7-2017

Some reflections on the Willem C Vis and Vis East International Commercial Arbitration Moots: Negotiating and bridging the civil-common divide

Siyuan CHEN
Singapore Management University, siyuanchen@smu.edu.sg

Bethel Ruiyi CHAN
Singapore Management University

Eden Yiling LI
Singapore Management University

SOME REFLECTIONS ON THE WILLEM C. VIS AND VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOTS: NEGOTIATING AND BRIDGING THE CIVIL-COMMON DIVIDE

Chen Siyuan[*]*, Bethel Chan Ruiyi*[†] *& Eden Li Yiling*[‡]

Abstract

This article draws from the co-authors' personal experiences of competing in the Willem C. Vis and Vis East International Commercial Arbitration Moots and highlights the importance of awareness of diversity in legal traditions. The article focuses on points of divergence between the civil and common law jurisdictions in three main aspects: substantive law, procedural rules and advocacy techniques. Specifically, the article discusses the doctrine of good faith in the United Nations Convention on Contracts for the International Sale of Goods, the group of companies doctrine, and the concept of discovery and disclosure in the International Bar Association Rules on the Taking of Evidence in International Arbitration. The latter two topics featured prominently in the 22nd and 23rd Vis moot problems respectively. The article illustrates how Vis moot participants can develop and present their arguments in a manner that gains traction with civil law and common law arbitrators alike by appealing to concepts and terminology that are familiar to them. The article also explores how international commercial arbitration provides scope for borrowing concepts from a wide range of legal traditions, so long as the applicability of these concepts is grounded in the parties' common intentions and expectations as reasonable businessmen.

I. Introduction

The Willem C. Vis and Vis East International Commercial Arbitration Moots ["**Vis moots**"] are two of the largest commercial arbitration moot competitions in the world. In 2017, the Vis moots attracted a combined total of around 500 teams – the biggest turnout yet. Participants in the Vis moots hail from all over the globe, providing students with a rare opportunity to interact with and compete against law students coming from vastly different backgrounds. Perhaps the most significant difference between each participant team is the legal tradition to which it bears allegiance. It is for this reason that the organisers of the Vis moots actively ensure that civil law schools argue against common law schools so that each may learn from approaches taken by persons trained in another legal culture.[1] In a similar vein, the arbitral tribunal judging each round also tends to comprise a healthy mix of persons with common law and civil law backgrounds.[2]

---

[*] LLB (National University of Singapore), LLM (Harvard Law School). Assistant Professor of Law Chen Siyuan teaches and researches mainly in evidence and procedural law at Singapore Management University (SMU). He founded SMU School of Law's International Moots Programme and continues to be heavily involved in moot coaching. He can be contacted at siyuanchen@smu.edu.sg.

[†] JD (Singapore Management University). Bethel Chan is presently a Justices' Law Clerk at the Supreme Court of Singapore. She represented SMU in the 2014–15 Willem C. Vis International Commercial Arbitration moot competition in Vienna. The SMU team emerged as first runner-up, and Bethel also received an individual Honourable Mention for Best Speaker. She can be contacted at Bethel_CHAN@supcourt.gov.sg.

[‡] LLB (Singapore Management University). Eden Li is presently a Justices' Law Clerk at the Supreme Court of Singapore. She represented SMU in the 2014–15 Willem C. Vis East International Commercial Arbitration moot competition in Hong Kong, where the SMU team took home the David Hunter Award for the Law School Team Prevailing in Oral Arguments. She can be contacted at Eden_LI@supcourt.gov.sg.

[1] *About the Moot*, THE ANNUAL THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT, https://vismoot.pace.edu/site/about-the-moot (last visited July 25, 2017).

[2] *Id.*

The civil-common divide can surface in a highly overt manner in the course of the Vis moots. In fact, from one of the co-author's experience as a former participant, it might happen in the midst of a submission on the United Nations Convention of Contracts for the International Sale of Goods ["**CISG**"].[3] One participant had made a reference to the oft-cited and highly authoritative treatise, *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods*.[4] An arbitrator interrupted the submission to comment, "*Yes, but that is just a textbook. It is not law. Do you have any cases?*" Fortunately, the team had on-hand several English cases which stood for the same proposition. Citing these cases soothed the arbitrator's common-law hackles and allowed the round to proceed smoothly.

This article looks at three aspects where differences between the civil and common law traditions surface. Part **II** focuses on substantive law – specifically, how the two legal traditions differ in their treatment of the doctrine of good faith and explores the techniques that a mooter can use to bridge the apparent divide. Part **III** discusses procedural rules and considers how regard may be had to concepts that ostensibly bear no connection to either legal tradition. Finally, Part **IV** explores how advocacy techniques may be adapted to suit the composition of each arbitral tribunal, depending on their backgrounds.

Before proceeding further, two important caveats must be made. First, this article does not purport to be an exhaustive statement of the areas of divergence between civil and common law jurisdictions, nor will it provide solutions on how to reconcile these differences. Secondly, it must be acknowledged that even within the two legal traditions, there is no single approach that can be termed *the* civil law or *the* common law approach. That would be simplistic and inaccurate. This article only hopes to illustrate, through broad generalisations, where the two legal systems tend to diverge and how the Vis moots can and have brought these issues to life.

II. Substantive law

The Vis moot problem each year is based on a transaction governed by the CISG. As of February 15, 2017, the CISG has been adopted by 85 countries.[5] Each country is broadly known as a "Contracting State". The CISG provides the set of rules that governs contracts for the sale and purchase of goods between parties located in different Contracting States.

The goal of the CISG is to unify international sales law. This is evidenced by the preamble to the CISG, which reads: "The States Parties to this Convention …[are] of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in

---

3 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 [*hereinafter* "CISG"].

4 SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (Ingeborg Schwenzer ed., 2016). The fourth edition of this treatise was published in 2016.

5 *CISG: Table of Contracting States*, INSTITUTE OF INTERNATIONAL COMMERCIAL LAW AT PACE UNIVERSITY LAW SCHOOL, www.iicl.law.pace.edu/cisg/page/cisg-table-contracting-states (last visited July 25, 2017).

international trade and promote the development of international trade."[6] Given this, it is quite accurate to state that the CISG aims "*not to identify itself with any legal system but to conjugate with all*".[7]

Having set such a lofty goal for itself, it is significant that the CISG is probably the closest the world has seen to a successful unification of contract law.[8] After all, the CISG has been adopted by most of the major industrial nations including Australia, China and the United States, together representing over 75% of the world's trade.[9] The success of this unification attempt is particularly remarkable when one considers that there exist significant differences between the civil and common law approaches towards the law of contract. Consider, for instance, one obvious point of divergence between the two systems – the doctrine of good faith.

In most common law jurisdictions, the doctrine of good faith is viewed with some circumspection.[10] English courts have traditionally refused to recognise that a duty of good faith is implied generally into *all* commercial contracts; rather, good faith is only implied in law into several limited classes of contracts like employment contracts, partnership contracts and other such contracts where the parties are in a fiduciary relationship.[11] In every other case, it is a question of implication in fact, applying the oft-cited business efficacy and officious bystander tests.[12] While the traditional English hostility towards good faith famously came under criticism by Leggatt J in the High Court decision of *Yam Seng Pte Ltd.* v. *International Trade Corp*[13], later authorities confirm that the traditional view still prevails.[14] In a similar vein, the Singapore Court of Appeal has been slow to accept the doctrine of good faith, observing that the doctrine remains a "*fledgling one in the Commonwealth*", and until "*the theoretical foundations, as well as the structure of this doctrine are settled, it would be inadvisable (to say the least) to even attempt to apply it in the practical sphere*".[15]

On the other hand, most civil law jurisdictions adopt a broader conception of good faith. Not only does it come into play in the performance of completed agreements, it also affects pre-contractual

---

6 CISG, pmbl.

7 Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 198 (1994–1995).

8 Peter Huber, *Comparative Sales Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 937, 939 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

9 Bruno Zeller & Camilla Baasch Andersen, *Good Faith – the Gordian Knot of International Commerce*, 28 PACE INT'L L. REV. 1, 2 (2016).

10 Ng Giap Hon v. Westcomb Securities Pte Ltd [2009] 3 SLR(R) 518 at [54] (Sing.) [*hereinafter* "Ng Giap Hon"].

11 Yam Seng Pte Ltd. v. International Trade Corp [2013] EWHC 111 (QB), [121] & [131] (Eng.) [*hereinafter* "Yam Seng Pte Ltd."].

12 *Id.* ¶ 132. A brief explanation of these two tests is set out in Marks and Spencer plc v. BNP Paribas Securities Services Trust Company (Jersey) Limited & Anor. [2015] UKSC 72, [2016] A.C. 742, [16] (Eng.). Under the business efficacy test, a term can only be implied if it is necessary in the business sense to give efficacy to the contract. Under the officious bystander test, a term can only be implied if, while parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, "Oh, of course!"

13 *Id.* ¶¶ 145,153.

14 *See, e.g.,* Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd (trading as Medirest) [2013] EWCA (Civ) 200, [105] (Eng.); TSG Building Services plc v. South Anglia Housing Ltd [2013] EWHC 151, [46] (Eng.).

15 Ng Giap Hon, [2009] 3 SLR(R) 518, ¶ 60 (Sing.).

bargaining, as well as the formation and interpretation of contracts.[16] This expansive conception of good faith is derived from Roman law, and is entrenched till present day in the civil codes of countries like Germany, France and Italy.[17]

Consider section 242 of the German Civil Code [*Bürgerliches Gesetzbuch*, or "**BGB**"], which states: "The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage."[18] Parties are obligated to refrain from every act that could harm the purpose of the contract.[19] The German concept of good faith also applies to pre-contractual obligations; the concept of a pre-contractual relationship (*culpa in contrahendo*) has been given a statutory basis in section 311(2)(3) of the BGB. In fact, under most European civil codes, sanctions will be imposed on a party who begins negotiations only to break them off in a manner contrary to good faith; conversely, in the common law system, a negotiating party is free to walk away from an as-yet incomplete bargain which he perceives as bad.[20] In a similar vein, pre-contractual parties in civil law systems must disclose information to their counterparties – a far cry from the common law conception where each party has a right to obtain a bargain and is entitled to withhold certain information.[21] This expansive civil law conception of good faith essentially stems from the idea that parties are entitled to reasonably rely on each other, and that parties' interests should be protected in every legal relation.[22]

The common law's aversion to good faith is often justified on several grounds. For one, the amorphous scope and content of the doctrine of good faith is said to create legal and practical uncertainty. Indeed, even amongst civil law jurisdictions, there may not be a common conception of good faith.[23] Another justification is that the concept of good faith is inherently incompatible with the adversarial self-dealing nature of contract law, particularly at the stage of pre-contractual negotiations.[24]

Without resolving the controversial question of whether the civil law or common law approach towards the doctrine of good faith is "better", it can nonetheless be easily appreciated that the two

---

16 Alejandro Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 466 (1989); Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L. J. 265, 290 (1984).

17 Yam Seng Pte Ltd., [2013] EWHC 111 (QB), ¶ 124 (Eng.).

18 "*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*", *translated in* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 94 (3d ed. 1999).

19 Nathalie Hofmann, *Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe*, 22 PACE INT'L L. REV. 145, 160 (2010). *See, e.g.,* Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 13, 1996 VIII ZR 99/94 (F.R.G.), *in* NEUE JURISTISCHE WOCHENZEIT-SCHRIFT-RECHTSPRECHUNGSREPORT [NJW-RR] 949, 1996 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 15, 2004, V ZR 100/04 (F.R.G.), *in* ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 2345, 2004 (Ger.).

20 Raphael Hui, *The Doctrine of Good Faith in Contract: Greater Acknowledgment in Hong Kong? A Comparative Study*, 5 CITY U. H. K. L. REV. 85, 107 (2014–2015).

21 CHITTY ON CONTRACTS, ¶ 1-042 (Hugh G. Beale ed., 32nd ed. 2015).

22 *See* Hofmann, *supra* note 19, at 160.

23 *See, e.g.,* Director General of Fair Trading v. First National Bank [2001] UKHL 52, [2002] 1 AC 507 at 17, where Lord Bingham states that "*[EU member states] have no common concept ... of good faith.*"

24 *See, e.g.*, Walford v. Miles [1992] 2 AC 128, [138] (Eng.); Yam Seng Pte Ltd, [2013] EWHC 111 (QB), at ¶ 122 (Eng.).

approaches are almost diametrically opposed: one system embraces it wholeheartedly while the other is slow to do so. That said, there are obvious exceptions to the norm. Amongst common law jurisdictions, the United States is one such exception which has explicitly provided for "good faith" in its statutory regime. For instance, section 1-304 of the Uniform Commercial Code states that "every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement."[25] Similarly, section 205 of the American Law Institute's Restatement (Second) of Contracts (1981) states that, "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement".[26] Another notable exception is Australia, where the New South Wales Supreme Court has suggested that terms of good faith and reasonableness are to be implied as a matter of law.[27]

Having regard to the varying approaches taken by common and civil law jurisdictions alike, a fundamental question for the drafters of the CISG would have been this: given that the CISG is meant to unify contract law, *should* the doctrine of good faith be incorporated into the CISG at all? If so, *how* can this be done so that good faith, or the incarnation of it that appears in the CISG, is acceptable to both legal systems? For instance, it is obvious that if the CISG was too influenced by civil law principles of contract law, common law countries would not reasonably agree to it.

62 countries – spanning both civil and common law jurisdictions, and more – participated in the drafting of the CISG at the Vienna Diplomatic Conference in 1980.[28] Civil law delegates argued for a good faith clause governing the interpretation of the sales contract. Common law delegates opposed any such explicit reference in the text of the CISG.[29] Eventually, a compromise was reached, and the wording of the CISG reveals the eventual balance that was struck. Article 7(1) reads: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and to the observance of good faith in international trade."

At first blush, good faith seems to play a relatively confined role: it only governs the interpretation of the CISG itself, but does not extend to the interpretation of the underlying sales contract.[30] Accordingly, the CISG does not appear to impose a duty on contracting parties to act in good faith, as would be the case in a civil law jurisdiction. This position, however, is not uncontroversial. Some academics argue that the role of good faith is more expansive than what a plain reading of Article 7(1) would suggest. One school argues that good faith is a "general principle" underlying the CISG

---

25 Although the Universal Commercial Code carries no official legal force, it has been adopted in the state laws of 49 states in the United States. *See* Hui, *supra* note 20, at 163.

26 Although the Restatement also does not have legal force, it has been considered an authoritative encyclopaedic compilation of the existing laws of the United States. *See* Hui, *supra* note 20, at 164.

27 *See*, *e.g.*, *NSW Rifles Association v Commonwealth,* [2012] 293 ALR 158, 181(Austl.).

28 *Identification of Contracting States*, INSTITUTE OF INTERNATIONAL COMMERCIAL LAW AT PACE UNIVERSITY LAW SCHOOL, http://iicl.law.pace.edu/cisg/page/identification-contracting-states.

29 Legislative History, 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 5th Meeting (Mar. 13, 1980), http://www.cisg.law.pace.edu/firstcommittee/Meeting5.html.

30 HONNOLD, *supra* note 18, § 94; Pascal Hachem, *Commentary on Article 7*, *in* SCHLECHTRIEM AND SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 127 (Schwenzer ed., 4th ed. 2016).

and imposes a general duty of good faith upon parties.[31] This immediately brings the CISG more in line with the approach taken by civil law jurisdictions.

Another question that arises from Article 7(1) is this: what exactly does "good faith" mean? As earlier established, the meaning of "good faith" and the extent to which it is given effect differs between civil and common law jurisdictions. One cannot assume that all parties to a dispute have, in the first place, the same understanding of what a good faith obligation entails. This generates a degree of uncertainty, anathema to commercial parties. Indeed, it has been accurately observed that "*businessmen prefer certainty to justice and like to know where they stand.*"[32]

Nonetheless, one thing is certain: Article 7(1) mandates that in the interpretation of the CISG, regard must be had to the CISG's "international character". This indicates that the concept of good faith in the CISG should be autonomous, and therefore that it would be inappropriate to look towards domestic legal concepts to determine what "good faith" means.[33] It has been suggested that recourse should be had to other international instruments and uniform projects as interpretational aids.[34] These include the 2010 UNIDROIT Principles of International Commercial Contracts ["**2010 UNIDROIT Principles**"][35] or the 1999 Principles of European Contract Law ["**PECL**"],[36] both of which set out express obligations requiring parties to act in good faith.[37] While one would expect that these rules, having been built on comparative studies, should be suitably "international" in character, the reality is that these rules were drafted by institutions that were more often than not, reflections of Continental European legal traditions.[38] To that extent, they may not capture the "international character" in respect of Contracting States to the CISG.

There is another valid approach that could give effect to the CISG's international character. Theoretically, one could attempt to distil, from the domestic laws of Contracting States, the core of a good faith obligation. This core would be one that is so unobjectionable and fundamentally sensible that no person – irrespective of the jurisdiction or legal tradition that he hails from –could possibly reject it. If such a core can be distilled, by reason of being acceptable to all jurisdictions and legal traditions, this core conception of good faith could be rightly called "international" in character for the purposes of the CISG. Like the reliance on international instruments and uniform projects,

---

31 *See, e.g.,* Michael Bonell, *Comments on Article 7 CISG [Interpretation of Convention]*, *in* CESARE BIANCA & MICHAEL BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 84–85 (1987); FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS: COMMENTARY 54–55 (1992); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 37 (2d ed. 2012).

32 The Right Hon. Lord Justice Staughton, *Good Faith and Fairness in Commercial Contract Law*, 7 J. CONT. L. 193, 194 (1994).

33 Hachem, *supra* note 30, at 122.

34 *Id.* at 131; ENDERLEIN & MASKOW, *supra* note 31, at 55.

35 UNIDROIT, INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2010 [*hereinafter* "2010 UNIDROIT Principles"].

36 THE PRINCIPLES OF EUROPEAN CONTRACT LAW I & II (Ole Lando & Hugh Beale eds., 1999); PRINCIPLES OF EUROPEAN CONTRACT LAW III (Ole Lando et al. eds., 2003).

37 *See, e.g.,* 2010 UNIDROIT Principles, art. 1.7; 1999 Principles of European Contract Law, art. 1.201.

38 Hachem, *supra* note 30, at 131; ENDERLEIN & MASKOW, *supra* note 31, at 55.

this proposed approach is premised on a comparative law method. It need only be cautioned that the biggest inherent danger of this method is the danger of relying on domestic preconceptions, simply because one may have only limited access to the domestic laws of Contracting States.[39] Although this exercise appears highly academic, it is nonetheless not an impossible endeavour. The Singapore Court of Appeal has ventured to articulate such a core conception:[40]

"We think that the concept of good faith is reducible to a core meaning … At its core, the concept of good faith encompasses the threshold subjective requirement of acting honestly, as well as the objective requirement of observing accepted commercial standards of fair dealing in the performance of the identified obligations. This encompasses a duty to act fairly, having regard to the legitimate interests of the other party."

The above discussion on good faith provides several key takeaways for the Vis mooter. First, the mooter should have a basic awareness that every person holds certain pre-conceived notions shaped by one's legal education and experience, or domestic preconceptions. By no account should it be assumed that one's opponents or the members of the arbitral tribunal have the same understanding of a concept like "good faith" which takes on a different complexion in every jurisdiction. The failure to shed these pre-conceived notions will lead to mooters and tribunals talking at cross-purposes, a highly undesirable outcome.

Secondly, the mooter must be flexible in the presentation of his submissions. Just as the CISG purports to strike a balance between different legal systems, the mooter must be able to pitch potentially controversial or divisive topics at a level that is acceptable to all arbitral tribunals regardless of their composition. This is alluded to in the above paragraph discussing the core conception of good faith. For instance, the point could be made that good faith – properly understood – is not alien to the institution of contract: without mutual trust, how can contracts be agreed upon at all? Even the staunchest opponents of good faith might find it hard to disagree with this point.

Alternatively, a flexible mooter can adapt his existing submissions to appeal to the particular arbitral tribunal. This is possible in the Vis moots since the arbitrators comprising the panel introduce themselves to the participants before the round begins. At this point, the mooter becomes alive to the unique composition of the tribunal and can consider modifying his submissions. Suppose the mooter's primary case is essentially that there was a breach of an obligation to act in good faith at the pre-contractual stage. This has a distinct civil law flavour to it, and thus may not meet with much resistance if the mooter appears before a tribunal comprising civil law legal practitioners. The situation becomes more problematic if the mooter faces a tribunal composed entirely of common law legal practitioners: he can anticipate that the tribunal may not have an instinctive understanding of what "good faith" entails, and might resist any notion of pre-contractual liability. The mooter should then consider how he can "re-package" his existing argument to make it palatable to the arbitral tribunal. The obvious solution is to couch it in terminology and concepts that are not alien

39 Hachem, *supra* note 30, at 130.

40 HSBC Institutional Trust Services (Singapore) Ltd. v. Toshin Development Singapore Pte Ltd. [2012] 4 SLR 738 at [45] (Sing.).

to common law legal practitioners, like fairness and reasonableness. Specific common law doctrines like estoppel, restitution for unjust enrichment and tort, for instance, have been noted for their ability to achieve similar results as the general doctrine of pre-contractual liability.[41]

On a more general level, it would be advisable to be upfront about the drawbacks of recognising an obligation of good faith. As mentioned above, one oft-levelled criticism is that the doctrine introduces an element of uncertainty into commercial relationships. By acknowledging this criticism, the mooter demonstrates that he is being fair and reasonable to the other side. However, he should go on to justify his stance by emphasising that an element of flexibility is desirable especially where a commercially insensible or unfair outcome would otherwise result. Pitched in this manner, an argument that may have initially been hard to swallow can be transformed into one that is more palatable to the arbitral tribunal, irrespective of their legal backgrounds. The Vis moots provide a fertile ground for young mooters and future arbitrators to try their hand at such advocacy techniques.

III. Procedural rules

Challenges posed by the civil-common divide also manifest in the realm of procedural law. Common to both the 22nd and 23rd Vis moot problems, participants had to argue for or against the applicability of certain procedural concepts that ostensibly bore no connection to the parties or their arbitration agreement.

A. Group of companies doctrine

The group of companies doctrine featured heavily in the 22nd Vis moot problem.[42] The doctrine originated from an International Chamber of Commerce (ICC) arbitral award.[43] It was subsequently upheld by the Cour d'appel de Paris, paving the way for the doctrine to become well-established in France.[44] This doctrine gives a tribunal scope to consider that a group of companies may constitute "one and the same economic reality", and therefore a non-signatory that plays a significant role in the conclusion, performance or termination of the contract may – in accordance with the mutual intention of all parties – be bound to an arbitration clause contained in such contract.[45]

In the context of the 22nd Vis moot problem, if the doctrine were applicable, then the respondent's parent company could be joined to the arbitration proceedings despite not being a signatory to the underlying contract or the arbitration agreement contained therein. One of the difficulties posed by the problem was that the doctrine had not been adopted under the law of Danubia – which is the

41 COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 346 (Stefan Vogenauer ed., 2d ed. 2015).

42 THE PROBLEM, TWENTY SECOND ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT, https://vismoot.pace.edu/media/site/previous-moots/22nd-vis-moot/10NovCorrectedMarkup22MootProblem.pdf (last visited July 25, 2017).

43 Dow Chemical France & Ors. v. ISOVER Saint Gobain, ICC Case No. 4131, Interim Award (Sept. 23, 1982) [*hereinafter* "Dow Chemical"].

44 *See* cour d'appel [CA] [regional court of appeal] Paris, Oct. 21, 1983, REV. ARB. 98 (1984) (Société Isover-Saint Gobain v. société Dow Chemical France et autre); Alexandre Meyniel, *That Which Must Not be Named: Rationalizing the Denial of US Courts with Respect to the Group of Companies Doctrine*, 3 ARB. BRIEF 18, 28 (2013).

45 Dow Chemical, ICC Case No. 4131, Interim Award (Sept. 23, 1982).

fictional country that is the seat of arbitration in all Vis moot problems and the country whose law the parties had chosen to govern their underlying contract and the arbitration clause in the 22nd Vis moot problem.

This obstacle posed by the moot problem is very much reflective of the reality. Many jurisdictions, in both the civil and common law worlds, have in fact rejected the group of companies doctrine. These jurisdictions do so on the basis that the doctrine appears to derogate from the requirement of consent, as well as the fundamental concept that each company has a separate legal personality. Many of these jurisdictions have interpreted the doctrine as one that treats the corporate relationship between two companies as a sufficient basis for making a parent company liable for the liabilities of its corporate affiliate and accordingly, have refused to apply the doctrine.

For instance, the Singapore High Court has observed that this doctrine allows a subsidiary to be made liable for the liabilities of its sister and parent companies, not because of control, but simply because all the companies belong to the same corporate group.[46] In the United States, the Court of Appeals for the Second Circuit overturned an arbitral tribunal's suggestion that "*subsidiary companies to one group of companies are deemed subject to [an] arbitration clause incorporated in any deal either is a party thereto*", finding instead that non-signatories may be bound to arbitrate only on the basis of doctrines such as incorporation by reference, piercing of the corporate veil and estoppel. The same Court also noted that "*the practice of dealing through a subsidiary is entirely appropriate and essential to our nation's conduct of foreign trade*".[47] The English courts also have declared that the doctrine "forms no part of English law" and have described arbitral awards applying the doctrine as "seriously flawed".[48]

It should not be assumed from the list of common law jurisdictions cited in the preceding paragraph that acceptance or rejection of the group of companies doctrine has any discernible link to the civil-common divide. Indeed, the doctrine has taken hold in at least one major common law jurisdiction, India, where the apex court has affirmed the doctrine.[49] On the other hand, it has also been noted that civil law jurisdictions have taken varying approaches to the doctrine,[50] because these jurisdictions differ in the degree to which they emphasise the importance of form in demonstrating consent to arbitration. For instance, although the group of companies doctrine has become well-established in France, another major civil law jurisdiction, Switzerland, has disapproved of the doctrine.[51]

The foregoing paragraphs demonstrate that there is no uniform treatment of the group of companies doctrine amongst either common law or civil law jurisdictions. For this reason, the fact that the 22nd Vis moot problem described Danubia as a "civil law country" was equivocal at best: it

---

46 Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd., [2014] SGHC 181 at [99] (Sing.).

47 Sarhank Group v. Oracle Corporation, 404 F.3d 657, 662 (2d. Cir. 2005).

48 Peterson Farms Inc v. C & M Farming Ltd., [2004] 1 Lloyd's Rep 603 [42] & [59] (Eng.).

49 *See, e.g.,* Chloro Controls India Pvt. Ltd v. Severn Trent Water Purification Inc & Ors. (2013) 1 SCC 641 (India).

50 Meyniel, *supra* note 44.

51 *See* Tribunal fédéral [TF] [Federal Supreme Court] Aug. 19, 2008, 4A_128/2008/ech (X Ltd v. Y & Z SpA) (Switz.); William Park, *Non-signatories and International Contracts: An Arbitrator's Dilemma, in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION ¶ 1.84 (Permanent Court of Arbitration ed., 2009).

did not necessarily suggest that Danubia would follow in the footsteps of France, a fellow civil law country, in adopting the group of companies doctrine. It could equally have followed in the footsteps of Switzerland.

Compared to Part I above, the traversing of the civil-common divide in the context of the group of companies doctrine came about in a different manner. It was no longer a question of deciding how to present an argument in a manner that reconciles the differing approaches between legal traditions. Rather, the traversing of the civil-common divide came about in the way in which participants were required to argue for or against the applicability of the doctrine.

As mentioned, participants had to contend with the main difficulty that the group of companies doctrine had no ostensible link to the parties themselves or the applicable procedural law, which was Danubian law. The 22nd Vis moot problem specified that, first, hypothetical academic commentators had concluded that "*Danubian courts will most likely not follow the doctrine*", and secondly, there were no decisions in Equatoriana or Mediterraneo (the fictional places of incorporation of the claimant and the respondent respectively) that had addressed the group of companies doctrine.

In order to get around this obstacle, participants acting for the respondent had to argue that the group of companies doctrine was no more than an expression of implied consent – this proposition, at the very least, is supported by substantial academic commentary.[52] This allowed participants to pivot the inquiry away from the relatively more controversial group of companies doctrine to the well-established general principle of implied consent. This strategy meant that participants could circumvent the doctrinal difficulties associated with the former. Importantly, it also left participants free to focus their arguments on what could be inferred from the rich factual scenario set out in the voluminous moot problem, spanning 70 pages in total! The desired eventual outcome was, of course, to convince the arbitral tribunal that the respondent's parent company had demonstrated through its conduct, its implied consent to be bound by the arbitration agreement. On that basis – and not merely by reason of an extant corporate relationship – a tribunal could be justified in finding that the respondent's parent company ought to be joined to the arbitration proceedings.

The approach described above is, perhaps, easier said than done. In a moot where the members comprising the arbitral tribunals are drawn from both civil and common law jurisdictions, the participant can expect that from one round of the competition to the next, he or she may be speaking to audiences who have rather different approaches and frames of reference. The impact this may have on one's chances of prevailing is not to be underestimated. As one moot arbitrator underscored to the participants, the issue of binding a non-signatory to an arbitration agreement has proved to be a controversial topic that has in the recent past led to a high-profile disagreement

[52] *See, e.g.,* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1450 (2d ed. 2014); Petrio Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There Any Reason for this Doctrine to Exist?*, J. INT'L ARB. 647, 651 (2009); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 5000 (Emmanuel Gaillard & John Savage eds., 1999); BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS ¶ 107 (2d ed. 2006).

between two major courts from the common and civil law realms respectively, both purportedly applying the same law to the same set of facts.[53]

Arbitrators and adjudicators hailing from the two different legal traditions naturally have different frames of reference, as has been noted by the former Chief Justice of the Supreme Court of New South Wales, the Honourable James Jacob Spigelman:[54]

"It is over-simplified, but useful, to state the differences between common law and civil law approaches in broad terms. The common law has an objective concept of contractual obligation, with a number of subjective exceptions. The basic approach in civil law systems is subjective, with some objective exceptions. In the common law tradition, the basal question is, "What are the meaning of the words used?" In the civil law tradition, the basal question is "What was the intention of the parties?" These are different starting points."

Given that the broad academic consensus points towards the group of companies doctrine being an application of the principle of implied consent, one might think that it would make sense to rely on authorities that had taken the *civil* law approach, which, as characterised by Spigelman CJ, focuses on the intentions of the parties rather than the words of the contract. However, on the facts of the 22nd Vis moot problem, the third party sought to be joined to the arbitration had signed the contract containing the arbitration agreement under the phrase "Endorsed for [the third party]". Given these facts, one of the most analogous cases available was, in fact, an English decision, *Stellar Shipping Co LLC* v. *Hudson Shipping Lines*.[55] English cases were also the authorities that were most readily accessible for an English-speaking team, and perhaps one of the strongest statements a participant could quote in favour of joinder of the third party was the remark of Lord Hoffman in *Fiona Trust & Holding Corporation* v. *Privalov* that *"[t]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.*"[56]

Unsurprisingly, the use of these English authorities was uncontroversial and even relatively well-received by the many common law arbitrators who were present at the competition. Equally unsurprising was the fact that other arbitrators were uncomfortable with the heavy use of English authorities, or at least wanted to hear an explanation for why they were relevant. In one round an arbitrator remarked, "*I can't see why you would cite an English case, nothing could be a more different creature from civil law*," prompting the speaking participant's co-counsel to swiftly cancel out all references to common law authorities in his notes while the speaking participant rushed to offer an explanation. However, the reliance on these English authorities was not difficult to justify. Whether as a

---

53 *See* the conflicting decisions of Dallah Real Estate & Tourism Holdings Co. v. Ministry of Religious Affairs, Government of Pakistan, [2010] UKSC 46, [2011] 1 AC 763 (Eng.) and cour d'appel [CA] [regional court of appeal] Paris, Feb. 17, 2011, 09/28533 (Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Société Dallah Real Estate and Tourism Holding Co.) (Fr.).

54 The Hon. James Spigelman QC, The Centrality of Contractual Interpretation: A Comparative Perspective, Neil Kaplan Lecture, Hong Kong (Nov. 27, 2013), http://neil-kaplan.com/wp-content/uploads/2013/08/KAPLAN-LECTURE-27.11.13.pdf.

55 Stellar Shipping Co. LLC v. Hudson Shipping Lines, [2010] EWHC (Comm.) 2985 (Eng.).

56 Fiona Trust & Holding Corporation v. Privalov [2007] 2 All ER (Comm.) 1053 at [13] (Eng.).

reflection of the English courts' pro-arbitration stance or as a reflection of the strong trend towards harmonisation in arbitration law in general,[57] the approach towards the construction of arbitration clauses in these English cases would not be strange or exceptional to any civil lawyer at all. There is a greater focus on the intentions of the parties, and a weaker focus on words and form.

Thus, in response to any objection that English law was a "different creature" from the law of a civil law jurisdiction like Danubia, it could truthfully be said that at least in the area of arbitration, English judgments were persuasive insofar as they focused on what the parties' actual intentions were. That is a focus which no arbitrator, whose power derives *solely* from party consent, would take issue with.

B. Discovery and disclosure of documents

The 23rd Vis moot problem considered issues relating to discovery and the disclosure of documents.[58] This was significant because discovery is another area where the civil and common law traditions diverge. Under the common law system, the process of discovery allows one party to request the other side to produce documents and information relevant to the litigation. This process enables parties to obtain facts and information about the case from the other party, assisting in preparation for trial.[59] For instance, in Singapore, a party is obligated under the general discovery process to produce documents that it relies or will rely on, and those which could adversely affect his own case, adversely affect another party's case, or support another party's case.[60] This is subject to a control mechanism – the requirement that such discovery is, in fact, necessary at that stage of the cause or matter, or to dispose fairly of the cause or matter or for saving costs.[61] Again, there is no singular approach taken by all common law jurisdictions. "American-style discovery" is perceived as being far more wide-ranging, with parties able to serve sweeping requests for production of documents and other information relevant to the litigation, and to obtain oral deposition testimony of witnesses in advance of trial – for this reason, discovery in the American system is often perceived as allowing parties to venture on "fishing expeditions".[62]

On the other hand, in the civil law tradition, discovery is essentially an alien procedural device; most jurisdictions do not have anything equivalent to the document disclosure procedure.[63] For instance,

---

57 *See generally*, Richard Garnett, *International Arbitration Law: Progress Towards Harmonisation*, 3 MELB. J. INT'L L. 400 (2002).

58 THE PROBLEM, TWENTY THIRD ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT, https://vismoot.pace.edu/media/site/previous-moots/23rd-vis-moot/Problem_P02.pdf (last visited July 25, 2017).

59 Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICTORIA U. WELLINGTON L. REV. 817, 832 (2001).

60 Supreme Court of Judicature Act, Rules of Court (Cap 322, R 5, 2014 Rev. Ed.), order 24 r. 1(2) (Sing.), http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:3dcb3cec-199a-4b9e-98a8-7f63843baaa2.

61 *Id.* order 24, r 7.

62 Javier Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L. L. 303, 304–305 (2004–2005); Geoffrey C. Hazard Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1017–1019 (1997–1998).

63 Klaus Sachs, *Use of Documents and Document Discovery: "Fishing Expeditions" versus Transparency and Burden of Proof*, 5 SCHIEDS VZ 193, 194 (2003).

under German law, parties only submit the documents on which they rely to prove their case.[64] They come under no obligation to submit documents detrimental to their own case. If one party wishes to obtain those documents from the other, it would have to seek a court order for such disclosure.[65] However, German courts rarely order parties to disclose documents in their possession or control that they have chosen not to disclose.[66] This is because such disclosure is perceived as an affront to privacy and confidentiality which commercial parties expect to enjoy.[67] In the words of a Swiss civil law commentator:[68]

"We feel that the principle onus probandi incumbat allegandi *excludes the possibility of obtaining the help of the court to extract evidence from the other side. We react to the notion of discovery, be it English or, worse, American style, as an invasion of privacy by the court, which is only acceptable in criminal cases, where the public interest is involved."*

Furthermore, the premise in civil law jurisdictions is that the production of evidence is carried out through the authority and responsibility of the court, and not through the authorisation of the parties' advocates.[69] Thus in most civil law jurisdictions, unless a court order is in place, parties come under no obligation to disclose all of the relevant documents in their possession.[70] Conversely, in the common law system, the judge is not responsible for the adequate development of evidence during trial; his role is to choose between the competing presentations of evidence and law tendered by the advocates.[71] To facilitate this, parties must have a right to require production of evidence from the other, and this is precisely what the discovery mechanism achieves.[72]

In the 23rd Vis moot problem, one question arising was whether the International Bar Association Rules on the Taking of Evidence in International Arbitration ["**IBA Rules**"][73] could be used by the arbitral tribunal as guidelines to assess a request for discovery. The IBA Rules are "intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations".[74] Notably, the IBA Rules are described as "[reflecting] procedures in use in many different legal systems, and they may be particularly useful when the parties come from different

---

64 Christian Borris, *The Reconciliation of Conflicts between Common-law and Civil-law Principles in the Arbitration Process, in* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 1, 11 (Stefan Frommel & Barry Rider eds., 1999).

65 Pejovic, *supra* note 59.

66 Rofl Trittman & Boris Kasolowsky, *Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – The Development of a European Hybrid Standard for Arbitration Proceedings*, 31 U.N.S.W. L. J. 330, 336 (2008).

67 Rubinstein, *supra* note 62, at 304.

68 Claude Reymond, *Civil Law and Common Law Procedures: Which is the More Inquisitorial? A Civil Lawyer's Response*, 5 ARB. INT'L 357, 360–361 (1989); *see also* Trittman & Kasolowsky, *supra* note 66, at 336.

69 Hazard, *supra* note 62, at 1019, 1024.

70 Shaun Lee, *IBA Rules on the Taking of Evidence in International Arbitration*, SING. INT'L ARB. BLOG (May 5, 2017), https://singaporeinternationalarbitration.com/2012/07/18/iba-rules-on-the-taking-of-evidence-in-international-arbitration/.

71 Hazard, *supra* note 62, at 1019.

72 *Id.* at 1024.

73 INT'L BAR ASSOC., The IBA Rules on the Taking of Evidence in International Arbitration (2010) [*hereinafter* "IBA Rules"].

74 *Id.* pmbl. ¶ 1.

legal cultures."[75] In other words, the IBA Rules were drafted with the intention of them enjoying the widest possible acceptance.[76]

Article 3 of the IBA Rules sets out the procedure relating to disclosure of documents. The party seeking disclosure of documents must submit a "Request to Produce" to the arbitral tribunal and the other parties. The requesting party must, amongst other requirements, describe each requested document in sufficient detail and state how the document requested is relevant to the case and material to its outcome.[77] The mechanism above has been described by some as encapsulating the careful balance between the common and civil law traditions.[78]

Returning to the 23rd Vis moot problem, it was favourable for the claimant to argue that the IBA Rules *should* apply and one reason cited in arguments was, unsurprisingly, that the IBA rules struck a compromise between the common and civil law systems. Against this, however, the reply that came from many respondents was that the parties had not incorporated or mentioned the IBA Rules in their agreement. Indeed, the problem stated that the parties were not even aware of the IBA Rules at the time of contracting. That being the case, there was no basis for applying the IBA Rules. Another argument run by a few teams was that the IBA rules have been criticised as not living up to their stated goal of "compromising" between different legal traditions and having a decidedly common law flavour, although it is noted that such remarks were made in relation to the 1999 edition of the IBA Rules.[79]

Participants in the 2016 (23rd) edition of the Vis moots were thus acquainted with the attendant difficulties that arise out of the fact that procedure in international commercial arbitration is highly flexible. Since arbitration is premised on parties' consent, parties are equally free to agree upon arbitral procedure. Yet the primacy of party autonomy can also be used to argue that however worthwhile the goals of harmonisation and compromise behind endeavours such as the IBA Rules may be, there is no basis for applying them if it cannot be shown that it was the common intention of the parties for them to apply. As against that, however, one argument relied on by many claimant teams was that arbitrators are granted broad procedural discretion: they can set any procedural norm they consider appropriate, provided there is respect for due process and parties' agreements on specific procedural rules.[80] This is reflected, for instance, in Article 19.2 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which grants arbitrators the power to conduct the arbitration in such manner as they

---

75 *Id.* foreword & pmbl. ¶ 1.

76 Trittman & Kasolowsky, *supra* note 66, at 333.

77 IBA Rules, art. 3.3.

78 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcommittee, *IBA Rules on the Taking of Evidence in International Arbitration*, http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C9-4106-46BF-A1C6-A8F0880444DC; Rubinstein, *supra* note 62, at 305.

79 *See, e.g.,* BORN, *supra* note 52, at 2210.

80 WILLIAM PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 459 (2d ed. 2006).

consider appropriate, including the power to determine the admissibility, relevance, materiality and weight of any evidence.[81]

Should discovery be limited in the context of international commercial arbitrations? It might be argued that there are several good reasons why it should. Discovery is intrusive and can be time-consuming and expensive.[82] It may also be subject to abuse by parties: requests for production of internal documents could be used to harass the opposing party.[83] Discovery also seems to run contrary to parties' desire to preserve confidentiality – the very reason they may have opted for arbitration in the first place.[84] A limited scope of discovery also seems to be a fairer way to treat parties from different legal traditions: for instance, parties from civil law jurisdictions are not used to the systematic disclosure of unfavourable documents.[85] For the aforementioned reasons it could be argued that international commercial arbitration should adopt the limited approach taken by civil law jurisdictions towards discovery and disclosure.

Ultimately, however, there can be no bright-line rule about how much discovery or disclosure should be allowed in arbitration as a default position. An international arbitration may draw together many different sets of laws, rules and principles, including the *lex arbitri*, institutional rules, and even "international practice" (if parties make express reference to it in their arbitration agreement, as the parties did in the 23rd Vis moot problem). Citing these various laws, rules and principles may offer a party several options for justifying why a tribunal should apply one procedural rule over another, but party autonomy is the first and best measure of whether a certain procedural rule should be applied. Thus, in choosing whether to rely on a particular law, rule or principle, a disputant must be aware of the hierarchy of considerations. The many rules which confer broad procedural discretion upon a tribunal may ultimately prove futile if the invocation of those rules is not consistent with the fundamental principles of consent and respect for the parties' intentions. However, where it can be established that parties have *not* applied their mind at all to a certain procedural issue, a tribunal has scope to exercise its wide discretion. This is where procedural guidelines that are perceived to be "neutral" – like the IBA Rules – can come into play.

The example of the group of companies doctrine and the issue of the applicability of the IBA rules in the 22nd and 23rd editions of the Vis moot respectively, both point to the same takeaway: mooters need not be unduly concerned that certain concepts, doctrines or principles are not, strictly speaking, "available" to the disputant in question or traditionally accepted as part of the legal tradition from which they hail. This is because the nature of international commercial arbitration provides scope to borrow concepts from a wide range of legal traditions, so long as the applicability

---

81 Other examples include UNCITRAL Arbitration Rules, art. 17.1 (2010); ICC Rules of Arbitration, art. 22.2 (2017); ICDR International Arbitration Rules, art. 20.1 (2014).

82 Cedric Chao & Maria Chedid, *Planning for Discovery in International Arbitration*, 9(4) ASIAN DISP. REV. 114 (2007).

83 Peter Hafter, *The Provisions on the Discovery of Internal Documents in the IBA Rules of 1999*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 179 (Gerald Asken et al. eds., 2005).

84 BORN, *supra* note 52, at 476.

85 *Id.*

of these concepts can be grounded in the parties' common intentions and expectations as reasonable businessmen.

IV. Advocacy techniques

Having explored the civil-common divide in the realm of substantive law and procedural rules, there remains to make some brief comments on how the divide manifests in the context of advocacy techniques. The anecdote mentioned at the beginning of this article underscores the importance of adapting one's advocacy style to the circumstances, including the background and experience of the arbitrators. Similar observations were made by three prominent international arbitrators, Juliet Blanch, Bernard Hanotiau and Pedro J. Martinez-Fraga, in a recent panel discussion. They proffered the following example: if the arbitral tribunal is composed of three Queen's Counsel, English court style advocacy might prove more effective.[86] It would be an exercise in over-simplification to attempt to comprehensively list the distinguishing features of either common or civil law style advocacy. However, it has been observed that, in general, common law advocates and civil law advocates differ in the following ways: First, common law advocates are generally more disposed than their civil law counterparts to question and to test the credibility of witnesses; secondly, civil law advocates usually adhere more closely to their written submissions than common law advocates; and thirdly common law advocates tend to cite more to case law whereas civil law advocates rely more readily on academic interpretations.[87]

In the setting of the Vis Moots, it goes without saying that teams do not have the luxury of choosing the composition of the arbitral tribunal that they appear before. This means that teams must be quick to adapt to the unique characteristics of each tribunal. This unpredictability is compounded by the fact that unlike most other international moots, the tribunal does not always comprise legally trained persons. This is reflective of arbitration in practice, where non-lawyers may sometimes be involved as arbitrators. The fact that non-lawyers are involved is a factor that may necessitate a shift in style. For instance, pure reliance on legal arguments and authorities might not be sufficiently persuasive: it could well be the case that a legal proposition – even if in itself technically correct and borne out on the authorities – when taken to its logical end, results in an outcome that is not commercially practicable. Such arguments may not gain traction with non-legally trained arbitrators, whose primary focus would be on achieving outcomes that are reasonable, sensible and practical for all involved, rather than legal niceties. Given this, the mooter should know how and when to depart from strict legal propositions and to instead make reference to underlying principles that no reasonable businessman would disagree with. The mooter should also be willing to provide real-life examples in order to flesh out how a certain legal proposition applies in reality. This would concretise an otherwise abstract concept, aiding in the non-legally trained arbitrator's understanding.

---

[86] Claire Morel de Westgaver & Sebastien Krier, *How Legal Traditions (Still) Matter in International Arbitration*, KLUWER ARB. BLOG (Mar. 20, 2017), http://kluwerarbitrationblog.com/2017/03/20/bryan-cave/.

[87] INTERNATIONAL ARBITRATION AND MEDIATION – FROM THE PROFESSIONAL'S PERSPECTIVE 74–75 (Anita Alibekova & Robert Carrow eds., 2007).

Again it must be emphasised that while this article highlights the civil-common divide, it does not mean to overstate the significance of legal traditions. It has been observed that more senior arbitrators tend to understand both civil and common law, given their wealth of experience and qualifications. It is only at more junior ranks that an arbitrator's legal training may be more relevant.[88] Be that as it may, one might reasonably take the view that it does no harm at all to be aware of each tribunal's inclinations and use that to one's advantage.

V. Conclusion

This article hopes to provide two major takeaways for the reader. First, that legal traditions can and do diverge. A good mooter should, first and foremost, be aware of what these points of divergence are, and develop their arguments in a way that helps them smoothly negotiate and bridge these differences. Secondly, the fact that a certain concept, doctrine or principle originated in a certain legal tradition does not preclude their applicability in a different legal tradition, even one with no ostensible link to the originating jurisdiction. A good mooter should be prepared to explain why reasonable businessmen would nonetheless have expected that these concepts, doctrines or principles apply. These issues are brought to life every year in the Vis moots.

Among the numerous international moot competitions available to law students, the Vis moots are a particularly good training ground for those who wish to develop the advocacy skills needed for practice in the arbitration sector in the future. This is very much due to the international nature of the Vis moots: from the subject matter (both in terms of substantive and procedural issues) and the competition format, to the profile of the participants and the composition of the arbitral tribunals judging each moot round. It would not be wrong to say that many universities participate in the Vis moots because it allows their students to gain direct exposure to a subject matter that is highly relevant in this globalised world. The international arbitration sector has grown tremendously over the past decade alone, and there is still much potential for growth, particularly in Asia. For these reasons, any law student interested in a future career in international arbitration would be well-advised to participate in the Vis moots.

[88] Westgaver and Krier, *supra* note 86.