The role of culture in international commercial arbitration

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International commercial arbitration is the primary mean for settling international disputes of a business nature. Because of its very structure, this procedure happens across borders and, needlessly to say, cultures. As a consequence highly technical nature of international commercial arbitration, the debate about "culture" in this field has adopted a fairly narrow approach, and is generally limited to issues relating to clashes of different procedural styles and models (e. g. the discovery of evidence, which is very different in Common Law and Civil Law jurisdictions), studies about the arbitration community itself (a still quite small and tightly-knit group of professionals), or to the arbitration-friendliness of a given country. Yet, the definition of "cultural issues" in international commercial arbitration should be addressed from a much broader perspective. This article intends to fill this gap, by tackling questions related to "law and culture" in arbitration under three possible patterns: issues affecting the arbitrator, issues relating to the applicable law, and issues relevant for the arbitration procedure.

Keywords: arbitration, alternative dispute resolution, legal cultures, procedural styles, comparative law.

Introduction[1]

International commercial arbitration purports to be the primary mean for settling international disputes of a business nature[2]. It normally involves parties coming from different countries, it often takes place in a third jurisdiction, it uses different languages and involves arbitrators of different nationalities: because of its very nature, this procedure happens across borders and cultures.

When discussing about culture and international commercial arbitration it is necessary to acknowledge a series of circumstances which makes the field marginal to the "law and culture" debate so central in comparative legal studies. First of all, the cultural approach[3], which emerged in the last decades, never fully extended to international commercial arbitration — probably due to its alleged technical, if not even dry, nature: business dispute are less susceptible to a cultural analysis than other areas of law, such as

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[1] This paper expands and further elaborates on the following publications: *Colombo G. F.* Cultural Expertise and International Commercial Arbitration / ed. by L. Holden; Cultural Expertise, Litigation and Rights: A Comprehensive Guide. Routledge, 2023; *Colombo G. F.* La rilevanza dell'identità culturale dell'arbitro: recenti casi nell'arbitrato commerciale // Bocconi Legal Papers. 2019. No. 13. P. 131–144.

[2] *Born G. B.* Planning for International Dispute Resolution // Journal of International Arbitration. 2000. Vol. 17, no. 3. P. 61–72.

[3] *Cotterell R.* The Concept of Legal Culture / Comparing Legal Cultures; ed. by D. Nelken. Dartmouth: Aldershot, 1997. P. 13–21; *Rosen L.* Law as Culture: An Invitation. Princeton, N. J.: Princeton University Press, 2008; *Merry S. E.* What Is Legal Culture — An Anthropological Perspective // Journal of Comparative Law. 2010. Vol. 5, no. 2. P. 40–58; *Nelken D.* Using Legal Culture: Purposes and Problems // Journal of Comparative Law. 2010. Vol. 5, no. 2. P. 1–39; *Nelken D.* Legal Cultures. Comparative Law and Society / ed. by D. Scott Clark. Cheltenham: Edward Elgar Publishing, 2012. P. 310–327.

family or inheritance Moreover, the hendiadys culture-arbitration is commonly associated with other kinds of arbitration, such as religious arbitration[4] — sometimes, however, with appreciable detours into purely contractual matters[5] — or the connected/overlapping family arbitration[6], but not with the commercial procedure.

As a consequence of the highly technical nature of international commercial arbitration, the debate about "culture" in this field has often adopted a fairly narrow approach, and is generally limited to issues relating to clashes of different procedural styles and models (e. g. the discovery of evidence, which is very different in Common Law and Civil Law jurisdictions)[7], studies about the arbitration community itself (a very diverse but still quite small and tightly-knit group of professionals)[8], the arbitration-friendliness of a given country[9] , or questions of professional ethics[10] (or a blend of the above)[11]. While all these approaches incidentally touch on cultural issues in a broad sense, their main focus is different from this paper: the present analysis intends to concentrate on a notion of culture in line with the one embedded in the definition of "cultural expertise"[12].

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[4] *Helfand M. A.* Arbitration's Counter-Narrative: The Religious Arbitration Paradigm // Yale Law Journal. 2015. Vol. 124, no. 8. P. 2294–3051; *Broyde M. J.* Sharia Tribunals, Rabbinical Courts, and Christian Panels. Oxford: Oxford University Press, 2017; *Hutler B.* Religious Arbitration and the Establishment Clause // Ohio State Journal on Dispute Resolution. 2018. Vol. 33, no. 3. P. 337–72.

[5] *Licari F.-X.* L'Arbitrage Rabbinique, Entre Droit Talmudique Et Droit Des Nations (Rabbinic Arbitration, Between Talmudic Law and the Law of the Gentiles) // Revue de l'Arbitrage. 2013. P. 57–120; *Broyde M. J.* Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society // Chicago-Kent Law Review. 2015. Vol. 90, no. 1. P. 111–40.

[6] *Spitko E. G.* Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration // Case Western Law Review. 1999a. Vol. 49, no. 2. P. 275–314; *Spitko E. G.* Judge Not: In Defense of Minority-Culture Arbitration // Washington University Law Quarterly. 1999b. Vol. 77. P. 1065–1085.

[7] *Bernini G.* Cultural Neutrality: A Prerequisite to Arbitration Justice // Michigan Journal of International Law. 1989. Vol. 10. P. 39–56; *Berg A. J., van den* (ed.). International Dispute Resolution: Towards an International Arbitration Culture. ICCA Congress Series. no. 8. The Hague; London; Boston, 1998; *Elsing S. H., Townsend J. M.* Bridging the Common Law-Civil Law Divide in Arbitration // Arbitration International. 2002. Vol. 18, no. 1. P. 59–65; *Pair L. M.* Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization? // ILSA Journal of International & Comparative Law. 2002. Vol. 9. P. 57–74; *Slate I. I., William K.* Paying Attention to "Culture" in International Commercial Arbitration // Dispute Resolution Journal. August — October 2004. P. 96–101; *Trakman L.* "Legal Traditions" and International Commercial Arbitration // UNSW Law Research Paper. 2007. Vol. 29. P. 1–35.

[8] *Dezalay Y., Garth B. G.* Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order. Language and Legal Discourse. Chicago: University of Chicago Press, 1996; *Kidane W.* The Culture of International Arbitration. New York, 2017; *Ginsburg T.* The Culture of Arbitration // Vanderbilt Journal of Transnational Law. 2003. Vol. 36. P. 1335–1345.

[9] *Manjiao C.* Is the Chinese Arbitration Act Truly Arbitration-Friendly: Determining the Validity of Arbitration Agreement under Chinese Law // Asian International Arbitration Journal. 2008. Vol. 4, no. 1. P. 104–120; *Georgiou Ph*. Staying Litigation in Favour of Arbitration — Are Hong Kong Courts Too Arbitration-Friendly? // Asian Dispute Review. 2010. Vol. 12, no. 4. P. 124–26; *Bataya Canyas A.* Enforcement of Foreign Arbitral Awards in Turkey; Further Steps towards a More Arbitration-Friendly Approach // ASA Bulletin. 2013. Vol. 31, no. 3. P. 537–557; *Napoles P. M., de.* Analysis of Angola's Arbitration Law: Is Angola an Arbitration-Friendly Jurisdiction? // International Business Law Journal. 2014. Vol. 3. P. 187–96; *Parsons L., Leonard J.* Australia as an Arbitration-Friendly Country: The Tension between Party Autonomy and Finality // Contemporary Asia Arbitration Journal. 2014. Vol. 7, no. 2. P. 357–88; *Kush M.* Half a Step Forward: Has the Supreme Court of Indian Really Propelled towards a More Arbitration-Friendly Regime Following the Reliance Cases // International Trade and Business Law Journal. 2018. Vol. 21. P. 245–54.

[10] *D'Silva M.* A New Legal Ethics Education Paradigm: Culture and Values in International Arbitration // Legal Education Review. 2013. Vol. 23. P. 83–112.

[11] *Karton J.* The Culture of International Arbitration and the Evolution of Contract Law. 1st ed. Oxford: Oxford University Press, 2013.

[12] Cultural Expertise and Litigation: Patterns, Conflicts, Narratives / ed. by L. Holden. Abingdon, New York: Routledge, 2011; *Holden L.* Cultural Expertise: An Emergent Concept and Evolving Practices // Laws.

While this kind of analysis in not unprecedented, and there actually excellent works already published on the subject[13] literature in this field is still scarce[14]: hence, the need to approach the matter in a systematic way, along the following lines.

This paper intends to specifically focus on the role of culture in commercial arbitration, disregarding, to the maximum extent allowed, other neighbouring (albeit connected) areas, such as the above-mentioned religious arbitration. It is aimed add to build on the existing discussion about the culture of arbitration[15], by tackling questions related to "law and culture" in arbitration under three possible patterns: issues affecting the *arbitrator*, issues relating to the *law/rules applicable to the merits*, and issues relevant for the *arbitration procedure*.

1. Culture and Commercial Arbitration

Before addressing specific cases, it is appropriate to explain the above-mentioned taxonomy, and provide a short explanation of each item in the partition: arbitrators, applicable law/rules, procedure.

As for the first category: commercial arbitration deals with business matters. However, irrespective of the content of the dispute, parties may want their arbitrators to meet some "cultural" requirement. The topic is quite controversial, as — in the uncertainty about the legal nature of the relationship between the parties and the arbitrators (mandate, power of attorney, etc.)[16] this may lead to discrimination. Some cases specifically dealt with this issue: the best example is the *Jivraj v. Hashwani* case [2011] UKSC 40. In these proceedings, parties required their arbitrators to be respected members of the Ismaili community even though the contract, a joint venture agreement, had nothing to do with religion (and the law applicable to the merits was English Law). When one of the parties appointed an arbitrator who did not meet such requirement the matter was brought to the court.

In another case, conversely, the fact that an arbitrator failed to disclose his belonging to an ethnic group was considered a problem. In the *Rebmann v. Rohde* case [196 Cal. Ap.4th 1283 (Cal.Ct.App. 2011)] one of the parties complained that the arbitrator failed to disclose his Jewish origin, and since the concerned party had family roots in Nazi Germany that may have caused the arbitrator to be biased.

Finally, in the case of *Shawn Carter (aka Jay-Z) et al. v. Iconix Brand Group et al.* (American Arbitration Association — AAA and New York State Supreme Court, New York County, No. 655894/2018), the petitioner complained that the lack of diversity of the arbi-

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2019. Vol. 8, no. 4. P. 1–28; Cultural Expertise, Law, and Rights: A Comprehensive Guide / ed. by L. Holden. Abingdon: Routledge, 2022.

[13] Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends / eds S. N. Frommel, B. A. K. Rider. Studies in Comparative Corporate and Financial Law. Vol. 4. The Hague, Boston: Kluwer Law International, 1999; *Karton J.* International Arbitration Culture and Global Governance // International Arbitration and Global Governance: Contending Theories and Evidence / eds W. Mattli, Th. Dietz. Oxford: Oxford University Press, 2014. P. 74–116. — The best example of this approach (to which this paper is highly indebted) is undoubtedly; *Licari F.-X.* Beyond Legal Pluralism: Some Thoughts on Paideic Arbitation / Global Private International Law: Adjudication without Frontiers / eds H. M. Watt, L. Bíziková, A. B. de Oliveira, D. P. F. Arroyo. Cheltenham: Edward Elgar Publishing, 2019. P. 182–190.

[14] *Kutty F.* The Shari'a Factor in International Commercial Arbitration'. Osgoode Hall Law School, 2006; *Zeinali A.* The Effect of Culture and Religion on Enforcement of International Arbitration Awards in Iran. San Francisco: Golden Gate University School of Law, 2018.

[15] *Karton J.* The Culture of International Arbitration and the Evolution of Contract Law.

[16] *Bedjaqui M.* The Arbitrator: One Man-Three Roles — Some Independent Comments on the Ethical and Legal Obligations of an Arbitrator // Journal of International Arbitration. 1988. Vol. 5, no. 1. P. 7–20; *Brode P. T.* The Arbitrator's Role: A Conservative View // Windsor Review of Legal and Social Issues. 1989. Vol. 1. P. 17–33.

tral body (i. e. the scarce availability of African American in the AAA list of arbitrators) was a violation of public policy: he brought the case to the New York State Supreme Court to obtain an order to stay the proceedings until the "racial bias" could have been resolved.

All those cases show how the "culture" (or "heritage") of an arbitrator or an arbitral tribunal may play an important role in the dispute.

As for the second kind of issues (those relating to the applicable law): generally speaking, international commercial arbitration is an area in which a certain degree of creativity about the applicable law may be seen: arbitrators sometimes rely to the *Lex Mercatoria* (often in the semi-codified form of the UNIDROIT Principles)[17] or to other non-State law, such as *Lex Sportiva*, etc. Notwithstanding this flexibility, however, the world of business is slightly more uncomfortable in juggling with other bodies of rules, such as religious law, or purely customary practices. This does not mean, however, that arbitrators are allowed to ignore it should the parties wanted otherwise.

In the case of the New York Diamond Dealers Club (DDC) arbitration, for example, the applicable rules involve a complex blend of trade customs, New York law, and provisions from the Hasidic legal tradition: this of course requires a specific cultural preparation on the side of the arbitrators, who would otherwise be unable to properly adjudicate the case.

The third kind of cases is dealing with issues relevant for the arbitration procedure: as mentioned, procedural styles are different across legal traditions. Civil Law practitioners are not used to manage cross-examination of witnesses, or massive document discovery typical of the Common Law (and more specifically American) system. Conversely, lawyers from Common Law background are puzzled by the stiffness of Civil Law style evidentiary practice.

In the case of Japan, the legendary stereotype about the importance of "harmony" and "conciliation" is still viewed by foreign operators as a barrier to proper adjudicative procedures. In arbitration, this favour towards non-contentiousness allegedly takes the form of improper "med-arb" procedures, in which the arbitrator acts a mediator and tries to help parties reach a settlement. While this procedure is not per se a problem, if mishandled it may create serious issues, such as question of *préjugé*, or violation of due process.

Considering the proceedings in a culturally-sensitive way is therefore crucial.

The above-mentioned partition, of course, is not perfect: for example, it is actually difficult to conceive the second issue (i. e. the application of some system of norms only known to a restricted community) without addressing the first: an "outsider" arbitrator will rarely, if ever, be considered. Rather than having the pretension of being an accurate taxonomy, this methodological choice is primarily aimed to offer the reader the possibility to approach the relationship between "arbitration" and "culture" from different angles.

Several categories of legal professionals are indeed the target of this paper: first of all, parties to a dispute (and their lawyers) may want their arbitration proceedings to match their needs for a specific cultural sensitivity, but they need to be mindful that the law may not always be capable of accommodating their requests. Judges are often invested with the task to evaluate the validity of an arbitration agreement, or to provide assistance to the procedure (for example, by intervening in the appointment of arbitrators when a reticent party fails to cooperate for that purpose), or to grant recognition and enforcement to an award: they need to have the specific preparation to address the issue of whether some cultural specificity of the proceedings may result in discrimination (either substantive or procedural) or in a violation of public policy. To be put in the position to carry out correct evaluations, specific cultural expertise is necessary: the case studies described in this paper are aimed to provide guidance to this effect.

[17] *Berger K. P.* International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts // American Journal of Comparative Law. 1998. Vol. 46. P. 129–150.

2. Cultural aspects relating to the arbitrator

One of the key advantages in international commercial arbitration is the possibility for the parties to choose as arbitrator the person they find most suitable to decide their specific dispute.

Of course, this freedom is not unlimited, as there are several rules in place to ensure that the choice does not result in undue benefits for either party or in other violations of due process: the most significant limitation is that, generally speaking, arbitrators must be independent from the parties and impartial towards the outcome of the dispute[18].

Moreover, while parties are in theory free to identify their "ideal" arbitrator, frivolous requirements may result in the nullity (or other form of pathology) of the arbitration agreement. Of course these need to be evaluated according to the circumstances: for example, the requirement of having an arbitrator "who has worked as a fashion model" may be considered inappropriate in a case involving, for example, a construction contract (and the just want to enjoy the beauty of the concerned individual), whereas it may be deemed valid in a dispute about a modelling service agreement. While parties enjoy ample freedom to tailor their arbitration agreements in the way they feel is more suitable for their case, this freedom cannot be used to circumvent the rules: handbooks mention that a clause which required "an English-speaking Italian national with a French law degree and experience in Middle-East construction contracts" was declared invalid not because any of those requirements was *per se*, flawed, but because the *combination* of all of them resulted in an indirect way to identify a specific individual (without mentioning them).

To avoid even just the mere appearance of bias, there are also rules in place to make sure that parties are not exposed to situations in which they may feel uncomfortable because of language, nationality, etc., of the arbitrators involved. For this reason, there are rules in place to avoid, for example, that in an international case either the sole arbitrator or the chairperson of the arbitral tribunal is of the same nationality of either party (e. g. ICC Rules).

The broader question, however, is: while parties are free to choose their arbitrators, and they are entitled to an arbitral tribunal which makes them feel at ease, to which extent should the law accommodate their wishes? The three cases which follow provide different approaches to this question.

2.1. *Jivraj v. Hashwani* case [2011] UKSC 40

The *Jivraj v. Hashwani* case, which was eventually decided by the UK Supreme Court on July 27, 2011 after an extremely controversial judicial path, is probably the most significant case dealing with religious qualification of arbitrators in a *commercial* dispute. The case has been commented by dozens of scholars and practitioners, both from the arbitration theory and the labour law's points of view[19].

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[18] *Lawson D. A.* Impartiality and Independence of International Arbitrators // ASA Bulletin. 2005. Vol. 23, no. 1. P. 22–44; *Rustamova A.* Neutrality of Arbitrators. LL. M. Short Thesis. Central European University, 2009. Available at: http://www.etd.ceu.hu/2009/rustamova_amina.pdf (accessed: 08.12.2023); *Hogas D.-L.* Insights on the Arbitrator's Requirement of Independence // Journal of Law and Administrative Sciences. Special Issue. 2015. P. 235–248; *Schafler M. D., Deepshikha D., Eckler A.* The Appearance of Justice: Independence and Impartiality of Arbitrators under Indian and Canadian Law // Indian Journal of Arbitration. 2017. Vol. 5 , no. 2. P. 150–63.

[19] *Sandberg R.* Jivraj v. Hashwani // Law and Justice. 2009. Vol. 163. P. 186–187; *Dundas H. R.* The Return of Normality: The UK Supreme Court Decides Jivraj // Arbitration. 2011. Vol. 77, no. 4. P. 467; *Komorowska A.* Case Note — Jivraj v Hashwani [2011] UKSC 40 // UK Law Students Review. 2011. Vol. 1. P. 80–85; *Rabinowitz L.* Arbitration and Equality: Jivraj v Hashwani // Business Law International. 2011. Vol. 12, no. 1. P. 119–126; *Style C., Cleobury Ph.* Jivraj v. Hashwani: Public Interest and Party Autonomy

The facts of the case are as follows: in 1981, the parties (two businessmen both belonging to the Shia Imami Ismaili Muslim religion) entered into a joint venture agreement for the shared management of their property investments. The law applicable to the substance of said agreement was English law; the arbitration agreement enshrined in the contract read as follows: "[any dispute] shall be referred to three arbitrators (acting by a majority) one to be appointed by each party and the third arbitrator to be the President of the HH Aga Khan National Council for the United Kingdom for the time being. All arbitrators shall be respected members of the Ismaili community and holders of high office within the community". The place of arbitration was London, United Kingdom.

In 2008, Mr. Hashwani started a claim against Mr. Jivraj. He, however, chose as party-appointed arbitrator Sir Anthony Colman, a very expert and skilled lawyer but not a member of the Ismaili community. When Mr. Jivraj objected to this appointed, Mr. Hashwani replied that the entry into force of The Employment Equality (Religion or Belief) regulations 2003[20] (enacted as implementation of the 2007/78/EC Council Directive) had made the arbitration agreement illegal in the part in which required the arbitrator to possess a religious affiliation. The matter was brought to court, and namely to the Commercial Court, which had jurisdiction over the case.

The Commercial Court ruled in favour of Jivraj: according to the judge, arbitrators cannot be considered employees, and therefore the rules under the Regulations were not applicable to them. More so, as a) the religious qualification was considered to fall under the "Exception for genuine occupational requirement" and parties had specifically crafted the arbitration agreement to suit their sense of belonging to a given community.

The Court of Appeals, however, overturned the judgment and held that a) for the purpose of the Regulation, the task of arbitrator fell under the definition of "employment" and as such was subject to the relevant provisions; b) there was no true, legally justifiable, need to attach to the arbitrator a religious belonging: the applicable law was English law, and no religious expertise was necessary to arbitrate the case; and c) removing the — illicit — religious requirement would create a radically different arbitration agreement: hence, the solution would be to declare the entire provision void, referring the dispute to the jurisdiction of State courts.

The decision sent shockwaves into the arbitration community: the reaction was almost unanimous in saying that the Court of Appeals had created a *vulnus* into the sanctity of arbitration which put the entire system at risk. It is not by chance that even the London Court of International Arbitration decided to join the proceedings and stand before the Supreme Court.

// Arbitration International. 2011. Vol. 27, no. 4. P. 563–574; *Zaiwalla S.* Are Arbitrators Not Human? Are They from Mars? Why Should Arbitrators Be a Separate Species? // Journal of International Arbitration. 2011. Vol. 28. P. 273–82; *McCrudden C.* Two Views of Subordination: The Personal Scope of Employment Discrimination Law in Jivraj v Hashwani // Industrial Law Journal. 2012. Vol. 41, no. 1. P. 30–55; *Baker C. M., Greenwod L.* The Regionalisation of International Arbitration: Maintaining International Standards in Appointing Arbitrators. A Comment on Jivraj v Hashwani / The Practice of Arbitration Essays in Honour of Hans van Houtte, edited by Patrick Wautelet, Thalia Kruger, and Govert Coppens. Oxford: Hart Publishing, 2012. P. 15; *Freedland M., Kountouris N.* Employment Equality and Personal Work Relations — A Critique of Jivraj v Haswani // Industrial Law Journal. 2012. Vol. 41, no. 1. P. 55–66; *Oseni U. A., Kadouf H. A.* The Discrimination Conundrum in the Appointment of Arbitrators in International Arbitration // Journal of International Arbitration. 2012. Vol. 29. P. 519; *Dasteel J.* Arbitration Agreements That Discriminate in the Appointment and Selection of Arbitrators // Richmond Journal of Global Law and Business. 2012. Vol. 11, no. 4. P. 383–405; *Connolly M.* Jivraj v Hashwani' // Employment Law Briefing. 2013. No. 113. P. 3–5; *Licari F.-X.* Beyond Legal Pluralism: Some Thoughts on Paideic Arbitation.

[20] Now superseded by the Equality Act 2010.

The Supreme Justices restored the peace of mind in the arbitration community[21]. In addressing the main concerns raised by the case, the judges established that arbitrators are not, at least for the purposes of the application of the 2003 Regulation, workers. The norm requires that the person who performs the services does that under the direction of another person, and of course arbitrators are not under the control of the parties in that sense. Moreover, and to the delight of the arbitration industry[22], the judges held that implying that there is no need to be a member of Ismaili community to apply English law denoted "a very narrow view on the function of arbitration proceedings".

The *Jivraj* case is notable under many perspectives: aside for the aspects pertaining to the nature of the legal relationship between arbitrators and parties (extremely interesting for arbitration theorists, but less for the audience to which this paper is addressed), the decision explicitly allows parties to attach a religious requirement to their selection of arbitrators.

The decision, however, is not immune from criticism: if we were to take the judgement literally, then the conclusion would be that virtually all forms of discrimination normally forbidden in employment relationships would be acceptable. As it was correctly pointed out[23], several anti-discrimination laws in various counties are applicable *irrespective* of the subordinate relationship implied in an employer-employee situation[24].

To fully appreciate *Jivrai*, then, it is necessary to slightly broaden the scope and engage with Licari's definition of "paideic" arbitration[25]: context, in this case, was extremely relevant. The fact that both parties belonged to the same religious community, a community which is (also) based on some legal institutions (such as the Ismaili Constitution, which provides, in Articles 12 and 13, systems of dispute resolution), and the fact that the arbitration agreement itself had a religious requirement not only for the party appointed arbitrator, but also for the president of the tribunal, allows accept the interpretation of a genuine "religious requirement" to perform a function which, *prima facie*, only required an adequate knowledge of English law and joint venture agreements. To borrow Licari's analysis: "In other words, it is not only a question of resolving a conflict, but of restoring peace in the respect of the community ethos, of ensuring that the conciliator or arbitrator respects and protects the values of the litigants in a liberal society where traditional values have taken a back seat"[26].

2.2. *Rebmann v. Rohde* case [196 Cal.Ap.4th 1283 (Cal.Ct.App. 2011)]

Another famous case deals with the arbitrator's religion, but in this instance the problem addressed in *Jivraj* is reversed: a party claimed that and arbitrator "religious and cultural affiliation" would have made him unsuitable to decide a case.

The argument is not, in itself and in purely abstract terms, fully devoid of any merits: as mentioned before, in arbitration is not sufficient that whoever serves as arbitrator is only independent from the parties (an objective condition), but also impartial *vis-à-vis*

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[21] *Chalk R., Choong J.* Dark Cloud Lifted: Jivraj v Hashwani // Asian Dispute Review. 2011. Vol. 13. P. 121–122.

[22] *Komorowska A.* Case Note — Jivraj v Hashwani [2011] UKSC 40 // UK Law Students Review. P. 84.

[23] *Dasteel J.* Arbitration Agreements That Discriminate in the Appointment and Selection of Arbitrators. P. 384.

[24] The decision was also criticized because, according to one scholar, it conflates and blends together *commercial arbitration* and *religious arbitration* (*Brachotte S.* The Limits of Arbitration Law in Addressing Cultural Diversity: The Example of Ismaili Arbitration in the United Kingdom // Laws. 2021. Vol. 10, no. 2. P. 47).

[25] *Licari F.-X.* Beyond Legal Pluralism… P. 182–190.

[26] Ibid. P. 186.

the dispute (a mixed objective-subjective condition)[27]. Ideological or cultural stances may indeed play a role in this regard: a famous environmental activist may not be considered suitable to judge a case where a company with a notorious pollution record is involved; with a bit more of logical stretch, we may cast a shadow over the impartiality of an arbitrator belonging to a cultural or ethnic minority may not be the most appropriate choice to decide a dispute involving a State-owned company of a country where that minority is undergoing discrimination. However, the scrutiny of those situations must be carried out with care and integrity: otherwise, "racist" or discriminatory bias may be granted a dignity they should and must not receive in the arbitration world.

The *Rebmann v. Rohde* case[28] was a dispute arising out of a joint venture agreement between an American company and a German one, which eventually was resolved by arbitration administered by JAMS. The arbitrator selected for that case was a retired federal judge, who duly filed his declaration of independence and impartiality: according to his statement, he had no specific disclosures to make based on the information the parties provided. The case could then proceed and a decision was made: while the decision on the merits was not particularly heavy on the losing party, legal expenses were significant, and according to the "loser pays" principle commonly applied in arbitration, such party had to shoulder it.

When the case was brought to court for confirmation, the defendant claimed that the arbitrator's religious and cultural background would have affected his impartiality. It turned out that the arbitrator was of Jewish origin, the son of two refugees from Nazi Germany, and was actively involved in an organization called the "1939 Club" active in preserving the memory of the Holocaust. The defendant was of German origin, his father has served in the *Wermacht* during World War II, and his father-in-law was a member of the *Schutzstaffel*. He consequently informed the trial court that if he had "known about his religious affiliation, his cultural affiliation, and the dedication to keeping the memory of the Holocaust alive, I never would have allowed him to be the arbitrator in my case". The court briskly dismissed the grievance[29].

There are indeed many technical reasons why the line of the defence put forth by Mr. Rohde's attorney was unconvincing: one of which is, of course, raising doubts on the impartiality of an arbitrator only after a negative award is issued. The court did not accept the motivation under which the defendant could only become suspicious about the lack of impartiality after exorbitant legal costs were awarded, not the clumsy point by which, since the arbitrator did not look "Jewish" enough, the party could not have raised the issue earlier[30].

On the question of cultural identity, the court plainly says that the mere belonging to a given group, community, belief, minority does not imply anything as far as independence and impartiality of an arbitrator are concerned[31]: even more, it does not even trigger a duty to disclose.

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[27] *Blackbaby N., Partasides C., Redfern A., Hunter M.* Redfern and Hunter on International Arbitration-Student Version. 5th ed. Oxford: Oxford University Press, 2009; *Paulsson J.* The Idea of Arbitration. Oxford, 2013. P. 149–151; *Grenig E.* After the Arbitration Award: Not Always Final and Binding // Marquette Sports Law Review. 2014. Vol. 25, no. 1. P. 84; *Licari F.-X.* Beyond Legal Pluralism… P. 182–190.

[28] *Mainland R. R.* Full Disclosures // Los Angeles Lawyer. 2011. Vol. 34, no. 8. P. 29–35.

[29] "[…] arguments are patently without merit".

[30] "If Arbitrator Haberfeld were an Orthodox Jew with outward characteristics that would have disclosed who he was, my clients' right to inquire would have been triggered. It's that kind of disclosure that is necessary to be advanced by this court. He further argued: 'Well, an Orthodox Jew or a Hasidic Jew would have the hairstyle, the beard, the… *yarmulke*, those kinds of things that would communicate his Jewishness and trigger the duty to inquire as to his history'. We very much disagree".

[31] "This argument implies that a judge who is a member of a minority cannot be fair when a case somehow related to that minority status—no matter how remote or tenuous that relationship might be —

The Californian judges took also a stance on the relationship between the arbitrator's cultural identity and the matter of the dispute. In this case the court is slightly more ambiguous: the judgement says that the impartiality of the arbitrator is even less questionable, as the case "had nothing to do with World War II, and nothing to do with the Holocaust". The judges, however, feel the need to specify in a footnote that: "We do not imply that if this case did have something to do with the Holocaust or World War II, then disclosure would automatically be required. Such facts are not before us", — leaving the reader somehow puzzled about whether, and to which extent, the subject matter should be taken into consideration when judging independence and impartiality.

2.3. *Carter et al v Iconix Brand Group Inc et al*, New York State Supreme Court, New York County, No. 655894/2018

One of the most notable and widely commented cases about diversity in the arbitral community is the New York State Supreme Court, New York County, No. 655894/2018, *Carter et al v Iconix Brand Group Inc et al*[32]. Shawn Carter is one of the most famous rap artists in the world, and he is known to the general public under the name of Jay-Z. In 2018, he entered into a dispute with the Iconix Brand Group, a clothing manufacturing company, for the sale of his brands to such company a few years before. The relevant contractual documents included an arbitration agreement requiring disputes to be submitted to the American Arbitration Association (AAA).

When it was time to appoint the arbitral tribunal, Mr. Carter brought the dispute to the court: according to his defence, the AAA was not diverse enough, and in particular, it lacked a sufficient number of African American male arbitrators: Jay-Z felt that to be an intolerable form of discrimination, sufficient to allow him to avoid the arbitration agreement[33]. He sought a temporary decision from the New York Supreme Court to halt the proceedings, which he was granted: eventually, after the AAA provided Mr. Carter with a list of possible arbitrators fulfilling his request for an African American male professional, he agreed to proceed to arbitration.

The case attracted significant media coverage, both because Mr. Carter is a public figure and for the issue at stake, racial discrimination, is indeed heatedly debated in the United States[34].

While the strive to achieve a more diverse arbitration community is of course commendable and fully legitimate, on purely legal grounds the situation is more complex: to put it technical terms, it is difficult to say whether Jay-Z's claim is legally grounded. Contrary to the situation in *Jivraj*, the arbitration agreement did not require the arbitrator to be African American, so there is no contractual basis for the claim. Moreover, a very controversial issue (which unfortunately was addressed but not fully debated in the court

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comes before that judge. A judge or arbitrator's impartiality should never be questioned simply because of who he or she is".

[32] *Green M. Z.* Arbitrarily Selecting Black Arbitrators // Fordham Law Review. 2020. Vol. 88, no. 6. P. 2255–2286; *La Rue H. C., Symonette A. A.* The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection // Howard Law Journal. 2020. Vol. 63, no. 2. P. 215–248; *Spigelman D.* The Need for Women in Arbitration and How to Implement Diversification of Arbitral Appointments // American Journal of Mediation. 2020. Vol. 13. P. 165–166; *Francis V.* Ethics in Arbitration: Bias, Diversity, and Inclusion // Cumberland Law Review. 2021. Vol. 51, no. 2. P. 435–436; *Glover G. M. II.* Reconsidering the LSAT to Improve Diversity in Arbitration // Resolved: Journal of Alternative Dispute Resolution. 2021. Vol. 9, no. 1. P. 8–11.

[33] *Oduntan G.* Jay-Z's $200-Million Clothing Battle Could Be Game Changer for Black Lawyers the World Over // The Conversation. 6 Dec. 2018.

[34] *Stempel J.* Jay-Z Wins Fight for African-American Arbitrators in Trademark Case // Reuters. 31 Jan. 2019.

procedure) is that Mr. Carter specifically asked for a male arbitrator: an African American woman would not have met his request[35].

Another point which may have been worth exploring is whether Jay-Z had asked for an African American male as arbitrator because he would have been in a better position to understand the subject matter of the disputes, i. e. the interpretation of a licensing agreement for clothes the general public would associate to African American culture. The settlement of the dispute did not allow for further elaboration on this point.

The *Jay-Z Case* is rightfully considered by many a "wake up call" to the arbitration community. The lack of diversity in arbitration is a central problem in the current debate. The need to go beyond the "male, pale, and stale"[36] composition of the arbitral élite is now a widely shared concern. However, this issue goes beyond the purposes of this paper, and I refer to the relevant literature for further analysis[37].

2.4. Representation, Diversity, Identification

All three cases reported above show that, irrespective of the merits of the underlying dispute, the "cultural" identity of the arbitrators may play a very important role, and that irrespective of whether this identity is desired (*Jivraj*, *Jay-Z*) or undesired (*Rebmann*) by the parties.

It is interesting, though, to underline that the discussion about the (ir)relevance of ethnic and cultural origin is used in a diametrically opposed way in *Jivraj* and in *Rebmann*: in the British case, the judge ruled that the religious requirement could be *relevant* even though the dispute had nothing to do with religion, whereas in *Rebmann* the court found that the ethnicity (and religious faith) of the arbitrator was *irrelevant* also because the dispute did not deal with matters of religious of cultural relevance.

It is equally interesting to notice that, in the *Jay-Z* case, the request for greater diversity and the alleged intention to fight discrimination may have actually resulted in reducing diversity and allowing for different forms of discrimination when Mr. Carter's lawyers specifically asked for an African American male to serve as arbitrator.

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[35] From the court transcript:

THE COURT: It has to be a male? It can't be an African-American female? Why does that matter?

MR. SPIRO: The protecting class that we are suggesting that requires a proper veneer for is African-American male. All the constitution cases, all the cases that interpret protected classes. Just so the Court understands, because I want to go back to something the Court said before, all we're seeking here, Judge, is that the panel have options, that's all we're seeking. Option of African-American panel members of the 200 we can select. What our order, if you look at the way is fashioned, is only to give us time to try to add to the populated AAA roster, to try to better understand whether there aren't other African-Americans in other jurisdictions or other people.

THE COURT: But it can't be African-American women, it can only be African-American men is what you're telling me. Okay.

MR. SPIRO: I'm not saying

THE COURT: That's exactly what you just said and it's on the record. So that is what it is.

[36] *Peters E.* Pale, Male, and Stale: Addressing Diversity in Arbitration // ADR Resarch Institute of Canada (blog). February 22, 2018. Available at: https://adric.ca/adr-perspectives/pale-male-and-stale-addressing-diversity-in-arbitration/ (accessed: 08.12.2023).

[37] *Franck S. D., Freda J., Lavin K., Lehmann T., Van Aaken A.* The Diversity Challenge: Exploring the Invisible College of International Arbitration // Columbia Journal of Transnational Law. 2015. Vol. 53, no. 3. P. 429–506; *Greenwood L.* Tipping the Balance — Diversity and Inclusion in International Arbitration // Arbitration International. 2017. Vol. 33, no. 1. P. 99–108; *Stempel J.* Jay-Z Wins Fight for African-American Arbitrators in Trademark Case; *La Rue H. C., Symonette A. A.* The Ray Corollary Initiative…; *Bjorklund A., Behn D., Franck S. D., Giorgetti Ch., Kidane W., de Nanteuil A., Onyema E.* The Diversity Deficit in International Investment Arbitration // The Journal of World Investment & Trade. 2020. Vol. 21, no. 2–3. P. 410–440; Diversity in International Arbitration: Why It Matters and How to Sustain It / eds Sh. F. Ali, F. Balcerzak, G. F. Colombo, J. Karton. Northamtpon: Edward Elgar Publishing, 2022.

The question of how and to which extent should the law accommodate the wishes (or even whims) of the parties is indeed a tricky one. The solution is probably to be found on a case-by-case basis, bearing into mind that it is necessary to balance the parties' right to choose their arbitrators with the mandatorily applicable rules and laws. If parties choose institutional arbitration and the institution has a "closed-list" of arbitrators (i. e. only individuals listed in the rooster approved by said institution are eligible for appointment) then trying to walk away for such choice claiming lack of options would be an uphill battle (unless the list had been drastically shortened after the arbitration agreement was entered into). Legislations across the world are relaxing their criteria to allow parties' freedom to choose their arbitration: e. g. Saudi Arabia has, in 2012, cancelled the requirement for arbitrators to be men: however, it is necessary to bear in mind such issues when choosing the place of arbitration.

Arbitration agreements may not, however, be employed to endorse discrimination. While some cultural or religious-based requirements may be tolerated (as shown in the *Jivraj* case), it is very likely that a court may find an agreement which provides for the arbitrator not to be Jewish (or Muslim; or Catholic; or Asian; or a woman) would be find in breach of public policy and hence inoperative in the vast majority of jurisdictions.

3. Cultural aspects relating to the applicable law/rules

International commercial law is an area of law where usages and customs play a very important role.

The relevance of these factors is actually enshrined in some of the most successful and widespread international law tools, such as the 1980 United Nations Convention on Contracts for the International Sale of Goods[38].

This is particularly true in sectors where the concerned trade is based on deeply-rooted traditions and/or the majority of operators belong to the same ethnic or religious group. A perfect example of this intersection is the diamond trade.

The diamond trade industry has been, for historical reasons, long dominated by Jewish traders[39]. While currently other players have entered the field, and in particular Jain merchants from India[40], the well-established connection between the professional commerce of precious stones and the Hasidic tradition resulted in a racking of usages embedded in the Jewish Orthodox community into the diamond trade, and now even traders belonging to other religions or cultures feel bound by those usages. An example will make the situation clear: in the commerce of diamonds a contract is not considered validly entered into if the parties do not shake hands and say "*mazal u' bracha*", a traditional Yiddish expression to wish good luck[41].

It is well-known that closely-knit communities have very effective tools to enforce compliance with the rules on their members even without the recourse to formal means of dispute resolution: this tends to be true — of course with huge differences in modalities,

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[38] See, for example, Art. 9, para. (b): "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the same type involved in the particular trade concerned".

[39] *Richman B. D.* Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York // John M. Olin Center for Law, Economics & Business, Discussion Paper No. 384. 2002.

[40] *Gómez M. A.* Precious Resolution: The Use of Intra-Community Arbitration by Jain Diamond Merchants // B-Arbitra. Vol. 2. 2013. P. 119–139.

[41] *Bernstein L.* Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry // The Journal of Legal Studies. 1992. Vol. 21, no. 1. P. 121–122; *Gómez M. A.* Precious Resolution... P. 128.

procedures, and norms — in Tokugawa Japan[42] as well as in the cattle-breeding communities of contemporary California[43]. The diamond trading industry, which indeed is a relatively small social environment, is no exception to this rule[44], and studies have well demonstrated the presence of more or less institutionalized mechanism of (culturally-sensitive) mechanisms of informal dispute resolution[45].

It is not great surprise, equally, to learn that the practice of contemporary adjudicative procedures has its roots in long-established, societal-elite managed, community-based settlement systems (and specifically the *Beth Din* typical of the Jewish *kehillah*)[46], but this again has been widely studied[47] in different societies and is not strictly related to the present research.

What is interesting for the purpose of this paper, in fact, is not the study of informal procedures in closely-knit communities, nor their historical origin, but their morphing into formal, adjudicative commercial arbitration procedure which nevertheless are profoundly moulded by their cultural background.

One of the best case-studies in this regard is the New York Diamond Dealers Club arbitration procedure (in short "DDC Arbitration"), which is the primary (and according to some, basically the only)[48] way of settling disputes for diamond traders in New York. While arbitration is mandatory for Club members[49] the DDC arbitration has recently opened its doors to non-club members, and it is actually encouraging its members to actively promote the procedure by inserting arbitration agreements in their contracts (Diamond Dealers Club New York 2019). This shift from a smaller community (i. e. the Club members) to a broader audience (i. e. people trading in the industry but outside the Club) is very significant, because it signals an attempt to steer disputes inside a long-tested mechanism managed by the community. "Why is arbitration so important in the diamond industry", the DDC asks rhetorically, and the answer — which includes of course the non-irrelevant aspects of confidentiality and swiftness — leads exactly to the point scrutinized under this paragraph: "[…] expertise. As those of you in the industry might know, our industry is quite unique. The diamond industry is highly technical, and functions on longstanding industry traditions that are unusual anywhere else. So as you might imagine, it's hard for judges and especially juries to understand diamond cases. Our arbitrators are all chosen from within the industry, and are therefore immediately familiar both with the trade custom and technical aspects of the diamond industry" (Diamond Dealers Club New York 2019). The arbitrator's expertise, which is of course a central factor in any arbitration, becomes

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[42] *Henderson D. F.* Conciliation and Japanese Law. Tokugawa and Modern. Vol. I–II. Tokyo: University of Tokyo Press; Seattle: University of Washington Press, 1965.

[43] *Ellickson R. C.* Order without Law: How Neighbors Settle Disputes. Cambridge, Mass.: Harvard University Press, 1991.

[44] *Bernstein L.* Opting out of the Legal System… P. 115–157; *Richman B. D.* How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York // Law & Social Inquiry. 2006. Vol. 31, no. 2. P. 383–420.

[45] For example, Gómez offers a fascinating analysis of the application of *anekāntavāda*-inspired intra-community conciliation among Jain diamantaires (*Gómez M. A.* Precious Resolution… P. 133).

[46] *Shield R. R.* Diamond Stories: Enduring Change on 47th Street. London, 2006. P. 8. — While those procedures are often considered informal, their functioning is actually much closer to arbitration rather than mediation in a contemporary sense.

[47] *Zirhlioglu E.* The Diamond Industry and the Industry's Dispute Resolution Mechanism // Arizona Journal of International and Comparative Law. 2013. Vol. 30. P. 447–507.

[48] *Shield R. R.* Diamond Stories: Enduring Change on 47th Street. P. 195.

[49] *Bernstein L.* Opting out of the Legal System… P. 120. — The application form to become a member includes this commitment: "To arbitrate all claims with other members of the DDC and with members of other Diamond Bourses which are part of the WFDB arising out of the diamond, precious stone, and jewelry business in accordance with the procedures set forth in the DDC Arbitration By-Laws and the By-Laws and Rules of the WFDB".

crucial when the access to the required knowledge is restricted to a limited number of individuals. As pointed out by Bernstein: "The DDC Board of Arbitrators does not apply the New York law of contract and damages, rather it resolves disputes on the basis of trade customs and usages. Many of these are set forth with particularity in the club's bylaws, and others simply are generally known and accepted. Although at first glance diamond transactions appear to be simple buy-sell agreements, complicated controversies often arise, particularly in the sale of polished stones. In general, disputes fall into three main classes: those that have explicit remedies prescribed in the trade rules; those that have no explicit remedies prescribed but are common enough that they are dealt with consistently according to widely known customs; and those complex disputes that the arbitrators either decline to hear or decide in accordance with rules of decision and damage measures that neither party can predict ex ante"[50].Those issues are particularly dense as far as applicable laws are concerned. Continues Bernstein: "In complex cases that are neither explicitly covered by the trade rules nor dealt with according to established customs, it is difficult to determine what substantive rules of decision are applied. Arbitrators explain that they decide complex cases on the basis of trade custom and usage, a little common sense, some Jewish law, and, last, common-law legal principles"[51].

It is patently obvious that in such cases, a culturally-sensitive selection of the arbitrator is crucial. While of course the pre-selection carried out by the DDC restricts parties in their freedom of choice of the arbitrators, it is clear that it would make little or no sense to appoint an outsider. More so, as it is a specific ethical duty of the arbitrator to accept an appointment only when they consider themselves adequately equipped to deal with the subject-matter of the dispute.

4. Cultural aspects relating to the arbitration procedure

Commercial arbitration, and specifically *international* commercial arbitration, has the ideal pretension to be somehow detached from any specific legal system[52]. While of course the law of the place of arbitration has a significant impact on the procedure (mandating, for example, the formal requirements for the validity of the award), international arbitration should be considered as the special procedure it is. One of the most frequent misunderstandings in this regard is the tendency of some lawyer to apply, *sic et simpliciter*, procedural rules practiced in litigation before the State courts to arbitration. To put in simple terms: the fact that an arbitration takes place in some American State where discovery happens in civil courts does not mean that arbitration is bound by the same evidentiary rules. This, of course, is not only the product of the lack of specific preparation, but it is also the result of some understandable (at least, from a behavioural point of view), path-dependency of the subjects involved.

The perception about the pervasiveness of some practices in a given jurisdiction, or of the path-dependency of its practitioners, could actually cripple the successful positioning of that country as attractive place of arbitration. This is indeed the case of Japan.

From the point of view of "mythology"[53], Japan was (and still is, to some extent) perceived as a "partial" country, where litigation (and arbitration) would favour local parties

[50] Ibid. P. 126.

[51] Ibid. P. 127.

[52] *Kaufmann-Kohler G.* Globalization of Arbitration Procedure // Vanderbilt Journal of Transnational Law. 2003. Vol. 36. P. 1313–1333.

[53] I use this word echoing the famous paper: *Haley J. O.* The Myth of the Reluctant Litigant // Journal of Japanese Studies. 1978. Vol. 4, no. 2. P. 359–390.

against foreign competitors[54]. This representation, which is the result of some English-language scholarship[55] mainly written during the years of the Japanese economic boom, is groundless.

Another frequent complaint foreigners move against the "Japanese-style" of arbitration is the tendency to put in place, sometime quite aggressively, mediation techniques during the arbitration proceedings[56]: this was done by applying *mutatis mutandiis*, the *wakai* conciliation strategy widely used in the framework of court litigation[57]. While *Med-Arb* procedures are certainly not unique to the Japanese archipelago, the representation was of a uniquely "Japanese" attitude towards them: an undue pressure to mediate by arbitral tribunals, resulting in a violation of the parties' freedom to choose a dispute resolution mechanism of their preference, and the procedurally problematic mixing of the role of arbitrator and mediator[58]. This alleged attitude, however, it is not found in practice to a level which could justify defining it a "feature" of arbitration in Japan.

This notwithstanding, the misperception of Japan as a place where a party cannot obtain clean, neat arbitration proceedings has percolated in the collective perception: as clearly demonstrated by Hayakawa[59], this was, in the late 90s, still the prevailing depiction of Japan.

It is indeed fascinating (and somehow peculiar) [60] that this whole debate revolves around the notion of "culture"[61], and that whoever tries to be culturally-sensitive inevitably falls into some broad generalization: the Japanese like conciliation and dislike adjudication, even in the form of arbitration[62].

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[54] *Trakman L.* "Legal Traditions" and International Commercial Arbitration. P. 8.

[55] *Coleman R.* A Preliminary Investigation of Possible Areas of Discrimination Against Foreign Litigants in Japanese Court and Arbitration Practice // Business Transactions with China, Japan, and South Korea / eds P. Saney, H. Smit. New York: Matthew Bender, 1983. P. 9–45; *Greig R. T.* International Commercial Arbitration in Japan: A User's Report // Journal of International Arbitration. 1989. Vol. 6, no. 4. P. 21–25; *Ragan Ch. R.* Arbitration in Japan: Caveat Foreign Drafter and Other Lessons // Arbitration International. 1991. Vol. 7, no. 2. P. 93–120.

[56] *Hanlon M. L. D.* The Japan Commercial Arbitration Association: Arbitration with the Flavor of Conciliation // Law and Policy in International Business. 1991. Vol. 22, no. 3. P. 603–626.

[57] *Taniguchi Y.* Settlement in International Commercial Arbitration // JCAA Newsletter. 1999. Vol. 4, no. 1. P. 1. — This was also due to the tendency of some Japanese parties to appoint retired judges as arbitrators. See: *Sawada T.* Practice of Arbitral Institutions in Japan // Arbitration International. 1988. Vol. 4, no. 2. P. 136–140.

[58] This matter was also dealt with in a ICC interim award in 1989, the ICC Interim Award in Case Nr. 6097. In the body of the award, we can read: "This very broad provision has its origin in a principle of Japanese law, which favours arbitration over recourse to the national courts in the settlement of disputes (see Raidl, Vertragsrecht und Vertragswirklichkeit in Japan, Zeitschrift für Rechtsvergleichung 1977. P. 180). Takeyoshi Kawashima expresses this concept in the following words: 'when problems arise, it is far better to discuss the problem in good faith, to calm over-heated spirits and to seek a harmonious solution' […] 'the parties prefer to reach an amicable settlement, a solution that is also recognized in Japanese law and frequently made use of'" (*Hobér K., Dahlquist J.* Investment Treaty Arbitration: Problems and Exercises. Cheltenham: Edward Elgar Publishing, 2018. P. 88).

[59] *Hayakawa Y.* The Distorted Image of the Japanese System of International Commercial Arbitration // JCAA Newsletter. 1999. No. 5.

[60] *Upham F. K.* The Place of Japanese Legal Studies in American Comparative Law // Utah Law Review. 1997. Vol. 1. P. 639–656. — Upham perfectly demonstrates the fact that occasionally comparative lawyers tend to use "culture" as *bonne a tout faire* when it comes to explain some feature of a legal system perceived as "remote", but hesitate to do that in the European or American context.

[61] *Stevens Ch. R., Takahashi K.* The East Asian Preference for Conciliation: An Example in a Kabuki Play // Arbitration International. 1989. Vol. 5, no. 1. P. 43–45.

[62] *Cole T.* Commercial Arbitration in Japan: Contributions to the Debate on Japanese Non-Litigiousness // New York University Journal of International Law and Politics. 2007. Vol. 40, no. 1. P. 29–114; *Fan K.* "Glocalization" of International Arbitration. Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan // University of Pennsylvania Asian Law Review. 2016. Vol. 11. P. 243–292.

It is not the place to discuss the shortcomings of legal Orientalism with regard to the Japanese experience[63]; nor to appreciate the cultural relevance of this debate; nor to identify the underlying truths to this somehow flat depiction: what is relevant for the purpose of this paper is to suggest a culturally-sensitive approach not to foreigners approaching arbitration in Japan, but to Japanese arbitrators and practitioners dealing with foreign parties.

This approach is specifically aimed at avoiding procedural problems: in fact, in case the arbitrator tries to mediate the dispute, or even to provoke a settlement between the parties, while the proceeding is pending, this may lead to their removal due to a violation of the process. The Japan Commercial Arbitration Association (JCAA) Rules are straightforward on this point: when parties to arbitration proceedings would like to have their dispute settled by mediation they can make a request to this effect, and the case will be moved to a *separate* mediation under the International Commercial Mediation Rules (ICMR)[64]. No arbitrator may serve as mediator in such new procedure, unless specifically authorized by both parties: and even when duly authorized, with limited procedural powers compared to a mediator regularly appointed under the ICMR[65].

A Japanese arbitrator, or even a foreign arbitrator in proceedings based in Japan, should be aware of the cultural bias that many non-Japanese parties have towards "Japanese" arbitration: the advice is, therefore, to be particularly cautious in clearly separating their roles as arbitrator from any attempt to settle the dispute, no matter how naïve or in good faith that could be. Parties who expect "Japanese" arbitrators to push for mediation (or conciliation) will be particularly sensitive to any interference with their choice for arbitration, and will react accordingly[66]. As noted by Karton, the matter would be extremely delicate in case of parties coming from jurisdictions where these attempts are generally met with hostility[67].

Conclusions

This paper shows that cultural expertise in commercial arbitration is certainly new as conceptualisation but has constituted the know-how of a good arbitrator since the very

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[63] *Colombo G. F.* Japan as a Victim of Comparative Law // Michigan State International Law Review. 2014. Vol. 22, no. 3. P. 731–754.

[64] Art. 58, Japan Commercial Arbitration Association Commercial Arbitration Rules (JCAA Rules). This seems an almost direct response to commentators such as (*Fan K.* "Glocalization" of International Arbitration. Rethinking Tradition… P. 282) "Arbitration is understood to be closer to conciliation than litigation in Japanese culture. Consequently, the same person assuming the role of a mediator, and later the role of an arbitrator is also culturally acceptable by the Japanese arbitrators and parties".

[65] Art. 59, JCAA Rules.

[66] While I am not aware of any successful challenge moved against an arbitrator in Japan on these grounds, it is sufficient to refer to Carbonneau (as quoted in: *Hayakawa Y.* The Distorted Image of the Japanese System of International Commercial Arbitration) to understand how deep this prejudice is, and how sensitive foreigner parties are: "As a result, arbitrations often are conducted as a framework for negotiation or mediation. The arbitral tribunal attempts to get the parties to reach their own settlement. The arbitral tribunal will delay and prolong the proceedings to achieve that objective. This factor may explain why the JCAA proceeding in Forochrome was so protracted, especially in terms of the number of sessions. Also, one wonders why the U. S. company would have agreed to such a one-sided and non-nationality-neutral arbitral procedure?"

[67] *Karton J.* International Arbitration Culture and Global Governance. P. 106. — Karton refers to an interview with an arbitrator about whether would be appropriate to seek a settlement: "I'm not among those who say that's out of the question; an arbitrator shouldn't do it. But you do have to be careful. You really have to choose where it will be well received and where it will not, and that may depend on the cultural background and the legal background of counsel and the parties. If I proposed it to Swiss and German parties, they will find it very natural, but if I have English and Australian counsel they will think it's totally outrageous".

beginning of commercial arbitration. The case and examples commented illustrate how broad, ample, and nuanced the relationship between culture and arbitration may be, but at the same time demonstrated that a culturally-sensitive approach in commercial arbitration is not a matter of politeness, and not even strategy, but it is actually necessary to avoid procedural violations which could result in the setting aside of an award, or in the failure to have it properly recognized and enforced.

The connection between arbitration and comparative law is not new. Already in the 1950s the great comparativist René David identified the close relationship between those two fields[68]. Emmanuel Gaillard and Joshua Karton magisterially summarized the debate[69], but here I would need to mention the importance that Gabriele Crespi Reghizzi had in shaping the discourse. In 2004, in his *L'Arbitrato e la Comparazione Giuridica*, he pointed out how even in the most formal situations, the cultural background of every arbitrator and arbitration lawyer creates that truly international "arbitration culture", a compromise between legal traditions[70].

So far, however, studies about arbitration did not employ a specific cultural lens, but, as recent trends in existing literature show, things are changing. Just to mention a few contributions to which this paper is indebted, Licari's studies on paideic arbitration[71] used methodologies normally employed for purely religious arbitration to analyses of commercial issues; building on the path opened by Deazalay and Garth[72], authors such as Ginsburg[73], Karton[74], and Kidane[75], while still dealing with a fairly focused notion of *arbitration culture* opened significant glimpses and deep perspectives of culture in arbitration in a much broader sense.

Paying homage to these works, this paper would like to take a step further and to foster further cooperation between legal anthropologists, arbitration experts, and comparative lawyers. While cultural aspects tend to be *per se* complex, it is necessary to employ a particularly strict methodology to avoid simplistic representations, from one side, and to be able to frame cultural questions as technical issues from the other. Sometimes cultural elements may not affect the proceedings, and they would just remain in the background, but on other occasions they need to be dealt with from a specific procedural angle: this paper purports to be a tool to that effect, to be used to see how and to which extent lawyers, arbitrators, and judges involved in arbitration proceedings may be called upon using cultural expertise in practice.

Cases such as those commented in section III show the relevance of an arbitrator's cultural identity in their suitability (or lack thereof) to be called upon deciding a case: this requirement may work as a reason to make an arbitrator a desirable decision maker, or, conversely, to exclude them.

Section IV aims to demonstrate the importance of culture in the concrete solution of a case brought to arbitration: in some kind of trades, it would be virtually impossible to prop-

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[68] *David R.* Arbitrage et Droit Comparé // Revue Internationale de Droit Comparé. 1959. Vol. 11, no. 1. P. 5–18.

[69] *Gaillard E.* Comparative Law in International Arbitration // Ius Comparatum. 2020. Vol. 1. P. 1–35; *Karton J.* International Arbitration as Comparative Law in Action // Journal of Dispute Resolution. 2020. No. 2. P. 293–326.

[70] *Crespi Reghizzi G.* L'Arbitrato e La Comparazione Giuridica / Io Comparo, Tu Compari Egli Compara: Che Cosa, Come, Perché? L'alambicco Del Comparatista. Milan: Giuffrè, 2003.

[71] *Licari F.-X.* Beyond Legal Pluralism…

[72] *Dezalay Y., Garth B. G.* Dealing in Virtue…

[73] *Ginsburg T.* The Culture of Arbitration.

[74] *Karton J.* The Culture of International Arbitration and the Evolution of Contract Law.

[75] *Kidane W.* The Culture of International Arbitration.

erly decide a dispute without having a complete and thorough access to the (sometimes complex indeed) substratum of culture on which the sector is based.

Section V demonstrates how cultural stereotypes may affect decision to locate arbitration proceedings in a country rather than another, based on the concerned jurisdiction (alleged) cultural attitude towards arbitration proceedings: it is not by coincidence that Japan is pushing hard with several initiatives to try to get rid of the pervasive stereotypes attached on it by English-written scholarship in the late 80s and 90s.

Business disputes may look, at a first glance, a field where technicalities of commercial law rule unopposed, and culture has little impact: the hope is that this paper has demonstrated the contrary. In an arbitration community increasingly concerned with diversity, and trying to at least renegotiate the dominance of the Global North in the arena of arbitration[76], the role of cultural expertise in commercial arbitration will be given the importance it should have.

References

Ali, Shahla F., Balcerzak, Filip, Colombo, Giorgio F. Colombo, Karton, Joshua (eds). 2022. *Diversity in International Arbitration: Why It Matters and How to Sustain It*. Northamtpon, Edward Elgar Publishing.

Baker, C. Mark, Greenwod, Lucy. 2012. The Regionalisation of International Arbitration: Maintaining International Standards in Appointing Arbitrators. A Comment on Jivraj v Hashwani. *The Practice of Arbitration Essays in Honour of Hans van Houtte*. Eds P. Wautelet, T. Kruger, G. Coppens. Oxford, Hart Publishing.

Bataya Canyas, Asli. 2013. Enforcement of Foreign Arbitral Awards in Turkey; Further Steps towards a More Arbitration-Friendly Approach. *ASA Bulletin* 31 (3): 537–557.

Bedjaqui, Mohammed. 1988. The Arbitrator: One Man-Three Roles — Some Independent Comments on the Ethical and Legal Obligations of an Arbitrator. *Journal of International Arbitration* 5 (1): 7–20.

Berg, Albert J. van den (ed.). 1998. International Dispute Resolution. *Towards an International Arbitration Culture. ICCA Congress Series.* No. 8. The Hague, London, Boston, Kluwer Law International.

Berger, Klaus P. 1998. International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts. *American Journal of Comparative Law* 46: 129–150.

Bernini, Giorgio. 1989. Cultural Neutrality: A Prerequisite to Arbitration Justice. *Michigan Journal of International Law* 10: 39–56.

Bernstein, Lisa. 1992. Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry. *The Journal of Legal Studies* 21 (1): 115–157.

Bjorklund, Andrea, Behn, Daniel, Franck, Susan D., Giorgetti, Chiara, Kidane, Won, de Nanteuil, Arnaud, Onyema, Emilia. 2020. The Diversity Deficit in International Investment Arbitration. *The Journal of World Investment & Trade* 21 (2-3): 410–440.

Blackbaby, Nigel, Partasides, Constantine, Redfern, Alan, Hunter, Martin. 2009. *Redfern and Hunter on International Arbitration-Student Version*. 5th ed. Oxford, Oxford University Press,

Born, Gary B. 2000. Planning for International Dispute Resolution. *Journal of International Arbitration* 17 (3): 61–72.

Brachotte, Sandrine. 2021. The Limits of Arbitration Law in Addressing Cultural Diversity: The Example of Ismaili Arbitration in the United Kingdom. *Laws* 10 (2): 47. https://doi.org/10.3390/laws10020047

Brode, Patrick T. 1989. The Arbitrator's Role: A Conservative View. *Windsor Review of Legal and Social Issues* 1: 17–33.

Broyde, Michael J. 2015. Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society. *Chicago-Kent Law Review* 90 (1): 111–140.

Broyde, Michael J. 2017. *Sharia Tribunals, Rabbinical Courts, and Christian Panels*. Oxford, Oxford University Press.

[76] Diversity in International Arbitration…

Chalk, Richard, Choong, John. 2011. Dark Cloud Lifted: Jivraj v Hashwani. *Asian Dispute Review* 13: 121–122.
Cole, Tony. 2007. Commercial Arbitration in Japan: Contributions to the Debate on Japanese Non-Litigiousness. *New York University Journal of International Law and Politics* 40 (1): 29–114.
Coleman, Rexford. 1983. A Preliminary Investigation of Possible Areas of Discrimination Against Foreign Litigants in Japanese Court and Arbitration Practice. *Business Transactions with China, Japan, and South Korea*. Eds P. Saney, H. Smit. New York, Matthew Bender: 9–45.
Colombo, Giorgio F. 2014. Japan as a Victim of Comparative Law. *Michigan State International Law Review* 22 (3): 731–754.
Colombo, Giorgio F. 2019. La rilevanza dell'identità culturale dell'arbitro: recenti casi nell'arbitrato commerciale. *Bocconi Legal Papers* 13: 131–144.
Colombo, Giorgio F. 2023. Cultural Expertise and International Commercial Arbitration. *Cultural Expertise, Litigation and Rights: A Comprehensive Guide*. Ed. by L. Holden. Routledge: 176–186.
Connolly. 2013. Jivraj v Hashwani. *Employment Law Briefing* 113: 3–5.
Cotterell, Roger. 1997. The Concept of Legal Culture. *Comparing Legal Cultures.* Ed. by D. Nelken. Dartmouth, Aldershot: 13–21.
Crespi Reghizzi, Gabriele. 2003. L'Arbitrato e La Comparazione Giuridica. *Io Comparo, Tu Compari Egli Compara: Che Cosa, Come, Perché? L'alambicco Del Comparatista*. Milan, Giuffré.
Dasteel, Jeff. 2012. Arbitration Agreements That Discriminate in the Appointment and Selection of Arbitrators. *Richmond Journal of Global Law and Business* 11 (4): 383–405.
David, René. 1959. Arbitrage et Droit Comparé. *Revue Internationale de Droit Comparé* 11 (1): 5–18.
Dezalay, Yves, Garth, Bryant G. 1996. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order. Language and Legal Discourse.* Chicago, University of Chicago Press.
Diamond Dealers Club New York. 2019. *Diamond Dealers Club New York. Webinar: Non-Members and Arbitration.* Available at: https://www.nyddc.com/arbitration (accessed: 20.01.2023).
D'Silva, Magdalene. 2013. A New Legal Ethics Education Paradigm: Culture and Values in International Arbitration. *Legal Education Review* 23: 83–112.
Dundas, Hew R. 2011. The Return of Normality: The UK Supreme Court Decides Jivraj. *Arbitration* 77 (4): 467.
Ellickson, Robert C. 1991. *Order without Law: How Neighbors Settle Disputes*. Cambridge, Mass., Harvard University Press.
Elsing, Siegfried H., Townsend, John M. 2002. Bridging the Common Law-Civil Law Divide in Arbitration. *Arbitration International* 18 (1): 59–65. https://doi.org/10.1023/A:1014200908066
Fan, Kun. 2016. "Glocalization" of International Arbitration. Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan. *University of Pennsylvania Asian Law Review* 11: 243–292.
Francis, Verlyn. 2021. Ethics in Arbitration: Bias, Diversity, and Inclusion. *Cumberland Law Review* 51 (2): 419–446.
Franck, Susan D., James, Freda, Kellen, Lavin, Tobias, Lehmann, Anne Van, Aaken. 2015. The Diversity Challenge: Exploring the Invisible College of International Arbitration. *Columbia Journal of Transnational Law* 53 (3): 429–506.
Freedland, Mark, Kountouris, Nicola. 2012. Employment Equality and Personal Work Relations — A Critique of Jivraj v Haswani. *Industrial Law Journal* 41 (1): 55–66.
Frommel, Stefan N., Rider, Barry Alexander K. (eds). 1999. *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends.* Studies in Comparative Corporate and Financial Law. V. 4. The Hague; Boston, Kluwer Law International.
Gaillard, Emmanuel. 2020. Comparative Law in International Arbitration. *Ius Comparatum* 1: 1–35.
Georgiou, Phillip. 2010. Staying Litigation in Favour of Arbitration — Are Hong Kong Courts Too Arbitration-Friendly? *Asian Dispute Review* 12 (4): 124–126.
Ginsburg, Tom. 2003. The Culture of Arbitration. *Vanderbilt Journal of Transnational Law* 36: 1335–1345.
Glover, G. Michael II. 2021. Reconsidering the LSAT to Improve Diversity in Arbitration. *Resolved: Journal of Alternative Dispute Resolution* 9 (1): 1–23.
Gómez, Manuel A. 2013. Precious Resolution: The Use of Intra-Community Arbitration by Jain Diamond Merchants. *B-Arbitra* 2: 119–139.

Green, Michael Z. 2020. Arbitrarily Selecting Black Arbitrators. *Fordham Law Review* 88 (6): 2255–2286.
Greenwood, Lucy. 2017. Tipping the Balance — Diversity and Inclusion in International Arbitration. *Arbitration International* 33 (1): 99–108.
Greig, Robert T. 1989. International Commercial Arbitration in Japan: A User's Report. *Journal of International Arbitration* 6 (4): 21–25.
Grenig, E. 2014. After the Arbitration Award: Not Always Final and Binding. *Marquette Sports Law Review* 25 (1): 65–99.
Haley, John O. 1978. The Myth of the Reluctant Litigant. *Journal of Japanese Studies* 4 (2): 359–390. https://doi.org/10.2307/132030
Hanlon, Michelle L. D. 1991. The Japan Commercial Arbitration Association: Arbitration with the Flavor of Conciliation. *Law and Policy in International Business* 22 (3): 603–626.
Hayakawa, Yoshihisa. 1999. The Distorted Image of the Japanese System of International Commercial Arbitration. *JCAA Newsletter* 5: 1–13.
Helfand, Michael A. 2015. Arbitration's Counter-Narrative: The Religious Arbitration Paradigm. *Yale Law Journal* 124 (8): 2294–3051.
Henderson, Dan F. 1965. *Conciliation and Japanese Law. Tokugawa and Modern.* In 2 vols. Vol. 1. Tokyo, University of Tokyo Press; Seattle, University of Washington Press.
Hobér, Kaj, Joel Dahlquist. 2018. *Investment Treaty Arbitration: Problems and Exercises*. Cheltenham, Edward Edgar Publishing.
Hogas, Diana-Loredana. 2015. Insights on the Arbitrator's Requirement of Independence. *Journal of Law and Administrative Sciences Special Issue*: 235–248.
Holden, Livia (ed.). 2011. *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. Abingdon; New York, Routledge.
Holden, Livia 2019. Cultural Expertise: An Emergent Concept and Evolving Practices. *Laws* 8 (4): 1–28. https://doi.org/10.3390/laws8040028
Holden, Livia (ed.). 2022. *Cultural Expertise, Law, and Rights: A Comprehensive Guide*. Abingdon, Routledge.
Hutler, Brian. 2018. Religious Arbitration and the Establishment Clause. *Ohio State Journal on Dispute Resolution* 33 (3): 337–372.
Karton, Joshua. 2013. *The Culture of International Arbitration and the Evolution of Contract Law*. 1st ed. Oxford, Oxford University Press.
Karton, Joshua. 2014. International Arbitration Culture and Global Governance. *International Arbitration and Global Governance: Contending Theories and Evidence*. Eds W. Mattli, T. Dietz. Oxford, Oxford University Press: 74–116.
Karton, Joshua. 2020. International Arbitration as Comparative Law in Action. *Journal of Dispute Resolution* 2020 (2): 293–326.
Kaufmann-Kohler, Gabrielle. 2003. Globalization of Arbitration Procedure. *Vanderbilt Journal of Transnational Law* 36: 1313–1333.
Kidane, Won. 2017. *The Culture of International Arbitration*. New York, Oxford University Press.
Komorowska, Adela. 2011. Case Note — Jivraj v Hashwani [2011] UKSC 40. *UK Law Students Review* 1: 80–85.
Kush, Makkar. 2018. Half a Step Forward: Has the Supreme Court of Indian Really Propelled towards a More Arbitration-Friendly Regime Following the Reliance Cases. *International Trade and Business Law Journal* 21: 245–254.
Kutty, Faisal. 2006. *The Shari'a Factor in International Commercial Arbitration*. New York, Osgoode Hall Law School.
La Rue, Homer C., Symonette, Alan A. 2020. The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection. *Howard Law Journal* 63 (2): 215–248.
Lawson, David A. 2005. Impartiality and Independence of International Arbitrators. *ASA Bulletin* 23 (1): 22–44.
Licari, François-Xavier. 2013. *L'Arbitrage Rabbinique, Entre Droit Talmudique Et Droit Des Nations (Rabbinic Arbitration, Between Talmudic Law and the Law of the Gentiles)*. Revue de l'Arbitrage, 57–120.
Licari, François-Xavier. 2019. Beyond Legal Pluralism: Some Thoughts on Paideic Arbitation. *Global Private International Law: Adjudication without Frontiers*. Eds H. Muir Watt, L. Bíziková, A. Brandão de Oliveira, D. P. Fernández Arroyo. Cheltenham: Edward Edgar Publushing: 182–190.

Mainland, Richard R. 2011. Full Disclosures. *Los Angeles Lawyer* 34 (8): 29–35.
Manjiao, Chi. 2008. Is the Chinese Arbitration Act Truly Arbitration-Friendly: Determining the Validity of Arbitration Agreement under Chinese Law. *Asian International Arbitration Journal* 4 (1): 104–120.
McCrudden, Cristopher. 2012. Two Views of Subordination: The Personal Scope of Employment Discrimination Law in Jivraj v Hashwani. *Industrial Law Journal* 41 (1): 30–55.
Merry, Sally Engle. 2010. What Is Legal Culture — An Anthropological Perspective. *Journal of Comparative Law* 5 (2): 40–58.
Napoles, Pedro Metello de. 2014. Analysis of Angola's Arbitration Law: Is Angola an Arbitration-Friendly Jurisdiction? *International Business Law Journal* 2014 (3): 187–196.
Nelken, David. 2010. Using Legal Culture: Purposes and Problems. *Journal of Comparative Law* 5 (2): 1–39.
Nelken, David. 2012. Legal Cultures. *Comparative Law and Society.* Ed. by D. Scott Clark. Cheltenham, Edward Edgar Publishing: 310–327.
Oduntan, Gbenga. 2018. Jay-Z's $200-Million Clothing Battle Could Be Game Changer for Black Lawyers the World Over. *The Conversation*, 6 Dec.
Oseni, Umar A., Abia Kadouf, Hunud. 2012. The Discrimination Conundrum in the Appointment of Arbitrators in International Arbitration. *Journal of International Arbitration* 29: 519–544.
Pair, Lara M. 2002. Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization? *ILSA Journal of International & Comparative Law* 9: 57–74.
Parsons, Louise, Leonard, Jack. 2014. Australia as an Arbitration-Friendly Country: The Tension between Party Autonomy and Finality. *Contemporary Asia Arbitration Journal* 7 (2): 357–388.
Paulsson, Jan. 2013. *The Idea of Arbitration*. Oxford, Oxford University Press.
Peters, Erin. 2018. Pale, Male, and Stale: Addressing Diversity in Arbitration. *ADR Resarch Institute of Canada (blog)*. February 22. Available at: https://www.adric.ca/adr-perspectives/pale-male-and-stale-addressing-diversity-in-arbitration/ (accessed: 20.01.2023).
Rabinowitz, Laurence. 2011. Arbitration and Equality: Jivraj v Hashwani. *Business Law International* 12 (1): 119–126.
Ragan, Charles R. 1991. Arbitration in Japan: Caveat Foreign Drafter and Other Lessons. *Arbitration International* 7 (2): 93–120.
Richman, Barak D. 2002. *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*. John M. Olin Center for Law, Economics & Business, Discussion Paper 384.
Richman, Barak D. 2006. How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York. *Law & Social Inquiry* 31 (2): 383–420.
Rosen, Lawrence. 2008. *Law as Culture: An Invitation. 3. printing, and 1. paperback printing*. Princeton, New Jersey, Princeton University Press.
Rustamova, Amina. 2009. Neutrality of Arbitrators. LL. M. Short Thesis, Central European University. Available at: http://www.etd.ceu.hu/2009/rustamova_amina.pdf (accessed: 08.12.2023).
Sandberg, Russell. 2009. Jivraj v. Hashwani. *Law and Justice* 163: 186–187.
Sawada, Toshio. 1988. Practice of Arbitral Institutions in Japan. *Arbitration International* 4 (2): 120–140. https://doi.org/10.1093/arbitration/4.2.120
Schafler, Michael D., Dutt, Deepshikha, Eckler, Alexander. 2017. The Appearance of Justice: Independence and Impartiality of Arbitrators under Indian and Canadian Law. *Indian Journal of Arbitration* 5 (2): 150–163.
Shield, Renée Rose. 2006. *Diamond Stories: Enduring Change on 47th Street*. Ithaca, London, Cornell University Press.
Slate II, William K. 2004. Paying Attention to "Culture" in International Commercial Arbitration. *Dispute Resolution Journal.* August — October: 96–101.
Spigelman, Devorah. 2020. The Need for Women in Arbitration and How to Implement Diversification of Arbitral Appointments. *American Journal of Mediation* 13: 152–181.
Spitko, E. Gary. 1999a. Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration. *Case Western Law Review* 49 (2): 275–314.
Spitko, E. Gary. 1999b. Judge Not: In Defense of Minority-Culture Arbitration. *Washington University Law Quarterly* 77: 1065–1085.

Stempel, Jonathan. 2019. 'Jay-Z Wins Fight for African-American Arbitrators in Trademark Case'. *Reuters* 31 January.
Stevens, Charles R., Takahashi, Kazunobu. 1989. The East Asian Preference for Conciliation: An Example in a Kabuki Play. *Arbitration International* 5 (1): 43–45.
Style, Cristopher, Cleobury, Philomena. 2011. Jivraj v. Hashwani: Public Interest and Party Autonomy. *Arbitration International* 27 (4): 563–574.
Taniguchi, Yasuhei. 1999. Settlement in International Commercial Arbitration. *JCAA Newsletter* 4 (1): 1.
Trakman, Leon. 2007. "Legal Traditions" and International Commercial Arbitration. UNSW Law Research Paper 29: 1–35.
Upham, Frank K. 1997. The Place of Japanese Legal Studies in American Comparative Law. *Utah Law Review* 1: 639–656.
Zaiwalla, Sarosh. 2011. Are Arbitrators Not Human? Are They from Mars? Why Should Arbitrators Be a Separate Species? *Journal of International Arbitration* 28: 273–282.
Zeinali, Atoosa. 2018. *The Effect of Culture and Religion on Enforcement of International Arbitration Awards in Iran*. San Francisco, Golden Gate University School of Law.
Zirhlioglu, Ersoy. 2013. The Diamond Industry and the Industry's Dispute Resolution Mechanism. *Arizona Journal of International and Comparative Law* 30: 447–507.

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Роль культуры в международном коммерческом арбитраже

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Международный коммерческий арбитраж является основным средством разрешения международных споров делового характера. Сама его структура предопределяет то, что эта трансграничная процедура представляет собой диалог различных культур. Как следствие высокотехничного характера международного коммерческого арбитража дискуссия о «культуре» в этой области восприняла довольно узкий подход и, как правило, ограничивается вопросами, касающимися столкновения различных процессуальных стилей и моделей (например, обнаружение доказательств, которые сильно различаются в юрисдикциях общего права и континентального права), исследования о самом арбитражном сообществе (все еще довольно небольшой и сплоченной группе профессионалов) или о дружелюбии к арбитражу в той или иной стране. Тем не менее обсуждение «культурных вопросов» в международном коммерческом арбитраже на самом деле следует вести в гораздо более широком контексте. Данная статья призвана восполнить указанный пробел, рассматривая вопросы, связанные с «правом и культурой» в арбитраже, по трем возможным схемам: вопросы, затрагивающие арбитра, вопросы, относящиеся к применимому законодательству, и, наконец, вопросы, имеющие отношение собственно к арбитражной процедуре.

Ключевые слова: арбитраж, альтернативное разрешение споров, правовые культуры, процессуальные стили, сравнительное правоведение.

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