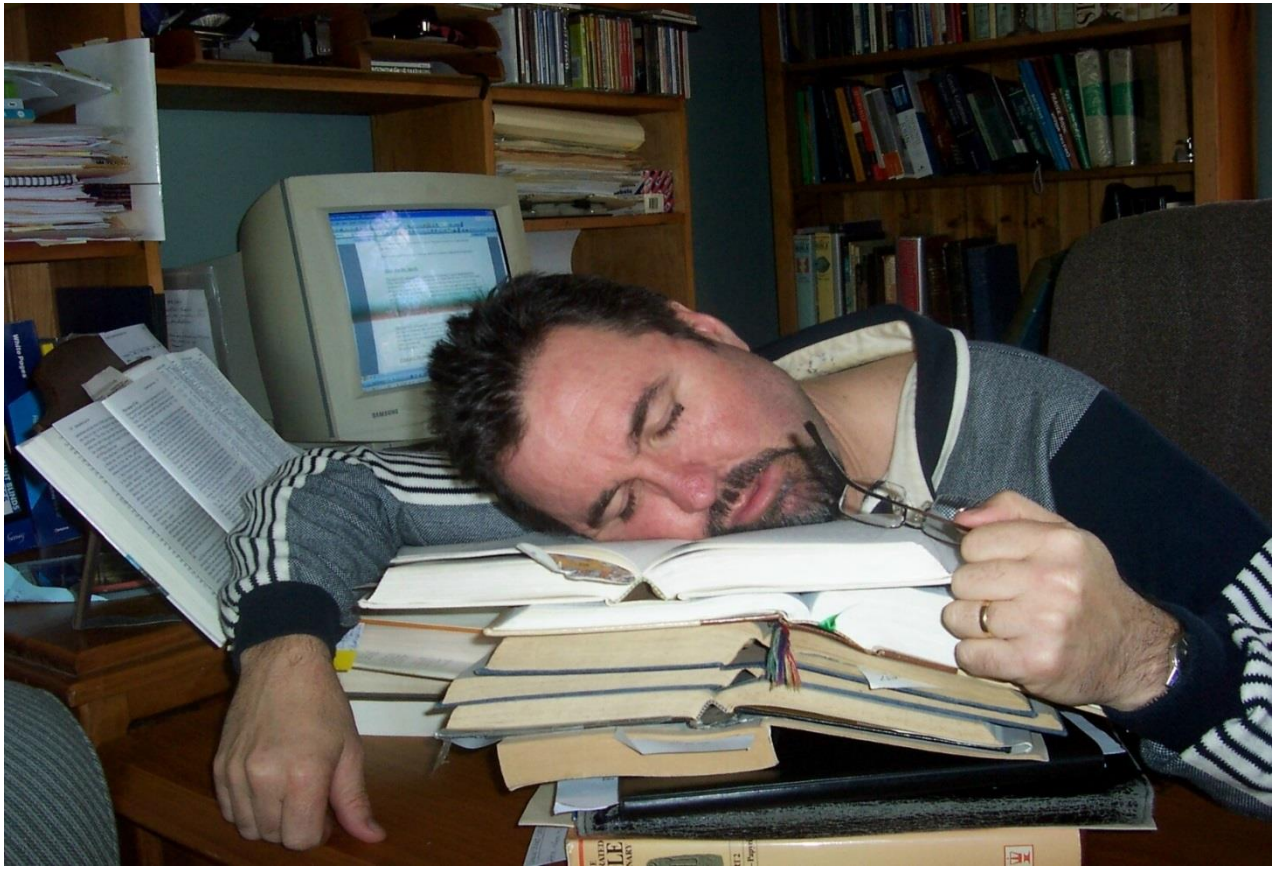
The impact of cultural differences in arbitration: civil vs common law

Cultural differences can affect:

1. The overall approach of the tribunal
2. Approach to disclosure and documents
3. Approach to factual evidence
4. Approach to expert evidence
5. Approach to length and content of hearing
6. Ethics and conduct

Very useful 2014 ICC document – "*Effective Management of International Arbitration – Guide for In House Counsel and Party Representatives*"

Common aim - to interest and ultimately persuade the Tribunal



What do the parties want?

2015 International Arbitration Survey by Queen Mary College London University concluded that parties perceived the worst characteristics of international arbitration to be:

- Cost
- Lack of effective sanctions during the process
- Lack of insight into arbitrators' efficiency
- Lack of speed

Tribunal Management Techniques

Should International Arbitration Tribunals adopt more of a "civil law" approach to the management of arbitration?

Some possibilities:

(1) Front loading of pleadings and evidence

(2) Being more proactive over issues at an early stage

(3) Civil Law approach to document production

(4) Different approaches to factual evidence

(5) Different approaches to expert evidence

(6) Expressing a view and facilitating settlement

(7) Management and duration of hearings

Should arbitration adopt some features of the approach of the English Courts?

1. The Pre-action Protocol
2. The Court's control of costs
3. Encouragement of ADR/mediation
4. Modern approach to disclosure
5. Firm approach to expert evidence
6. Speed/efficiency in producing judgments

Guerrilla warfare in arbitration

Common spoiling tactics

QMC survey identified perceived problem of lack of effective sanctions during the process

Question: is this a lack of sanctions or failure in their effective use – caused by “due process paranoia”?

Common spoiling tactics include:

- Failing to comply with procedural orders
- Failing to pay deposits
- Requiring further time/adjournments for spurious reasons
- Discharging legal advisers/ asking for more time
- Appointing new advisers creating conflicts of interest

…and how to deal with them

Difficulty for Tribunal to recognise at an early stage that a party is acting unreasonably. Once this is clear, Tribunal will need to be on its guard/practise “defensive arbitration”:

Management techniques include:

- Tribunal’s overall power to conduct arbitration under ICC Art 22, including control of time limits
- Case management including Appendix IV techniques (ICC Art 24)
- Failure to pay deposit may lead to deemed withdrawal of a relevant claim (ICC Art 37)
- Tribunal may proceed with hearing if party fails to attend without valid excuse (ICC Art 26)

Further LCIA provisions

Article 14.5 – “at all times, the parties shall do everything necessary *in good faith* for the fair, efficient and expeditious conduct of the arbitration…”

Article 18.4 – Tribunal power to withhold approval of change to party representatives in all the circumstances

Article 18.6 – Express sanctions available to the Tribunal in the event of breach by party reps of the Guidelines

Annexed Guidelines, precluding a range of conduct including … engaging in activities intended unfairly to obstruct the arbitration or prejudice the finality of the award (para 2)