THE INAUGURAL AZERBAIJAN ARBITRATION DAY: CULTURE AND INTERNATIONAL ARBITRATION

TRANSCRIPT

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Preface

On June 14, 2023, the first Azerbaijan Arbitration Day was held by the Azerbaijan Arbitration Association in Paris. Baku State University Law Review took part in this event as one of the organizing partners alongside the International Chamber of Commerce and Jus Mundi. The event commenced with an inauguration during which Ms. Leyla Abdullayeva – Her Excellency the Ambassador of the Republic of Azerbaijan to France, Ms. Claudia Salomon – the President of the International Court of Arbitration of the ICC, and Professor Kamalia Mehtiyeva – the President of the Azerbaijan Arbitration Association delivered speeches.

Afterwards, two panels took place covering topics related to arbitration from both Azerbaijani and international perspectives. Eminent figures from the field of arbitration, university professors, and lawyers from Azerbaijan were among the attendees who engaged in these discussions. Further, a special speech on "Culture and persuasion in International Arbitration" was delivered by Mr Andrew Clarke. Finally, a debate on whether culture matters in adjudication took place between Professor Bernard Hanotiau and Judge Koorosh Ameli.

This issue of the Baku State University Law Review contains transcripts of these discussions and speeches to provide a comprehensive overview of the event.

Ön söz

14 iyun 2023-cü il tarixində Parisdə Azərbaycan Arbitraj Assosiasiyası tərəfindən ilk dəfə Azərbaycan Arbitraj Günü keçirilmişdir. Bakı Dövlət

Universiteti Tələbə Hüquq Jurnalı Beynəlxalq Ticarət Palatası yanında Beynəlxalq Arbitraj Məhkəməsi və Jus Mundi ilə birlikdə bu tədbirdə təşkilatçı tərəfdaş kimi iştirak etmişdir. Tədbir Azərbaycan Respublikasının Fransadakı səfiri Leyla Abdullayeva, Beynəlxalq Arbitraj Məhkəməsinin sədri Klaudia Salomon və Azərbaycan Arbitraj Assosiasiyasının sədri Kəmalə Mehdiyevanın çıxışları ilə başlamışdır.

Tədbirin gedişatında həm Azərbaycanda, həm də beynəlxalq sahədə arbitrajla bağlı mövzuları əhatə edən iki panel baş tutmuşdur. Bu müzakirələrdə arbitraj sahəsinin tanınmış simaları, professorlar və Azərbaycandan hüquqşünaslar iştirak etmişdir. Bundan əlavə, Andrew Clarke "Beynəlxalq arbitrajda mədəniyyət və inandırma" adlı məruzə ilə çıxış etmişdir. Sonda isə "Arbitraj mühakiməsində mədəniyyət əhəmiyyət daşıyırmı?" mövzusunda professor Bernard Hanotiau və Koorosh Ameli arasında debat baş tutmuşdur.

Bakı Dövlət Universiteti Tələbə Hüquq Jurnalının bu Sayında tədbirin geniş icmalını təqdim etmək üçün həmin müzakirə və çıxışların stenoqramları toplanmışdır.

INTRODUCTION

Kamalia Mehtiyeva: Your excellency, dear Ms. Leyla, Madame Chairman of the ICC Court, dear Claudia, dear colleagues, dear friends, welcome to the inaugural edition of the Azerbaijan Arbitration Day ("AzAD"). Thank you to all of you for being here today. Azerbaijan Arbitration Day is the main project of the Azerbaijan Arbitration Association, which has been established for the purposes quite well explained in the title of the Association. I will, however, say a few words about them a little later this morning.

Today, we launch a new project together, today, the international arbitration community will grow, today, international arbitration will start exploring new opportunities and a new venue.

The inaugural AzAD is dedicated to culture and international arbitration. The topic of culture and international arbitration has significant scientific value. Yet, its importance seems to have been underestimated and, therefore, understudied.

There are trends of promoting diversification, namely of nationalities, in order to increase representation of certain nationalities amongst arbitrators, tribunal secretaries, institution counsel, *etc*. The existence of such trends reveals the necessity to avoid the phenomenon when arbitration, instead of being *international*, becomes *foreign*, and may thus become, from the perspective of certain justice users, source of mistrust.

International arbitrators do not administer justice on behalf of any given State. Rather, they play a judicial role for the benefit of the international community. This feature is usually presented as neutrality of international arbitration. However, an international community is only truly international if cultural difference is not an issue. Therefore, neutrality should not be misunderstood: it is just another word to express autonomy of arbitration with respect to sovereigns. In no way does neutrality imply cultural relativism.

The cultural relativism is based on the occidental ethnocentrism, considering that the occidental civilization is a model towards which everyone should go. Anthropologists have written extensive studies on the subject, some of which have become manifestos against occidental ethnocentrism.[1] The idea is that all cultures are equal, and everyone has the right to the integrity of their culture. All cultures being equal, there is no absolute standard by which to measure or judge them. All systems of values are equivalent. Nothing can be right with a culture; nothing can be wrong with it. Nothing can be good, nor can it be bad.

But is there any room for *systems of value* in an international arbitration? How to consider cultural values of a nation without crossing the bar of

[1] *See* Claude Lévy-Strauss, Race and History (1952).

stereotypes? What factors change a collective culture? I believe every nation has a set of common features. But does individual culture change if a person lives, studies, works in a foreign country and assimilates a new culture? Does that create two separate cultures which a person can master or does that create a mixture of cultures unique to each person? In the globalized world, people move more freely from one country to another: Will the internationality of this century contribute to emergence of new cultures?

On a less positive note, two subjects of common concern for the planet, wars and climate changes, have made millions of people leave their homes and live abroad. What is the fate of the culture of children of the refugees and climate displaced persons?

These and many other questions are in the air today and we all look forward to enriching ourselves thanks to all the speakers of the Azerbaijan Arbitration Day.

Just before that, I wish to mention the goals of the Azerbaijan Arbitration Association. The most ambitious goal is to make of Azerbaijan a place of international arbitration, in the region, and why not beyond, along with Türkiye or Asian jurisdictions such as Hong Kong and Singapore.

Another goal is to promote the knowledge of international arbitration in Azerbaijan. There is a need, there is a willingness, but there are not enough offers to those who are eager to learn. When you come from far and you do not have access to books, the fountain is dry and you are always thirsty. The Association's most important goal is to increase the knowledge and to share the knowledge in international arbitration. More information about educational programs of the Association will be published soon.

Through sharing of knowledge, the Association will establish human connections. This part of the challenge has already been met. We have many people from Azerbaijan who travelled all the way here to attend the event. I want to thank particularly five law students in the audience – Rufat Naghiyev, Mansur Samadov, Khoshgadam Salmanova, Gulnara Fatullayeva and Mehri Guliyeva, students at the Baku State University, also editors of the Baku State University Law Review.

They have been doing extraordinary work with the Law Review which is on HeinOnline and Scopus. They have brought as a gift to every speaker one issue of the last edition of the Law Review. If any of you wish to publish in that review, do not hesitate to reach out to the editorial team.

Ladies and gentlemen, it is now time to give floor to our speakers. We will hear the first panel dedicated to culture and international transactions. The first panel of discussions will be followed by a special speech delivered by Mr Andrew Clarke on culture and persuasion in international arbitration. This afternoon will be further enriched by discussions of the second panel dedicated to culture and investment arbitration, followed by the final act of

the inaugural Azerbaijan Arbitration Day – the debate on whether culture matters in adjudication.

FIRST PANEL: CULTURE AND INTERNATIONAL TRANSACTIONS

PARTICIPANTS:

***Paul KEY**, moderator*

Visiting Professor in International Arbitration Law,
King's College;
King's Counsel, Essex Court Chambers

James HOGAN

Senior Partner, Dentons Azerbaijan

Nurlan MUSTAFAYEV

Counsel for International Legal Affairs, SOCAR

Huseyn ALIYEV

Legal Manager, GL LTD;
Member of the Azerbaijan Bar Association;
Lecturer on alternative dispute resolution, Baku State University

Ruslan MIRZAYEV

Head of Legal Education and Training;
Secretariat of the ICC International Court of Arbitration

Hélène BUZY-PUCHEU

Former Head of Legal, South Stream Transport B.V.;
Executive Contract Specialist in the Netherlands

***Paul Key*:** We will review some of the features of arbitration prevalent in Azerbaijan. These are familiar topics from an international perspective, but we will be looking at them from the perspective of what happens in Azerbaijan. Why does it happen? What does it mean for arbitration or dispute resolution for those with Azerbaijani interests? Moreover, are there ways that it might change for the better or worse?

So I would like to start with you, James, if you could give the audience a brief idea of the history of Azerbaijan state contracts and commercial contracts, how we got to the current position, and so on.

James Hogan: Thank you very much. Thank you for your kind introduction. I think it is crucial when looking at the development of international arbitration in Azerbaijan to look at it from a historical context. I look around the room and know with some regret that many of you do not recall the incredible transformations and disruptions that took place in Eastern Europe from roughly 1978 onward, culminating in the breakup of the Soviet Union in 1991. This was an event which I think we all have to admit was not anticipated by anyone, including the government of Azerbaijan SSR.

When this disruption happened, all of the dislocations common to the newly independent states of the former Soviet Union were similar in many ways, with hyperinflation, mass unemployment, the breaking of supply chains, the challenge of putting together national legal regimes based on an entirely new market system, and Azerbaijan was no exception to this. However, Azerbaijan had the additional challenge of pursuing a violent shooting war for its independence for the first three years. In this context, the government of Azerbaijan was in dire need of foreign investment and expertise in exploiting the Caspian Sea's world-class oil and gas fields. None of the newly independent states was exceptionally well equipped to comprehensively start national legislation from scratch. That is why Azerbaijan took an efficient approach in being very open to foreign investment, particularly in the hydrocarbon sector. Azerbaijan negotiated what became known as "The Contract of the Century" in 1994, among a group of roughly eight or nine primarily international oil companies and SOCAR, to exploit the world-class Azeri-Chirag-Gunashli field. At the time, there was significant, understandable and legitimate pride in state sovereignty and the application of Azerbaijani law in institutions. However, the government of Azerbaijan, to its credit, recognized that it would take some time to build sufficient confidence in the national court system and, as well as the national legal system. In the case of "The Contract of the Century", when it came to resolving disputes, the negotiating parties ultimately decided to apply the 1977 optional clause that was agreed between the USSR Chamber of Commerce and Industry and the American Arbitration Association. This clause provided for UNICTRAL Rules and arbitration in Stockholm, Sweden,

with the Stockholm Chamber of Commerce as appointing authority. While this was certainly based on the Soviet legacy, it was the only clause negotiated in Soviet times between the USSR and Western enterprises. As with many things, it became a template used in virtually all of the production-sharing agreements that have been negotiated and signed since then.

Due to the absence of comprehensive oil and gas legislation and a modern civil code, Azerbaijan's unique approach was to approve the initial production-sharing agreements through the National Parliament and have them signed into law by the President. This stipulation meant that the terms of the PSA[1] (Protocols to the Production Sharing Agreement) would take precedence over laws of general application of past and future. This was also thought to be a temporary stopgap measure. Nevertheless, alas, we are now 28 years later, it is still the standard rule, and international oil companies entirely welcome it because it guarantees the ultimate stability.

***Paul Key*:** So Nurlan, obviously, from the SOCAR perspective, you are the living manifestation of a decades-old legacy. What is the standard approach, if any, SOCAR takes regarding the dispute resolution clause? Is there a standard negotiating clause, or it depends on the situation?

***Nurlan Mustafayev*:** To add to James's excellent description of why the contracts came about from the early 1990s, I think we need to look at it in the larger legal context: the government and SOCAR wanted to create a predictable, straightforward, and stable legal regime for all investors. This approach sought to ensure that investors investing billions of dollars in upstream projects or listing projects would feel comfortable that their investments would be fully protected. Therefore, in line with that perspective, SOCAR offers investors a very generous arbitration clause. This includes waiving sovereign immunity for commercial or investment disputes and agreeing to apply foreign laws, particularly of the English Law. Additionally, a foreign country is chosen as the seat of arbitration. Usually, it is London, Geneva or Stockholm, as rightly mentioned by James. Equally, we prefer institutional arbitration instead of ad hoc arbitration. For example, in some of our contracts, we have the Permanent Court of Arbitration and the Stockholm Chamber of Commerce as dispute resolution mechanisms. The key reason is that institutional arbitration is perceived as more balanced, with a lot of checks and balances in procedure and evidence-taking. Unlike ad hoc arbitration, institutional arbitration offers an additional review mechanism in

[1] PSA stands for "Production Sharing Agreement." It is a contractual arrangement between a government and an oil or gas company for the exploration and production of hydrocarbon resources. It was established to ensure the country benefited from its oil wealth in the presence of international oil company investment and exploitation. Kirsten Bindemann, Production-Sharing Agreements: An Economic Analysis (1999).

case of appeal or termination, etc. That is a general introduction to our approach.

***Paul Key*:** Let us look at the actual dispute resolution negotiation and what SOCAR does: Do SOCAR and similar state agencies have their standard template, which they can always put into the contract to negotiate? Alternatively, do you find that foreign companies come with this standard contract or want to put a particular provision into a contract, and ultimately, it has negotiated a halfway house or something else?

***Nurlan Mustafayev*:** Usually, we take the initiative. Standard provisions from the early 1990s are often used for large PSA projects. Regarding other projects, we often take the initiative to draft our arbitration clause. We do not want to take advantage of that perspective and try to be as neutral and objective as possible. Our approach addresses two key points: The first is that a foreign investor would be entirely comfortable. Secondly, we choose the Stockholm Chamber of Commerce for arbitration due to its historical exposure to other post-Soviet Union state enterprises' work and its understanding of various business nuances. In contrast, the Permanent Court of Arbitration may not be very familiar with business nuances because it can not fully grasp why there are state-owned enterprises in Azerbaijan or Russia in the first place or why the governments play such a significant role in economies. This has legal implications; therefore, we usually take the initiative by ourselves to ensure a suitable arbitration clause.

***Paul Key*:** I would like to ask the panelists another question. When considering more general commercial arbitrations that do not involve state interests, is the dispute resolution clause given much attention by Azerbaijan? In other words, is it treated as a "midnight clause"[2] that is merely copied from a template and inserted into contracts, or does it receive genuine consideration and thought in Azerbaijan or the broader region?

***Huseyn Aliyev*:** So I will try to answer that. I have been working for SOCAR affiliated companies for more than ten years, and we do have a recommended dispute resolution clause from SOCAR that guides us. So SOCAR-affiliated companies, and generally, other companies, typically have their own well-thought dispute resolution clauses that we prefer. We want to make ourselves comfortable with the governing law and the seat of arbitration. We also understand that most foreign companies prefer to avoid litigation in Azerbaijan due to their agendas, which we respect. In all negotiations I had been to, we usually chose the ICC in Paris or the London Court of

[2] The "midnight clauses" are the clauses of a contract negotiated or simply drafted at the very last minute in a rush to close a transaction. *See* Don't be a Midnight Cowboy: avoiding common pitfalls when drafting and negotiating arbitration clauses (2018), http://arbitrationblog.practicallaw.com/dont-be-a-midnight-cowboy-avoiding-common-pitfalls-when-drafting-and-negotiating-arbitration-clauses/ (last visited Aug 19. 2023).

International Arbitration for various reasons. Mainly because we know these institutions and their processes, that is mainly our approach, and it is well-thought. We do have a template. Although we go through negotiations, that template is basically what we end up with.

Paul Key: Ruslan, have you got anything to fill in?

***Ruslan Mirzayev*:** In my experience, I can talk about generally what most companies do. I can say there are companies with this kind of system that have this well-thought process about dispute resolution clauses, such as SOCAR and their affiliates. However, in my experience, in some arbitration cases where I was involved, I am confident that those dispute resolution clauses were not negotiated at all, even in cases where one of the parties was state ministries or state agencies. For example, in some instances, the dispute resolution clause in the contract might have the wrong name of the institution, lack any reference to arbitration, or fail to specify which arbitration rules apply. Additionally, the dispute resolution clause ends up in different types of cases in the contract. Initially, it was in the draft contract, and parties used it without much negotiation, or one of the parties unilaterally drafted it without proper negotiation. In the end, they ended up with that resolution clause. More detailed negotiations might occur in exceptional cases where parties have significant arbitration experience, such as large holdings. Nevertheless, again, I have seen contracts where one of the parties was even a state agency or ministry, and the dispute resolution clause referred to the wrong arbitration institution, or it referred to rules without specifying which rules they are: whether they are arbitration rules, cancellation rules, etc.

***Paul Key*:** And then the final comment…

***Hélène Buzy-Pucheu*:** I have a slightly different experience with state-owned companies. They usually have a template, which, based on my experience, is difficult to negotiate, and you have to give them something. So, it is not flexible. Another exciting aspect is that major companies have a standard clause for commercial arbitration, usually opting for ICC or UNICTRAL Rules. You also have a booklet, which serves as the main clause and will be on a sheet or something. In the context of the big oil and gas companies, the booklet might have strict guidelines on what can be negotiated and what is non-negotiable. So, at one point, you will end up in a situation where your booklet says no and the state-owned companies will have their certainties.

***Paul Key*:** And just moving bits in the same general ballpark. What is the general mood in Azerbaijan regarding favouring arbitration as a dispute resolution mechanism in contracts, particularly in contrast with state court litigation? Moreover, secondly, whether, in fact, companies like all mediation provisions built into a contract, whether as part of a resolution clause or as a

separate, negotiated aspect of dispute resolution. So I am sure everybody has experience of this.

***Ruslan Mirzayev*:** I think, overall, as Huseyn mentioned, most investors or most foreign counterparties want to have arbitration. Furthermore, that is in accordance with the different reports developed by different institutions and universities, which state that more than 90% of cross-border trade or investment cases involve arbitration. The government, government agencies, or local businesses do not initiate that. It is the requirement of a foreign investor or foreign counterpart in a contract. So, that is why most contracts I have seen include an arbitration clause when an international foreign party is involved. Concerning the perception of the local businesses, I think there is still the perception that arbitration is costly. They see arbitration as very abstract because most lawyers do not have the training or capacity to represent parties in arbitration. That is what arbitration seems to them as something very abstract. That is why they do not feel confident choosing arbitration or referring their disputes to arbitration. However, there is almost no alternative to arbitration for foreign parties.

***Paul Key*:** What could bring about a change in this perception? While we do not have to be proponents of arbitration, we do have an interest in it as a dispute resolution mechanism. Given this, naturally, we believe arbitration is a valuable means of resolving disputes. So, with this assumption, what steps could help the Azerbaijani market gain confidence in the virtues and benefits of arbitration? Could it be through training initiatives or similar measures from your perspective?

***Ruslan Mirzayev*:** From my perspective, I think that is an excellent question, which requires a very complex response. One aspect of that is, of course, capacity building. Suppose we can train around 50 lawyers to effectively represent parties in international arbitration and provide training for in-house counsel in arbitration proceedings. In that case, they will feel more confident choosing arbitration as their preferred dispute resolution method. However, that is just one aspect.

Additionally, that will also reduce the price cost of arbitration. Because, you know, the most considerable portion of the cost of arbitration is the counsel representation. That is one aspect. Nevertheless, from other perspectives, domestic arbitration may be developed. The Azerbaijani Bar Association can be exposed to practising arbitration domestically, which will help them feel more confident about international arbitration and understand how it works.

Moreover, I think there is a need for legislative reform. I can say that there is an initiative to reform the legislation from different perspectives to eliminate contradictions in the legislation and allow domestic arbitration.

Regarding capacity building, I can say that the European Union was heavily involved in training attorneys and arbitrators. Now, the US Department of Commerce is involved in training arbitration counsel. Additionally, there are different initiatives, and ICC recently launched an Advanced Arbitration Academy for arbitrators from that region. However, there is still some work that needs to be done in order to reach our aim.

Paul Key: James, what are your thoughts on arbitration initiatives that might improve customer confidence?

James Hogan: Sure, I agree with Ruslan and my other colleagues on the panel. Obviously, the local court system is much more familiar and comfortable for Azerbaijani state enterprises, government agencies and privately owned enterprises. It is much cheaper and more convenient. Additionally, at least from their point of view, there is very little uncertainty about how the process will pan out. It is also the case in Azerbaijan that the local court system, such as it is, is incredibly speedy. It is scarce to go through even two or three adjudication instances that last beyond a year, a year and a half, or two years. So, this aspect of things has a lot of perceived advantages to local enterprises. Of course, memories die hard, and for foreign enterprises, it will take significant time to change their perception. Despite tremendous advances in the training of judges to remove certain influences from the court system in Azerbaijan, it will be quite a number of years before foreign investors, especially large projects, will be entirely comfortable trusting their projects to dispute resolution before the local courts.

Huseyn Aliyev: Yeah, I agree with that. When we negotiate contracts with domestic companies, it is always litigation as a rule. However, we also understand that these foreign companies do not feel comfortable litigating in Azerbaijan and it is standard that they will have a dispute resolution clause. As Ruslan and James mentioned, companies and lawyers do not have vast experience with arbitration, and they feel more comfortable litigating. It is much cheaper in Azerbaijan to register a claim than to hire a lawyer to present you, and it is a pretty speedy process. However, I also think that educating people and some initiatives might change this situation.

Paul Key: Hélène, from a regional perspective, what are your thoughts?

Hélène Buzy-Pucheu: I would say that most of the time they prefer going to the court. However, we represent companies, so we are interested in arbitration. I think arbitration is still more preferred in the EU, unlike in the Netherlands. However, sometimes we prefer courts in the Netherlands as well. For example, we had a commercial arbitration. However, we decided not to go to arbitration and to go to a local court because there were two positive things about it: It is cheap, and the NCC (Netherlands Commercial Court) is in English. Furthermore, the client was very interested as well. It was

cheap and very quick. So, I would not say the NCC is a competitor to the arbitration, but it is sometimes interesting to use it depending on the area. Local courts are more or less the same as arbitration.

Paul Key**:** Nurlan, obviously, SOCAR is in a unique position, but what are your thoughts on the general perception of arbitration in Azerbaijan? Moreover, what initiatives or training might be done to improve that perception further?

Nurlan Mustafayev**:** Yes, I agree with the points about the costs and the length of the arbitration. I would also add to this the unpredictability of the arbitration and final arbitration decision. Additionally, there is an objectivity factor to consider. From a practical standpoint, I do not believe arbitrations and courts can be treated similarly, especially from a legal policy perspective. To contribute to certainty in dispute resolution, we should view it in a broader context, considering that the Azerbaijani legal system is based on a continental European model and is inquisitorial. This is quite different from the adversarial witness statements and cross-examination often used in arbitrations, which may not be as familiar or effective in Azerbaijan. Even if we conduct training, it may be challenging to implement these practices without a legal system that supports them. So, I think it would not be easy to achieve. In SOCAR's practice, depending on the nature of the project and budget constraints, we choose different jurisdictions like English courts, German courts, Swiss courts, or French courts. This approach helps us achieve a more balanced and diverse range of dispute resolution options.

Paul Key**:** We shall return to some of the things you mentioned there. However, if we go back to a topic that we touched on but did not quite go into, which was mediation. Because I know we have got two experts in some sense on mediation from Azerbaijan here, Huseyn and Ruslan. Ruslan, let us start with you. Do parties commonly include mediation clauses in contracts, or is it more something they turn to after a dispute? What use is made of mediation generally by Azerbaijan?

Ruslan Mirzayev**:** I was involved in the initial stages of mediation in Azerbaijan. I can say that the situation in Azerbaijan about mediation is very peculiar because it had some jump-start. A law was adopted requiring all commercial, labour, and family disputes to go to mediation before litigation or arbitration. As a result, in Azerbaijan, the number of mediation cases is very high compared to neighbouring countries and even many countries in Europe. So, that law was adopted in 2019 and that mandatory requirement came into force in 2021. So before that, there was practically no mediation in Azerbaijan. Maybe there was one mediation case without any system. That is why even in the presidential decree, which adopted the strategic roadmap and included the development of mediation, there was a requirement to

increase the number of mediations twice. However, the problem with that requirement was that we did not have the starting number. It was like zero; whatever you do, it will increase more than twice. So, mediation was not part of our legal culture or practice.

Nevertheless, the number of mediation cases is very high due to that law. However, the other question is whether the lawyers and parties like mediation and trust in it. In commercial, labour, and family disputes, irrespective of whether there is a clause in the agreement, it is a mandatory requirement to go to mediation before going to court, it is automatic, and the parties have to go to mediation before going to court. Nevertheless, how parties treat mediation and how they like it is probably something that Huseyn can touch upon.

***Paul Key*:** And I should say that Ruslan has written a great book on mediation, which, if you want a copy, ask me; for a large fee, I will provide an autographed copy to you. In short order, Huseyn, you have done all these mediations as a mediator. So obviously, there is some market for it, what are your views?

***Huseyn Aliyev*:** You do not need to include a mediation clause in the agreement because it is obligatory for commercial, family and labour disputes. You have to go to mediation before registering the claim in court. We also have voluntary mediation for Civil and Administrative disputes. However, it is voluntary; parties may choose or not. If two entities sign a contract and there is a dispute, they have to go through mediation, which is one month's process. Parties may extend this time for another month. Unless it is extended, they have to conclude within a month. If there is no conclusion, then they will go to the litigation. The law became enforced on July 1 of 2021. I checked some data for 2022, we had 20,000 plus mediation cases, and less than 800 of them resulted in disputes being resolved in the mediation process.

In most cases, even when I was heavily involved in mediation, one of the parties was not showing up or was showing up to get their papers so they could go to court. There was little minimal trust in mediation. Unfortunately, some companies or individuals saw mediation as an obstacle, a stage they must go before going to court. Fortunately, it is changing, and as Ruslan mentioned, there was a huge jump. While initially, there were 19 registered mediation organizations in Baku, the number has reduced to 15 as people realised the process's complexities and heavy work. You also cannot choose your mediator and must go to the mediation organization to resolve your dispute. As I said, the approach is changing, and more companies recognise mediation as an efficient and cost-effective way to resolve disputes with complete control over the process. I believe there will be further positive changes in the future.

***Paul Key*:** We have some exciting topics to deal with. We are just finishing off quickly with mediation. I shall ask James and Nurlan whether you have seen and negotiated in a dispute resolution clause, an escalation provision requiring some form of alternative dispute resolution before either court or arbitration, particularly in an international sitting. Whether it is the meeting of CEOs to negotiate in good faith or otherwise. Just whether you have seen that?

***James Hogan*:** Yes, to answer your question. It is often situational. Sometimes, it depends upon the particular contract or industry; many foreign investors and counterparties having contracts in Azerbaijan provide for an escalation. Usually, some committees comprised of the CEOs with the two sides and perhaps other higher management try to resolve a dispute amicably before it proceeds to mediation or arbitration. I do not know if one can say that it is a standard operating procedure in Azerbaijan, however. I think it depends upon the particular parties involved in the transaction.

Paul Key: Nurlan, what are your thoughts about this?

***Nurlan Mustafayev*:** In our practice, we also use escalation provisions. So, we use the PSAs, as James mentioned. In other projects, we use negotiation cancellation and sometimes expert determination provisions for the arbitration.

***Paul Key*:** So, to sit on our agenda, we shall try to deal with three topics and then open up for questions from the audience. First, we will deal with the seat, where and why you choose seats. Number two is the formation of the tribunal. From the Azerbaijan perspective, what characteristics are you looking for in tribunal members? Thirdly, enforcement of arbitral awards in Azerbaijan. Starting with seats: Obviously, one is interested in the weather, restaurants, hotels, and the like. However, putting all those obvious points to one side, where historically and currently have Azerbaijan companies and individuals chosen as a seat of arbitration, why? As far as I understand, Stockholm is a favoured seek.

***Nurlan Mustafayev*:** As it is a consensual provision, we usually opt for mutual agreement between the parties as a matter of principle. Additionally, we often select the Stockholm Chamber of Commerce as another principle. However, in cases where parties are related, we only choose a mutual seat among them. We also bear in mind that this decision is related to enforcing the final award, and we consider all the elements in the process.

***Paul Key*:** I would also like to discuss with you the possibility of Azerbaijan, Baku, as a seat of arbitration. Is that something that you have ever tried to negotiate for in SOCAR contracts? Moreover, do you ever succeed? There are domestic contracts; how would that work in international sittings?

Nurlan Mustafayev**:** In the international sitting, we have very few cases where we managed to include Baku as a seat of arbitration. However, most borderline contract practices are under usually mutual jurisdiction, not in Azerbaijan. So, as mentioned by Huseyn and others, it is a susceptible matter for foreign companies. There are huge investments involved, so it is hard to convince these companies. Nevertheless, yes, we also try to include Baku as a seat.

Paul Key**:** And James, what do you see as empirical reporting regarding the chosen seats? Why?

James Hogan**:** Well, I have never done a scientific study, but based on my perception, I can say this: although Stockholm was the traditional seat, almost universally in the early years, as companies became more significant and became more familiar with the arbitral process the trend has shifted. Nowadays, companies opt for arbitration in most large contracts outside of production-sharing agreements, usually with London as the seat of arbitration. They usually prefer LMAA (London Maritime Arbitrators Association), ICC rules, or, in some cases, UNICTRAL rules to carry out arbitration. I think two things hamper the designation of Baku as a seat of arbitration in international disputes. Firstly, there is a lack of the necessary infrastructure for handling arbitral disputes in Baku. Secondly, there is some uncertainty. Azerbaijan, of course, is a signatory to the New York Convention and all the other significant conventions about the recognition or enforcement of foreign arbitral awards.

Furthermore, the Civil Procedure Code explicitly recognises domestic and international arbitrations and provides the procedure for enforcing foreign arbitral awards. However, there is some uncertainty in the uncovered area of enforcement of awards relating to arbitrations with the seat as Baku. Furthermore, until that uncertainty is resolved, I think it will be a slower process.

Paul Key**:** And to make sure, I want to understand what you mean when you say "infrastructure". It could be the somewhat ethereal notion of infrastructure, such as supportive arbitration legislation or much more mundane things, such as venues and hotels. I assume it is the former.

James Hogan**:** I think it is very much the latter. Also, Azerbaijan enacted a law on international arbitration, which models the UNCITRAL law. So it is comprehensive and very well written. However, in my experience, the facilities for posting international arbitrations with the seat in Baku are mainly lacking. There have been many important initiatives that held great promise over the years. So, it might be that it will bear fruit eventually. However, in my experience, even foreign investors and counterparties willing to

arbitration in Baku are uncomfortable over the lack of history, experience and facilities for hosting international arbitrations.

***Paul Key*:** Ruslan and Huseyn, as you both have domestic perspectives on the choice of seats, you may have insights into what is considered comfortable by Azerbaijan, what challenges are faced, and what the future prospects are.

***Huseyn Aliyev*:** Currently, and most of the time, as it is mentioned, when we have an arbitration clause, the seat is London. This choice has several reasons, such as language, logistics, and familiarity with English law, which makes parties feel more comfortable. Nevertheless, I have never successfully negotiated any dispute resolution clause that the seat was in Baku. Maybe it might be possible, but I do not have any practice.

***Ruslan Mirzayev*:** I shall be very blunt. I would never advise my client to choose Baku as the seat of arbitration. It is a huge lack of legal certainty. There are many problems. First, the issue with the legal framework would not work. The second problem is the issue with the consistency of the court's approach to arbitration. Again, if you choose Baku as a seat, you need the courts' support at many stages. Moreover, at the end, that can be the normal, challenging proceedings. If you advise your client, you must ensure that your client has something workable or effective. That is why it is not prudent to choose Baku as a seat of arbitration. Moreover, I can tell this from different perspectives first, ICC statistics. In ICC cases, Baku has never been chosen as a seat of arbitration. In the last ten years, only Kazakhstan was chosen as a seat of arbitration from the post-Soviet states, and it was only once or twice. In other cases, they were not selected as a seat of arbitration, and there are solid reasons for that.

Because if you invest in those countries, you must have powerful legal certainty. Furthermore, when we talk about legal certainty, it means legal framework and court practice. It is essential to know how the courts will treat arbitral awards and how they will support the process, etc. Moreover, you have issues with the practice, trust, system, etc. I have to say that there is progress concerning court practice. They want to improve the quality of treatment of arbitration by courts, but it is a long way for two reasons. Firstly, because there is no legislative ground for that; second, Azerbaijan has not developed court practice about arbitration. That is a very negative part. Now, coming back to the practical part, which is the choice of seat: In my experience, London was chosen as the seat of arbitration in most cases. The institution was the ICC or LCIA (London Court of International Arbitration).

In many cases, it was UNCITRAL ad hoc arbitration. Most of them were construction disputes, and in construction disputes, some of them are financed by the World Bank Group. Furthermore, if the World Bank Group finances them, they use their templates, and in some of those templates, it is

UNCITRAL without any specific state, and the seat is decided later. So the seat of arbitration was London, in most cases, then Paris and mostly under UNCITRAL arbitration. Recently, I have seen a few cases where one of the parties was a Turkish company, and they chose ISTAC (Istanbul Arbitration Center).

Paul Key**:** Obviously, it is an exciting topic to explore. What more could be done to help the Azerbaijan nascent domestic arbitration community advance itself in performance? I shall leave that there for the audience to pick up. Let us move to the second of our three topics: The formation of the tribunal. You are representing Azerbaijan, and we shall assume we shall be in a commercial setting. What characteristics, in particular, from a tribunal or potential tribunal appointee are you looking for? Is there any sense in which culture, cultural sensitivity, or cultural appreciation plays a role? Alternatively, I shall be very commercial about it and say that if you want somebody with a track record of deciding in this way on specific contracts.

Nurlan Mustafayev**:** Regarding requirements, in addition, to track record and hard skills, we will usually look at whether prospective arbitrators deeply understand developing countries. This is because countries' legal challenges, practices, and other factors can differ significantly from those in more developed investment countries. For example, I mentioned state-owned enterprises briefly, as SOCAR is the largest enterprise in Azerbaijan. Many Western countries do not have state-owned enterprises. Therefore, when selecting an arbitrator, especially one from an English or traditional Swedish background, it is essential to assess whether they have experience dealing with developing countries, particularly those with a post-Soviet history, as this experience can significantly impact the outcome of the arbitration.

Paul Key**:** James, just quickly, if you can add or subtract from that in your experience advising clients on active disputes when they reach the crystallized stage, what do Azerbaijani interests typically look for in terms of an arbitrator? And notably from a cultural perspective. Is it a factor at all, this sort of cultural sympathy alignment or otherwise? Or are they just very hard-nosed about who has a history in a particular sector?

James Hogan**:** Well, this gets into the nuts and bolts of arbitral proceedings as they are constituted. Most of my experience, to my great satisfaction, has been gained by proceeding to that level. What Azerbaijani enterprises, agencies, and state bodies would be looking for. I think we have covered the issue quite well: it is important not necessarily to expect that there would be any bias but to have an arbitrator who understands the region, the culture, the history, and the business environment in Azerbaijan in order to be able to provide a complete and fair resolution of a dispute.

***Paul Key*:** Ruslan, do you agree that cultural aspects play a part in the choice of an arbitrator from an Azerbaijani perspective, and if it is the case, how do you judge that? In other words, do you judge it based on nationality or something else?

***Ruslan Mirzayev*:** Relevant criteria from that perspective was the exposure to the region's legal system. The arbitrator should have some insight into the post-soviet legislation because there is something prevalent in many post-soviet countries. That was one of the criteria. Moreover, I think it is more about their knowledge; in some instances, they understand how business practices exist in these countries. So that was a criterion.

***Paul Key*:** Huseyn, do you agree, disagree, or have no views?

***Huseyn Aliyev*:** Well, in terms of the number of arbitrators as a commercial entity, we usually said, if the contract amount is not large, there is one arbitrator because we do not want to have several arbitrators and increase the cost. In terms of nationality, that was never the case. However, they require knowledge of the region; usually, English knowledge is considered in the process, but nationality is not.

***Paul Key*:** In addition, I will touch on our third topic with you, Ruslan and Huseyn. Then, then we will hand over to the audience so that we do not get into the audience time too much. Is there anything that I, the audience and practitioners in Azerbaijan, need to know about the enforcement of awards in Azerbaijan?

***Ruslan Mirzayev*:** Azerbaijan adapted and ratified the New York Convention without reservation or declaration, unlike France, which had a reservation about reciprocity. For this reason, I can say that it is quite pro-arbitration from a legislative perspective. Moreover, I analysed the court cases about the recognition and enforcement of foreign arbitral awards, and I can say there is progress. There is progress concerning applying the New York Convention. If you look at the situation 10 or 15 years ago, even when foreign arbitral awards were recognized and enforced, court decisions did not refer to the New York Convention. The foreign arbitral awards were recognized and enforced based on the civil procedural code, which differs from the New York Convention. However, now, if you look at the court decisions, you can say that in most cases, they refer to the New York Convention. That is a very huge progress. The challenge with the recognition and enforcement is that there is no consistency.

In some cases, courts would say: Okay, we recognize and enforce this decision because it aligns with the New York Convention and the national legislation. Moreover, you do not know what would have happened if that was not in line with the national legislation but in line with the New York Convention. So there is no consistency. That is why there is no solid legal

certainty from that perspective. However, overall, there is a will to improve that. Recently, in 2019, the Constitutional Court of Azerbaijan adopted a decision concerning notices in arbitration, which is one of the reasons for using enforcement. The Constitutional Court says the respondent must prove that the Party did not receive a notice. Lack of notice was the major reason for refusing recognition and enforcement in Azerbaijan. The respondent could decide not to respond to many arbitration notices and keep them somewhere. Then, at the end, he could say: Okay, I was unaware of this process, etc. And then, it was very challenging for the claimant to prove that there was a notification of the arbitration process. However, starting in 2019, there is a firm decision of the Constitutional Court saying that it is up to the respondents to prove that they did not receive the notice, which is very difficult from a logical perspective. Because it is much more challenging to prove that something does not exist than to prove that something exists. So that is a very pro-arbitration rule. I think that is why I can talk optimistically and say there is a will to improve. However, there is still a problem with the current system.

***Paul Key*:** Huseyn, this is the final time with you before we hand it over to the audience.

***Huseyn Aliyev*:** Enforcement and recognition are done by the Supreme Court of the Republic of Azerbaijan. Recently, last Saturday, I was talking to one of the lawyers, and he had a case where the counterpart said they did not know that there is an arbitration clause. That is why they wanted to challenge the enforcement of the arbitration decision on the Supreme Court, despite the fact that they actively participated in the arbitration proceedings. It is, again, done by the Supreme Court. The issue is consistency, but there are changes there. Furthermore, I think more and more arbitral decisions are recognized in Azerbaijan, and there is considerable progress there.

***Paul Key*:** Optimistic as well. So, audience, this is your big chance.

***Andrew Clarke (from the audience)*:** I have a question about whether every practice has discharged its obligations when they have been found to have an obligation through an arbitration. Putting enforcement on one side, have they voluntarily paid out the award for what has happened?

***Paul Key*:** Who can volunteer for that?

***Ruslan Mirzayev*:** I can. Concerning the investment treaty arbitration cases, I think the government's approach is quite sensitive. They always want to ensure no awards against Azerbaijan and not lose any reputation. In other cases, I have not seen voluntary enforcement of arbitral awards in commercial cases.

***Nurlan Mustafayev*:** I can add that some of our BITs (Bilateral Investment Treaty) envisage negotiation obligation from the investor. Discharge of obligation is usually seen in arbitration. The government or state-owned enterprises argue that no negotiation has happened in line with it yet. Therefore, there is no discharge of obligation.

***Marina Weiss (from the audience)*:** My question is more basic for all the panelists discussing the choice of seat on the question. I would be interested to hear more about the choice of applicable law. I have heard English law mentioned several times and we would be interested if you could elaborate on the reasons for that: Is it historical, cultural, economic or otherwise? Additionally, what other laws may be found in the contracts in Azerbaijan bound transactions?

***Paul Key*:** Because I know you have said something to me, I want you to start us off, James.

***James Hogan*:** Sure, first of all, for many reasons, financial institutions use English law and arbitration in London. Usually, the LCIA (London Court of International Arbitration) is the standard practice. Generally, financial institutions impose this requirement on their Azerbaijani borrowers who are always ready to receive credit. The exciting aspect of Azerbaijani jurisprudence that I was referring to is the rather curious choice of law clause found in the initial production sharing agreement for Azeri-Ciraq-Guneshli, which provides, essentially, the contract shall be interpreted and enforced following legal principles common to the laws of the Republic of Azerbaijan, and the laws of England. To the extent that no such commonality exists, principles under the common law of Alberta, Canada, are applied, which is, as an academic exercise, has given rise to much thinking.

Furthermore, we have indeed had cases that, fortunately, do go to arbitration. However, we did need to solicit legal opinions from counsel not only in Azerbaijan and England but also in the province of Alberta. Our law firm had a bit of an inside track since we have two offices in Calgary and Edmonton, Alberta. Moreover, we have certainly made use of the expertise in Alberta law that is required in Azerbaijan. I do know that the genesis of this rather unusual clause is due to massive pressure to compromise on something acceptable to both sides. Obviously, for hydrocarbon projects, there is often a presumption of the sovereign law of the country where the hydrocarbons are located. Moreover, initially, the new government of independent Azerbaijan did insist on the application of Azerbaijani law. Negotiating international oil companies at the time and remember, this was between 1991 and 94 basically replied with: Well, that is fine, can you tell us what does Azerbaijani law say about intensive oil and gas production? It was a blank slate, essentially. So they tried to come up with something that everybody was comfortable with

reciting the laws of Azerbaijan, England, and, to some extent, economic principles.

Furthermore, I know from lunch with the person who drafted the final arbitration or the final choice of law clause that they looked all over the world, including Australia and New Zealand, to Texas, which was rejected for some reason and ultimately came up with laws of Alberta, Canada. Of course, the international oil companies were reasonably confident that Alberta law would parallel English law in most respects.

Nevertheless, the idea of a production-sharing agreement, which has been adopted as a law of the country, being interpreted and enforced by two party-appointed and one institution-appointed arbitrators based on Azerbaijani, English, and Alberta legal principles is quite mind-boggling. However, this has worked quite well. That is why it is the standard choice of low-cost production sharing agreements to this day.

***Paul Key*:** Does anybody else have a question? Please.

***Koorosh Ameli (from the audience)*:** What is the education of English law in Azerbaijan? Is there an Azerbaijani law school teaching English law? Why are you going to choose a law that you do not learn? Understanding this law that is so real in practice in your contracting provisions is essential.

***Paul Key*:** Maybe for the Azerbaijani nationals.

***Ruslan Mirzayev*:** I think, in arbitration cases, in this kind of huge negotiation cases, the Azerbaijani government mainly involves English lawyers, and they rely on their expertise and knowledge in that regard. That is why English law is often chosen in oil production contracts and other contracts in Azerbaijan. I think the reason is that in huge project finance contracts, joint ventures, and all other types of contracts, English lawyers, mostly London offices of US law firms and international law firms or UK law firms, are involved as lawyers. So that is the reason I think it was worth it.

***Paul Key*:** All right, is there anything from SOCAR's perspective? Did you have internal SOCAR legal knowledge of presiding over a person's head or multiple people's heads about English law or Alberta law?

***Nurlan Mustafayev*:** Good question. Most of the people in Azerbaijan are never going to practice English. However, that is not why the English law is the choice. English law is perceived in Azerbaijan's business environment as an essential legal regime for protecting foreign investors and holding contractual certainty. Because at the end of the day, that is a vital issue we should talk about. In SOCAR, we have English-trained solicitors. Moreover, we use international law firms. Any contentious legal questions on the English roles?

***Paul Key*:** Yes. We have a question.

***Audience member*:** I am going to push this question. Suppose I can go back to the topic, which is culture, also, back to the fact that SOCAR, the most influential company in Azerbaijan, has the leverage to impose. When choosing the seat of the arbitration, you want to ensure neutrality and other things, so you do not have much advantage. However, if there is one place where you have the advantage, it is with the Azerbaijani law. It is different with financial institutions because they may impose, and that is a different type of leverage.

Nevertheless, when you do not have that, you can go back to your roots and say, Azerbaijani law is what I am going to impose, and ultimately, this is what I want for my contracts. I am sorry, no offence, for allowing English lawyers to tell you what to do because English law is the best law. Why accept that as a premise? Furthermore, why not try to go back culturally? Ultimately, English law will become part of your international transactions and contracts culture. Moreover, Azerbaijan alone will not have the same advantage as it should or could. Again, I am thinking culturally and to what extent English law will become the legal background I refer to, as opposed to your background.

***Paul Key*:** It is an important question, and yes, you are at the negotiating table when negotiating the applicable law clause. So I am interested in the Azerbaijani nationals. His job is to answer.

***Nurlan Mustafayev*:** So that is a good question, if you look at SOCAR's practice, it has evolved. For example, our initial upstream contracts envision Azerbaijani law without English law. And then, there was a period that James described, so there was a period when there were common principles of English law and Azerbaijani law. Moreover, in exceptional cases, you have Alberta and New York law. Yeah, but, we can impose our view on that. So it's non-negotiable. Of course, we can use it. However, you should look at it in a larger commercial context. Azerbaijani oil and gas contracts are exhausted contracts; we have run over hundreds of pages, and every issue is regulated definitively. They do not leave anything for doubt. So that is what English law is. Parties agree on what law provision will apply to the particular situation as a practical matter so you can manage your risks from that perspective. Exhaustively deal with and describe what rules apply to commercial and tax cases. I should also note that the Azerbaijani contracts do not exclude the laws of Azerbaijan. In terms of the State's rights for natural resources on the ground subsurface law, it still applies. So they will make it very clear in the contractual arrangements. We do not look at English law as the ideal legal system. Nevertheless, all major oil and gas contracts are based in English law to try to bring more certain investments. That is it.

***James Hogan*:** Just one comment: I do not want to give the wrong impression. Except for the financial institution and oil and gas sectors, Azerbaijani law is readily accepted by foreign counterparties in joint venture contracts, construction contracts, and other high-value agreements, as long as it is used in conjunction with international arbitration for dispute resolution. So I would say that these days, the application of national law is the norm, not the exception, other than in those two things.

***Ruslan Mirzayev*:** First, I completely agree with James. I was involved in arbitration cases where the applicable law was Azerbaijani, but the seat was in Paris, etc. The World Bank supported and approved PD contracts. They also include this wording saying that the applicable law is Azerbaijani. However, there is another challenge because I think the law needs to be chosen before you start drafting specific contract clauses. Otherwise, after completing the drafting of the contract, you cannot choose the law because you do not know how those provisions will be interpreted under that law. For example, you may have a clause about representations, warranties, or other aspects relevant to English law but not to Azerbaijani law in a contract. In this case, you do not know how those provisions will be interpreted under the Azerbaijani law because we do not have any court practice in that regard, etc. So overall, I think that is a perfect idea.

Moreover, that creates opportunities for Azerbaijani lawyers to be more involved in arbitration and other cases. However, it has its challenges as well. When you choose Azerbaijani law, you need to be sure that the provisions in that contract have some meaning under Azerbaijani law and how they will be treated or interpreted under Azerbaijani law. I gave an example of warranties and representations, which have a specific regime and different laws but do not mean anything under Azerbaijani law.

***Koorosh Ameli (from the audience)*:** As Mr. Hogan rightly referred to this earlier, when in the negotiations, the Azerbaijani side shows their law and acknowledges that it does not have provisions to regulate the matter at hand. It is an honest and correct approach. We can see what it is all about. However, why do not you, like other developing countries, supplement your contracts with UNIDROIT principles? I have done it in several cases, which has worked very well. Of course, I recognize these are long-term contracts which are not spontaneous like a sale of goods contracts. So, it would help if you also had the contract administration. In other words, you need people to administer your contract in English law. Otherwise, you cannot persuade the other side to correct the irregularities in the negotiation, whatever they are. I have found this very helpful. It is important to note that raising this issue after a contract has been concluded can be quite challenging. As we have seen in arbitration, UNIDROIT Principles have been supplemented with the agreement of the parties.

***Paul Key*:** Excellent content. And, obviously, this provides a great foundation for a keynote speech we will hear from Andrew Clarke after the lunch break.

*Andrew Clarke**

CULTURE AND PERSUASION IN INTERNATIONAL ARBITRATION

Please note that I am not an international arbitration lawyer by background, but by adoption; indeed, I have not maintained my registration as a practising barrister since my retirement in 2020, so my claim to be a lawyer is also rather tenuous.

Furthermore, I am not a behavioural scientist or a psychologist; however, I have been working with such specialists over the last 6 months; I must also add that I am indebted to: *"Arbitration: The Art & Science of Persuasion"*[1] published by Oxford University Press last year, for its insightful analysis of the contribution that psychology and behavioural sciences can make to arbitration.

I do claim to know something about culture and persuasion. I spent 35 years working for multinational energy companies. For about half that time (16 years), I lived and worked in other countries, in the Far East, the Middle East, the Near East, as well as in America. I also negotiated or worked on contracts in 26 countries, so my exposure to different cultures, attitudes and legal systems has been very broad.

Much of my career entailed providing legal support to the negotiation, drafting and implementation of major transactions (LNG project development and LNG sales, oil and gas field developments, pipeline transportation agreements, and concession agreements with host governments), but inevitably, large projects lead to significant disputes. This requires the lawyer with the best knowledge of the project to assist in efforts to resolve the dispute.

Managing disputes requires an understanding of the events that have given rise to it, the dispute resolution process that may govern it (which is almost always international arbitration for such transactions), as well as a knowledge of your counterparty and the key decision makers involved.

This means you must know how arbitration, as a process, can be used (strategically, tactically, and operationally) to put the company in the strongest position to avoid, settle or prosecute a dispute when it arises.

This is more complex than the simple interpretation of the terms of the contract or analysing the factual circumstances that have arisen. It also

* Former General Counsel, ExxonMobil International; Former Chairman, Corporate Counsel International Arbitration Group (United Kingdom).

[1] *See generally* Donald E. Vinson & Klaus Reichert, Arbitration: The Art & Science of Persuasion (2022).

involves cross-cultural understanding, psychology, behavioural science, and sociology.

Despite my retirement, my interest in the psychology of dispute management and resolution remains undiminished, and I am continuing to develop my knowledge in this area. This extends to the influences at play in a dispute, including the influence of culture and the importance of clear and effective communication.

Which leads me to my topic – Culture and Persuasion in International Arbitration.

Let me start with a bold and provocative statement:

Persuasion is such an important factor in international arbitration: Why it has been left to the lawyers?

We will come back to that later. But for now, I am going to try and tease out the very interconnected threads of culture and persuasion, although there are many overlaps.

Culture. Fortunately, you are all unique – just like everyone else. However, we are all the beneficiaries and prisoners of our cultures.

Culture is stronger than life and death. People may choose to commit suicide rather than face dishonour, starve rather than eat unclean food, and believe in life after death through religion.

It is hard to exaggerate the impact of culture on our relationship with the world around us. It hardwires our beliefs and makes it very difficult to listen to arguments that run contrary to them.

We are born without culture – a new-born infant is a blank page that comes with a huge appetite for learning, and a strong desire to make sense of the world around it and understand the patterns that emerge. Almost from birth, direct and indirect socialisation starts to take place, turning the egotistical child into a social animal, one that learns how to relate to people and how to fit into the small culture of the family.

Early influences are considered to be the most powerful source of cultural learning, and they continue with lesser intensity as one grows older. But the sources of our socialisation are many and diverse. We used to say that "apples do not fall far from the tree", reflecting many people's experience that they are not so different from their parents when they get older. But increasingly I see very young children sitting in front of screens watching cartoons, or young people busy with their devices, so this influence may be diminishing.

Looking at society as a whole, you can identify different types of culture that affect people. Consider the groupings or segments you might fall into, and bear in mind many of these can apply to an individual at the same time. Families, siblings, and friends; school, university and professional training; local, regional and national; by gender, job, and geography.

All of these cultures shape our values, beliefs, opinions and attitudes – generically referred to as "cognitions", but they differ in intensity and

duration. Opinions usually relate to current questions and tend to be temporary. Beliefs and attitudes are more deep-seated and lasting. You can think of opinions as impressions, attitudes as convictions, and beliefs as values.[2] Our perceptions and decisions are significantly affected by our pre-existing cognitions because they act as screens or filters to interpret, distort, or reinforce information presented to us.

So, let us consider the relevance of culture to dispute resolution.

A dispute might involve conflicting views of an event or the interpretation of a document between the parties. It may relate to a matter of law, fact, or a combination of both. Where lawyers are appointed, it is likely that the parties have failed to reach an agreement to resolve the dispute and want to increase the quality and strength of their advocacy.

Advocates are appointed to speak on behalf of a client and present their case effectively. They must do so while adhering to ethical and regulatory standards, ensuring they do not mislead the tribunal. The advocate brings knowledge, training, and experience to bear to put forward the arguments and evidence in the best possible light for the client.

The advocate's primary task is to review the case from the client's point of view, analyse the facts and the law, and:

(1) help the client persuade its counterparty to reconsider their position; or

(2) persuade the arbitrator(s) appointed to agree with their interpretation of the law and facts and make an award in favour of their client.

Culture plays a crucial role in shaping the perspectives, expectations, and decision-making processes of the parties involved, including the arbitrators, counsel, and witnesses.

Different cultures have distinct values and beliefs that shape their attitudes and behaviours. To be effective, messages must align with these cultural values. For example, in individualistic cultures, where personal autonomy and achievement are highly valued, effective messaging could emphasize personal benefits and individual success. On the other hand, in collectivist cultures, where group harmony and interdependence are emphasized, messaging should focus on social responsibility and the well-being of the community.

Culture also affects communication styles, including language use, non-verbal cues, and even the optimal channels for communication. In arbitration, it is important to avoid misunderstandings or misinterpretations, so messages need to be crafted in a manner that resonates with the cultural communication norms. Cultural sensitivity and awareness are essential to foster clear and meaningful communication among the parties involved.

[2] *See generally* Gregory R. Maio, James M. Olson, Mark M. Bernard & Michelle A. Luke, Handbook of Social Psychology, § 12 (2003).

Cultural frameworks and cognitive biases influence the way individuals process and interpret information. Confirmation bias, as an example (the tendency to seek information that confirms pre-existing beliefs), can impact how messages are received. Culturally specific frames, metaphors, or narratives that resonate with individuals' cultural experiences can enhance the strength of messaging by aligning with existing belief systems.

Finally, cultural factors influence the way arbitrators assess evidence, evaluate witness testimonies, and reach decisions. Different legal traditions, ethical values, and perceptions of fairness may affect the outcome of the arbitration.

As already noted, we cannot and should not expect someone from a different culture to think the same way, to share the same beliefs or views on fundamental issues such as justice, fairness, equity, or morality.

Let us illustrate this with an example and I will ask you to think about what you would do in trying to handle the issues fairly.

A technology company has a team of 20 programmers working in your country but has decided to close the office making everyone redundant (except the manager who is to be redeployed). The manager must inform the staff of the company's decision and run the redundancy program. There are probably 5-10 jobs with other tech companies in the region that the programmers can apply for, but no more than that. So, whoever applies first has the best chance of finding new employment.

Do you:

- Get everyone into a room and announce the closure to them all at the same time? (That they all have the same chance, and that is the fair way to deal with things.)
- Bring the individuals who have done the best job for you into your office one by one and tell them first? (Rewarding their hard work by allowing them to apply for other jobs ahead of the others.)
- Prioritise the individuals with the greatest need, perhaps with challenging personal situations? (Reflecting their obligation to support their families, relatives, etc.)

All of these would be considered fair and appropriate in certain cultures.

Persuasion. The act of persuasion is an attempt to reinforce, change, or create some specific attitude, opinion, or behaviour in another individual or group of people. It is a dynamic process which involves the relationship between the parties (those attempting to persuade) and those being persuaded (the counterparty or the arbitrators).

It follows that, for lawyers to be persuasive, they must consider the characteristics of the tribunal as well as the circumstances of the case and adjust their strategies and tactics accordingly.

Persuasion, as a human activity, has attracted the attention of philosophers, theologists, merchants and many others from time immemorial. It is hard to

imagine early camel traders not discussing how to get the best price for their livestock.

The earliest surviving written texts are about 2,500 years old and come from the ancient Greeks. In *"Rhetoric"*[3] Aristotle defined three main types of persuasive appeals, or "modes of persuasion" in rhetoric: ethos, pathos, and logos. Ethos refers to the credibility and ethical character of the speaker, pathos relates to the emotional appeal to the audience, and logos deals with logical reasoning and evidence.

Furthermore, he emphasized the importance of understanding the audience and tailoring the arguments accordingly. He also highlighted the significance of organizing speeches effectively, using appropriate language and style, and employing rhetorical devices like metaphors and analogies to make persuasive arguments.

In developing these theories of rhetoric, the Roman orators, including Cicero and Quintillian, placed more focus on the orator and the process involved in developing, memorising, and delivering a speech, reducing the importance of the listener considerably. This way of thinking continued for about 2000 years until the middle of the 20th century.

During the two world wars, governments were heavily dependent on their ability to communicate persuasively with their citizens, so significant effort was put into understanding the process and tactics that could enhance its effect.

Research continued after the war to determine what variables could increase the persuasiveness of a given communication, and what underlying psychological mechanisms and processes might influence the "persuasibility" of an individual. By the 1950s, researchers at Yale identified three basic elements common to all persuasion situations and which might induce attitude change: (1) the source, or speaker, (2) the message, and (3) the receiver. The common theme was this: *The receiver of the message determined the persuasive effects of the communication.*[4] A speaker's credibility is not simply a function of their academic credentials, but how credible they appeared; it could also be affected by how fast the speaker talked, or whether the listener believed they were trying to hide something. This shifted the focus back to the listener as one of the key factors in effective persuasion, a return to Aristotle's thinking of 2,500 years ago.

And you must take your listener as you find them – with all of their cultural baggage.

Persuasion plays a critical role in international arbitration, as the parties strive to convince the arbitrators of the merits of their case. It involves presenting compelling arguments, evidence, and legal reasoning to influence

[3] *See generally* Edward Cope & John Sandys, Aristotle: Rhetoric: Volume 2 (2009).
[4] Vinson & Reichert, *supra* note 1, 19.

the final decision in their favour. At the same time, as we have already seen, culture plays a crucial role in persuasion by influencing the way people perceive and interpret messages.

Key aspects of persuasion in international arbitration include:

Advocacy: The ability of counsel to present their client's case persuasively is paramount in arbitration. Effective advocacy involves crafting persuasive arguments, marshalling evidence, and employing convincing rhetorical techniques. Understanding the cultural backgrounds and expectations of the arbitrators is essential for tailoring arguments that resonate with their perspectives and legal traditions.

Expert witnesses: play a significant role in presenting technical or specialized information to support a party's case. Persuading the arbitrators through the testimony of these witnesses requires clear and concise communication, contextualizing complex concepts, and establishing credibility. The cultural background of the expert witness and their ability to communicate effectively with arbitrators from diverse backgrounds can impact their persuasiveness.

And finally: *Arbitrators' decision-making*. The ability of arbitrators to remain impartial and independent is crucial. However, persuasion can influence arbitrators' understanding and interpretation of the facts, legal arguments, and applicable law. Cultural factors, including legal traditions and personal biases, may affect their decision-making. Thus, parties often engage in tactics aimed at aligning their arguments with the arbitrators' cultural perspectives and legal norms.

Of course, we are led to believe that arbitrators follow an inductive process to make decisions, carefully sifting the arguments, the evidence, and the law, for one side and then the other, before reaching their conclusions.

But arbitrators are human too and bring their humanity, with its failings and frailties, into the process. They have their individual belief systems, the attitudes and values which define how they understand the world. This is informed, in turn, by the various cultures they have experienced and internalised.

We also know that many people make immediate judgments and seek support for the view they have formed from the information available to them. This includes deductive thinking, reasoning from the general to the particular.

Despite their training and experience, arbitrators are not immune from these traits.

We must also remember that arbitrators are often appointed as part of a panel of 3. So, in addition to the influence of their personal cultural background, they become part of a social group where their capability as an opinion leader is key. The interactions within the group have a significant

impact on the final decisions, and the socialisation of their relationships is tremendously important.

In summary, culture and persuasion have a significant role to play in international arbitration. Understanding and navigating cultural differences, along with employing persuasive techniques tailored to the arbitrators and the international context, can enhance effective communication, ensure a fair process, and increase the likelihood of successful dispute resolution.

What I find particularly interesting is the opportunities these insights present. The door is now open for parties to utilise experts in psychology as well as the behavioural and communication sciences. Experts who can analyse the persuasiveness of the arguments, evidence and law supporting a client's claim or defence. This is an area that is now well understood and has been utilised in the USA for more than 35 years. Preparation for large jury trials, almost without exception, involves the use of such experts.

The opportunities of clients involved in international arbitration are clear. An early independent and impartial assessment of the strengths of a party's case could lead to early settlement, avoiding the arbitration process entirely and preserving business relationships. Substantial expense, time and effort are involved in developing a party's case. If these could be focused on the key, determinative issues, the process could be quicker, more focused, less costly, and more effective. Furthermore, the opportunity to reframe arguments into a more persuasive and effective format is immense. This requires the involvement of psychologists and behavioural scientists, working alongside lawyers and arbitration experts.

So. In conclusion, I ask the question again: *Persuasion is such an important factor in international arbitration: Why has it been left to the lawyers?*

Thank you for your attention.

SECOND PANEL: CULTURE AND INVESTMENT ARBITRATION

PARTICIPANTS:

Sergii MELNYK, *moderator*

Deputy Counsel, ICC International Court of Arbitration;
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PhD in Maritime Law;
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Hugo BARBIER

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Kamil VALIYEV

Member of the Azerbaijan Bar Association;
Partner, Dentons

Marina WEISS

Member of the Paris Bar,
specialized in investment arbitration;
Partner, Bredin Prat

Sergii Melnyk: Ladies and gentlemen, esteemed participants and honoured guests, welcome to this panel discussion focused on the intricate facets of arbitration within the distinctive context of Azerbaijan. Today, we embark on a journey to unravel the profound interplay between Azerbaijan's historical, cultural, and geographical dimensions and their consequential impact on business contracts, dispute resolution, and arbitration practices.

I think it is essential that we also have this discussion on the panel to establish these cultural factors before moving on to conflict resolution. The idea, which is embraced by many countries in the region, is "better to prevent disputes and not to arrive at the request of arbitration" through negotiations to better understand what is happening between the parties. So the question would be: Could you please tell us more about Azerbaijani business culture? I want to ask Zeynab about it.

Zeynab Jahan: I would like to first talk about PSA, production sharing agreement for the business culture. Thirty-two years ago, when we became independent and business with Western countries was about to start, special agreements were invented to protect foreign investments. Moreover, this agreement is legally protected by the national legislation and Milli Majlis. Since then, there has been a special one for BP and other upstream companies. Since then, BP and others have been working successfully in the region. No laws have been violated; no big companies have left Azerbaijan.

Furthermore, those big companies have attracted other supportive companies. There are satellite enterprises, major players in the oil industry, and other small businesses gathered around them. Also, FDI is developing quite well, and Azerbaijan is a member of important organizations. So, this is the business culture. Maybe my panel colleagues would like to add something.

Sergii Melnyk: I would like to ask Safar. From the government's perspective, how do you see it?

Safar Safarli: Good afternoon, everyone. So, I think state aid is essential for business development in Azerbaijan. The state is now much more involved in business relationships and has been making more reforms for the last five to six years, including institutional ones. At the top of the list, I would mention our tax reforms. The headline was "moving out of the shadow economy", and the main logic was to bring more transparency to the relations between business and government. The statistics show that the reform worked well for businesses and the government.

Furthermore, coming to the institutional reforms the Ministry of Economy headed, we currently have three different organizations functioning under the Ministry and dealing directly with businesses. So, I would start with the EDF, which is the Entrepreneurship Development Fund. The fund deals with

people who want to start a business in Azerbaijan. They are giving their financial support. The interest rates offered by EDF are significantly lower, almost five times less than those offered by private banks in the market. So, they have three years for you to develop your business, and then you start to give the loan back. The second organization is the Small and Medium Business Development Agency. This agency deals with all your concerns if you are a small or medium entrepreneur who wants to grow your business — from the relationship with the government to finding foreign markets for your products.

Moreover, there is also the Agency for Development of Economic Zones, which deals with major investments in the sphere of industry. Apart from the organizations operating under the Ministry of Economy, we have a new concept of free economic zones: Alat. Alat is considered a new concept for Azerbaijan because it has different legislation, management, and more critical logistical opportunities due to its proximity to the port of Baku. Also, regarding the legal perspective, it has a different dispute resolution mechanism, which includes the seat for arbitration. In this case, I would say that the state, for the last five to six years, has dealt with many more businesses and improved the business environment in Azerbaijan.

Sergii Melnyk: Thank you very much. It is impressive to think of all these initiatives that have started recently. Given Azerbaijan's general business climate, we want to move more to the investment side. So the question would be for Hugo**.** How do cultural factors affect foreign investments in Azerbaijan? From your perspective outside, as outside border consulting, and also otherwise?

Hugo Barbier: I can give you an insight into what happened in France concerning the cultural climate for investment, and then we shall talk about Azerbaijan. In 2016, France took significant steps regarding its contract law, which was highly regarded as a preference and appreciated by investors, including foreign investors. That is why, at that time, contractors in France heavily relied on the strength of promises; promises had to be kept. In the case of non-performance of a contract, you may be aware that in France, the performance in kind was the sanction of this non-performance. Moreover, a huge sign of the strength of promises in France was that there was no omission of the theory of imprevision. So, in the case of an unforeseeable change in the circumstances surrounding the contract, there was no way to revise or nullify the contract. These factors were highly appealing to foreign investors: the legal and cultural identities of French contracts. Then, in 2016, French law decided to change and modify the legal regime of contracts. It was mainly to get closer to neighbouring systems, particularly common law and other civil laws. This is when the legislator tried to take a step to reduce the strength of the promise in France. How did we try to do so? The performance in kind was

considered an aggressive sanction, which was inappropriate. So, we decided to put it in a place that would be more of an exception. At the same time, the government decided to introduce the theory of imprevision in France and the possibility to modify the contract in case of an unforeseeable event that could affect it. The problem was, when these initiatives were publicised, we had strong reactions from foreign investors about why we expected that they would be happy to see our system evolve towards common law or neighbouring systems. They were unhappy to see these potential changes to the system of the French contract. This is why these two major changes were not implemented on the eve of the reform, and we slightly adapted the performance in kind.

Moreover, we introduced that on a very minimal scale and the ability to modify the contract in case of unforeseeable changes. But we had to consider how foreign investors reacted to these potential reforms, which showed that you have to stick to your legal culture and not move to another culture, just because it is trendy and is in harmony or some people recommend it. So, it was a great lesson for us, as lawyers and for the government. This is my experience from the French side. I guess, for the Azerbaijani side, my colleagues will provide many observations.

Sergii Melnyk: It is a very important lesson: you can evolve, but not radically. Indeed, investors want some certainty and predictability. Kamil, do you have any comments on the Azerbaijani side?

Kamil Valiyev: Well, maybe I can add from the perspective of the government, at least what we see as a culture, and I would add to what my colleague Safar bey just mentioned. Since its independence, the government has taken care to ensure that foreign investors who come to the country have confidence in the government. Also, if we look at the history of production-sharing agreements and compare the state's approach to investors with other countries in the region, we see that there are very few investment arbitrations, especially some kinds of disputes between the government and investors. And that is, maybe due to the approach that the government has been showing, trying to settle most of the disagreements without making drastic changes in the legislation or in bilateral contracts with investors, which would lead to some kind of international arbitration, investment arbitration. And so this consistent approach was to build, as I mentioned, reliable and trustworthy government partners, and we see that in the example of SOCAR as well. There was a question about why SOCAR does not use the leverage of the state oil company to change the governing law clauses in the contracts. And if we look into the example that my colleague, James Hogan, mentioned, this arbitration clause with the Alberta reference, etc., this has been repeated in various production-sharing agreements over the last 30 years. And that is the message that the government was giving to investors: You can trust us,

you can rely on us, and we will be consistent in our approach to such issues. So, that is how it has become, I would say, part of the culture that the government follows in respect of the investors, but of course, there have been investment disputes, maybe not as many as in our neighbours, but I think there could be various reasons for them, which we can discuss later.

Sergii Melnyk: What about the factor of cultural proximity? Meaning, do you see any tendencies that more investors from neighbouring countries, for example, Türkiye, are more involved with their projects in Azerbaijan? Do you see equal representation across the globe? What is the theory? Also, the question is for Safar.

Safar Safarli: So, from my experience in the agency, the tendency is that the investors coming from the more culturally bound states, for example, Türkiye, Uzbekistan, or Georgia, are much more informed about the gaps in our local market. For example, I am talking about industrial production, they are aiming to meet the requirements of the local market, but not just to export their products out of Azerbaijan. But the investors coming from, for example, eastern Asia and Europe, see our industrial zones as a hub for the Southern Caucasus or the Middle Asian region. So, it may be something that they will debate later to the proximity and culture. Because, as I said, if we have a historical and cultural heritage in common with the investors from Turkiye, Uzbekistan, or Georgia, they know all about almost all of our local markets, and they know what we need, how they can meet our standards and requirements from the public. So, maybe it is the difference that the culture makes.

Sergii Melnyk: Probably also, it is much easier for them to integrate businesses and grow branches.

Safar Safarli: Yes, integration and the realisation of the investment. So, if there are some problems, they will understand much quicker than those coming from countries far from Azerbaijan. Maybe it is something regarding the culture or, as I said, the history of commerce.

Zeynab Jahan: I can speak from what I have seen within these two years of living in the current context. Now there is another challenge for us with all the sanctions against Russia. Of course, that changes a lot for the businesses in the region. As an expert in trans-Caspian commerce, I have seen the interest in Azerbaijan for the past year. Moreover, the corridor, Alat, that you mentioned is more interesting. I think that the oil and gas industry is not, let us say, insatiable, and Europe is now considering every continent. There is more for Azerbaijan to lead on their renewable energy as well.

Sergii Melnyk: But coming back, you raised a very important aspect and new development. Because of the Russian invasion in Ukraine, it appears to

us that Azerbaijan has a huge opportunity to export energy resources to Europe.

Zeynab Jahan: Of course, that is our main focus now. At the end of the battle, I would like to talk more about renewable energy.

Sergii Melnyk: Well, actually, if you will, we can do it now, because we will be moving to the investment arbitration.

Zeynab Jahan: Yes. I want to ask the audience. Do you consider this region proper to work within renewable energy or not at all? So, like Azerbaijan, the trans-Caspian corridor is only the oil and gas sector?

Sergii Melnyk: Who thinks that Azerbaijan will become a green energy country?

Audience member 1: There is lots of wind. So, I can see much potential.

Zeynab Jahan: Some other thoughts?

Audience member 2: Can I answer this one in a lawyerly way? It depends. Yes, because it really depends on the future directions the government will take. I agree that, in the context of the research done by different European institutions, there is much potential in Azerbaijan's territory for the projects. Indeed, there should be more initiatives to do it in a way relevant to the free market style rather than in a natural monopolist manner.

Audience member 3: I think it depends, also. I did my PhD thesis on sovereign wealth funds. Many countries in the Middle East use the money they earn from oil resources to create and invest in new technology. Well, in the case of Saudi Arabia, it is nuclear technology. So that might be an issue if it is good or bad, but for example, in our region, they finance many activities with revenues from oil and gas. So, it is not just a matter of policy for the government to save this money to invest in the sector. Every country has an opportunity for renewable energy. So why not?

Zeynab Jahan: Because everything is so focused on hydrocarbons, oil, and gas, I think that the region, Azerbaijan, mainly, can be a great source of renewables.

Kamil Valiyev: Maybe I can also comment on the recent developments in the renewable energy area. So, Azerbaijan enacted the law on renewable energy nearly two years ago. There are already two huge renewable energy projects under construction with the involvement of big developers, such as ACWA Power from the Middle East. Also, there are some more projects in the pipeline. Those green energy development projects are expected to be the backbone of the export of power and electrical energy from Azerbaijan to Europe. So, there are a lot of insurance and support by the government, and a month ago, the new law on electrical power was enacted in Azerbaijan,

which is diversifying and reforming the entire power sector. We should expect this to be done in three phases, which will go up to 2028 when the entire market is expected to be liberalised, and there will be less state involvement in the public generation.

Moreover, that will be my personal view on investment and culture. Let us look at the investments attracted by the government into the sector. We see that the government again tries to rely on long-term players and considers some geopolitical and foreign policy priorities. That also relates to the export of energy to Europe, involvement of companies from friendly jurisdictions. That could be given as a cultural approach to doing business, that you rely on your long-term partners. We build relationships with businesses.

Sergii Melnyk: And obviously, all these megaprojects. In those projects, it is not a matter of "if" but a matter of "when" the dispute arises because, on the scale, something always goes wrong. So, it is also good news for investment, especially for arbitration lawyers in future cases. Before we move to the core topic, I have a quick question for Safar. Can you give a concise overview of what your agency is doing to facilitate, first of all, economic development but also cultural links between investors and the state?

Safar Safarli: The idea behind creating the economic zones started in 2011 with the presidential decree. The main reason for standing behind was, in the first place, to reduce our dependence on the country and others for regional development, like attracting FDI and diversifying the export products. So, that being the case, the state established six industrial parks and four industrial districts, and the main advantages are mainly related to the tax and customs exemptions. Furthermore, the state supports the investors from the logistical and infrastructural perspectives. In 2021, the state decided to develop the management of those industrial zones. For that to be the case, the state established the Economic Zones Development Agency. For the last two years, I think the agency's functioning can be considered successful because the number of residents in the industrial parks has doubled. For example, until 2021 there were like 25 investors in industrial parks, but now their number is nearly 50. For industrial districts, the number has increased by almost 40%.

So, the characteristics of the relations between the investor and our agency are twofold. Because our agency is, in part, a state agency providing the certificate to our residents, based on which they can get all those benefits of industrial zones. On the other hand, we are acting as operating companies for those industrial zones. Under that part, we have private relationships and commercial relationships with our investors. Arising out of these kinds of relations, we also have two main contracts if you sign with investors. The first one is an investment contract, which is public law-related. On the other hand, we have a service contract which is more on the commercial part of the

relation. The dispute resolution part of those two contracts is almost the same; we are granting the investors 90 days for the negotiation. The parties can go to the domestic courts if the negotiation period is useless. However, you can ask: Why do you have the domestic court as a dispute resolution method rather than arbitration? I can answer by describing the current situation and the perspective for arbitration as a dispute resolution method. The current situation is that under the first contract, an investment contract, the foreign investors still have the chance to go to arbitration, even if we indicate that the disputes will be referred to the domestic courts. This access is provided under the new law enacted last year, the Law on the Investment Activity. It states that foreign investors can go to investment arbitration after the exhaustion of local remedies. Unfortunately for the National investors on the investment agreement, we do not have a seat of arbitration in Azerbaijan. So, that is why we cannot have access to arbitration with our national investors. Coming to the service agreements, we have the same story again for the national investors since we cannot go to the domestic arbitration.

Nevertheless, the approach is that, in this relationship, we did not want to differentiate between our national and foreign investors regarding access to the dispute resolution methods. Because the government has prepared a new law on domestic arbitration, we are so close to modifying our agreements in favour of arbitration. So, that is the perspective on the implication between our agency and investors.

Sergii Melnyk: Yes, I think it is an excellent moment to discuss the present prerequisites for investment finally. So basically, this can be described as initial negotiations before an investment goes forward. Let us now discuss what happens when things go wrong. Moreover, somebody who has the final claim is most probably an investor. So the question would be to Marina, do you think that the cultural proximity between investors and states causing the investment plays any role, or is it actually what matters in commercial cases but not investment ones? What is your understanding?

Marina Weiss: As Andrew Clarke has already aptly formulated, it plays a crucial role. Dispute settlement, especially at the early stage, is about effective communication. To do that well, not only is it helpful to speak the language, but to look beyond that and understand what motivates and drives a political actor you oppose. Now, because he also mentioned the field of commercial arbitration and whether there was a difference, I think, if you take the discussion to a more conceptual level, you can distinguish two categories, two scenarios. The first one would be one where you have, let us say, two highly sophisticated parties that are advised by experienced counsel who are involved in high-stakes transactions regarding important contracts. There, you observe that cultural proximity almost appears to be the less relevant factor because of the degree of sophistication and the understanding that the

underlying issues will have been carefully assessed with due diligence and another rationalized approach. At the other extreme, you could envision very inexperienced, small companies, or even certain physical persons, where the questions of means and mastery of language and access to knowledge will be slightly different. There, you could understand that proximity will have a positive impact because the necessity to bridge the gap is clearer. So, in a way, you hear, also the two extremes. They illustrate the tension between the first category, accepting universalism, which is, I think, what we observe in our field of international arbitration, where we all see each other all the time at conferences. We interact based on at least one shared set of values, even though we all have our own—the other extreme being cultural isolation and insistence on cultural specificity.

Moreover, there is, however, an intermediary scenario where you have a sophisticated party facing a less sophisticated one, for example. From experience, I think what we all can say is that what matters the most here is, as the party with more experience in the international legal concepts and codes, is empathy towards the other party. This is something you do see, of course, in an investor-state context where certain states depend. There is no one-size-fits-all approach, but in certain states, merely because of the organization of the dispute management system, you do not talk to one agency overseeing foreign investment disputes. You may talk to the ministry concerned that was involved in the actual conduct that then underlies the investment claim. There may be a gap in experience and understanding there. So here, it is, again, that empathy and the need to look beyond the concepts and search for a thorough understanding are the keys to success.

Sergii Melnyk*:* It is not the study of investment or commercial. It is more about the sophistication of the discipline itself and the counsel or lack of counsel representing. So we mostly see a lot of heated debates on smaller amounts in disputes, then, on your highly available cases, where those are global law firms fighting each other on very established grounds, very predictable procedures. Yes, there is also a question about the role of arbitrators in all of these. So, the question, probably to Hugo, is to what extent an arbitrator should consider the local business culture when applying international standards and rules.

Hugo Barbier*:* Thank you. So yes, to give a quick definition of what we can call local business culture, I think it is the mindset of business people, the set of beliefs that they carry with them when they do business, and to what extent an arbitrator should take this mindset and set of beliefs into account when applying international rules and especially investment rules and standards. So we have minimal time here, so I shall stick to one example that interests me quite. It relates to the expected due diligence that an investor should do before the investment. May know that a reasonable investor is supposed to

perform a certain amount of investigation and may sometimes come to questions about state officials' representations and evaluations. It is a way to assess the situation and the opportunity to invest. These standards of the reasonable investor and expected due diligence are quite critical in investment arbitration because, failing to do so, the investor may lose some of the substantive protection. For example, reasonably equitable treatment is very sensitive to this first step, which is due diligence initially made by the investor. There comes the cultural aspect of the question. To assess the reasonableness of the investor, you have to set a level of legitimate trust that an investor can put in foreign state officials. Here is a tutorial question: Do you trust neighbours or strangers? This is a classic question that we meet in sociology, especially in French sociology, which is called cultural sociology and cultural theory of trust for one's interest. Several sociological studies have been established. This is where we have the cultural issue should the standard of a reasonable investor be sensitive to this cultural background. We can say should the investor be taken to arise, or should arbitration standards be culturally sensitive?

It is a straightforward question, but it is challenging to address this issue. I would say informally, we could imagine that arbitrators consider this data when assessing what reasonable investors should have done. This cultural trust from investors coming from developing countries towards state officials at some point could be an informer about it. Is it conceivable to go further than that? Do you imagine that an award or our submissions talk about directly addressing this issue? That is not easy to imagine. The example I gave with an investor's due diligence could be duplicated. For example, in international arbitration investment arbitration, there is often this issue of the apparent authority of the contractor. When someone had the legitimate belief that the other party to the contract had the authority to make the contract to conclude the contract, then the contract is deemed to be concluded even though the authority was not there then. This is the apparent authority theory. However, once again, you have to establish the level of trust that someone can have towards another. You have this cultural theory of trust and the idea that there is a cultural value. It is a positive prejudice that could impact the level of caution of a contractor or an investor. Furthermore, this is, I think, one of the most challenging questions: How can mindsets, which are something quite difficult to see, be considered by arbitrators who might miss something if they do not, at a certain point, take into account this mindset to apply these highly international standards, highly harmonized standard that we have in investment arbitration?

***Sergii Melnyk**:* You know, it should not be applied blindly. Yes. I agree. I think that the arbitrator should first focus on a set of facts, consider the nuances which can include cultural differences, and adequately assess the

facts. Now, relate the question to Marina: Does the culture of arbitrators and parties' material impact the contract of investment arbitration? So, let us now enlarge the scope of stakeholders from arbitrators to the parties.

***Marina Weiss**:* Yes, these questions are related because the key distinctive characteristic is how different people assess and characterize the same set of facts, right? There has been discussion regarding arbitral awards in the field of corruption, and how to establish that. Based on the legal tradition of the co-arbitrators, on the one hand, and on the national law that may be applicable to establish corruption or fraud. The answers can be quite variable as part of the facto pattern and ethics and arbitration. So, we are looking at the culture of arbitrators and parties. There is a distinction; we say there are two differences. The one is between the arbitrators and the parties and, more broadly, the fact pattern and investor-state context also, the law of the host side and the sensitivity to the cultural specificities, on the one hand. Then, on the other hand, you have the intra-tribunal dynamics, the dynamics between different co-arbitrators where also, of course, the ability to communicate will be critical in the genesis of the adjudicatory process.

Moreover, we all agree that the more astute the arbitrator, the more influential the co-arbitrator, and the more effective the nominating party will consider that its nomination will have been. Here again, we observe, I think, the same tendency that I have tried to highlight in the exact tension between universalism on the one hand, which we live every day because we communicate. I guess one standard, set of language and professional codes. On the other hand, it is also necessary to consider cultural specificity and particularities. I do not think it is helpful only to have lawyers from one jurisdiction on a panel simply because that is the origin country of the parties involved. Precisely because we may miss certain crucial tools, you obtain to experience and not through immersion in a specific cultural context. Here again, what I would advocate for the most is that what matters is the sensitivity and the awareness of the difference of the other side's position and the openness to communicate over that. It should not be a question of one culture feeling dominated by another just because it represents the culture. It is not behind the steering wheel, necessarily. Maybe it is a bit provocative, but it is also my experience of growing up in East Germany and with the transition phase after the unification. We were not in the same context as a CIS country where you had to adapt to a new system radically. We felt we adhered to an existing system, which is a certain experience. Our culture disappeared or was not taken into account. Thus, however, instead of deploring that although it is, of course, in principle dependable, we also learnt that by adapting to the other codes, while still retaining specific core values that you might have had, you become stronger and more apt to deal with a much broader variety of situations. So, this is the background to my statement.

Sergii Melnyk: It is true regarding directly to arbitral proceedings. Moreover, we see from time to time, because you know, what they see we can sometimes solve conflicts within the tribunal, sometimes tensions arise, or a company come to us to play to say, judge. We see that, I mean, I see from what I was dealing with, that people from at least related jurisdictions, for example, Germanic countries or from Nordic, would usually quickly find the solutions themselves without coming to us we know about the issues later on. Well, you know, there is a significant cultural gap. One is, for example, from the USA, and another is from Europe. Sometimes, this element prevents them from resolving it without third-party counselling. So, we see culture making a material impact on how the case proceeds because it also impacts the efficiency of deliberation, for example, of the tribunal themselves. Another question will be addressed to the panel, specifically to Hugo. Is investment arbitration a threat or tool to promote culture and cultural heritage?

Hugo Barbier: Yes, I would say that investment arbitration is both. It is a manageable threat and can also be a tool and, I believe, a potential threat. Of course. Since states tend to protect their cultural heritage with local cultural policies and reviews, it may impact how other investors have the right to have consistent state policy. So, when the state decides to be more protective of its cultural heritage, it could affect investors' rights and trigger an investment arbitration. This is when the battle begins between investors, substantive protection against expropriation standards like relatively equitable treatment, etc. and the state's right to regulate. This right to regulate extent, of course, to control matters. We have several examples in case law that address this particular issue, this particular battle. One of them, which is highly significant, I think, is the famous Glamis v. the USA case. It is interesting because, in that case, Glamis was a Canadian-based mining company and wanted to invest in California to set up a mining site there. However, the problem was that the site was just closed as a highly cultural land in California because it used to be Native American land. This is why the State of California conducted a cultural review of Glamis' project to assess the risks for the Native American culture. At the end of this review, California decided not to grant authorization to implement these mining sites. Glamis received that as violating the fairly equitable treatment and NAFTA Treaty.

Why is that? California has previously granted the same type of authorization to other similar projects to the Glamis project. So, it was claimed as a sort of inconsistency and a betrayal of the legitimate expectations of these Canadian investors. It could have been a good opportunity for the arbitral tribunal to stick to the legitimate expectations of Glamis, to consider that the state was at fault, and to compensate Glamis. Nevertheless, the reasoning of the arbitral tribunal was more settled than that. It explained that since the cultural value of lands of Native Americans entered into the public debate, it

was necessary for the media that this Canadian investor should have lowered its expectations to be granted this authorization.

At last, due to the variation of the expectations of the investor, at the end of the day, there was no compensation for Glamis because legitimate expectations were not deceived. So we can see how, once again, this international standard, the legitimate expectation, has been highly impacted by the rising of this public debate about Native American culture and how the investor was supposed to take that into account when deciding to invest in the state of California. So I think it is quite interesting.

It also can be a tool. Moreover, there is an ongoing debate, investment arbitration, about the very definition of an investment, and it is directly related to cultural aspects because we know that an investment is usually defined by the contribution, the duration, and the risk taken by the investor. There is also another factor, which is the contribution to the economic development of the country. Sometimes, these factors are considered, and sometimes, they are not. However, the question is: Is it conceivable to substitute this last factor with another which could contribute to the host state's culture even though there is no significant economic impact of alleged investment on the host state's economy? So, should we consider that a purely cultural contribution made by an average investor is sufficient to comply with the investment definition? This is not easy, and now the case must consider insufficient. You have to demonstrate your contribution to the government. I think that debate is ongoing, and I am not sure it is a definitive answer to these questions. We could see arbitration investment as a tool if we directly integrate the idea of contribution to the culture into the investment's definition.

Sergii Melnyk: Having a professor of law on board is impressive. So, Kamil, maybe you can provide comments from Azerbaijani perspective.

Kamil Valiyev: Well, from the Azerbaijani perspective to my knowledge, I am personally not aware of any case with the cultural heritage involved, and what has been happening in the practice that we have seen in such cases of a collision of the business interests with the protection of cultural heritage. There have been multiple cases where some solution was found for further resolution. Moreover, we have seen quite a huge infrastructure project in Azerbaijan over the last 30 years, which was trespassing on cultural sites. There has been quite a diligent approach to the extent that we are aware of the international companies operating in Azerbaijan to ensure this cultural heritage is preserved. However, at the same time, the project itself is devolved. And so far, to my knowledge, there have not been disputes in this area. From the perspective of investment arbitration, my personal view on this matter is that there was a question of empathy, just mentioned by Marina, regarding how the more assertive parties should perceive the case. I think, from that

perspective, of course, we are now talking about sustainable development. We are discussing the importance of ESG and other such international values in business transactions, especially with international and multinational companies. I think the question here also is, to some extent, an ethical question or ethical dilemma: To what extent should investors prioritize their investment, ambitions and appetite in protecting cultural heritage for specific countries? From this perspective, I believe that more weight should be given, especially at the legislative and international treaty levels, to the protection of international heritage and cultural heritage. Again, I have not done any homework in this respect. I could not explore these as profoundly as my colleague Hugo. That will be my answer to the question.

Sergii Melnyk: Thank you very much. The beginning of your comment was very inspiring that no disputes exist so far; that is exemplary behaviour on behalf of the States and investors' respect. We will close the discussion with a quite specific question for Marina, which is the following: Are there limitations to national treatment requirements in the sector of culture?

Marina Weiss: Yes, this also, I think, is related to the discussion that we are having. The question can be answered abstractly. However, if we look at the current context, where there is an increasing international awareness of the importance of corporate social responsibility for the protection of cultural heritage, of a general empathy, which has this place now that it did not have 10-15 years ago when I started working as a lawyer. These types of considerations did not have the same rank, but I think they need to be taken into account. Nevertheless, I think it is interesting that the cultural sector, broadly speaking, has been the subject of delegations of various sorts, and you can distinguish two scenarios: one where there is a specific codification in that regard and one where there is none. Even in the scenario where there is no codification, first, you can distinguish the existence of parallel international obligations that are stagnant, such as obligations relating to the preservation of cultural heritage. The problem here is that there may not necessarily be an avenue or a remedy that can be indicated in order to seek redress for certain violations. When faced with an investor, states may feel obliged by those other international obligations to adopt a specific course of conduct simply because those are the international obligations. The instruments of treaty interpretation, allow us to take that into account through the lens of the Vienna Convention on the Law of Treaties, which provides the basis for a horizontal interpretation, and this may, in some instances in the past, in practice, without tribunals, to consider that liability could not be established or under a different obligation for the national treatment obligation. However, even if we put it aside like formal international obligations, the mere fact that national or cultural specificities may not be considered to advance national treatment. I think it is an ongoing discussion. When you look at codification

initiatives, which have been increasingly numerous in recent years, you see a clear tendency. For example, certain countries like New Zealand have systematically included comprehensive exception clauses in their free trade agreements, comprising investor chapters. For example, in article 200.3, the New Zealand-China Free Trade Agreement provides the following: "*For the purposes of this Agreement, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods or services or investment …*"[1] So there is a kind of outer protection; still "nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts of national value". Those are broad concepts. They constitute compounds from the substantive scope of protection under the treaty. And those are not the only examples. I think before the big wave and leading up to 2004, with the accession wave to the EU, several of the new member states have adopted at the request of the EU Commission. By including annexes that allowed or carved out cultural policy, or carved out national acceptance for media and media content. I mean, we are in France, which is one of the countries known to have a very strong cultural acceptance and very strong policies when it comes to media content. And investors deal with this. And I personally think it is a very right thing where a market fails, because a market cannot, in and of itself, necessarily protect the values because that is also not the job of the market. Here the policy has to step in and provide that framework, and that is very important.

Sergii Melnyk: That is also very positive as the solution, I guess, it is mostly like the new generation treaties.

Marina Weiss: So also, in addition to these obvious and environmental considerations, the regulations of health, but for cultural specificities, because of these international conventions, there is already a strong interest. I guess certain practices may be less dominant in this regard because there is less political risk, and there have been fewer cases where payments with the state to those types of matters. However, in the anti-ISDS discussion, there is always the example of the indigenous people who see their lands being taken away. It certainly may have happened and is very undesirable, but it is also a sense of certain exaggeration to present.

Sergii Melnyk: Thank you very much. Time for questions if anyone has a question.

Audience member 4: The question is actually directly related to investment arbitration; but also to the second part of the topic, which is culture. Imagine,

[1] Free Trade Agreement, New Zealand-China, art. 200.3 (2008).

in a dispute between a company and its shareholders, there are different investment agreements, and two different tribunals can be established based on these investment agreements. So, what happens? Did you have such experience related to such a case? Or do you think, in this case, international *res judicata* can help if it exists?

Marina Weiss: It all depends on the language of the treaty. It depends on the legal framework, whether you are in the self-contained excellent system or are arbitrarily under the law of a given seat and what the law has to say. It is a very complex topic that gives rise to conceptual issues relating to the standing of shareholders and whatever it should be as a matter of principle. There are the problems. Secondly, as you alluded to, there are potential contradictory outcomes and potential double recovery. There was also a question, apparently, and this brings us back to a cultural component, which is the question of whether it qualifies as an excuse for not initiating legal proceedings based on different legal instruments by formally different parties, but which may be ultimately controlled by the same person or not. There are too many distinctive factors to allow us to give a principal answer.

Sergii Melnyk: Anyone else?

Audience member 5: Thank you so much for the fascinating information. I have a question, if I may. To what extent can we draw a line between preserving the local culture, as far as Azerbaijan is concerned, and protectionism or nationalism, *vis-à-vis* international oil and gas companies? Also, I have been listening carefully to the first panel. We are not covering midstream and downstream oil and gas activities. Is it because of a lack of legal culture or arbitration investment disputes in this field? Thank you.

Kamil Valiyev: Maybe I can start with your second question. Of course, all upstream projects are closely linked with Eastern projects because Azerbaijan is an exporter of oil and gas, and all export operations are done through upstream operations. Those midstream projects are usually part of the regulatory and legal regime and upstream production operations. So, they work together. Thus, whatever we have discussed for upstream projects will also be relevant for the midstreams. From the shareholders' perspective, we do not see that the state investments heavily dominate big investments into downstream projects. Still, those projects may be one of the reasons why we do not see much discussion about arbitration in this area.

As to the cultural perspective of the upstream projects, if you look at the popularity of the upstream projects in Azerbaijan, you can divide these projects into two parts. One part is onshore projects. These onshore projects have been under development for more than a hundred years. Azerbaijan is one of the pioneers of oil and gas production. So those projects onshore have been developing for more than 100 years, and state-owned companies, such

as SOCAR, were involved. That is why, from the cultural heritage preservation perspective, we see that the interests of the state and the developers are aligned because the state develops it. I have not heard about any issues regarding cultural heritage preservation and the development of this onshore project. So main investment is made in offshore projects, and they are in the Azerbaijani sector of the Caspian Sea. From the upstream perspective, I have not heard of any cultural sites revealed in these territories on the Caspian Sea. So, there may be a remote risk of a clash of international and cultural heritage interests and upstream development.

And regarding these midstream projects, just mentioned that there were cases where, during the construction of pipelines, such facilities' historical sites were revealed. Visit Baku and go to the History Museum of Azerbaijan. You will see some tags saying that this company that contributed to the History Museum found our artefacts during the pipeline excavation. Thus, it may be a factual harmonical connection.

Hugo Barbier: Just one quick word about its way to draw the line between federal policy and protectionism. Arbitrators have a sort of limited scope of intervention. So long as the state comes with a labelled cultural policy that exists, and so long as the governmental measure that is criticized by the industry relates to this cultural policy, it is quite challenging for the arbitral tribunal to go further and assess its legitimacy. Of course, you have standards and tools like the theory of abuse among others. However, using that in this very separate context would be quite challenging. We would have to be quite egregious to borrow the term investment arbitration to identify fault coming from the state and the right to be compensated for the investor.

***Sergii Melnyk*:** The time to conclude the panel here. Thank you!

Kamalia Mehtiyeva: Thank you very much, Sergii, for the moderation. It looks like it has been one semester of teaching in terms of science. So much has been said – we have heard very nuanced and sophisticated conclusions, deductions, and links between the ideas, both conceptually and geographically, per industry, per sector. Thank you to all speakers for their time and preparation and to everyone who has travelled for their commitment.

DEBATE: DOES CULTURE MATTER IN ADJUDICATION?

PARTICIPANTS:

Kamalia Mehtiyeva*, moderator*

President of Azerbaijan Arbitration Association;
Professor of Law, Paris XII University;
Member of the Paris Bar

Koorosh AMELI

LL.M. in Harvard Law School;
Director, Arbitrator and Legal Consultant
at Ameli International Arbitration

Bernard HANOTIAU

PhD in Columbia University;
Professor Emeritus of the Law School
of Leuven University

Kamalia Mehtiyeva: Ladies and gentlemen, good evening again. We are here for the last legal part of our programme. I say that because the legal part of the conference will be followed by a concert of Azerbaijani classical music. So the last part of this programme is extraordinary because it is a debate, and the format is therefore slightly different from the panel. I believe the purpose of the debate is not to discuss but to disagree. At least, as the word suggests, you may agree, but I thought we may disagree on certain things.

Moreover, by the end of the day, pardon me for not being very formal. However, I would say that someone must pinch me to wake me up from a dream because I have never dreamt of being a moderator of a debate between Professor Bernard Hanotiau and Judge Koorosh Ameli. I say that very sincerely. This has no exaggerated modesty; I would have never dreamt of moderating a debate between the world's most prominent arbitration lawyers. I will briefly introduce the form because the two guests do not need any introduction. I am very honoured to be here tonight, and I would like to thank you for being here and for having travelled and made time despite your extraordinary schedules and agendas. Thank you very much.

First, I want to introduce the judge, Koorosh Ameli. Judge Ameli was educated at the law schools of the National University of Iran, Harvard University and George Washington University. He worked as a law clerk with the magistrate and district courts of Tehran during his LL.B. programme, and he also worked as a judicial officer of the Iranian gendarmerie as part of his national military service and during his LL.M. programme. In the United States, he obtained in Harvard LL.M. degree. He worked with two major international law firms, Baker and McKenzie, as a summer associate in Chicago in 1977 and then Chatburn and Park, New York, as an associate until 1979. Then, he joined the George Washington University SDG (Sustainable Development Goals) programme until he accepted a position as a legal advisor with the Iran – United States Claims Tribunal in The Hague in May 1981. It looks like an incredible movie script, but this is true, and I am not done with your biography. This is, in fact, a concise summary of your biography. Judge Ameli has more than 40 years of experience in international arbitration, about 30 years of which were with the Iran – United States Claims Tribunal, where he started as a legal adviser to the judges and later became a judge from 1985 to 1988. And then, from 1990 to 2009, he resigned and began his private international arbitration practice in The Hague. Since 1982, Judge Ameli has also accepted appointments as arbitrator in many cases under different international arbitration rules. He has more than 100 major conflicts, international commercial and interstate arbitration cases in almost every field of industries dealing with various public international law issues and different national laws. Welcome and thank you for being here, Judge Ameli.

Next, we have Professor Bernard Hanotiau. Professor Hanotiau is a member of the Brussels and Paris Bar. In 2001, Professor Hanotiau established

a boutique law firm in Brussels, concentrating on international arbitration and litigation. Since 1978, Bernard Hanotiau has been involved in more than 600 international arbitration cases, both commercial and investment in all parts of the world. Maybe not Azerbaijan yet?

Bernard Hanotiau: Not yet (laughter). Next time.

Kamalia Mehtiyeva: This means that I have managed to find one minus in your biography, but we will work on that. And in all sectors of the industry.

Mr. Hanotiau is a professor emeritus of the Law School of Leuven University in Belgium. He is a visiting professor at the universities in Singapore and Shanghai. He is a member of the ICCA advisory board and a member of the Council of the ICC Institute. He is a member of the Court of Arbitration of SIAC (Singapore International Arbitration Center) and the Hong Kong International Arbitration Advisory Board. He is the author of many legal publications, including "Complex Arbitrations: Multi-Party, Multi-Contract & Multi-Issue" published with Kluwer in 2006, with a second edition released in 2020. In March 2011, Mr. Hanotiau received the GAR (Global Arbitration Review) Award for Arbitrator of the Year. Moreover, in April 2016, Professor Hanotiau received the Who is Who Legal Award for Lawyer of the Year in Arbitration. So, Professor Hanotiau, thank you very much for being here.

Now, onto the question of our debate - "Does culture matter in adjudication?" I guess both of you are the best people in the world to address this question, given your experience in different forms of arbitration, with very varied types of arbitral tribunals across different sectors and decades. So, to address that question, I thought we might take it from more minor questions because how “does culture matter in adjudication?” is perhaps too broad. So, my first sub-question to both of you would be: How would you define cultural differences susceptible to requiring your action as an arbitrator? Would they be ethnic, geographic or religious differences? The second sub-question is: How do these differences manifest themselves, and if they do, how do you think your action as an arbitrator is required?

Koorosh Ameli: Thank you. Cultural differences can require action as an arbitrator in many forms. Firstly, these differences can exist among all participants involved, including the arbitrators, parties and representatives. Such differences can manifest not only in ethnic, geographical, or religious backgrounds but also stem from varying industrial backgrounds. For instance, challenges may arise in the construction industry or maritime commodity arbitrations due to these disparities between different parties. This difference is resolved from the very outset of the arbitration, such as in the selection and appointment of arbitrators, choice of languages and place of arbitration, the arbitration rules and substantive law or rules, especially if they

are not already specified in the arbitration agreement, as well as in the preparation of the terms of reference, procedure, and the overall timetable of the tribunal. The arbitration process, such as in case management conferences, pleadings, provisional major examination of witnesses, hearings, hearing briefs, liability, remedies and quantification of damages, final awards, and challenges to arbitrators, or their resignation, can be among these. So, in all these areas, cultural differences may manifest themselves.

Every step of the way, innocent cultural issues, misunderstandings or even abusive cultural tactics may be in play. Arbitral tribunals need to be vigilant of such potential issues, to understand the situation, to flag them out to the parties for common consideration and then to decide. So, I guess the misunderstandings or cultural differences that are readily perceivable and actually percieved by arbitrators are easy to resolve. The difficulties lie in cultural issues that the tribunal does not discover or pay significant attention to, and more importantly, in the abusive supposed misunderstanding. This is due to a lack of notice or awareness of the cultural differences or issues. The co-arbitrators may come from different cultures and can assist in resolving the misunderstanding. The other members of the tribunal need to appreciate the co-arbitrators for understanding the situation. Cultural differences may just as often be abusive or used with ulterior motives, such as for restoration of the arbitration process, where, for example, the losing party claims cultural disregard and discrimination by the arbitrator or doubts the opposing party. In that situation, whatever solution is offered other than precisely what the losing party wants will be a challenge for all tribunal members or the arbitration tribunal's president. In the prevailing anti-arbitration atmosphere, if the appointing authority wrongfully approves such a challenge when deciding it, it not only derides the arbitration process but also compels institutional appointing authorities to defend its legitimacy unjustly. This, in turn, leads to a total disruption of the arbitration process.

***Kamalia Mehtiyeva*:** If I may ask just a quick follow-up question. You used the word "discrimination". Moreover, you said that there are cultural differences that are not taken into consideration by an arbitrator. Could you give us one or a couple of examples of such cultural differences that became problematic and were used by the parties, either as a formal challenge or as a source of complaints for not taking into consideration? One primary example that comes to my mind is the procedural calendar, which does not consider religious holidays or significant religious days. Is that what you were referring to when you said "discrimination"?

***Koorosh Ameli*:** Yes, for example, if a communist regime comes to power in Russia which disrespects and seeks to eradicate Christianity, could a Christian church genuinely argue that its religious holidays should be recognized and given more consideration by arbitration?

***Kamalia Mehtiyeva*:** We will get to the question of the council later. However, at this point, Professor Hanotiau, would you like to give us your view?

***Bernard Hanotiau*:** Yes, I will give a different perspective. First, I think how you perceive the problem depends on your role. I am not a judge and no longer counsel. I am a full-time arbitrator. So, I perceive the problem from the point of view of an arbitrator. I may be provocative, but I agree with Jan Paulsson and Horacio Grigera Naón, experienced arbitrators who consider cultural clashes a myth and international arbitration culturally neutral. Thus, they are right if you put yourself from the procedure perspective. Of course, our culture will indeed have different impacts on arbitration. However, from a procedural point of view, I agree that the arbitration procedure is culturally neutral.

You know the words, people have their own cultures. When they are involved in international arbitration, the same way as they take off their vest when entering their house, they strip themselves to some extent of their legal culture. They enter into a mood of international arbitration culture. Arbitration is no longer what it used to be 40-45 years ago. Today, young lawyers travel, and there is the Erasmus Programme. They attend courses on arbitration in various countries. They work in international law firms, so they become truly international.

Moreover, you see conversions, uniformization of the international arbitration framework wherever you look in the world. This process started with the New York Convention and then with the Model Law, which has been adopted in many countries. The consequence is that all the national laws with some differences look alike today. All the rules of international institutions look alike because they copy each other. So, an international culture is developed common to practitioners, arbitrators, and parties involved in the international arbitration practice. In other words, the gradual convergence in norms and procedures has led to a gradual convergence of the participants' expectations in the arbitration process.

Nevertheless, to answer your question, I would say that the differences in culture susceptible to requiring the action are ethnic but also geographic. You can say that the approach to resolving a dispute in the United States is different from that in Asia. For example, arbitration is more aggressive in the United States, and arbitration can become a "war" sometimes. In Asia, they will try to privilege conciliation.

Furthermore, you asked how these differences manifest themselves. I would say that they manifest themselves in various ways. From the point of view of an arbitrator, they will manifest themselves in the first place at the procedural level. As Professor Claude Remond, a well-known arbitrator once said, participants in arbitration are generally not surprised or shocked by the

fact that the law applicable to the merits differs from their own. However, on the other hand, they have more difficulties accepting that the applicable procedural law is different from their own. Moreover, of course, the role of the arbitral tribunal is to listen to the parties, try to see the expectations and adapt the procedure to these expectations.

The cultural differences may manifest themselves in many other ways. For instance, you might encounter a situation in the dining room where you have Syrian parties and want to shake hands with a Syrian lady. However, cultural norms may prohibit such an action, and you must refrain. These differences can also manifest themselves in the course of the arbitral procedure. For instance, I have experienced a very aggressive American party. In such situations, you have to intervene. Additionally, you might realise that one of your co-arbitrators has a different perception of their role as a co-arbitrator and is leaking information to one of the parties.

***Kamalia Mehtiyeva*:** Thank you very much. This debate carries on well. We are in a disagreement mode, which is excellent because that is how the best ideas emerge. You mentioned a few things, Professor Hanotiau, concerning students travelling and participating in different international programmes like Erasmus. So, in some way, that reduces the risks of cultural clashes, as you say. If I hear what you say, there may be no cultural clash, or at least every party tries to avoid it. Now, "clash" is different from "differences". There may be no clash, or at least, as you said, every party tries to avoid a clash.

In this verb, "try," there seems to be an effort. So perhaps there is something there that requires effort. Regarding cultural differences, is it a clash or a difference that shall take any place or role in arbitration and adjudication? That is, of course, a different question. Moreover, the fact that you mentioned the different educations brings me to another question. I think the word "culture" has been used in both of your responses to refer to something individual, personal, religious, or cultural.

Moreover, at the same time, "culture" can also refer to legal culture, which may be something that procedural lawyers forbid you to say at the university. Nevertheless, let us make that distinction between civil law and common law because that is quite a distinction. At the end of the day, it does exist. So, both of you refer to culture in both ways, classically and legally. Do you think that legal training and the difference between common law and civil law may make a difference from a cultural perspective? Moreover, it is a second question, very closely related to the first one: Do you believe there is such a thing as belonging to a legal culture?

***Bernard Hanotiau*:** First, your question concerning civil law and common law. Indeed, there is a big difference between the two systems. Although we can see some compromises nowadays, this difference between the two

systems remains. First, if we take the merits — the law itself, there are many points on which we do not have the same approach. I can take the pre-contractual negotiations as an example. In England, they do not take the role of pre-contractual negotiations to interpret a contract. We do so in the civil law. The law in England is considered a fact to be proven. In many legal systems on the continent, the court is considered to know the law, and it does not have to be proven.

Another example can be implied terms. We imply terms in a contract. It is much more difficult in England. There are many conditions to be met. The interpretation of good faith: it has long been considered to have no place in the English system. However, good faith has considerable importance in our system. The conduct of a party as an expression of consent is not entirely accepted in England, but it carries substantial weight in our system. *Lex mercatoria,* and I could continue like this.

These differences persist in procedural aspects as well. Our civil procedure is different. In civil law, when you submit to court, you explain the facts, tell the story, explain the law, and provide supporting authorities and documents. Moreover, in principle, what you are going to be before the court is what you have submitted, so there is no pre-trial discovery. You will plead based on the documents you have submitted. In my jurisdiction, for example, we never hear witnesses. There are no witness statements, and when an expert intervenes in the proceedings, he/she is appointed by the court.

In the English procedure the process is different. The original submission only lists basic facts. Then, if we take the American procedure, pre-trial discovery will determine which documents will be submitted. The procedure is different. It is a more extended procedure with a witness statement, expert cross-examination, first opening statement, and closing statement at the end. So, it is a different procedure.

Nevertheless, there has been a compromise in international arbitration, and the procedure is a mixture of both. The written submissions follow the civil law model, including two rounds of written submissions with supporting documents. The rest of the procedure is English: opening statements, cross-examining witnesses and experts, each party bringing his own experts and closing submissions. This compromise has also been extended to the IBA (International Bar Association) rules of evidence. However, I would say there is a growing domination of the common law culture worldwide. This is because the big law firms in every country are predominantly English or American, unlike French law firms, for instance.

Consequently, there appears to be a prevailing domination of the colonial structure and the common law culture. For example, in places like Dubai or Qatar, I would say 80% to 90% of appointed arbitrators are English or American lawyers, not civil law lawyers, even though the legal system in place is the civil law system. Moreover, when in Dubai or Qatar they need to

draft a new law, they ask English lawyers to draft the law. I would even say that we all agree that there is a kind of "Americanization" of international arbitration.

When I started 45 years ago, it was a straightforward process. We had submissions, had one meeting, exchanged documents, made oral presentations, and that was all. Moreover, you can see that the process has been progressive. For example, until the end of the last century, no document production existed in international arbitration. Nowadays, I recently had a document production of 500 pages. It is probably one of the most expensive parts of international arbitration—the same thing in terms of conflicts of interest. Previously, you checked your conflicts, and it was relatively simple. Nevertheless, today, it is becoming very prolonged exercise. In some parts of the world, it has become, I would say, paranoia.

***Kamalia Mehtiyeva*:** That is a clear answer. I shall perhaps take back my comment that in the universities, it was forbidden to distinguish between common and civil law as it was considered to be approximate and not scientifically exact. However, I think your answer proves the opposite.

Turning to you, Judge Ameli, I would like to hear your view on the same topic, along with a small additional question. Because you are both trained in Iran and the US, and you had experience as a practitioner in both countries which belong to different systems of law, how do you perceive, in addition to the first question – the common law and the civil law differences, how do you perceive that personally?

And if I may, a second additional question. Do you feel like you belong more to one or another system of law? I only speak of a system of law here. Thank you.

***Koorosh Ameli*:** Yes, I guess the second one is easier. I do not have a clear answer because I am on all sides in this regard. About the first question: Of course, differences does not exist only between common and civil law, there are also different variations of Islamic Countries. Even at common law, you cannot say Indian common law is the same as the British common law. Alternatively, Nigerian common law is precisely the same. We need to be able to distinguish between cultures, particularly those stemming from former colonies, and recognize how they have established their legal systems to address these matters. This is evident even in civil law countries influenced by French law during the colonial era. For instance, Chinese law has been significantly altered, resulting in fundamental differences. One of the primary distinctions I observe is the prevalence of case law and legal precedent in common law systems, which is not present in the same manner in other regions, including civil law jurisdictions.

Furthermore, the practice of reporting and publishing judgments varies. In civil law countries such as Italy and France, they tend to publish only the

decisions of the Supreme Court. Of course, it would result in concise decisions with very little analysis. The Iranians have given me several court of appeal decisions.

So, another significant difference is drafting an analysis. Most of the time, you will see people from civil law countries, especially from my country, who are serious in all countries. They are sticking to contradictory terms, even in the same sentence. So, it would help if you had consistency in arbitration to persuade a judge. So, how do you want to make sense of it? Of course, he is not exactly lying, but he has a main line in his observation while making contradictory remarks. So you have to be able to distinguish. It is entirely unreliable. Therefore, the common law lawyers will make it clear.

Moreover, I can tell you, that we had an Iranian Supreme Court Judge early in the stages of the tribunal. However, I and other Iranian arbitrators could not comprehend his speech. Who could understand him – American judge in his chamber, who dealt with him daily. He said what he meant was only these three sentences. So, in essence, despite the extensive discussions, despite the extensive discussions, it meant very little. Then I said analysis. If you do not make an analysis, it does not give reasons. They are not familiar with giving reasons. That is a serious trouble. They are not wholly familiar with international litigation. So, they do not know how to write a statement of claim and how to write a statement of defence. For example, in 1981, when we started, they had severe problems. So we have to ask some American lawyers to give them some format to work it out.

Indeed, during those years, I recall the Iranian pleadings being relatively brief, often consisting of only a few lines for jurisdictional objections and a minimal contract outline. Such submissions naturally failed to meet the expectations of the parties involved. In response, the tribunal had to take action to address this issue. Instead of relying solely on a statement of defence and rejoinder, they expanded the scope of the pleadings. This included allowing additional submissions for evidence and briefs, among other measures. Iranian parties frequently requested extensions and were often granted, resulting in prolonged proceedings. For instance, a case from 1981 is still ongoing despite numerous decisions being made since its filing.

Kamalia Mehtiyeva: That is quite a litigation.

Koorosh Ameli: In conclusion, I really appreciate many points.

Kamalia Mehtiyeva: Yeah, unfortunately, I do too. So, that spoils the purpose of the debate, but I have to agree with what you said.

Moreover, Professor Hanotiau, you mentioned "Americanization"; I think that was the word you used. It is exciting to have your perspective that 45 years ago, the procedural management of cases was much more straightforward, even though the cases themselves may have been complex.

Furthermore, a 500-page document production request is quite a request. I wonder if a new trend is emerging with the rise of boutique law firms – these smaller firms may now handle cases traditionally dealt with by big American or English law firms. So, in the landscape of actors in international arbitration, we have seen an increase in smaller law firms. Do you think this trend could impact the influence of American culture, which has taken over monopoly or the dominance of the procedural style in international arbitration? Or do you think this is neutral because the process is irreversible? As someone who has established a boutique law firm, you exemplify the atomization of actors in international arbitration. Now, you act as an arbitrator and advocate successfully against larger firms. Do you think this trend of smaller law firms gaining prominence offers a chance to neutralize or reduce the "Americanization" of a process?

Bernard Hanotiau: Well, I have seen some cases where smaller law firms appeared in France, for instance. I must say that the big law firms are still dominant in the cases in which I am involved. However, it is still true that there are several cases where you can see smaller law firms. I would say that I see one advantage: generally, they impose less complexity in the procedure. On the other hand, they are sometimes less experienced, for example, when cross-examining experts or witnesses. Otherwise, I think it is relatively neutral. For example, I have sometimes seen the same case in France and England. It takes two weeks in England, but only one week in France.

Kamalia Mehtiyeva: But that is not a case in the state court, right? Because otherwise, we talk about the years. We are talking about arbitration influenced by French and English cultures, right?

Bernard Hanotiau: Generally, we tend to privilege documents rather than witnesses. In English and American law, many people question the importance of witnesses, such as Toby Landau in England and Mark Baker in the United States. The people ask themselves, should we spend so much time on witnesses? I can ask this question because the question has also been asked to me: Are there many cases, in your experience, which have been decided just based on the witness statements? I would say that the answer is generally no. You rarely find a smoking gun in the witness statements. It happens, but not very frequently.

Kamalia Mehtiyeva: Judge Ameli, have you ever seen a smoking gun in a witness statement? Has it happened to you?

Koorosh Ameli: Yes, it happens, but very rarely. Now, I think we get important and valuable experiences from the American style of writing, cross-examination. However, we are concerned by the abuse of that procedure and the extravagance this brings. In our tribunal rules, we were able, for example, to make the point that the Tribunal will put the question and may allow the

parties to put questions. We did not use the word examination. However, these things prevented that extravagant cross-examination you see outside of document production. The Tribunal said that this necessity must be specific, or you have to establish the relevance. Some of these are circular and difficult.

Nonetheless, they have been helpful. Unfortunately, because of the civil law system, including that of Iran, they do not know very well; therefore, they do not know where this legal war takes them. For example, the American government says it does not exist. When the document does not exist, I cannot present. Furthermore, a chairman from communist-liberated Poland feels very comfortable reading it. What I would say, of course, is that the way it drafts does not exist. However, if you look at the other side, it exists. In other words, the presiding arbitrator unfamiliar with the tactics of common law can be easily misled. So how much the co-arbitrators can help? Unfortunately, as I just mentioned, nothing can be done on that occasion.

Kamalia Mehtiyeva: It is exciting and insightful. Despite the "relative value of witness statements", for what it is worth, in France, there has been a recent reform. The context of this reform is interesting because the French legislator decided to increase the attractiveness of the French forum as a place for international litigation, not international arbitration. Moreover, it is interesting that the legislator intended to compete with London, not as a seat of arbitration but as a place for international litigation. There were statistics available online, published in some reports, showing the percentage of parties from the United Arab Emirates and ex-Soviet Union countries who, without an arbitration clause, preferred to take their chances in English courts to find a connection to the English judge to sue there. Thus, the French try to compete, but it is interesting to see that when they try to compete, they almost feel obliged to take the features from the competitor. So, instead of imposing their model, they have, for a few years now, established special chambers in state courts called International Chambers, and they are competent as long as the dispute has international elements.

Interestingly, you can enter the courtroom and hear cross-examinations, even though we are in the French state, before the French judge, and with applicable French civil procedure. They have inserted a few provisions in the procedural code, allowing them to cross-examine, rely on witnesses, and plead in English, thus offering a bigger choice. The late Emmanuel Gaillard has organized a conference on that, and there is a publication in one of the French law reviews. So it is interesting that we, as civil lawyers, finally renounce our legal culture and adopt specific aspects from others, perhaps because it is a realistic view.

Koorosh Ameli: Really, it is not only a realistic view. You can consider it reasonable, although you miss it elsewhere. For example, when I went to the United States, I was impressed with the course on evidence. We do not have

such a course to a significant extent. Of course, we have studied evidence law, a course in civil law — only a few lines here and there. That is it. That experience educated me and was a valuable part of my education.

We mentioned, for example, the situation of the production document before. If an attorney comes to certify a document that does not exist, why should you believe whatever attorneys say? Because they certify? They certify everything. However, which bar rule or which code regulates this issue? Unfortunately, there is no specific regulation governing applying, which I have proposed. Today, IBA may be able to prepare a code of conduct with the arbitral tribunal's authority to deal with it.[1] Unfortunately, such issues are more common in civil lawsuits, with questionable documents being presented. Moreover, you will see more aggressive cross-examination by civil law lawyers that you never see in common law lawyers. In that respect, the number of counsel complaining about the civil law lawyers and arbitrators do not know what to do with them.

Kamalia Mehtiyeva: That is an interesting point. Arbitrators have many powers, but perhaps not these. However, that question brings me to my next question, which may be a double question. You mentioned many actors in the arbitral procedure: witnesses, counsel, parties, and arbitrators in the first line. If we believe that cultural matters may make a difference to a certain extent, whose culture significantly impacts the arbitral proceedings? Do you think it is the witness's culture, the counsel's culture, or cultural differences between counsel and client? Whose culture do you think matters?

Koorosh Ameli: The arbitral tribunal should leave aside its culture and remain impartial. However, as an American lawyer told me, Supreme Court judges read newspapers, too. I mean, they know what is happening in your country and cannot forget it. In one way or another, this will affect them. So, cultural factors play a role, and the composition of the arbitral tribunal should consider this.

Furthermore, parties should be able to adjust their behaviour to persuade the tribunal effectively. It is important to have lawyers who can speak the tribunal's language and use their legal analysis methods and writing style. In the International Court of Justice, you will see so many judges from various backgrounds. Parties ensure they have counsel who can adapt to the diverse nature of the court, especially those whose vote may be controlling in delivering the judgment.

Kamalia Mehtiyeva: So, there is some strategy behind communication in international arbitration. Moreover, as Andrew Clarke stated during his speech earlier this afternoon, it is essential to consider who delivers and

[1] *See generally* IBA Rules on the Taking of Evidence in International Arbitration (2020).

receives the message, right? Professor Hanotiau, what would your view be on that?

Bernard Hanotiau: Yes. So your question is, whose culture impacts parties mostly? As an arbitrator, we only see what happens during the meetings and the hearings; we do not know what happens backstage. So, the people who express themselves at the hearings are counsel. So, for me, the culture of counsel has the biggest impact. They generally educate their clients and tell them what to expect in the proceedings. They can act as messengers for the parties. So, during the hearings, we see the expression of the culture by counsel.

Kamala Mehtiyeva**:** In the same vein, is the cultural difference between the counsel and client good? Mark Twain said, “It is difference of opinion that make the horse-races.” So the counsel is on the client's side anyway, the difference of culture may not be a clash, but it may be sometimes. Do you think it is better to have a counsel who understands you, or it is sort of a preparation to have cultural clashes backstage and neutralize them before the tribunal? In other words, would you think it is better for the litigation and counsel to be of the same culture as they are?

Bernard Hanotiau: In my opinion, it is not necessary. I have seen counsellors differ in culture from their clients, but your clients do not express themselves. We get the message from counsel, which, of course, has been discussed with the party.

Kamalia Mehtiyeva: There are so many other things to ask and to have your view on. Perhaps that brings me to another question. Since we are talking about adjudication and you, as adjudicators, do you think there is such a notion as successful adjudication? Suppose there is such a thing as successful adjudication from the perspective of arbitrators rather than the parties. Would you consider a successful adjudication to have effectively addressed cultural differences or have taken them into account?

Koorosh Ameli: If the answer is standard, the neutralizer can do that. However, it depends on what kind of culture it is. I remember you saying that there is no bad culture. However, sometimes you will have to change certain aspects, like the bad culture of corruption in my country or other countries. We have to change. Although Islamic law has been against it for centuries, it is difficult to change. So, they are all forcing the arbitrator to leak information. They think this arbitrator is your advocate. They appoint foreign counsel and arbitrators to avoid this perception, especially in unfamiliar environments like the sixth location. This tactic seeks to shape the proceedings to neutralise biased perceptions and ensure a more favourable environment for the tribunal. For example, I remember that in some cases, the Iranian arbitrator had presented 20 questions to the claimant against Iran, to the gentleman who

was in English. He said: No, you are allowed no more than three questions, which must be short.

Kamalia Mehtiyeva: Professor Hanotiau, do you wish to respond to that?

Bernard Hanotiau: From a procedural point of view, I think real international arbitration is developing.

Kamalia Mehtiyeva: That is very interesting, but there is a development of the culture of international arbitration, which is progress, a good thing, in my view. However, I wondered, because international arbitration is not developed in the same way in one country or another, perhaps the perception of counsel or the parties of the international arbitrator may be different. Indeed, the style of international arbitration or the arbitrator's adjudication may differ slightly from the state judges' style. I can say that, from what I have seen in the state courts and international arbitration, I think that is pretty much a fact. In some nations, in some cultures, a judge is a very authoritative figure, while an arbitrator is intellectually and procedurally authoritative, but there are no symbols of justice. The arbitrations are often conducted in a modern room. The arbitrator is not wearing a red gown; he or she is wearing a suit. The symbols are also important – the tone and how it is conducted. Do you think some nations, and cultures have difficulties with the image of the arbitrator, who is not as authoritative as a judge?

Bernard Hanotiau: First, let me kill the neck of a distinction often made that the civil law system would be inquisitorial and the English system is accusatorial.

Kamalia Mehtiyeva: Let us kill that one. I agree. Definitely!

Bernard Hanotiau: It is thought in universities and is nonsense. In my country, for example, you go before a judge, and the judge listens to you and does not ask questions. In the civil law system, it is thought that a judge may order the production of a document, but they never do it. In England, it is totally the contrary; the judge always asked questions. Moreover, let me give you an example of a case. I presided over a case with a Canadian and an English arbitrator, and each party had one hour to make their opening statements. From the beginning, I would say that after just 30 seconds of the first opening statement, the English arbitrator started to ask questions continuously. By the end of the hour, the poor guy had not been able to complete presenting their opening segment. I told the co-arbitrators that this was unfair, and I could not accept that. As a judge of the Supreme Court in Canada, the Canadian arbitrator was familiar with the practice of allowing questions during presentations. My English co-arbitrator said precisely the same. So, in other words, in England or North America, it looks normal for an

arbitrator to ask questions all the time, even if it restricts the time allocated to the lawyer.

Nevertheless, it is more difficult to accept a civil law judge and talk of the image of the arbitrator. Moreover, if you go to Asia, you see that they respect the hierarchy. When my daughter, for example, worked as a lawyer in Singapore, she said: When I asked a question to people working with me, generally I did not get an answer. They do not want to come to talk to me, contradicting what I think. Thus, the image of the arbitrator in Asia is that he can ask anything, and they will comply with it.

Kamalia Mehtiyeva: That is very interesting. Would you like to add something to that?

Koorosh Ameli: Yes. In civil law, judges deal with questions regarding the facts in criminal cases, some of which differ from civil cases. Civil cases are supposed to be adversarial. Concerning the hierarchy, it is the arbitrators' experience, attitude, and performance for me at the end of the day. Instead, that should be the authority rather than coming from a judge.

Morover, I have noticed that, unfortunately, people from many different cultures have no respect for the arbitrators. They only respect you if they feel you will agree with them. They are going to challenge you, or they are going to use bad words against you.

Kamalia Mehtiyeva: Yeah, of course. There is no universal answer because of many different approaches and cultures. I guess the only common thing is that no one likes to lose. There must be a culture of accepting the defeat, perhaps for just a couple of minutes that we have. We discussed with you the culture *in* adjudication. I wonder if you think that there is a culture *of* adjudication. Do you think there is one?

Bernard Hanotiau: In international arbitration?

Kamalia Mehtiyeva: Yes.

Bernard Hanotiau: No, as I said, there is an international arbitration culture. I think you can do it anywhere in the world. You will proceed relatively in the same way.

Koorosh Ameli: In that question, I think there is adjudication in decision-making. For me, that is the method of your deliberation, the method of making your mind, persuasion. That is a very important part. However, it is an area lacking cultural norms or specific rules. Even when seeking guidance, I could not find established practices, not even in the International Court of Justice or domestic judicial proceedings. One example is that judges there are advised to convene a meeting after a hearing to compile a list of key issues. In practice, I think everybody would agree that arbitrators have a short exchange of views after the hearing is closed. Subsequently, they circulate the list of

issues, allowing the co-arbitrators to provide written comments. Following this, a deliberation meeting is held, and based on the majority opinion, the chairman revises the draft accordingly. Of course, this aligns with the ICC rules stipulating that the chairman can issue the award independently if a majority is not reached. Therefore required for trying to take advantage, for example, in 1982, I was appointed as an arbitrator to a huge telecommunication case. In our jurisdiction, the majority did not agree with the court and the ICC Court as we can improve alternative opinion for the jurisdiction of the court.

Bernard Hanotiau: But so this is evidence that there is an international arbitration. Of course, they are different, but there are differences. You know, whether you are in Singapore, Hong Kong, Paris, or New York, we all work the same way. You know, but there are various ways of deliberating in Singapore, New York or Paris. So, we have all the same approach.

Kamalia Mehtiyeva: Here starts the debate. Well, there is a culture. It is not a national but rather an international arbitration culture.

Koorosh Ameli: No, about the adjudication itself. If you want to bring it to decision-making rather than the whole process, the whole process is one thing. After the hearing is finished, what are you going to do? Is there not anything that I am suggesting? You got to find out what to do. Of course, even what I just mentioned depends on the chairperson's direction and the type of case.

Bernard Hanotiau: It is not a matter of culture. Because if you have four alternatives entirely, you deliberate, you have the same four alternatives worldwide.

Koorosh Ameli: This is why I say it is not even a culture. However, this is the approach. We are taking a common sense, and it depends on what the chairman believes is right in the case.

Kamalia Mehtiyeva: Well, perhaps that is also the purpose of all these conferences and educational programs that you have mentioned, including different LLMs and international programs, whereby having a common ground and shared knowledge, we narrow the gap between state post-arbitral practice and arbitration practice. This way, state courts can become more familiar with international arbitration practices and culture.

You have been very generous with your time, and this debate could continue. However, I think we should end on this very optimistic note because you mentioned this international arbitration culture, which I did not think would be the conclusion or the spirit of the debate. When I think about this, I started today with a pro-culture manifesto in international arbitration. However, perhaps for a developing country like Azerbaijan, a new market not

yet thoroughly familiar with international arbitration, we have discussed with certain Azerbaijani lawyers that because you do not know, you do not trust. Well, perhaps when you know there is a common culture, you must assimilate it as well. Once you do that, there is no inequality. So maybe that is the sort of a promise for developing markets, emerging arbitration markets, for the future development and acceptance of international arbitration as a dispute resolution mechanism.

Since we have such a beautiful end of the evening ahead, I think it is better to at least agree on that and terminate the debate here.

I wish to thank you very sincerely. It is an honour to have you. Thank you for your generosity, time, and thoughts resulting from decades of experience. You gave it to us on a plate; we were very lucky to have it, and we took it. So thank you very much.