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## REVISITING THE DISCUSSION ON CULTURE SHOCK IN INTERNATIONAL ARBITRATION WITH A MULTIDISCIPLINARY APPROACH

by Alex Vinicius Santana Souza

### I. INTRODUCTION

Eminent arbitrators John Barkett and Jan Paulsson wrote that cultural clashes in international arbitration are only a myth,<sup>1</sup> Mr. Paulsson also affirmed that a culture shock occurs when the parties in an international arbitration are represented by lawyers who come from the same jurisdiction.<sup>2</sup> Similarly, Dr. Horacio Naon has asserted that “international arbitration is essentially culturally neutral and a-historic.”<sup>3</sup> In general terms, these authors believe that arbitration’s agreed-upon process will end up trumping cultural differences, but there is reason to conclude that this is not the case.

International businesses are profoundly influenced by the various cultures involved, and arbitration is no exception. In fact, arbitration is a sociocultural phenomenon. That is, international arbitration first and foremost reflects culture. Further, it is also becoming increasingly accepted that international arbitration is developing into a *sui generis* transnational legal order, shaped by the numerous actors around the globe. Arbitration can be said to be the most adequate dispute resolution method in a globalized economy: in the 2016 Olympics, for instance, the cases that appeared throughout the games were under the jurisdiction of an “ad hoc division” of arbitral tribunals, specifically created to avert state jurisdiction.<sup>4</sup>

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<sup>1</sup> See 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/cgi/viewcontent.cgi?article=1083&context=lawreview>.

<sup>2</sup> See Jan Paulsson, *Cultural Differences in Advocacy in International Arbitration*, in *THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION* 15 (Doak Bishop & Edward G. Kehoe eds., 2d ed. 2010).

<sup>3</sup> Horacio A. Grigera Naon, *Cultural Clashes in International Arbitration: How Much of a Real Issue?*, in *LIBER AMICORUM: BERNARDO CREMADES* 557-560, 558 (M.A. Fernandez-Ballesteros & David Arias Lozano eds., 2010), as cited in Ian Meredith and Hendrik Puschmann, *Notes on the Cultural Dimension of International Commercial Arbitration*, 5 SLOVENSKA ARBITRAŽNA PRAKSA [SAR] 29, 31 (2016) (Slovn.).

<sup>4</sup> See Lucas Mendes, *Os Jogos Olímpicos Rio 2016 e a globalização de sistemas jurídicos*, COMITÊ BRASILEIRO DE ARBITRAGEM, <http://cbar.org.br/site/os-jogos-olimpicos-rio-2016-e-a-globalizacao-de-sistemas->



Recently, the subject of cultural differences in international arbitration has received increased attention. Joshua Karton, in “The Culture of International Arbitration and The Evaluation of Contract Law,” sought to formulate a framework for understanding decisions on substantive law in arbitration<sup>5</sup> and Karen Mills<sup>6</sup> and Lara Pair<sup>7</sup> addressed the impact of the history, morals, religion and the workplace culture of the general populace, seeking to explain how these issues would affect international arbitration cases.

Because of harmonization, many believed that cultural clashes were trumped and are no longer an issue to be taken into consideration, and this view has become common in the arbitral community. However, this approach is deeply mistaken—as Klaus Peter Berger accurately described, harmonization is a creeping codification of transnational commercial law.<sup>8</sup> Cultural backgrounds will always influence how people see arbitration and what they expect in its procedure and formalities, as well as the substantive results.<sup>9</sup> The cultural and legal background of parties and their counsel affect many aspects of the arbitral proceeding, such as (1) arbitrator nomination and appointment; (2) settlement; and (3) the decision making process in general.<sup>10</sup> Although hearings in international arbitration have a highly standardized procedure, as Emmanuel Gaillard has pointed out,<sup>11</sup> cultural shock is a real

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juridicos/.

<sup>5</sup> See JOSHUA D. H. KARTON, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* (2013).

<sup>6</sup> See Karen Mills, *Cultural Differences & Ethnic Bias in International Dispute Resolution: An Arbitrator/Mediator's Perspective*, NOTTINGHAM.AC.UK, available at <https://www.nottingham.ac.uk/research/groups/ctccs/projects/translating-cultures/documents/journals/cultural-differences-and-ethnic-bias-in-international-dispute-resolution.pdf>.

<sup>7</sup> See Lara M. Pair, *Cross - Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 ILSA J. INT'L & COMP. L. 57, (2003), available at <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1409&context=ilsajournal>.

<sup>8</sup> KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA* 3 (Wolters Kluwer, 2d ed. 2010) (1999).

<sup>9</sup> See Pair, *supra* note 7, at 4.

<sup>10</sup> See Claire Morel de Westgaver and Sébastien Krier, *How Legal Traditions (Still) Matter in International Arbitration*. KLUWER ARB. BLOG, Mar. 20, 2017, <http://arbitrationblog.kluwerarbitration.com/2017/03/20/bryan-cave/>.

<sup>11</sup> Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L, 1, 11 (2015).



phenomenon in international arbitration, and creating standards and formal guidelines does not address the underlying issues.

Consider, for example, the taking of evidence and document production in international arbitration. In general, these procedures are not fully proscribed by the applicable arbitration rules, but rather they are a product of the culture of the parties' countries. For example, a Brazilian lawyer may not be accustomed to American style cross-examination (due to its general absence in Brazil), to prepare a witness is considered absolutely unethical.<sup>12</sup> Thus, these issues are a matter of ethics and culture, not merely "an issue of simple procedural fairness."<sup>13</sup> Lawyers educated in common law countries are well versed in discovery and cross-examination—while the ones who come from civil law countries may have never even heard of it, and would likely believe that the best evidence always comes from documents.<sup>14</sup> Of course, that happens because this is generally the only perspective they have seen during their legal education, as well as in court proceedings and domestic arbitration proceedings in their jurisdictions. Indeed, if documents are ordered to be produced in international arbitration, a party from a civil law country may not even be prepared to show the documents.<sup>15</sup>

Further, witnesses from civil law countries often feel intimidated by cross-examination, and become flustered, which may be a disadvantage to the civil law party, who might not be familiar with witness preparation.<sup>16</sup> Witnesses' understanding of the procedure directly affects his or her performance on providing the facts.<sup>17</sup> Therefore, although domestic and international arbitration are two very

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<sup>12</sup> John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 U. MIAMI INTER-AM. L. REV. 1, 4 (2004), available at: <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1166&context=umialr>.

<sup>13</sup> See Barkett & Paulsson, *supra* note 1, at 4.

<sup>14</sup> Siegfried H. Elsing and John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration*, HUGHES HUBBARD & REED, available at <https://www.hugheshubbard.com/news/bridging-the-common-law-civil-law-divide-in-arbitration>.

<sup>15</sup> Marco Deluiggi, *O conflito de culturas na produção de provas em arbitragens internacionais*, in ARBITRAGEM INTERNACIONAL: UNIDROIT, CISG E DIREITO BRASILEIRO 137 (Jonathan Barros Vita, Napoleão Casado Filho & Cláudio Finkelstein eds., Quartier Latin 2010).

<sup>16</sup> See MEREDITH & PUSCHMANN, *supra* note 3, at 5.

<sup>17</sup> José I Astigarraga & Eduardo J De la Peña Bernal, *Cultural Considerations in Advocacy: Latin America*,





different things—“like an elephant and a sea elephant”<sup>18</sup>—common law-trained lawyers may have an advantage in international arbitration when they are up against advocates with a civil law background, and standardized procedures will do little to remedy this truth.

Nowadays, the topic of cultural differences is more important than ever. Technological advances such as social networks, and political issues like the refugee crisis clearly expose (and facilitate) cultural clashes. The economy also tends to continuously become more globalized. Foreign investment is growing as innovations in fintech such as cryptocurrencies spread, and conflicts between people with different cultural backgrounds are likely to grow in the years to come. International arbitration is commonly used to resolve important cross-border disputes, involving a variety of different industries and practices, including antitrust and infrastructure.<sup>19</sup>

The recently released Prague Rules on the Efficient Conduct of Proceedings in International Arbitration, a set of rules about procedure and taking of evidence based on civil law, generated quite a debate.<sup>20</sup> According to its creators, the Prague Rules were a response to the IBA Rules of Evidence, which are closer to common law practices and, therefore, benefit participants educated in this legal tradition.

In addition, the development of international arbitration into a transnational legal order should not be ignored. This topic is of such importance that must be taken into consideration in every discussion about international arbitration. On this topic, the Chief Justice of the Federal Court of Australia, James Allsop, noted:

[A]rbitration is to be recognised as part of a world-wide legal order or system of dispute resolution – of a

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in GLOB. ARBITRATION REVIEW, *THE GUIDE TO ADVOCACY* 146 (Stephen Jagusch, Philippe Pinsolle & Timothy L Foden eds., 2d ed. 2017), available at: <https://globalarbitrationreview.com/chapter/1147798/cultural-considerations-in-advocacy-latin-america>.

<sup>18</sup> Jan Paulssen, *International Arbitration is not Arbitration*. 2008 STOCKHOLM INT’L ARB. REV. 1, 3, available at: [https://www.arbitration-icca.org/media/4/38838389608773/media012331138275470siar\\_2008-2\\_paulssen.pdf](https://www.arbitration-icca.org/media/4/38838389608773/media012331138275470siar_2008-2_paulssen.pdf).

<sup>19</sup> See Catherine A. Rogers, *The World is not Enough*. KLUWER ARB. BLOG, Nov. 6, 2016, <http://arbitrationblog.kluwerarbitration.com/2016/11/06/the-world-is-not-enough/>.

<sup>20</sup> See Michael McIlwrath, *The Prague Rules: The Real Cultural War Isn’t Over Civil vs Common Law*. KLUWER ARB. BLOG, Dec. 12, 2018., <http://arbitrationblog.kluwerarbitration.com/2018/12/12/the-prague-rules-the-real-cultural-war-isnt-over-civil-vs-common-law/>.





system of justice. It is part of a complex, integrated justice system that involves courts (national and international), arbitrators, and arbitral institutions, mediators, facilitators and legal advisers. This integrated justice system is the manifestation of a true international legal order. The importance of that development in the 20th and 21st centuries should not be ignored or devalued. The recognition of the importance of this, and of the fragility and dynamism of any such system, should frame all serious discussion about it. It is from these two features – a respect for the autonomy of the individual and the place of arbitration as a fair way of vindicating the rule of law – that the institution draws its international support from nations, legislatures and judiciaries.<sup>21</sup>

The present article will show that not merely the law but also the history, customs and traditions of each country influence international arbitration proceedings greatly. The aim is to enlighten the study of the field of international arbitration with a multidisciplinary approach that seems to have been put aside recently and, by doing so, show that culture shock will always prevail, despite harmonization.

The first section discusses how the legal background of the parties and counsel influence international arbitration. In the second section, the article covers how the cultural background of the nationalities shape parties and counsel's view on arbitration.<sup>22</sup> Further, the third section provides some suggested guidance on how to best resolve and/or deal with the cultural clash in international arbitration.

## **II. DOMESTIC LAW DETERMINES EXPECTATIONS FOR INTERNATIONAL ARBITRATION**

Expectations are a major factor in international arbitration proceedings. Users expect international arbitration to be similar to the practices of the legal tradition from where they come.<sup>23</sup> A lawyer trained in common law expects an adversarial

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<sup>21</sup> Allsop, Chief Justice, Fed. Court of Austl., CIArb Inaugural Annual Lecture: The Role of Law in International Commercial Arbitration (Oct. 15, 2018), *available at* [https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20181015#\\_ftn1a](https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20181015#_ftn1a).

<sup>22</sup> Preference will be given to Brazil, Austria and Germany as the representatives of civil law and to the United States as the representatives of common law because this writer is familiarized with the customs and language of these countries. Germany may also represent Continental Europe as a whole.

<sup>23</sup> See Pair, *supra* note 7, at 4.



approach, with both parties playing an important role during the entire process. On the contrary, civil law lawyers expect an active judge and an inquisitorial system. Additionally, in Germany, litigation is normally used as a means of exerting force and leverage,<sup>24</sup> and arbitrators are expected, as a tradition, to seek amicable settlements during the proceedings,<sup>25</sup> which happens in the majority of domestic arbitrations.<sup>26</sup>

The *iura novit curia* principle, as observed by the civil law tradition, states that the parties only have to prove the facts alleged by them, because the court is presumed to know the law (“give me the facts and I will give you the applicable law”).<sup>27</sup> Conversely, in common law systems, the parties are expected to assist the court in applying the law; the facts have to be scrutinized in order to find the applicable law (“remedies precede rights”).<sup>28</sup> Evidence-gathering in civil law jurisdictions is done only by the court, while in common law the parties themselves have a significant role on that point. Hence, the preference for pleadings instead of memorials—or vice versa—in international arbitration is also a cultural issue.<sup>29</sup>

Oral advocacy plays a major role in international arbitration as well as in the common law tradition. Jury trials are commonplace in the U.S., in which lawyers’ practice and hone their advocacy skills. Civil law systems, on the other hand, have almost no oral advocacy (or it has less importance in the process), not only in court but also in domestic arbitration.

Another fact that should be taken into consideration is that in civil law countries

<sup>24</sup> Hannes Unberath, *Auf dem Weg zu einer differenzierten Streitkultur - Neue gesetzliche Rahmenbedingungen für die alternative Konfliktlösung*, 65 JURISTEN ZEITUNG 975, 976 (2010) (Ger.).

<sup>25</sup> This practice is explicit under both the 1998 and the new rules of the DIS, issued in March 2018, German Arbitration Institute, 2018 DIS Arbitration Rules, 2018 DEUTSCHE INSTITUTION FÜR SCHIEDSGERICHTSBARKEIT § 27.4 (Ger.) (“With a view to increasing procedural efficiency, the arbitral tribunal shall specifically discuss the following with the parties: (iii) the possibility of using mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues.”).

<sup>26</sup> Karl-Heinz Böckstiegel, *Case Management by Arbitrators: Experiences and Suggestions*, REVISTA DE ARBITRAGEM E MEDIAÇÃO, Jan./Mar., 2007, at 103.

<sup>27</sup> *Iura novit curia*, WIKIPEDIA, [https://en.wikipedia.org/w/index.php?title=Iura\\_novit\\_curia&oldid=818450315](https://en.wikipedia.org/w/index.php?title=Iura_novit_curia&oldid=818450315) (last updated Jan. 3, 2018).

<sup>28</sup> ELISABETH ZOLLER, *INTRODUCTION TO PUBLIC LAW: A COMPARATIVE STUDY* 121 (2008).

<sup>29</sup> See Antony Smith & Marc Jones, *Arbitration News: Memorials or pleadings? A cultural conflict*. BEALE & Co, May 2018, available at <https://beale-law.com/publications/743-arbitration-news-memorials-or-pleadings-a-cultural-conflict.php>.



legal certainty is associated with written rules. This matter is important because the extent of the cultural influence on *ad hoc* processes tend to be much higher because “institutional arbitrations usually have more clearly defined rules of procedure and tend to adopt a common approach for arbitrations, instead of a case-by-case determination.”<sup>30</sup> Hence, attorneys who have more experience with *ad hoc* arbitrations may also have an advantage in international arbitration when facing civil law-educated lawyers who do not.

Austria and Germany may be exceptions to that rule. In both these countries the law governing arbitration is in their Civil Procedure Code (*Zivilprozessordnung*), which gives a large set of discretion to arbitrators and make arbitration procedures unpredictable.<sup>31</sup> In addition, in Austria, mediation is rare and international arbitrations are more frequent than both *ad hoc* and institutional domestic arbitrations.<sup>32</sup>

In Germany, the acceptance to arbitration grew after the reforms that were made in the law and in the DIS rules in 1998. A study conducted in the beginning of the century has shown that only about half of the contracts in Germany had arbitration agreements, while in the rest of the world it was around 90%.<sup>33</sup> In January 2018, the *Landgericht Frankfurt am Main* (Frankfurt High Court) established a chamber of international commercial law.<sup>34</sup> Its Chairwoman, seeing an opportunity after Brexit, has proposed that German courts adopt the English language in order to encourage doing business in the country.<sup>35</sup> International commercial arbitration may benefit from that as well.

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<sup>30</sup> See Pair, *supra* note 7, at 2.

<sup>31</sup> Richard Kreindler, Thomas Kopp & Patrick Gerardy, *Arbitration Guide: GERMANY*, 2018 I.B.A. ARB. COMMITTEE 3, 21.

<sup>32</sup> Gerold Zeiler, *Arbitration Guide: AUSTRIA*, 2018 I.B.A. ARB. COMMITTEE 3.

<sup>33</sup> JENS-PETER LACHMANN, *HANDBUCH FÜR DIE SCHIEDSGERICHTSPRAXIS* 27 (2d ed. 2008).

<sup>34</sup> Christoph Just, *A New Landmark in International Commercial Litigation? The Frankfurt High Court Installed a Specialized Chamber for International Commercial Matters*. [WWW.SCHULTE-LAWYERS.COM](http://www.schulte-lawyers.com) (Jan. 26, 2018), available at <https://www.schulte-lawyers.com/schulteblog/2882017-6y2e6>.

<sup>35</sup> Joe Barnes, *BREXIT SNATCH: Germany Plots English-Speaking Courts to Exploit BILLION Pound UK Industry*, [WWW.EXPRESS.CO.UK](http://www.express.co.uk), Aug. 14, 2018. (World), available at <https://www.express.co.uk/news/world/1002905/Brexit-news-UK-EU-Germany-English-speaking-litigation-court>.



In Brazil, arbitration only began to thrive in 2001, when its Supreme Court (“STF”) declared that the 1996 Brazilian Arbitration Act was constitutional. Before that, all arbitral awards had to be confirmed by the Judiciary in order to be enforced. It was also in 2001 that arbitral clauses were allowed to be stated in corporate bylaws.<sup>36</sup> Arbitration even became mandatory in some market segments of the country’s Stock Exchange (“B3”) as it is considered to be of the highest standards in corporate governance—this is of utmost relevance because highly developed stock markets, like the American and the Swiss, are still discussing about shareholder arbitration and others, like the German, are hostile against it.<sup>37</sup> In the following year, the New York Convention, which is from 1958, was finally ratified by both the congress and the presidency.<sup>38</sup> Also, very recently, legislative changes, such as the new Code of Civil Procedure (Law No 13.105/2015), were made in order “to improve the effectiveness of judicial proceedings necessary for the recognition and enforcement of foreign judgments and arbitral awards in the country.”<sup>39</sup>

The Brazilian Arbitration Act was reformed in 2015, and state-owned enterprises may now take part in arbitral proceedings. The Judiciary Power is also becoming more and more arbitration friendly.<sup>40</sup> Hence, arbitration is the fastest growing alternative dispute resolution method in Brazil: comparing 2010 and 2017, the number of new proceedings in the country’s leading arbitral chambers grew 114,84%.<sup>41</sup>

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<sup>36</sup> Due to a reform in the Brazilian Corporate Act (Law No 6.404/1976). Lei No. 13.129, de 26 de maio de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.05.2015 (Braz.).

<sup>37</sup> Wilmer Cutler Pickering Hale and Dorr LLP, *What to Expect When Arbitrating in Brazil: Recent Developments in International Arbitrations and the Institutional Landscape*, YOUTUBE (May 3, 2018) [hereinafter Wilmer Cutler], available at <https://www.youtube.com/watch?v=ODMSIQH3aEU>.

<sup>38</sup> Decreto No. 4.311 de 23 de Julho de 2002, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.07.2002 (Braz.).

<sup>39</sup> Renato Stephan Grion, Guilherme Piccardi de Andrade Silva and Thiago Del Pozzo Zanelato, *Recent Legislative Developments in Brazil Expected to Improve the Effectiveness of Proceedings for the Recognition and Enforcement of Foreign Judgments in the Country*, INT’L LITIG. NEWS, Sept. 2017, at 26-27, available at [http://www.pinheironeto.com.br/Documents/Artigos/Recent\\_legislative\\_developments\\_in\\_Brazil\\_Sept2017.pdf](http://www.pinheironeto.com.br/Documents/Artigos/Recent_legislative_developments_in_Brazil_Sept2017.pdf).

<sup>40</sup> See Felipe Sperandio, *Kompetenz-Kompetenz in Brazil: Alive and Kicking*, KLUWER ARB. BLOG, Dec. 10, 2013, <http://arbitrationblog.kluwerarbitration.com/2013/12/10/kompetenz-kompetenz-in-brazil-alive-and-kicking/>.

<sup>41</sup> See Selma Lemes. *Pesquisa - 2017 Arbitragem em Números e Valores. Seis Câmaras. 8 anos Período de 2010 (jan./dez) a 2017 (jan./dez.)*, SELMALEMES.ADV.BR, (jul/ago 2018) (Braz.), available at <http://selmalemes.adv.br/artigos/An%C3%A1lise-%20Pesquisa-%20Arbitragens%20Ns.%20e%20>



Arbitration is also thoroughly accepted by the Brazilian business community. However, the lack of arbitral tradition seems to be harmful. Despite recent efforts, arbitration is absent in almost all law schools. Some court decisions, especially from the smallest states, prove that judges that are not from Rio de Janeiro or São Paulo do not have basic knowledge of Arbitral Law. The obligation of the use of the Portuguese language and the restriction on the choice of the applicable law are strong barriers to international investors. The country still lacks skilled professionals and scholars and “most of today’s top arbitration experts of the first and even of the second generation—may be arbitrators or counsels—have a litigation background and civil procedure law as their intellectual basis.”<sup>42</sup>

### III. CULTURAL BACKGROUND IS A STRONG FACTOR IN INTERNATIONAL ARBITRATION

Religious, political, and social traditions of a country, underpinning its legal system, have the greatest influence on international arbitration.<sup>43</sup>

Although the cultural background of international arbitration users is a very important topic, it is seldom considered as it should be. Unlike the corporations that spend millions of dollars to learn about the country they want to invest in, the international arbitration community has “made little or no effort to be culturally sensitive to the parties to international commercial arbitration.”<sup>44</sup>

Despite the attempts to standardize international arbitration and create a “culturally neutral and a-historic” environment, there will always be cultural clash. The background of the users strongly shapes their approach to the topic.

Addressing this issue on a speech held in a conference in Beijing, the President and CEO of the American Arbitration Association, William K. Slade II, said:

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Valores-%202010%20a%202017%20-final.pdf.

<sup>42</sup> See Wilmer Cutler, *supra* note 37.

<sup>43</sup> Nikola Georgiev, *Cultural Differences or Cultural Clash? The Future of International Commercial Arbitration*, [WWW.WORKS.BEPRESS.COM](http://www.works.bepress.com), at 7, Apr. 13, 2012, available at [http://works.bepress.com/nikola\\_georgiev/8/](http://works.bepress.com/nikola_georgiev/8/).

<sup>44</sup> William K. Slade II, Speech delivered at the 17th ICCA Conference in Beijing, China: Culture Connection in International Commercial Arbitration (May 18, 2004) in *DISP. RES. J.*, Aug.-Oct. 2004. A paper that adapts the remarks delivered from Mr. Slate is available at <https://www.nottingham.ac.uk/research/groups/ctccs/projects/translating-cultures/documents/journals/paying-attention-to-culture-in-international-commercial-arbitration.pdf>.



We need to recognize cultural prejudices and be sensitive to cultural traditions lest we unintentionally offend our real and would-be friends. At the same time, we need to pay attention to culturally induced personal behaviors of our own that could be perceived in an unflattering light.<sup>45</sup>

Hence, it is very easy to offend someone that has a different cultural background while communicating, as both verbal and nonverbal communication are very different throughout cultures. In order to avoid misunderstandings and unintentional insults, it is of great importance to observe body language and language. For example, head nodding can mean “yes, I agree”; “yes, I hear you”; and even “no.” In addition, chitchat and joking prior to the hearings may be very effective tools to break the ice and build a positive work environment, but in some cultures, that may be seen as “signs of mental instability or suspicious attempt at confidence schemes.”<sup>46</sup> These cultural differences may eventually escalate into something much more serious, which is important to always keep in mind.

However, it would seem valid, even well intentioned, to argue that one should not talk about cultures in general but address each person individually in order to avoid biases and stereotypes. Nevertheless, as Professor Erin Meyer explains, it just so happens that it is the exact opposite:

If you go into every interaction assuming that culture doesn't matter, your default mechanism will be to view others through you own cultural lens and to judge them accordingly. ... Yes, every individual is different. And yes, when you work with people from other cultures you shouldn't make assumptions about individual traits based on where a person comes from. But this doesn't mean learning about cultural contexts is unnecessary. If your business success relies on your ability to work successfully with people from around the world, you need to have an appreciation for cultural differences as well as respect for individual differences. Both are essential.<sup>47</sup>

Culture is much more than just manners. Equally important to international arbitration is the history, the beliefs, the values and the political views from the participant's home country. For instance, Brazil's long-time experience with

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<sup>45</sup> *Id.*

<sup>46</sup> See Mills, *supra* note 6, at 5.

<sup>47</sup> ERIN MEYER, THE CULTURE MAP: BREAKING THROUGH THE INVISIBLE BOUNDARIES OF GLOBAL BUSINESS 13 (2014).





exacerbated nationalism, numerous *coup d'états* and stark governmental interference in the private sphere are a strong barrier to international arbitration. The governments always gave preference to state-owned enterprises and to public interest to the detriment of free international trade. Because of the small Brazilian presence in international commerce, there are few conflicts and, therefore, few international arbitration proceedings. Brazilian congress has never ratified any investment treaty agreements<sup>48</sup> and the country never took part in an investor-state case.<sup>49</sup> By comparison, the UK is party to numerous bilateral and multilateral treaties and agreements.<sup>50</sup>

Conversely, Japan (and other East Asian countries) has a tradition on conciliatory means of dispute resolution that go back to the feudal times, more specifically to the Tokugawa period:<sup>51</sup> litigation was seen as immoral back then. Hence, it is, to this day, deeply embedded in people's minds that an adversarial, litigant way of resolving conflicts is extremely unethical.<sup>52</sup> Nowadays, "arbitration is not necessarily regarded by Japanese users as a fast and inexpensive method of resolving disputes"<sup>53</sup> and international arbitration is even less popular in the country.<sup>54</sup> It should also be noted that, in East Asia, "[a]dvocates who appear unprepared for or unwilling to attempt reconciliatory measures may be perceived as insincere and disrespectful towards the dispute resolution process."<sup>55</sup>

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<sup>48</sup> Arnaldo Wald, *Uma nova visão dos tratados de proteção de investimento e da arbitragem internacional*, in *REVISTA DE ARBITRAGEM E MEDIAÇÃO*, Apr. 21, 2009, at 9-29 (Braz.).

<sup>49</sup> Fábio Peixinho Gomes Corrêa and Laura Ghitti, *The International Comparative Legal Guide to: Investor-State Arbitration 2019 - Brazil*. ICLG.COM (Nov. 13, 2018), available at <https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/brazil>.

<sup>50</sup> Dominic Roughton and David Turner, *The International Comparative Legal Guide to: Investor-State Arbitration 2019 - United Kingdom*. ICLG.COM (Nov. 13, 2018), available at <https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/united-kingdom>.

<sup>51</sup> Also known as "Edo Period" it is the period between 1603 and 1868 in the history of Japan. The country was ruled by a military commander known as *shogun*, a member of the Tokugawa clan.

<sup>52</sup> See Pair, *supra* note 7, at 12.

<sup>53</sup> Hiroyuki Tezuka & Yutaro Kawabata, *Arbitration Guide: JAPAN*, 2018 I.B.A ARB. COMMITTEE 3.

<sup>54</sup> See David A. Livdahl, *Cultural and Structural Aspects of International Commercial Arbitration in Japan*, 20 J. INT'L ARB.. 375 (2003).

<sup>55</sup> Alvin Yeo SC & Chou Sean Yu, *Cultural Considerations in Advocacy: East Meets West*. GLOB. ARBITRATION REVIEW. THE GUIDE TO ADVOCACY 182 (Stephen Jagusch, Philippe Pinsolle Alexander G. Leventhal eds., 3d





Another fact about East Asia that often baffles Westerners is the philosophy of Sun Tzu. The ideas of the author of *The Art of War* are still thoroughly followed in the Eastern World. The Chinese general taught that, in order to win, one may not just attack continuously (as Occidentals do), but take steps back in order to attract the enemy to a desired spot, where he will be vulnerable, and then attack.<sup>56</sup> Westerners have a Chess mentality whereas Easterners have a Go mentality.<sup>57</sup> In Chess, one just attacks; in the traditional Chinese board game Go, on the other hand, the objective is to conquer most of the board's territory (if you just keep moving forward, you will lose).

The population of Continental Europe is highly likely to disfavor international arbitration and investment protection treaties. NGOs and other watchdog groups, like the Corporate Europe Observatory and End ISDS, often gather hundreds of thousands of people to demonstrate against such treaties. The main concern of the demonstrators is the allegation that arbitral tribunals privilege big companies, the processes are confidential, and, therefore, incompatible with democracy.<sup>58</sup> Many question international investment arbitration's legitimacy.<sup>59</sup> This sentiment grew even stronger after the two Vattenfall cases. Thus, the critics come from both the people and the government: Germany's Minister for Economics and Energy, Brigitte Zypries, once affirmed that the "Federal Government wants alternative dispute-resolution methods to be kept to a minimum."<sup>60</sup> About this, Emmanuel Gaillard alerted, in a speech held in a Conference in Rio de Janeiro, that these NGOs should be aware not to criticize investment arbitration and commercial arbitration at the

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ed. 2018), available at <https://globalarbitrationreview.com/chapter/1175413/cultural-considerations-in-advocacy-east-meets-west>.

<sup>56</sup> SUN TZU, *THE ART OF WAR* (Filiquarian 2007) (500 B.C.).

<sup>57</sup> MARK SPITZNAGEL, *THE DAO OF CAPITAL: AUSTRIAN INVESTING IN A DISTORTED WORLD* 75-77 (2013).

<sup>58</sup> ARD, *TTIP und Schiedsgerichte: scheinheilige Kritik*, YOUTUBE (June 5, 2015) (Ger.), available at <https://www.youtube.com/watch?v=GMw6BLjYdLM>.

<sup>59</sup> See S.I. Strong, *Legitimacy and International Arbitration: An Alternate View*, KLUWER ARB. BLOG, Oct. 4, 2017, <http://arbitrationblog.kluwerarbitration.com/2017/10/04/legitimacy-international-arbitration-alternate-view/>.

<sup>60</sup> Wikithek, *Schiedsgerichte - Im Schatten der Justiz (Freihandelsabkommen TTIP, CETA)* (2014), YOUTUBE (Mar. 21, 2014) (Ger.), available at <https://www.youtube.com/watch?v=-mE7QcTmX-Y>.



same time, in order not to harm the latter.<sup>61</sup>

All of this may have culminated in the—at least—peculiar ruling of the Court of Justice of the European Union (CJEU) in the *Achmea* case.<sup>62</sup> In that occasion, the supranational court decided that an investment arbitration clause was incompatible with EU Law because only European Courts may interpret and apply European Law. After this decision, Germany has requested dismissal of the Vattenfall case.<sup>63</sup>

#### IV. MANAGING CULTURAL CLASHES IN INTERNATIONAL ARBITRATION

In order to excel in international arbitration, it is mandatory to develop cross-cultural competency skills. Not only the lawyers should observe this, but also—maybe, even especially—the arbitrators. In addition, oftentimes one will have to work within a global, multicultural team. This means that one must know how to manage the complexities of his own party before confronting the other parties (“know thyself, know thy opponent, and know thy arbitrator”).<sup>64</sup>

Notwithstanding, the agreed-upon process is not enough to avoid cultural clashes. The participants themselves have a significant role on that point. As the lawyers of Smith, Gambrell, & Russell, LLP put it:

The procedural flexibility of arbitration may avoid, or at least limit, the risk of bias inherent in international litigation by giving the parties and the panel a chance to address cultural and legal differences. However, arbitration does not provide the solution; it is ultimately the parties’ and the panel’s responsibility to do so.<sup>65</sup>

In international arbitration, the cultural issues are as important as the matter of the arbitration itself. Committing a culture-related mistake may be excusable for a

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<sup>61</sup> Gaillard, Emmanuel, Opening speech of the III CBMA International Arbitration Congress in Rio de Janeiro, Brazil: (Aug. 9, 2018).

<sup>62</sup> Case C-284/16, *Slowakische Republik v Achmea BV*, 2008 ECLI 158 (Mar. 6, 2018), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0284>.

<sup>63</sup> Joerg Risse & Max Oehm, *The Aftermath of Achmea: Germany Requests Dismissal of Vattenfall Case After CJEU’s Achmea Decision*, GLOBAL ARB. NEWS (May 14, 2018), available at <https://globalarbitrationnews.com/aftermath-achmea-germany-requests-dismissal-vattenfall-case-cjeus-achmea-decision/>.

<sup>64</sup> *Effects of Differing Cultural Backgrounds on Dispute Resolution*. TRUST THE LEADERS (Smith, Gambrell, & Russell, LLP, Atlanta, Ga.), Spring 2005, available at <http://www.sgrlaw.com/ttl-articles/877/>.

<sup>65</sup> *Id.*



tourist, but it could be extremely detrimental, sometimes even unforgiving, when committed by one of the parties in an international arbitration proceeding.<sup>66</sup> The lawyers need to be sure that the clients understand this. On this topic, Meredith and Puschmann wrote:

Your clients are unlikely to be lawyers, let alone international arbitration professionals. They are far less likely than you to be mindful of the implications posed by the cultural background of their opponents and the tribunal. Take some time to explain the issue to them.<sup>67</sup>

Although the identification of cultural issues begins at the preliminary hearings, it is highly recommended to consider culture when choosing the tribunal.<sup>68</sup> One must be sure to interview the potential arbitrators; just reading his or her credentials is not nearly enough.<sup>69</sup> When establishing procedures, umpires must understand their impact on the parties and ensure that due process is not compromised. The arbitrators cannot manage the case efficiently unless and until they are familiar enough with its substance. When the arbitrators do not know all the issues surrounding the case, there will inevitably be consequences in costs and duration of the proceeding.<sup>70</sup> Moreover, they must be able to render an award that is both binding and enforceable. He or she will be able to do this only if he or she has a clear understanding on everything about that arbitral procedure. To achieve this, more than just intellectual rigor is required.<sup>71</sup> That is of utmost relevance because, in some locations, to enforce an award is already close to impossible.<sup>72</sup>

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<sup>66</sup> See Mills, *supra* note 6, at 3.

<sup>67</sup> See MEREDITH & PUSCHMANN, *supra* note 3, at 6.

<sup>68</sup> Theodore K. Cheng, *The Importance of Developing Skills to Address Culture in Arbitration*, ARBITRATIONBLOG.PRACTICALLAW.COM (Nov. 22, 2016), available at <http://arbitrationblog.practicallaw.com/the-importance-of-developing-skills-to-address-culture-in-arbitration/>.

<sup>69</sup> Gary Benton, *The Biggest Mistake in Selecting an Arbitrator*, SVAMC.ORG, available at <https://svamc.org/the-biggest-mistake-in-selecting-an-arbitrator/>.

<sup>70</sup> Yves Derains, *Some Remarks on the Management of International Arbitration*, REVISTA DE ARBITRAGEM E MEDIAÇÃO, jan./mar., 2007, at 132 (Braz.). This paper is an adaptation of the one prepared for the ICC Miami Conference on Latin American Arbitration, on July 11, 2016.

<sup>71</sup> See Slade, *supra* note 44.

<sup>72</sup> See Sergejs Dilevka, *So You Think You Can... Enforce an Arbitral Award in the Kingdom of Saudi Arabia?* KLUWER ARB. BLOG, Dec. 7, 2018, <http://arbitrationblog.kluwerarbitration.com/2018/12/07/so-you-think-you-can-enforce-an-arbitral-award-in-the-kingdom-of-saudi-arabia/>.



Diversity in the arbitral panel is also of utmost importance. A famous empirical study suggested that “panels with at least one female judge tend to have a higher quality of reasoning in some respects than an all-male panel.”<sup>73</sup> However, it should be kept in mind that diversity based only on gender is not enough. The ideal would be that the appointed arbitrators come from different cultural backgrounds. On this, Joshua Karton and Ksenia Polonskaya observed:

After all, female lawyers come from various backgrounds. There are Asian female lawyers, Indigenous female lawyers, black female lawyers, female lawyers from developing states, Muslim female lawyers, and so on. These overlapping characteristics generate different experiences and different struggles to find “points of entry” into the field of investment arbitration. Being an arbitrator is a position of prestige and importance; it is also well remunerated. If we as a community are to take diversity seriously, we must move beyond the kind of token diversity that sees only white women from developed Western countries added to the pool of arbitrators.<sup>74</sup>

Consider, as an example, the *Liamco v. Libya* case, one of the three cases that arose from Libya’s nationalization of its oil sector in 1973.<sup>75</sup> On that occasion, Libyan American Oil Co., under its concession agreements with the government, claimed “as its primary remedy the reinstatement of its concessions and as an alternative, damages in the amount of US\$207,652,667 plus interest.”<sup>76</sup> Sole arbitrator Sohbi Mahmassani rendered an award reasoned not only in English and French law but also in Islamic Law.<sup>77</sup> He was able to render such an award only because he was familiarized with all these cultures (and legal traditions), as he studied in both Lyon and London and came from Lebanon, being fluent in English, French and Arabic. This

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<sup>73</sup> Robert Kovacs & Alex Fawke, *An Empirical Analysis of Diversity in Investment Arbitration: The Good, the Bad and the Ugly*, 4 TRANSNAT’L DISP. MGMT. 1, 9–10 (2015)

<sup>74</sup> Joshua Karton and Ksenia Polonskaya, *True Diversity is Intersectional: Escaping the One- Dimensional Discourse on Arbitrator Diversity*, KLUWER ARB. BLOG, July 10, 2018, <http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/>.

<sup>75</sup> See, e.g., Valentina Vadi, *Culture Clash: Investor’s Rights v. Cultural Heritage in International Investment Law & Arbitration*, PAPERS.SSRN.COM, at 10–14 (June 19, 2012), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2087823](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087823).

<sup>76</sup> *Libyan Am. Oil Co. (LIAMCO) v. Libya*, 4 Y.B. COMM. ARB. 177 (Ad-hoc Arb.1979).

<sup>77</sup> *Id.*



case also showed the importance of giving attention to culture while drafting the arbitral clause: the arbitrator could not have been a national of Libya.

While defending a culturally diverse panel of arbitrators, Won Kidane wrote:

The algorithm for the selection of arbitrators must thus account for the ability to determine facts, identify and interpret law, and apply the law to the facts. The determination of fact is probably the most culturally sensitive step, but the ability to correctly determine facts is perhaps the most ignored of all criteria for arbitrator selection. There is no doubt that ordinarily Chinese judges would understand Chinese witnesses better than European or African arbitrators because of the cultural proximity. ...

If all three members of the tribunal share a cultural background with each other but not with the party representatives or the witnesses, that alignment of diversity would probably have a negative impact on comprehension. But if, assuming interchangeability, two of the arbitrators change positions with the party-representatives or witnesses, comprehension could improve.<sup>78</sup>

Hence, the best way to develop cross-cultural competence is to seek cultural immersion. Traveling to study or work abroad is the best way to do so. With so many LL.M. and international associate programs that is actually not very difficult. Moot Courts can also be very helpful on that point. In the Willem C. Vis Moot and in the Vis Moot East, for instance, a team never argues against a team from their own country. These competitions are of great value to students because they have been proving to be a great instrument for developing oral and writing skills<sup>79</sup> as well as fostering a more diverse global legal community.<sup>80</sup> Teaching arbitration is neglected by many universities. Moot courts can help fill that gap.<sup>81</sup> There are also a vast

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<sup>78</sup> Won Kidane, *Does Cultural Diversity Improve or Hinder the Quality of Arbitral Justice?*, KLUWER ARB. BLOG, Mar. 31, 2017, <http://arbitrationblog.kluwerarbitration.com/2017/03/31/does-cultural-diversity-improve-or-hinder-the-quality-of-arbitral-justice/>.

<sup>79</sup> See Mark R. Shulman, *Making Progress: How Eric Bergsten and the Vis Moot Advance the Enterprise of Universal Peace*, 24 PACE INT'L L. REV. 1, 3 (2012), <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1318&context=pilr>.

<sup>80</sup> Mark R. Shulman, Letter to the Editor, *Moot Court in Global Language of Trade*, N.Y. L.J., Apr. 2, 2007, available at <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=http://www.markrshulman.com/publications&httpsredir=1&article=1320&context=lawfaculty>.

<sup>81</sup> See Thiago Del Pozzo Zanelato & Lucas Moreira Jimenez, *The Development of Arbitration Legal Studies In Brazil (or How the Vis Moot Can Change Your Life)*, KLUWER ARB. BLOG, Mar. 28, 2017,



number of preparatory competitions that spawned all around the world because of the Vis Moot. That is one of the reasons why it “is truly an international event at every stage”<sup>82</sup> and an “entry ticket to practice international arbitration.”<sup>83</sup> About this, Vaughan and Graves wrote: “Students are encouraged to employ a comparative perspective in their analysis and advocacy. Through this comparative approach, students arguably gain a better understanding not only of other legal systems, but of their own as well.”<sup>84</sup>

It is also important to learn many languages. Language has a very important role not only in international arbitration but also in the law as a whole. For instance, because of the 24 official languages of the European Union, European lawyers have been struggling with the application and the translation of EU Law.<sup>85</sup> Hence, it is strongly recommended that lawyers working in international arbitration know a great deal of languages and that the arbitral tribunal itself have a multilingual staff at its disposal.

It is also of utmost importance to keep in mind the religion of the participants in an arbitration. For example, it may be appropriate to take pauses for religious activities, such as prayers.<sup>86</sup>

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<http://arbitrationblog.kluwerarbitration.com/2017/03/28/the-development-of-arbitration-legal-studies-in-brazil-or-how-the-vis-moot-can-change-your-life/>.

<sup>82</sup> Eric E. Bergsten, *Teaching About International Commercial Law and Arbitration: The Eighth Annual Willem C. Vis International Commercial Arbitration Moot*, 18 J. INT'L ARB. 481, 482 (2001), <http://www.cisg.law.pace.edu/cisg/biblio/bergsten1.html>.

<sup>83</sup> Julián Bordacahar and Emmanuel E. Kaufman, *Debriefing: University of Buenos Aires Winning the 23rd Willem C. Vis Moot*, KLUWER ARB. BLOG, May 31, 2016, <http://arbitrationblog.kluwerarbitration.com/2016/05/31/debriefing-university-of-buenos-aires-winning-the-23rd-willem-c-vis-moot/>.

<sup>84</sup> Jack Graves and Stephanie Vaughan, *The Willem C. Vis International Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity*, 10 VINDOBONA J. INT'L COM. L. & ARB. 173, 177 (2006), available at <https://ssrn.com/abstract=1425570>.

<sup>85</sup> The bibliography regarding this topic is utterly vast. See, e.g., LANGUAGE AND CULTURE IN EU LAW, MULTIDISCIPLINARY PERSPECTIVES (Šarčević, Susan ed., Routledge 2015); THE ROLE OF LEGAL TRANSLATION IN LEGAL HARMONIZATION (C.J.W. Baaij ed., Wolters Kluwer 2012).

<sup>86</sup> According to Justinian “Justice is the constant and perpetual wish to render everyone his due ... . The maxims of law are these: to live honestly, to hurt no one, to give everyone his due.” Justinian I, *The Institutes of Justinian*, THELATINLIBRARY.COM (A.D. 535), available at <http://thelatinlibrary.com/law/institutes.html>.





## V. CONCLUSION

A lawyer pursuing a career in international dispute resolution will inevitably come across people who come from different countries with many different cultures. It is impossible to know each one of them in detail, and for this reason, the freedom to choose and tailor arbitration proceedings as the parties see fit is one of arbitration's best qualities.<sup>87</sup> The arbitral community must be careful not to drive international arbitration procedures into a creeping Americanization nor into a creeping codification.

Nonetheless, it would be naive to affirm that the arbitrators and the counsels will make no mistakes, even after following all the instructions stated in the chapter above. Errors and misunderstandings will always happen. Cognitive bias will always exist. The participants are only humans after all. As Carlos López stated:

Obviously, the arbitrators are not humans isolated in some strange island disconnected from the world, who are called to our world to arbitrate a case, and then when the case is done they return to their island to await, unpolluted, the call to arbitrate another case. Arbitrators are human beings who by nature establish relationships of different levels with people, places, things, ideas, and because of this, biases are inevitable.<sup>88</sup>

In order to diminish this situation, one must always examine the parties, the tribunal, the nationalities involved, and so forth. All the participants must be extremely well prepared and familiarized with all the issues surrounding the proceeding. Especially the arbitrators, who have to be sensible to the parties. As Malcolm Wilkey stated: “an emphatic tribunal should do its best to make both litigants feel at home.”<sup>89</sup> The key words here are sensitivity and open-mindedness. Being open to new ideas and empathic to the differences are the most appropriate ways to behave in international arbitration. By doing so, the attorneys will be able to provide

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<sup>87</sup> See Elsing and Townsend, *supra* note 14.

<sup>88</sup> Carlos A. Matheus López, *Should Arbitrators Come from Utopia Island?*, KLUWER ARB. BLOG, Dec. 6, 2018; <http://arbitrationblog.kluwerarbitration.com/2018/12/06/should-arbitrators-come-from-utopia-island/>.

<sup>89</sup> Malcolm Wilkey, *The Practicalities of Cross-Cultural Arbitration*, in *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS* 79, 86 (Stefan N. Frommel & Barry A.K. Rider eds., Kluwer Law International 1996).





better counselling and the arbitrators will be capable to manage the case properly, which may eventually lead to an amicable settlement or an enforceable award that properly observes all the issues involved.



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