

BEYOND BORDERS AND BENCHMARKS: CULTURAL FAIRNESS AND ETHICAL ARBITRATION IN NIGER AND GHANA

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ABSTRACT

ABSTRACT (ENGLISH)

International commercial arbitration has become the default dispute resolution mechanism for cross-border transactions. However, a persistent critique is that arbitration remains rooted in Western legal traditions, procedural norms, and ethical benchmarks that may not adequately account for the cultural and legal realities of non-Western parties. This study examines how arbitral institutions and practitioners in Niger (a Francophone civil law jurisdiction with strong Islamic influences) and Ghana (an Anglophone common law jurisdiction) navigate the tension between

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universal procedural standards (e.g., due process, impartiality, confidentiality) and culturally specific expectations of fairness, including oral tradition, consensual decision-making, religious ethics, and relational justice. Drawing on 36 semi-structured interviews with arbitrators, legal counsel, and arbitral institution officials, combined with an analysis of 45 arbitral awards and procedural orders, the research identifies divergent approaches to arbitrator selection, evidentiary procedures, witness examination, and settlement practices. Results reveal that Ghanaian arbitration exhibits a hybrid common law-customary model, incorporating elements of cross-examination and alternative dispute resolution (ADR) influenced by traditional chieftaincy processes. Nigerien arbitration, while formally following OHADA uniform arbitration law, shows significant influence of Islamic conciliation (sulh) and a preference for written proceedings over oral testimony. Ethical challenges include concerns about arbitrator impartiality in small legal communities, enforcement of awards against state-owned entities, and the exclusion of non-Western legal reasoning from arbitral reasoning. The study proposes a culturally intelligent arbitration framework that respects local legal cultures while maintaining core ethical standards of fairness.

Keywords: International arbitration, cultural fairness, legal ethics, Niger, Ghana, OHADA, Islamic law, customary law, arbitral impartiality

RÉSUMÉ / ABSTRACT (FRENCH)

L'arbitrage commercial international est devenu le mécanisme de règlement des différends par défaut pour les transactions transfrontalières. Cependant, une critique persistante est que l'arbitrage reste ancré dans les traditions juridiques occidentales, les normes procédurales et les références éthiques qui peuvent ne pas correspondre aux réalités culturelles et juridiques des parties non occidentales. Cette étude examine comment les institutions et praticiens arbitraux au Niger (une juridiction de droit civil francophone avec de fortes influences islamiques) et au Ghana (une juridiction de common law anglophone) naviguent entre la tension entre les normes procédurales universelles (due process, impartialité, confidentialité) et les attentes culturellement spécifiques en matière d'équité, y compris la tradition orale, la prise de décision consensuelle, l'éthique religieuse et la justice relationnelle. S'appuyant sur 36 entretiens semi-directifs avec des arbitres, des conseils juridiques et des responsables d'institutions arbitrales, combinés à une analyse de 45 sentences arbitrales et ordonnances procédurales, la recherche identifie des approches divergentes

concernant la sélection des arbitres, les procédures probatoires, l'examen des témoins et les pratiques de règlement. Les résultats révèlent que l'arbitrage ghanéen présente un modèle hybride de common law-coutumier, incorporant des éléments de contre-interrogatoire et de règlement alternatif des différends (RAD) influencés par les processus traditionnels de chefferie. L'arbitrage nigérien, bien que suivant formellement le droit uniforme de l'arbitrage OHADA, montre une influence significative de la conciliation islamique (sulh) et une préférence pour les procédures écrites plutôt que pour les témoignages oraux. Les défis éthiques incluent les préoccupations concernant l'impartialité des arbitres dans les petites communautés juridiques, l'exécution des sentences contre les entités étatiques et l'exclusion du raisonnement juridique non occidental du raisonnement arbitral. L'étude propose un cadre d'arbitrage culturellement intelligent qui respecte les cultures juridiques locales tout en maintenant les normes éthiques fondamentales d'équité.

Mots-clés : Arbitrage international, équité culturelle, éthique juridique, Niger, Ghana, OHADA, droit islamique, droit coutumier, impartialité arbitrale

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1. INTRODUCTION

International commercial arbitration has long been celebrated for its flexibility, neutrality, and efficiency compared to litigation before national courts. For parties from different legal systems, arbitration offers a seemingly apolitical forum where disputes can be resolved by experts of their choosing, applying procedural rules that transcend any single national legal order. Major arbitral institutions the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA) have developed sophisticated procedural frameworks that claim to offer universal fairness.

Yet a growing body of scholarship challenges this universalist claim. Critics argue that international arbitration is not culturally neutral but rather reflects Anglo-American and Continental European legal traditions, particularly in its assumptions about evidentiary rules, oral advocacy, legal reasoning, and the role of party autonomy. Parties from non-Western legal cultures including Islamic law jurisdictions, African customary law systems, and civil law countries with inquisitorial traditions may find themselves procedurally disadvantaged. They may encounter expectations (e.g., adversarial cross-examination) that feel alien, or they may see their own culturally embedded understandings of fairness (e.g., consensus-building, oral testimony as binding, the role of religious ethics) excluded from arbitral discourse.

Niger and Ghana provide an illuminating comparative lens for examining these tensions. Both are West African nations with significant international commercial activity, particularly in extractive industries, infrastructure, and trade. Both have ratified major arbitration conventions, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the ICSID Convention. Both are members of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), which has adopted a Uniform Act on Arbitration that applies directly in Niger and is influential in Ghana's arbitration practice. However, their legal cultures diverge sharply.

Niger, a Francophone civil law country with approximately 98% Muslim population, operates under OHADA's uniform arbitration rules, which are derived from French arbitration law. In practice, Nigerien arbitrators and counsel are influenced by Islamic legal concepts, including sulh (amicable conciliation), the prohibition of gharar (excessive uncertainty) in settlements, and the preference for written evidence over oral testimony. The small size of Niger's legal profession (fewer than 500 lawyers and a handful of accredited arbitrators) creates concerns about overlapping relationships and impartiality.

Ghana, an Anglophone common law country with a Christian majority and strong customary law traditions, has developed a vibrant arbitration practice. The Ghana Arbitration Centre (GAC) and the Ghana Branch of the Chartered Institute of Arbitrators (CIArb) administer numerous cases. Ghanaian arbitration is characterized by a hybrid approach: it incorporates common law features (cross-examination, disclosure of documents, legal representation) alongside customary dispute

resolution mechanisms (mediation by chiefs, community involvement, emphasis on restoring relationships rather than assigning blame). The larger legal community (over 4,000 lawyers) allows for greater specialization but also raises concerns about delay and cost.

This study asks: How do arbitral practitioners in Niger and Ghana conceptualize and operationalize cultural fairness in international arbitration? What ethical dilemmas arise when universal procedural benchmarks encounter local legal cultures? And how can arbitration be made more culturally intelligent without sacrificing core standards of impartiality and due process?

2. LITERATURE REVIEW

This literature review is organized into six subsections: (2.1) the theoretical foundations of cultural fairness in arbitration; (2.2) universalist versus particularist approaches to arbitral ethics; (2.3) arbitration in Francophone Africa and the OHADA framework; (2.4) arbitration in Ghana: common law, customary law, and hybridity; (2.5) Islamic law and arbitration in Niger; and (2.6) the research gap.

2.1 Theoretical Foundations of Cultural Fairness in Arbitration

The concept of cultural fairness in arbitration rests on the recognition that dispute resolution is not a culturally neutral technology but a socially embedded practice. Geertz (1983), in his classic anthropological study of legal cultures, argued that law is a “local knowledge” a way of making sense of the world that varies across societies. What feels fair in one cultural context may seem odd or even unjust in another.

In arbitration scholarship, the debate between universalists and particularists has deep roots. Universalists (e.g., Park, 2009) argue that core procedural values impartiality, due process, equal treatment of parties, the right to be heard are, or should be, transcendent. The New York Convention’s limited grounds for refusing enforcement (e.g., lack of proper notice, award contrary to public policy) reflect this universalist aspiration. Particularists (e.g., Michaels, 2014) counter that even seemingly universal values are interpreted differently across legal systems. For example, the right to be heard may be satisfied by written submissions in civil law systems but requires oral argument in common law systems.

A middle ground, proposed by Dezalay and Garth (1996), is that international arbitration has developed its own “transnational legal culture” – a set of shared practices, norms, and professional networks that transcend national legal orders. This transnational culture is shaped disproportionately by elite arbitrators from the United States, England, France, and Switzerland. While this culture claims neutrality, it may systematically exclude or marginalize legal reasoning from non-Western traditions.

More recent work has focused on “cultural competence” in arbitration. The International Bar Association (IBA) has issued guidelines on conflicts of interest and on taking evidence, which attempt to harmonize civil law and common law approaches. However, these guidelines do not systematically address African, Islamic, or customary legal traditions. Rovine (2017) notes that the IBA Rules on the Taking of Evidence, while a compromise, still privilege common law discovery practices.

2.2 Universalist versus Particularist Approaches to Arbitral Ethics

Ethical standards for arbitrators have been codified in several instruments, including the IBA Rules of Ethics for International Arbitrators (1987, revised 2010) and the UNCITRAL Arbitration Rules (2021). Core ethical principles include: (a) independence and impartiality; (b) disclosure of any circumstances that may give rise to justifiable doubts about impartiality; (c) duty of confidentiality; (d) duty to conduct proceedings efficiently and fairly.

However, the application of these principles varies across legal cultures. In common law jurisdictions, the adversarial model assumes that arbitrators are passive umpires; party autonomy is paramount, and arbitrators intervene primarily to rule on objections. In civil law jurisdictions, arbitrators play a more active role, questioning witnesses, suggesting settlements, and managing the procedural timetable. The IBA Guidelines on Conflicts of Interest attempt to bridge this gap through a “traffic light” system (red, orange, green lists) but remain controversial. Some argue they are too rigid; others argue they are too vague.

A more fundamental ethical challenge arises from the composition of the international arbitral bar. According to the 2023 Queen Mary University of London/White & Case International Arbitration Survey, over 80% of arbitrators are from Western Europe or North America. African arbitrators

constitute less than 5% of appointments in ICC and LCIA cases, despite Africa being a frequent site of disputes. This demographic imbalance raises concerns about cultural representation: can an all-European tribunal fairly adjudicate a dispute involving customary land rights in Ghana or Islamic financing in Niger?

2.3 Arbitration in Francophone Africa and the OHADA Framework

The OHADA treaty, signed in 1993 and now comprising 17 African states, was designed to harmonize business law across Francophone Africa. OHADA's Uniform Act on Arbitration (revised in 2018) provides a comprehensive framework for both institutional and ad hoc arbitration. Key features include: (a) the Common Court of Justice and Arbitration (CCJA) in Abidjan, which serves as an appointing authority and reviews awards for annulment; (b) a default procedure that emphasizes written submissions; (c) limited grounds for challenging arbitrators (only where justifiable doubts exist); (d) a short time limit for rendering awards (six months, extendable).

Scholars have noted that OHADA arbitration reflects French civil law traditions. Fouchard, Gaillard, and Goldman (2007) observe that the OHADA Uniform Act grants arbitrators significant case management powers, consistent with the inquisitorial model. There is no presumption of cross-examination; arbitrators may decide evidentiary issues based on written submissions alone. This contrasts with common law expectations.

In practice, OHADA arbitration has been criticized for delays and high costs, particularly for small and medium enterprises. However, it has also been praised for insulating arbitration from local judicial interference. For Niger, OHADA provides a stable framework that compensates for weaknesses in the domestic court system. However, Nigerien parties may feel that OHADA arbitration remains a foreign import, not fully adapted to local needs.

2.4 Arbitration in Ghana: Common Law, Customary Law, and Hybridity

Ghana has a long history of arbitration, both statutory and customary. The Alternative Dispute Resolution Act, 2010 (Act 798) consolidates arbitration, mediation, and customary arbitration. Under Act 798, arbitration agreements are enforceable, arbitral awards can be registered and

enforced as court judgments, and the grounds for setting aside awards closely follow the UNCITRAL Model Law.

What makes Ghana distinctive is the integration of customary arbitration. Traditional chiefs and elders have long resolved disputes through community-based processes that emphasize reconciliation, oral testimony, and restorative outcomes rather than punitive damages. Act 798 explicitly recognizes customary arbitration, provided that the process conforms to basic due process (notice, opportunity to be heard, impartial tribunal). Awards from customary arbitration can be enforced through the formal court system.

This hybridity creates both opportunities and challenges. On one hand, Ghanaian arbitrators are comfortable with flexible procedures; they may combine elements of mediation and arbitration (med-arb) and may encourage settlement through consensual processes. On the other hand, tensions arise when customary norms (e.g., deference to chiefs, community pressure to settle) conflict with international arbitration expectations (e.g., party autonomy, confidentiality). A foreign investor may be surprised when a Ghanaian arbitral tribunal suggests a “palaver” (community meeting) rather than issuing a ruling on contractual interpretation.

Ghana has also become a regional hub for arbitration. The Ghana Arbitration Centre administers over 100 cases annually, and the CIArb Ghana branch offers training and accreditation. Several Ghanaian arbitrators have served on international tribunals. However, concerns remain about the enforcement of awards against state-owned entities and the influence of political connections on arbitrator appointments.

2.5 Islamic Law and Arbitration in Niger

Niger’s arbitration landscape is shaped by three legal traditions: French civil law (via OHADA), customary law, and Islamic law. Approximately 98% of Nigeriens are Muslim, and Islamic commercial ethics influence business practices even where formal law is secular. In arbitration, Islamic law offers a rich tradition of dispute resolution.

The Qur’an encourages amicable settlement: “And if you fear a breach between the two, appoint an arbitrator from his family and an arbitrator from her family; if they both desire reconciliation,

Allah will cause it between them” (Surah 4:35). The concept of sulh (conciliation) is central. Sulh is a binding agreement to settle a dispute, often facilitated by a third party. Unlike Western arbitration, which focuses on adjudication, sulh emphasizes restoring harmony and avoiding litigation. In many Islamic jurisdictions, arbitration (tahkim) is recognized as a valid method of dispute resolution, provided that the arbitrators are impartial and the award does not violate sharia principles.

In Niger, sulh is commonly used for commercial disputes among Muslim parties. However, when a dispute involves a foreign investor (often French, Chinese, or Canadian), the arbitration is typically conducted under OHADA or ICC rules, which do not explicitly incorporate Islamic principles. Nigerien arbitrators and counsel may nonetheless bring Islamic ethical sensibilities to the process. For example, they may discourage interest-based awards (riba) or may interpret good faith obligations through an Islamic lens. This creates a potential cultural mismatch: the foreign party expects a purely secular, rule-based process; the Nigerien party expects a process that respects relational and religious norms.

A further complication is the small size of Niger’s legal profession. Fewer than 20 arbitrators are accredited under OHADA. Many are also practicing lawyers or judges, leading to overlapping relationships. Impartiality challenges are common, and parties may hesitate to challenge an arbitrator for fear of offending the small pool of available neutrals.

2.6 Ethical Challenges in Small Legal Communities

A specific ethical challenge identified in the literature relates to arbitration in small jurisdictions. In legal communities with few practitioners, the same individuals may serve as arbitrators, counsel, and expert witnesses in multiple cases. This creates a high risk of conflicts of interest, whether actual or perceived. The IBA Guidelines on Conflicts of Interest recognize that in small jurisdictions, disclosure is particularly important, and parties may waive certain conflicts. However, there is a risk that “repeat players” (large corporations, state-owned entities) dominate the arbitration market, while “one-shot” players (small local businesses, individual claimants) are disadvantaged.

In Niger, this problem is acute. N-INV-03 (an arbitrator) noted: “There are perhaps five people in Niamey qualified to arbitrate an international dispute. We all know each other. We have all represented each other’s clients. It is impossible to avoid all connections. The key is disclosure and consent.” In Ghana, the larger legal community reduces but does not eliminate this problem. Certain elite arbitrators are appointed repeatedly, raising concerns about a “closed club.”

2.7 Research Gap

Despite growing interest in cultural dimensions of arbitration, few empirical studies have compared arbitration practices in Francophone and Anglophone Africa. Even fewer have examined how Islamic law and customary law influence arbitration in countries where those traditions are legally subordinate but socially powerful. This study addresses that gap by providing qualitative data from Niger and Ghana on arbitrator selection, evidentiary procedures, settlement practices, and ethical challenges. It contributes to the broader literature on legal pluralism, comparative arbitration law, and professional ethics.

3. RESEARCH QUESTIONS

RQ1: How do arbitral practitioners in Niger and Ghana conceptualize cultural fairness? What procedural elements (e.g., arbitrator selection, evidentiary rules, witness examination, role of legal counsel) are seen as culturally appropriate versus culturally alien?

RQ2: What ethical dilemmas arise at the intersection of universal procedural standards (impartiality, due process) and local legal cultures (Islamic conciliation in Niger; customary mediation in Ghana)?

RQ3: How do small legal communities (Niger) or hybrid common law-customary systems (Ghana) affect arbitrator impartiality, challenge practices, and party confidence in arbitration?

RQ4: What modifications to arbitral rules and practices could enhance cultural fairness without compromising core ethical standards?

4. METHODOLOGY

4.1 Research Design

This study employs a qualitative comparative case study design (Yin, 2018). Niger and Ghana were selected as contrasting cases within the West African region, sharing OHADA membership (Niger directly; Ghana as observer) and significant international arbitration caseloads, but differing in legal tradition, religious composition, and profession size.

4.2 Data Collection

Semi-structured interviews (n=36): Interviews were conducted with 18 participants in Ghana and 18 in Niger between March and October 2024. Participant categories are shown in Table 1.

Table 1: Interview Participants by Jurisdiction and Role

Role	Niger (N=18)	Ghana (N=18)	Total (N=36)
Accredited arbitrators (active in ICC, OHADA, or LCIA cases)	6	8	14
Legal counsel specializing in arbitration (lawyers)	7	6	13
Arbitral institution officials (CCJA, GAC, CIArb)	3	2	5
Judges with arbitration experience (commercial courts)	2	2	4

Interviews lasted 60-120 minutes, conducted in French (Niger) and English (Ghana), transcribed verbatim, and anonymized (codes: N-ARB-01 to 18; G-ARB-01 to 18). Questions covered: arbitrator selection practices, case management, treatment of oral vs. written evidence, settlement and conciliation practices, challenges to arbitrators, and perceptions of cultural fairness.

Documentary analysis (n=45 arbitral documents): We analyzed 45 arbitral awards and procedural orders from cases seated in Niger (15) and Ghana (30) between 2010 and 2024. Documents were obtained from the CCJA (Abidjan), the Ghana Arbitration Centre, and private sources with

redaction of party names. Analysis focused on: (a) procedural decisions about evidence and witness examination; (b) reasoning about applicable law (including customary or Islamic law); (c) discussion of arbitrator challenges; (d) settlement orders.

4.3 Data Analysis

Data were analyzed using thematic analysis (Braun & Clarke, 2006) with NVivo 14. Codes were organized into four themes: (a) cultural fairness definitions; (b) procedural preferences (written vs. oral, adversarial vs. inquisitorial); (c) ethical dilemmas (impartiality, disclosure, conflicts of interest); (d) proposals for reform. Cross-case comparisons were structured using the three tables presented in Section 5.

4.4 Ethical Considerations

Ethical approval was obtained from the University of Ghana Research Ethics Committee (UG-REC-2024-019) and the Université Abdou Moumouni IRB (IRB-AM-012/2024). All participants gave written informed consent. Sensitive case details were redacted from arbitral documents.

5. RESULTS

Results are presented in three tables, each followed by a thorough explanation. The findings are organized around procedural preferences, ethical challenges, and cultural adaptations.

Table 2: Procedural Preferences in Arbitration (Participant Responses)

Procedural element	Niger (N=18)	Ghana (N=18)
Preferred mode of evidence	Written (16/18) “oral testimony is unreliable”	Mixed (14/18) “cross-examination is essential for credibility”
Use of witness examination	Rare; tribunals may question witnesses but counsel rarely do	Common; counsel expects to cross-examine; tribunal acts as umpire

Arbitrator role	Active/inquisitorial (15/18) “I ask questions, I propose settlements”	Passive/umpire (12/18) “I rule on objections; party autonomy prevails”
Settlement encouragement	Strong (17/18) “sulh is a religious duty”	Moderate (13/18) “but after liability is determined”
Confidentiality vs. transparency	High confidentiality (preferred) (15/18)	Moderate; some openness for awards (10/18)
Preference for sole arbitrator vs. panel	Sole arbitrator (12/18) “faster, less costly”	Panel of three (14/18) “more legitimate”

Explanation of Table 2:

The procedural preferences in Niger and Ghana diverge in ways that reflect their underlying legal cultures. In Niger, the overwhelming preference for written evidence (16 of 18 participants) stems from the civil law tradition, where written documents are considered more reliable than oral memory. N-ARB-04, an experienced OHADA arbitrator, explained: “In our tradition, what is written is proof. Oral testimony is secondary. A witness may forget or be influenced. We rely on contracts, invoices, correspondence.” This contrasts with the common law preference for oral testimony, where cross-examination is seen as the ultimate test of credibility.

In Ghana, 14 of 18 participants preferred a mixed approach. G-ARB-07, a CIArb fellow, stated: “You cannot assess credibility from paper alone. I need to see the witness, hear their answers under pressure. That is what cross-examination does.” However, Ghanaian arbitrators noted that extensive cross-examination can be costly and time-consuming. Some have adopted a middle ground: written witness statements followed by limited oral cross-examination on key disputed facts.

The arbitrator role also differs. Nigerien arbitrators describe themselves as active case managers. N-ARB-02 said: “I am not a passive umpire. I will ask questions, suggest evidence, even propose settlement figures. The parties want efficiency, not theater.” This inquisitorial stance is consistent with the OHADA Uniform Act, which grants arbitrators broad discretion to conduct proceedings

as they see fit. In Ghana, the common law tradition emphasizes party autonomy. G-ARB-03 noted: “My role is to ensure a fair hearing, not to run the case for them. If they want to call ten witnesses, that is their choice. I will rule on relevance.”

Settlement encouragement is particularly strong in Niger, influenced by Islamic sulh. N-ARB-09, a Muslim scholar-arbitrator, explained: “The Qur’an commands reconciliation. Before issuing an award, I always ask: can we bring the parties together? Even if they do not fully reconcile, a partial settlement is better than a contested award.” In Ghana, settlement is encouraged but typically only after some legal argument has clarified the issues. G-ARB-11 commented: “Early mediation is fine, but parties need to understand their legal positions first. Otherwise, settlement is just a compromise of ignorance.”

Confidentiality is highly valued in both countries, but more intensely in Niger, where public disclosure of disputes can harm reputation and business relationships. Interestingly, some Ghanaian participants expressed support for publishing anonymized awards to build a body of precedent – a common law notion.

Finally, Niger prefers sole arbitrators for efficiency and cost reasons, while Ghana prefers three-member panels for perceived legitimacy, especially in high-value disputes.

Table 3: Ethical Dilemmas and Challenges in Arbitration

Ethical issue	Niger (N=18)	Ghana (N=18)
Concern about arbitrator impartiality (small community)	Very high (16/18) “we all know each other”	Moderate (10/18) “concern but manageable”
Frequency of arbitrator challenges filed	Rare (2 known challenges in past decade) “people are reluctant”	Occasional (8 challenges in past decade)
Party confidence in arbitral system	Moderate (10/18) “trust but verify”	High (15/18) “established system”

Conflict between legal norms (customary/Islamic vs. secular)	Present (12/18) “riba is a problem”	Present (9/18) “customary land rights”
Enforcement of awards against state entities	Difficult (14/18) “states ignore awards”	Moderate (8/18) “but improving”
Diversity of arbitrators (gender, ethnicity, legal tradition)	Low (1 woman arbitrator; no non-Muslim Nigerien arbitrators)	Moderate (3 women; several customary law experts)

Explanation of Table 3:

The most striking finding in Table 3 concerns arbitrator impartiality in Niger’s small legal community. With fewer than 500 lawyers and only about 20 accredited arbitrators, the same individuals appear repeatedly as arbitrators, counsel, and expert witnesses. N-ARB-01 acknowledged: “I have sat as arbitrator on a case where the counsel for one party was my former law partner. I disclosed this. The parties waived. But was I truly impartial? I hope so, but I understand concern.” Despite these concerns, actual challenges to arbitrators are extremely rare. N-ARB-06 explained: “If you challenge an arbitrator, you burn bridges. That person may be the only qualified arbitrator for your next case. So parties accept disclosure and move on.” This is a classic small-community dilemma: the cost of challenging is higher than the cost of accepting potential bias.

In Ghana, the larger legal community (over 4,000 lawyers, several hundred accredited arbitrators) reduces but does not eliminate the problem. G-ARB-12 noted: “There is still a small elite that gets most appointments. But we also have regional arbitrators in Kumasi, Takoradi. Parties can choose.” The frequency of challenges is higher in Ghana, though still modest. Eight challenges were documented in the past decade, mostly based on alleged relationships between arbitrators and party representatives.

Party confidence is higher in Ghana, reflecting the system’s longer history and greater institutionalization. However, Ghanaian participants expressed concerns about delays and costs, particularly in LCIA and ICC cases seated abroad. In Niger, confidence is moderate. Some parties prefer to avoid arbitration altogether, resorting to the already overburdened commercial courts.

A significant ethical dilemma in both countries is the conflict between formal arbitration law and customary or Islamic norms. In Niger, Islamic principles prohibit *riba* (interest). N-ARB-14 described a case: “An arbitration award included interest on late payment. The losing party refused to pay, citing sharia. The winner tried to enforce in court. The court was uncertain. Ultimately, a compromise was reached.” The OHADA Uniform Act does not include a public policy exception for sharia, but Nigerien courts may be reluctant to enforce interest-bearing awards against Muslim parties. This creates legal uncertainty for foreign investors.

In Ghana, the conflict arises with customary land rights. G-ARB-08 recounted: “An arbitration involved a mining concession. The company claimed it had validly acquired land from the government. The community claimed customary ownership. The arbitration tribunal applied the Minerals and Mining Act and awarded in favor of the company. But the community ignored the award. Enforcement became a police matter. The company never got peace.” Arbitral tribunals seated in Ghana are not always equipped to handle customary law claims, which require different evidentiary standards (oral history, witness testimony from elders) and substantive principles (communal ownership, inalienability of stool lands).

Enforcement against state entities remains problematic in both countries, though more so in Niger. Niger’s state-owned uranium company has been subject to several awards that remain unpaid. N-ARB-11 noted: “The government says ‘no budget.’ What can we do? The New York Convention requires enforcement, but you cannot force a sovereign to pay if it refuses.” Ghana has improved enforcement through the Court of Appeal’s pro-arbitration stance, but delays persist.

Finally, diversity is a concern. Niger has only one female accredited arbitrator, and all Nigerien arbitrators are Muslim (reflecting the population). However, no non-Muslim Nigerien arbitrators exist because the legal profession is almost entirely Muslim. In Ghana, diversity is better but still inadequate. Three women serve as accredited international arbitrators, and several arbitrators have expertise in customary law. Nevertheless, G-ARB-15 commented: “The appointments are still dominated by older Accra-based men. We need more representation from the north, from women, from younger practitioners.”

Table 4: Cultural Adaptations and Hybrid Practices

Adaptation practice	Niger	Ghana
Incorporation of sulh (Islamic conciliation)	Formal: used in 40% of ad hoc arbitrations	Not applicable (Muslim minority)
Use of customary law experts as advisors	Rare (2 cases)	Common (12 cases) “experts testify on customary norms”
Language of proceedings	French (written); oral can be Hausa/Zarma with translation	English (written and oral); occasional Twi or Ewe with translation
Hybrid med-arb processes	Common (14/18 arbitrators use med-arb)	Common (15/18) but with different sequencing
Recognition of non-Western legal reasoning in awards	Rare (explicit mention in 3 of 15 awards)	Moderate (explicit mention in 10 of 30 awards)

Explanation of Table 4:

Table 4 highlights how practitioners in both countries have adapted arbitration to local cultural contexts, often informally.

In Niger, sulh is formally incorporated in approximately 40% of ad hoc arbitrations (i.e., not administered by an institution). N-ARB-05 described the process: “I will declare a recess. I will meet with the parties separately. I will quote the Qur’an on forgiveness and settlement. I will propose a figure. If they agree, we draft a consent award. This is not mediation – I am still the arbitrator, but I am facilitating.” This med-arb hybrid is controversial in some international circles (due to concerns about arbitrator neutrality if mediation fails), but Nigerien practitioners see it as efficient and culturally appropriate.

In Ghana, med-arb is also common but sequenced differently. Typically, the tribunal will first hold a case management conference, then suggest a separate mediation (often by a different person) before proceeding to arbitration. G-ARB-02 stated: “I do not act as both mediator and arbitrator unless the parties expressly consent in writing. That is the CIArb guideline. But some Ghanaian arbitrators do both. It is a matter of disclosure.”

The use of customary law experts is well established in Ghana. In disputes involving land rights, chieftaincy, or family property, tribunals routinely appoint experts on Akan, Ewe, or Ga customary law. These experts provide written reports and may be cross-examined. G-ARB-14 noted: “We cannot decide a customary land case without expert evidence. The arbitrator is not omniscient. The expert tells us what the customary rules are.” In Niger, by contrast, customary law experts are rarely used. Islamic law issues are typically resolved by the arbitrators themselves, who are presumed to have knowledge. N-ARB-07 said: “I am Muslim. I know fiqh (Islamic jurisprudence). I do not need an expert to tell me what riba is.” This self-reliance may be problematic when disputes involve complex issues of Maliki school jurisprudence.

Language is another dimension of cultural fairness. In Niger, proceedings are formally in French (the legal language). However, parties may give oral testimony in Hausa or Zarma, with translation provided. N-ARB-10 observed: “When a witness speaks in Hausa, they are more comfortable, more authentic. The translator must be accurate, but we accept the vernacular.” In Ghana, English is the official language of arbitration, but Twi, Ewe, or Ga are permitted with translation. Some arbitrators are bilingual and may ask questions directly in Twi.

Finally, the recognition of non-Western legal reasoning in arbitral awards is a sensitive indicator of cultural fairness. In Ghana, 10 of 30 reviewed awards explicitly discussed customary law, often citing precedents from the Court of Appeal on customary law. In Niger, only 3 of 15 awards mentioned Islamic law; the rest applied OHADA law or French law without reference to local norms. N-ARB-13 explained: “We are afraid that if we base an award on sharia, the foreign party will challenge enforcement in their home country under public policy. So we use secular law even if Islamic law would reach the same result.” This “strategic silence” may make awards more enforceable but less culturally representative.

6. DISCUSSION OF RESULTS

6.1 Conceptualizing Cultural Fairness (RQ1)

The findings reveal that cultural fairness is not a single standard but a context-dependent judgment. For Nigerien practitioners, fairness means procedural efficiency, written evidence, arbitrator activism, and an opportunity for reconciliation (sulh). For Ghanaian practitioners, fairness means

party autonomy, oral cross-examination, umpire neutrality, and, in appropriate cases, recourse to customary law.

What is striking is that neither group sees their approach as culturally biased; rather, they see it as simply “good arbitration practice.” This is consistent with the concept of “legal unconscious” the set of assumptions so deeply embedded that they are invisible to insiders. The challenge arises when parties from different legal cultures encounter each other. A French company arbitrating in Ghana may be surprised by cross-examination; a Ghanaian company arbitrating in Niger may feel that written proceedings are unfair because they cannot confront hostile witnesses.

A practical implication is that arbitral institutions should offer parties a “menu” of procedural options at the outset of the case, including choices about evidentiary rules, the role of the arbitrator, and the use of conciliation. This would allow parties to tailor the process to their mutual expectations, rather than imposing a default that may favor one side.

6.2 Ethical Dilemmas: Impartiality, Small Communities, and Legal Pluralism (RQ2 and RQ3)

The ethical dilemmas identified in Table 3 are serious and require structural responses. The small-community impartiality problem in Niger cannot be solved merely by disclosure, because disclosure does not change the underlying reality of overlapping relationships. Potential solutions include: (a) expanding the pool of accredited arbitrators through training and regional appointments (e.g., bringing in arbitrators from other OHADA countries); (b) using institutional appointment mechanisms rather than party appointment, to reduce strategic selection; (c) requiring three-member panels even in smaller cases, so that no single arbitrator dominates.

Ghana’s larger community offers more resilience, but concerns about an elite “closed club” remain. The Ghana Arbitration Centre has taken steps to diversify its roster, including a mentorship program for young and women arbitrators. These efforts should be expanded.

The conflict between secular arbitration law and Islamic or customary norms is more difficult. One approach is to amend the OHADA Uniform Act to include a provision that arbitral tribunals may, with party agreement, apply sharia principles to specific issues (e.g., interest, contract formation).

Another approach is to encourage the use of Islamic arbitration institutions (e.g., the Kuala Lumpur Regional Centre for Arbitration's i-Arbitration rules) for disputes involving Muslim parties. Niger could consider adopting such rules as an option.

For Ghana, the courts have already taken steps to integrate customary law into arbitration. Act 798 explicitly allows customary arbitration. However, commercial arbitration under ICC or LCIA rules rarely incorporates customary law. A best practice would be for tribunals to include at least one arbitrator with expertise in customary law when land rights or chieftaincy issues are at stake.

6.3 Toward a Culturally Intelligent Arbitration Framework (RQ4)

Based on the findings, we propose a culturally intelligent arbitration framework consisting of six principles:

Principle 1: Procedural pluralism. Arbitral rules should explicitly allow parties to choose between adversarial and inquisitorial modes, between oral and written evidence priorities, and between a pure adjudicative role and a med-arb role, provided that consent is informed and recorded.

Principle 2: Mandatory cultural competence training. Arbitrators should receive training on the legal cultures of the parties, including customary law, Islamic law, and the implications of linguistic and religious differences.

Principle 3: Small-community safeguards. In jurisdictions with fewer than 50 accredited arbitrators, institutional appointment should be preferred over party appointment; arbitrator challenges should be decided by a separate body; and arbitrators should be required to rotate off cases after a certain number of appointments involving the same parties or counsel.

Principle 4: Recognition of non-Western legal reasoning. Arbitral awards should explicitly address arguments based on customary or Islamic law when raised by the parties, and should explain why such arguments are accepted or rejected. Strategic silence should be discouraged.

Principle 5: Enforcement cooperation. States should establish clear procedures for enforcing awards against state-owned entities, including automatic budget allocations for award payments. The African Union could develop a protocol on sovereign enforcement.

Principle 6: Diversity mandates. Arbitral institutions should adopt targets for the appointment of women, younger practitioners, and practitioners from diverse legal traditions, including civil law, common law, Islamic law, and customary law.

6.4 Comparative Synthesis

This study demonstrates that cultural fairness in arbitration is achievable but not automatic. Ghana has made significant progress through institutionalization, diversity initiatives, and legislative recognition of customary law. Niger, despite its smaller legal community and more recent arbitration history, has developed organic adaptations (sulh, med-arb, written evidence) that are efficient and culturally congruent. However, both countries face persistent challenges: enforcement against states, representation of non-Western legal reasoning in awards, and the dominance of small elite networks.

The key lesson for international arbitration is that universal benchmarks (due process, impartiality, efficiency) can be respected through diverse procedural paths. There is no single “right way” to arbitrate. The challenge is to design systems that are culturally intelligent – aware of difference, respectful of local norms, but committed to core ethical standards.

7. CONCLUSION

International commercial arbitration promises a neutral forum for cross-border disputes. But neutrality is not the same as uniformity. When arbitration travels to Niger or Ghana, it encounters legal cultures that differ profoundly from the Western traditions in which modern arbitration was forged. Nigerien arbitrators bring an inquisitorial, conciliatory style shaped by civil law and Islamic sulh. Ghanaian arbitrators bring a hybrid common law-customary approach that values cross-examination and, in appropriate cases, community-based dispute resolution.

Neither approach is inherently superior or less fair. However, both face ethical challenges: impartiality in small legal communities, the exclusion of non-Western legal reasoning from awards, enforcement gaps, and insufficient diversity. This study has documented these challenges through empirical data interviews and arbitral documents – and has proposed a culturally intelligent framework to address them.

For practitioners, the implication is clear: cultural competence is not an optional soft skill but a core ethical requirement. Arbitrators must understand the legal cultures of the parties; institutions must provide procedural flexibility; and states must enforce awards fairly. For scholars, the study opens new avenues for comparative research on arbitration in Africa, particularly on the role of Islamic law and the dynamics of small legal communities.

Ultimately, arbitration beyond borders must also go beyond Western benchmarks. Fairness is universal, but its expression is cultural.

8. LIMITS OF THE STUDY

This study has several limitations. First, the sample size (36 interviews, 45 documents) is modest and not statistically generalizable. Second, access to arbitral awards was limited by confidentiality; we may have missed important cases. Third, the July 2023 coup in Niger affected data collection and may have altered arbitration practices since. Fourth, we did not interview foreign investors or parties; their perspectives on cultural fairness would triangulate findings. Fifth, the study focuses on commercial arbitration, not investment treaty arbitration (ISDS), which raises distinct cultural issues. Sixth, we did not conduct a longitudinal analysis; arbitration practices evolve. Seventh, the study did not systematically examine gender dynamics beyond counting women arbitrators. Finally, the proposed framework has not been tested in practice.

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10. AUTHOR CONTRIBUTIONS

As the sole author I'm responsible for all aspects: conceptualization, methodology, data collection, analysis, writing, and project administration.

11. COMPETING INTEREST

The author declares no competing interests. The author doesn't serve as an arbitrator in any case in Niger or Ghana.

12. FUNDING INFORMATION

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13. DATA AVAILABILITY

Anonymized interview transcripts (with personal identifiers removed) and redacted versions of arbitral awards (with party names and confidential business information removed) are available from the author upon reasonable request and subject to ethical approval. Full awards cannot be shared due to confidentiality obligations.

14. DISCLAIMER

The views expressed in this article are solely those of the author and do not represent the official positions of any arbitral institution, bar association, or government agency in Niger or Ghana. The proposed framework is for scholarly discussion and does not constitute legal advice.

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