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Jurnal haqqında

BDU Hüquq fakültəsi Tələbə Elmi Cəmiyyəti tərəfindən nəşr edilən Bakı Dövlət Universiteti Tələbə Hüquq Jurnalı tələbələr tərəfindən təşkil olunan və müvafiq akademik yoxlama qaydası ilə redaktə edilən yeganə jurnal olub milli, beynəlxalq və müqayisəli hüquqda mövcud olan müasir hüquqi problemlərə akademik səviyyədə peşəkar yanaşmanı təbliğ edir. Jurnalın əsası 2014-cü ilin noyabr ayında qoyulmuş və 2015-ci ildən başlayaraq "HeinOnline", 2023-cü ildən etibarən isə ən böyük onlayn məlumat bazalarından biri olan "Scopus"-da yerləşdirilməkdədir. Nəzəri fikirləri, dünya dövlətlərinin məhkəmə və qanunvericilik təcrübəsini ümumiləşdirərək mübahisəli məqamlara aydınlıq gətirmək, hüquq cəmiyyətinə həm elmi, həm də praktiki müstəvidə yaradıcı düşüncə və hüquqi tənqid qabiliyyətini, hüquq mədəniyyətini aşılamaq Jurnalın əsas prinsipləridir. Jurnal tərkibindəki məqalələr vasitəsilə hüquqi əsaslandırma ilə aktual məsələlərə mümkün həllərin irəli sürülməsini və yenilikçiliyi prioritet məqsəd kimi müəyyənləşdirir. Hüquq tələbələrinin hüquqi yazı və hüquqi düşüncə bacarıqlarını üzə çıxararaq inkişaf etdirməklə onları akademik araşdırmaya həvəsləndirmək və bunu sağlam elmi rəqabət ənənəsinə çevirmək Jurnalın əsas məramını təşkil edir.

About the Review

Baku State University Law Review is the only student-run and peer-reviewed academic journal in Azerbaijan and a publication of Student Academic Society of Baku State University Law School. It was founded in November 2014 and has been placed in HeinOnline since 2015, and in Scopus, one of the largest online databases, since 2023. The Review promotes academic and professional approach to contemporary legal issues which exist in national, international and comparative law. Clarification of debatable issues with induction of theoretical concepts, judicial and legislation practice of foreign countries, foster legal criticism skills, creative thinking, and legal culture on both academic and practical sphere are basic principles of the Review. With its published articles, the Law Review promotes possible solutions to actual legal issues with reference to legal reasoning and opportunities given by legal scholarship and determines avoiding repetition as prior purposes of Review. Encouraging law students to academic research with making them improve their legal writing and legal thinking skills and make this as a fair competition are permanent goals of the Review.

Elvin Karimli[*]

THE DEVIL IS IN THE DETAIL: CROSS-BORDER APPLICATION AND (IN)VISIBLE ISSUE OF APPLICABLE LAW IN THE GENERAL DATA PROTECTION REGULATION

Abstract

The advent of modern technologies has recently exposed the EU data protection regime to significant changes. In this vein, the General Data Protection Regulation (GDPR) has improved the previous EU data protection regime and regulated the exponentially increasing form of data processing activities – the extraterritorial data processing activities – at the required level. Accordingly, the applicability issue has played an intriguing role within the framework of the GDPR. Herewith, this article will explore the issue of determining the applicable law within the GDPR. Whereas the GDPR has uniform applicability on the EU level at first sight, a closer examination reveals that the regulation of certain substantive issues is left to the discretion of the Member States. That said, the non-existence of the rule on determining the applicable law within the GDPR puts its objective in peril.

In this article, the applicability of the GDPR will be analyzed in the context of the territorial and extraterritorial reach. Specifically, the criterion of "establishment" the criterion of "offering goods or services" and "monitoring the data subjects' behaviours" will be examined in greater detail in this regard. Furthermore, this article will delve into the (in)visible issue – the determination of applicable law – in the framework of the GDPR. As regards this issue, the possible mechanisms will be scrutinized, and viable solutions will be suggested to determine the applicable law in case of the overlapping of the Member States' laws.

Annotasiya

Müasir texnologiyaların inkişafı son zamanlarda Aİ-nin məlumatların mühafizəsi rejimində əhəmiyyətli dəyişikliklərə səbəb olmuşdur. Bu mənada, Ümumi Məlumatların Qorunması Reqlamenti ("ÜMQR") əvvəlki Aİ-nin məlumatların mühafizəsi rejimini təkmilləşdirmiş və məlumatların emalı fəaliyyətlərinin sürətlə artan formasını – məlumatların eksterritorial emalı fəaliyyətlərini lazımi səviyyədə tənzimləmişdir. Buna uyğun olaraq, tətbiqetmə məsələsi ÜMQR çərçivəsində mühüm rol oynayan məsələlərdən biridir. İlk baxışdan ÜMQR Aİ səviyyəsində vahid tətbiq olunma xüsusiyyətinə malik olsa da, daha yaxından araşdırma müəyyən mühüm məsələlərin tənzimlənməsinin Üzv Dövlətlərin ixtiyarına buraxıldığını göstərir. Beləliklə, ÜMQR daxilində tətbiq olunan qanunun müəyyən edilməsi ilə bağlı qaydanın mövcud olmaması onun məqsədini təhlükə altına qoyur.

Bu Məqalədə ÜMQR-nin tətbiqi ərazi və ekstraterritorial əhatə kontekstində təhlil ediləcəkdir. Konkret olaraq, "təsis" meyarı, "mal və ya xidmətlərin təklif edilməsi" və "məlumat subyektlərinin davranışlarının monitorinqi" meyarı bu mövzuda daha ətraflı araşdırılacaqdır. Bundan əlavə, bu Məqalə ÜMQR çərçivəsində (görünməyən) məsələni –

[*] 2nd year LL.M. student in Intellectual Property Law at Baku State University and Université Lumière Lyon-2 (double degree-program).

tətbiq olunan hüququn müəyyən edilməsini araşdıracaqdır. Bu məsələ ilə bağlı mümkün mexanizmlər müəyyən ediləcək və Üzv Dövlətlərin qanunlarının ziddiyyəti halında tətbiq olunan hüququn müəyyən edilməsi üçün məqsədəuyğun həll yolları təklif olunacaqdır.

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Introduction

The unprecedented expansion of modern technologies can challenge the traditional approaches in legal fields in every domain. Among them, the changes brought by the Internet are required to grab much more attention due to its importance. The Internet can provide everyone with the opportunity to cross the traditionally existing geographical boundaries between the states as freely and easily as the air we breathe. Namely, the delineation of precise boundaries does not exist in this borderless environment. Owing to such ease of online arrangements, the number of persons who utilize the advantages of the Internet is exponentially growing day by day. As a response, approximately all major companies have commenced to restructure their mode of business in accordance with the online environment. Accordingly, the companies have increased data processing activities and this has caused major concerns over privacy and security matters. To put it simply, the Big Tech – GAMAM (Google, Apple, Meta, Amazon, Microsoft) make their services accessible to the users in exchange for their data. Consequently, the raw data has started to become a major source of generating revenue for most companies through behavioural marketing or targeting advertising. It is no coincidence that the raw data is deemed a new oil in the 21st century.

The increased cross-border data processing activities raise the vexing issues on the regulation and protection of privacy and security-related matters of the data subjects. Nevertheless, in the first instance, the determination of the applicable law plays a significant role in the data processing activities. Despite the importance of this issue, there is actually no international treaty or standard for determining the applicable law for the processing of personal data. However, the regulatory initiatives can be found at the regional level. In this vein, the initiatives taken on the European Union (hereinafter EU) level, which are also at the heart of this article, should be ascribed great weight. Thus, two major legal instruments have been adopted by the EU institutions to regulate data processing activities: 1) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (hereinafter DPD); 2) the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC (hereinafter GDPR). The applicability issue has played a crucial role in the frames of both these instruments. In this regard, this article will explore the applicability issue from two standpoints: 1) the applicability of the GDPR itself and 2) the issue of applicable law within the GDPR. Regarding the former, the applicability of the GPDR will be analyzed in light of the territorial and extraterritorial application. In relation to the latter, the intersection between the GDPR and the EU private international law will be addressed. In this respect, it can be understood, at first sight, that there is no room for the problem of overlapping or conflicting laws between Member States in the GDPR. However, by going much deeper, it can become apparent that the Member States' laws still maintain their importance within the GDPR and it leaves several essential issues to the discretion of the Member States to have the last say. To this end, whereas the GDPR is a Regulation in a formal way, it might have a hybrid role between the Regulation and Directive in a material form.[1] In light of this fact, the avoidance of the conflict-of-law rule raises the vexing question as to how to resolve the issue of the applicable law.

Based on the above-mentioned, the first chapter will primarily address the legislative history of the data protection regime within the EU. It will then explain the specificities of the DPD and GDPR in an orderly manner. The second chapter will further elaborate on the applicability issue within the GDPR. Especially, it will focus on the extraterritorial applicability of the GDPR in light of the newly added criteria (*"the offering of goods or services"* and *"the monitoring of the behaviours")*. The third chapter will, in turn, aim at

[1] Jiahong Chen, *How the Best-laid Plans Go Awry: The (Unsolved) Issues of Applicable Law in the General Data Protection Regulation*, 6 International Data Privacy Law 310, 312 (2016).

considering the juxtaposition between the issue of applicable law and the GDPR, and focus on finding the possible solutions for determining the applicable law within the GDPR.

I. The EU Data Protection Law and Legislative History within the EU

The formulation of data protection on the European level has approximately the same lifetime as the development of the European Union. In this context, data protection has been included as an integral part of the Treaty on the Functioning of the European Union (hereinafter TFEU), which is one of two treaties forming the constitutional basis of the EU, through Article 16 (1). Pursuant to this Article, *"everyone has the right to the protection of personal data concerning them"*.[2] Furthermore, Article 16 (2) expressly gives a mandate to the EU to legislate with respect to the protection of the individual's personal data in case of data processing activities. The advent of modern technologies and the increasing importance of personal data can bring data protection to the level of fundamental human rights. In this regard, the Charter of Fundamental Rights of the European Union (hereinafter Charter) goes a bit further and includes data protection in its composition. Under Article 8 (1), the Charter stipulates that *"everyone has the right to the protection of personal data concerning him or her"*.[3] In addition, Article 8 (2) contains the legitimate basis on which the processing of personal data is authorized. Regarding this, the Treaty of Lisbon made the Charter a legally binding instrument and incorporated the latter into the EU law.[4] By doing so, data protection as a fundamental right under the Charter is also incorporated into the integral part of the EU.

In light of this development, further initiatives have been taken to ensure the specific legislative acts regarding data protection on the EU level. These legislative acts refer to the DPD and the GDPR in a respective manner. Hence, this chapter will primarily focus on the legislative history of data protection within the EU and the specificities of the DPD and the GDPR.

A. The Legislative History of the Data Protection on the EU Level

The increasing concerns of the EU with respect to data protection were, to a certain extent, derived from the horrific experiences during World War II,

[2] European Union, Consolidated Version of the Treaty on the Functioning of the European Union, art. 16 (1) (2012).
[3] European Parliament, Charter of Fundamental Rights of the European Union, art. 8 (2000).
[4] *See* European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 6 (2007).

in which personal data was used to identify Jewish individuals.[5] In its turn, the first legislative act, on both the EU and worldwide level, concerning data protection was adopted in Germany, the State of Hesse.[6] Such initiatives in data protection could further trigger the introduction of new legislative acts by other Member States. In this context, Sweden adopted the nationwide data protection legislation in 1973, which was further followed by Germany and France.[7]

As time evolved, the general legislative act was required on a European level in the context of the data protection regime. The first active role was taken by the Council of Europe instead of the EU. In the early 1970s, the Council of Europe took an initiative to strengthen the protection of personal data on a European level and two recommendations –Resolution (73) 22 on the Protection of the Privacy of Individuals vis-à-vis Electronic Data Banks in the Private Sector in 1973, and Resolution (79) 29 on the Protection of the Privacy of Individuals vis-à-vis Electronic Data Banks in the Public Sector in 1974 – were adopted by the Committee of Ministers to the Member States.[8] As a continuation of these recommendations, the Council of Europe, at last, adopted the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (hereinafter Convention 108) in 1981. As per Article 1 of this Convention, the objective is to *"secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection")"*.[9] As a result of this initiative, this Convention has been ratified approximately by 50 States, among which, all EU Member States currently exist.[10] In light of Convention 108, the European Commission sought to urge all Member States to adopt this Convention to strengthen the data protection regime. Nevertheless, the ratification of the Convention 108 lacked consistency among the EU Member States, specifically, some of which conducted the ratification process very later or some of them arrived at different conclusions through the ratification. Henceforth, the European Commission decided to take the role on its own to harmonize the national laws concerning data protection within the EU.

[5] The GDPR Is Just the Latest Example of Europe's Caution on Privacy Rights. That Outlook Has a Disturbing History (2018). Available at: https://time.com/5290043/nazi-history-eu-data-privacy-gdpr/ (last visited Apr. 18, 2023).
[6] Dan Jerker B. Svantesson, *The Extraterritoriality of EU Data Privacy Law Its Theoretical Justification – Its Practical Effect on U.S. Businesses*, 50 Stanford Journal of International Law 53, 57 (2014).
[7] Orla Lynskey, The Foundations of EU Data Protection Law, 47 (2015).
[8] Council of Europe, Explanatory Report to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, para. 4 (1981).
[9] Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, art. 1 (1981).
[10] Chart of signatures and ratifications of Treaty 108, https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=108 (last visited Apr. 18, 2023).

B. The Data Protection Directive

Since the adoption of Convention 108, the data has commenced becoming a valuable asset and a commodity on its own in the world market economy. Even though Facebook's motto states that *"It's free and always will be"*, it does not reflect the practical reality.[11] Notably, the raw data of the individuals has a significant commercial value for the data controllers or processors to sell them businesses for the purpose of targeting advertising. To this end, the European Commission adopted the DPD in 1995 as a response to the transforming nature of the data in the global economy.

The DPD aimed at ensuring two major objectives: firstly, the protection of the personal data of the EU individuals as a fundamental right, secondly, the prevention of blocking the free flow of the data by the Member States to improve the market economy. Herewith, the European Commission not only secured the protection of personal data at the required level but also took into consideration the indispensable role of the data for the purpose of the modern economy.[12] The further advantage of the DPD was concerned with the improvement of the functioning of the internal market by harmonizing the data protection legislations within the EU.[13]

To begin with, the scope of the DPD's applicability plays a significant role in delving much deeper into the substantive provisions of this Directive. The cases under which the DPD's applicability was triggered were enshrined under Article 4 of the DPD. As regards these cases, the primary emphasis is put on the data processing activities within the EU, but not beyond the border.[14] The reason behind this approach lies in the fact during the drafting process, the cross-border data processing activities had not received much more attention than the current period. To provide a full picture, there is a need to look into Article 4, which is specified in the following:[15]

Article 4

1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

a. the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

[11] Adèle Azzi, *The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation*, 9 Journal of Intellectual Property, Information Technology and E-Commerce Law 126, 127 (2018).
[12] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, art. 1 (1995).
[13] Lynskey, *supra* note 7, 49-50.
[14] Christopher Kuner, Transborder Data Flows and Data Privacy Law, 235 (2013).
[15] *Supra* note 12, art. 4.

b. the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;

c. the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

2. In the circumstances referred to in paragraph 1 (c), the controller must designate a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself.

The aforementioned Article expressly reinforced the fact that the applicability scope of the DPD was primarily confined to the territorial boundaries of the EU or required a sufficient territorial link for its applicability to non-EU data processing activities. Therefore, Article 4 (1) (a) and Article 4 (1) (c) relied specifically upon the territorial connecting factor – *"the existence of the establishment"* and *"the territorial presence of the equipment in the EU"*. The DPD's affiliation with the territoriality principle lags behind the incremental development of modern technologies. Specifically, the technological developments have led to an increased processing of individuals' personal data outside the EU, and the regulation of the data processing activities beyond the borders of the EU has started to play a much more significant role than before. In this regard, as Kuner notes, *"most of the controversies surrounding European data protection law have been caused by the fact that legal instruments designed mainly for intra-EU use have been forced by the expanding information economy to be applied to global problems on a scale for which they were not intended"*.[16] Accordingly, there is a need to adopt the novel data protection regime within the EU.

C. The General Data Protection Regulation

In light of the increased nature of the cross-border data processing activities, the territoriality principle within the DPD seems to be old-fashioned and it necessitated avoiding the straightforward approach of the territoriality principle. Herewith, the DPD was repealed by the GDPR which came into effect on May 25, 2018. By coming into force, the GDPR steps in and harmonizes the data protection regime for all Member States in the same manner. Likewise, the divergences between the data protection laws of the Member States can be brought to the minimum by adopting a uniform law.

Along with the uniform applicability, the GDPR brings about the game-changing amendments by outstretching its applicability even into the cross-border cases in which the data controller has no territorial presence in the EU, however, carries out the data processing of the persons residing in this

[16] Kuner, *supra* note 14.

Union.[17] In lieu of the old-fashioned equipment criterion, Article 3 of the GDPR has introduced new connecting factors, i.e., the offering of goods or services to data subjects in the Union[18] and the monitoring of their behaviours as far as their behaviours take place within the Union.[19] To provide a better overview, it would be insightful to put forward Article 3 in the following:[20]

Article 3

1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.

2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

a. the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

b. the monitoring of their behavior as far as their behavior takes place within the Union.

3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.

It infers that the cross-border application of the GDPR is conditioned upon two criteria, which include, on the one hand, the offering of goods or services, on the other hand, the monitoring of the EU individuals. Accordingly, the following chapter will elaborate on these aspects in detail.

II. The Issue of the Applicability within the EU Data Protection Law

Since the adoption of the GDPR, the issue of applicability has always been given great weight. Specifically, as the newly added criteria add the flavour of extraterritoriality to the GDPR, the analysis of the applicability has always been at the heart of international academia.

Accordingly, this chapter will address the in-depth analysis of the applicability issue within the GDPR. Prior to this analysis, the predecessor of this Article in the DPD will be specified, and the GDPR's counterpart will be compared in relation to the former on the basis of the newly-added criteria.

[17] Paul de Hert, Michal Czerniawski, *Expanding the European Data Protection Scope Beyond Territory: Article 3 of the General Data Protection Regulation in Its Wider Context*, 6 International Data Privacy Law 230, 238 (2016).

[18] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), art. 3 (2) (a) (2016).

[19] *Id.*, art. 3 (2) (b).

[20] *Id.*, art. 3.

By doing so, it can shed much light on the better comprehension of the applicability of the GDPR.

A. The Clause on Applicable Law in Data Protection Directive

The applicability issue within the DPD had been formulated with regard to the peculiarities of its legislative form and it leaves the implementation to the discretion of Member States through their national laws as a Directive.[21] Accordingly, this situation elevated the possibility of the conflicting of Member States' laws into an evitable issue. To prevent the existence of the chaotic situation in the further application, the applicability clause under Article 4 was included in the composition of the DPD.

As it infers from this Article, three different applicability cases are identified: a) the placement of the establishment of the controller; b) the application by virtue of public international law; and c) the placement of the equipment used for processing data. Accordingly, the major connecting factor for determining the applicable law is related to the placement of the establishment and the equipment.[22] By doing so, the DPD relied on the territoriality principle by following the traditional approach of private international law.[23]

As time evolves, the advent of modern technologies has warranted a more flexible stance towards Article 4. Likewise, the advisory body of the DPD, Article 29 Data Protection Working Party (hereinafter Working Party), had pronounced its opinion on the applicable law in 2010,[24] which sought to provide a clear understanding of Article 4 to prevent any uncertainty for all stakeholders.

In the first instance, the Working Party was primarily focused on the notions of *"establishment"* and *"processing in the context of the activities of establishment"* under Article 4 (1) (a).[25] Firstly, by referring to Recital 19 of the DPD, the Working Party determined that the notion of *"establishment"* entails the effective and real exercise of activity through stable arrangements.[26] However, it took a flexible approach and interpreted the *"establishment"* in such a manner as to make the legal form of this establishment a non-determining factor.

The degree of the involvement of the establishment in the data processing activities plays a critical role in assessing the *"processing in the context of the*

[21] Directive (EU), https://uk.practicallaw.thomsonreuters.com/1-107-6116?transitionType=Default&contextData=(sc.Default)&firstPage=true (last visited Apr. 18, 2023).
[22] Lokke Moerel, *The Long Arm of EU Data Protection Law: Does the Data Protection Directive Apply to Processing of Personal Data of EU Citizens by Websites Worldwide?*, 1 International Data Privacy Law 28, 28 (2011).
[23] *Ibid.*
[24] *See* Article 29 Data Protection Working Party, Opinion 8/2010 on applicable law (2010).
[25] *Id.*, 11-12.
[26] *Id.*, 11.

activities of establishment". In this respect, it is necessary to delve into the question of *"who is doing what?"*.[27] Through this question, it can be identified whether the establishment is processing the personal data in the context of its own activities or the activities of another establishment. As far as the former is concerned, the law of the Member State where the establishment itself is situated is applied. Nonetheless, in case it is related to the activities of another establishment, the law of the Member State where the other establishment is located comes into play.[28]

Furthermore, the Working Party has centred on Article 4 (1) (c). The inclusion of this provision was necessitated by the higher likelihood of the processing at a distance without any presence in the EU.[29] Accordingly, this case is applicable even when there is no physical presence in the EU territory, however, there is already a close connection with this territory. In this case, the connecting factor is conditioned upon the localization of the equipment used for the processing. In the light of the flexible approach, the Working Party interpreted this criterion in the context of *"means"* instead of *"the equipment"*.[30] The reason lies in the fact that the notion of *"equipment"* would have a much narrower meaning than *"means"*, which is primarily focused on a physical apparatus rather than *"any possible means"*.[31] By this technique, the scope of this criterion is widened and even includes the cookies or JavaScript banners for the processing of personal data.

In addition, Article 4 of the DPD not only regulates the cases under which the DPD is applicable but also determines the applicable law in case of a conflict between the Member States' laws. Herewith, it seems to have a two-stage function: in the first place, it determines whether European law is applicable to the processing of personal data as opposed to the law of a non-EU country.[32] If the first stage is met, then it seeks to identify the law of which Member State is applicable to the case at hand.[33] To this end, this Article is also referred to as the *"conflict-of-law rule"*, which intends to prevent the conflicting of laws if necessary.

B. The GDPR's Applicability and Its Newly-Added Criteria

As it evolved over time, significant initiatives have been taken to enhance the lacking aspects of the DPD. That being so, the new legislative act – the

[27] *Id.*, 14.
[28] *Ibid.*
[29] Article 29 Data Protection Working Party, Working document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based web sites, 12 (2002).
[30] *Supra* note 24, 2.
[31] Douwe Korff, EC Study on Implementation of Data Protection Directive, Comparative Summary of National Laws, 48 (2002).
[32] Maja Brkan, *Data Protection and European Private International Law*, European University Institute Schuman Center for Advanced Studies, Working Paper 2015/40, 32 (2015).
[33] *Ibid.*

GDPR – was adopted and it had introduced several significant changes to the applicability issue in the previous data protection legislation. Namely, the GDPR's applicability under Article 3 has raised very engaging issues with its newly added criteria and extraterritorial reach.[34]

As inferred from the content of Article 3, it does not completely diverge from its predecessor – Article 4 of the DPD. To put it differently, two cases triggering the applicability under Article 4 of the DPD also remain intact in Article 3 of the GDPR: a) the existence of the establishment of the controller or processor in the Union and b) the application by virtue of public international law. Along with them, the GDPR gives effect to the new criteria, which expand its territorial reach outside the EU. Pursuant to these criteria, the companies operating outside the EU can find themselves under the cloak of the GDPR when the processing is carried out in relation to the offering of goods or services[35] or to the monitoring of the behaviours[36] insofar as the data subjects are within the EU.

At first glance, the understanding of Article 3 seems to be straightforward, however, it can cause challenging issues in a practical sense. Therefore, it is much worth examining this Article in a thorough manner.

1. The Case of the Establishment in the European Union

The first case under Article 3 (1) is essentially following the traces of its counterpart under the DPD.[37] The applicability of the GDPR can be triggered in the case of the processing in the context of the activities of the establishment in the EU. Thus, the first criterion relies upon the territoriality principle by requiring physical presence within the EU, and the three-layered approach is upheld.[38]

Firstly, the central term under this Article is concerned with the notion of the *"establishment"*. As is in the DPD, the GDPR itself does not provide the definition of the *"establishment"* in the context of Article 3 (1). In this regard, this paper can recourse to Recital 22 of the GDPR and guidelines of the European Data Protection Board (hereinafter EDPB). By referring to Recital 22, the EDPB explains that the notion of *"establishment"* implies the effective and real exercise of activity through stable arrangements,[39] and the matters of the registration and legal form of the undertakings are deemed non-determining factors for evaluating the *"establishment"*. In this respect, the degree of the stability of the arrangements and the effective exercise of activities through the necessary human and technical resources should be

[34] Hert, Czerniawski, *supra* note 17, 237.
[35] *Supra* note 18.
[36] *Id.*, art. 3 (2) (b).
[37] Manuel Klar, *Binding Effects of the European General Data Protection Regulation (GDPR) on U.S. Companies*, 11 Hastings Science and Technology Law Journal 102, 106 (2020).
[38] European Data Protection Board, Guidelines 3/2018 on the territorial scope of the GDPR (Art. 3), 5 (2020).
[39] *Supra* note 18, recital 22.

taken into consideration for the determination of the *"establishment"*.[40] The current expansion of the Internet and online activities has lessened the threshold to a minimum. Accordingly, the degree of stability and the effective exercise of activities do not require the undertakings to have a complex corporate structure; instead, the presence of one representative with necessary resources might be sufficient to be considered a stable establishment.[41]

The second layer constitutes the processing in the context of the activities of the establishment. This layer sought to strike a balance in the effective interpretation of Article 3 (1). Notably, it prevents, on the one hand, the confinement of the scope of Article 3 (1) to the cases when the processing is carried out by the establishment itself.[42] On the other hand, it prevents too far-reaching applicability in cases when the operation of the establishment has the remotest connections with the data processing of the non-EU data controller or processor.[43] The EDPB has determined that there is a need, at least, for the existence of the inextricable link between the operation of the establishment and the data processing activities of non-EU data controllers or processors.[44] Further, the EDPB has recalled the fact of loosening the criterion to mere advertising or sales establishments. To put it simply, the revenue-raising activities, which are inextricably linked to the data processing, fall squarely within the context of the activities of the establishment.[45]

Such a flexible approach is also taken by the CJEU in Google Spain and Weltimmo cases consecutively. Even though these cases were handed down in the lifespan of Article 4 of the DPD, they have still been relevant with respect to Article 3 (1) of the GDPR.[46]

a. Google Spain and Google Cases

The case is primarily concerned with the dispute between, on the one hand, Google Spain SL (hereinafter Google Spain) and Google Inc., and on the other hand, the Agencia Española de Protección de Datos (hereinafter AEPD) and Mr. Costeja González. As a Spanish national resident, he filed a complaint before AEPD concerning his name and personal data which appear in links relating to the Spanish daily newspaper La Vanguardia on the search results of Google search engine.[47] Mr. Costeja González requested to remove such search results mentioning Mr. Costeja González's name for a real estate auction having the connection with attachment proceedings to recover the

[40] Berkholz v. Finanzamt Hamburg-Mitte-Altstadt, C-168/84, Judgment, para. 18 (1985).
[41] Merlin Gömann, *The new territorial scope of EU data protection law: Deconstructing a revolutionary achievement*, 54 Common Market Law Review 567, 575 (2017).
[42] *Supra* note 38, 7.
[43] *Ibid.*
[44] *Id.*, 8.
[45] *Ibid.*
[46] Klar, *supra* note 37, 106.
[47] Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, C-131/12, Judgment, para. 14 (2014).

social security debts.[48] Preliminarily, AEPD upheld such a claim as opposed to the Google search engine and took the view that it should withdraw the concerned personal data. As opposed to this decision, Google Spain and Google Inc. lodged separate action with AEPD on this matter. Due to the complexity of this case, the AEPD referred it to the CJEU to give a preliminary ruling on the basis of three questions. Among these questions, this part will be solely focused on the question concerning Article 4 (1) of the DPD, and the other ones will not be touched upon due to the non-relevancy.

Regarding the question in Article 4 (1) (a) of the DPD, three different scenarios were presented for the CJEU to epitomize the case.[49] Among these scenarios, the Court started the analysis of Article 4 (1) (a) in the case where *"the operator of the search engine sets up in a Member State an office or subsidiary for the purpose of promoting and selling advertising space on the search engine, which orientates its activity towards the inhabitants of that State"*.[50] In this regard, by just relying on Recital 19 of the DPD, the Court reinforced the view that the establishment implies the effective and real exercise of the activity through stable arrangements.[51]

After expounding the notion of the establishment, the Court delved much deeper into the dissection of the *"in the context of the activities of the establishment"*, which was also the turning point in broadening the scope of Article 4 (1) (a). In this regard, the Court stood in line with the argument of Mr. Costeja González and determined that the notion of *"in the context of the activities of the establishment"* should not be read restrictively.[52] The Court pointed out that it is not required for Article 4 (1) (a) to have the data processing carried out by the establishment itself; rather, it suffices to ensure the inevitable link between the establishment and the data processing.[53] Accordingly, the Court noted that although Google Spain itself did not participate in the data processing, such economic activities, e.g., *promoting the sales and advertising space*, made the operation of the data processing by the search engine profitable and could fall within this link.

b. Weltimmo Case

The reasoning of the CJEU in Google Spain and Google Inc. case was followed by Weltimmo judgment after a couple of years. The dispute which occurred between the company of Weltimmo and the Hungarian Data Protection Authority was related to the fine imposed by the latter for encroaching the Hungarian Law on freedom of information.[54] Weltimmo is a

[48] *Ibid.*
[49] *Id.*, para. 45.
[50] *Ibid.*
[51] *Id.*, para. 48.
[52] *Id.*, para. 53.
[53] *Id.*, para. 55-56.
[54] Weltimmo s. r. o. v. Nemzeti Adatvédelmi és Információszabadság Hatóság, C-230/14, Judgment, para. 2 (2015).

company registered in Slovakia and manages a website dealing with properties located in Hungary. To this end, it conducted the data processing of the advertisers. The advertisements are free of charge for one month and from onwards the fee is charged. Therefore, the advertisers requested Weltimmo to delete their announcements and personal data from the website, nevertheless, it did the contrary, even passing on these data to the debt collection agencies. As a result, the advertisers filed a complaint before the Hungarian Data Protection Authority which declared itself competent to hear the case and fined the company of Weltimmo for the infringement of the relevant legislation.[55] Weltimmo then forwarded the case to the Budapest Administrative and Labor Court and argued that the Hungarian Data Protection Authority is not entitled to apply the Hungarian Law due to the location of the company in another Member State.[56] By the same token, the Court dismissed this defence and upheld the decision of the Hungarian Data Protection Authority. Thereafter, Weltimmo appealed on the same ground to the Hungarian Supreme Court which referred the issue on the applicable law under Article 4 (1) of the DPD to the CJEU for the examination.

The CJEU examined the determination of the applicable law to the data processing carried out by the company which on the one hand, had the registration office in one Member State, on the other hand, operated in another Member State. To this end, the Court predominantly heeded the notion of *"establishment"* and *"in the context of the activities of the establishment"*. By following the traces of the Google Spain and Google Inc. case, the CJEU relied on the same definition of the establishment as implying the effective and real exercise of the activities through stable arrangements.[57] Unlike the Google Spain and Google Inc. case, the Court did not confine its reasoning merely to the above-mentioned explanation and lessened this criterion. The Court stressed that the mere presence of one representative can also be sufficient to fall within this criterion in the case of having a substantial level of stability and necessary equipment for the provision of services.[58]

Furthermore, the Court reinstated the approach made in the Google Spain and Google Inc. case towards the notion of *"in the context of the activities of the establishment"*, which necessitates the flexible and broad interpretation of this notion.[59]

By applying such reasoning, the Court made a big step in adapting to the demands of the modern period. Especially, its findings on the notion of *"the establishment"* can give the green light to the applicability of EU data protection legislation even for the non-EU data controllers fulfilling the data

[55] *Id.*, para. 10.
[56] *Id.*, para. 11.
[57] *Id.*, para. 28.
[58] *Id.*, para. 30.
[59] *Id.*, para. 34-35.

processing through one representative permanently residing in the EU.[60] Such flexible approaches have also played a role of a primary harbinger for the recent shape of EU data protection legislation.

2. The Offering of Goods or Services to the Data Subjects Located in the EU

The criterion of the offering of goods or services is incorporated into the GDPR owing to the incremental ease of the data processing activities at a distance through the rapid development of modern technologies. Accordingly, the initial elaboration and analysis of this criterion is provided for by the GDPR itself in Recital 23 which enshrines the following:

"… In order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor ***envisages*** *offering services to data subjects in one or more Member States in the Union. Whereas the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such* ***intention****, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union".*[61]

As a starting point, Recital 23 can provide us with two major benchmarks for an all-inclusive understanding of this criterion: 1) envisaging the offering of goods or services to the data subjects in the EU; 2) having a clear intention.[62] These benchmarks refer to the "targeting" approach as evidenced by the EDPB.[63] Even though this criterion expressly becomes part of the EU data protection law through the GDPR, its roots date back to the operational period of the DPD. Specifically, the Working Party determined the targeting of, or orientating the business activities towards, the EU individuals as an additional criterion for the applicability of the DPD.[64] Moreover, the Working Party spelt out several factors, e.g. the availability of information or advertising in EU languages, the accessibility of the services or products for the EU individuals, and the purchase of the services or products through an EU credit card. That being so, these factors equated, in part, the targeting

[60] Gömann, *supra* note 41, 575.
[61] *Supra* note 18, recital 23.
[62] Maja Brkan, *Data Protection and Conflict-of-Laws: A Challenging Relationship*, 3 European Data Protection Law Review 324, 337-338 (2016).
[63] *Ibid.*; *See also* Dan Jerker B. Svantesson, *Extraterritoriality and Targeting in EU Data Privacy Law: The Weak Spot Undermining the Regulation*, 5 International Privacy Law Review 226, 231 (2015).
[64] *Supra* note 24, 31.

approach under the data protection law with the criterion of orientating or directing activities in the consumer protection law.[65]

The traces of the targeting approach taken by the Working Party are followed by the GDPR as incorporating the criterion of offering goods or services to persons in the EU. This criterion is approached by Recital 23 of the GDPR and the EDPB in light of the targeting approach.[66] By the same token, the offering of goods or services is also analogous, to a certain extent, to the criterion of orientating or directing activities towards the EU in the consumer protection law.[67] In this regard, it is worth noting that the interservice draft version of the GDPR proposed by the European Commission included the benchmark of directing activities rather than the offering of goods or services.[68] Accordingly, it stems from that the drafters of the GDPR had in mind the criterion of directing activities when drafting the current Article 3 (2) (a). Nevertheless, these two criteria are not equated with each other, and the CJEU cases regarding the directing activities in the consumer protection law could just be assistance in unveiling the offering of goods or services in the data protection law. Prior to having recourse to these cases, it is deemed necessary, firstly, to touch upon the interrelation between the consumer and data protection law.

a. The Interrelation between the Consumer and Data Protection Law

Before the widespread use of modern technologies, the parallelism between consumer law and data protection law existed at a minimum level. However, the over-paced expansion of the Internet and e-commerce can intermingle these fields with each other. Accordingly, the legal systems of some developed states, e.g., the USA, consider data protection law as an inseparable part of consumer law.[69] This tendency is also followed in the framework of the EU legal system. Nevertheless, unlike the USA, the simple fact of being a data subject does not automatically equate it with the notion of the *"consumer"* in the EU legal system.[70] To qualify as a consumer, the data subject is required to conclude a contract for purposes which are beyond their trade or profession. In this context, it should be noted that most of the online services are offered to the data subjects in a contractual arrangement.[71] As an example, some social media websites, e.g., Facebook[72], and LinkedIn[73],

[65] *Ibid.*
[66] *Supra* note 18, recital 23; *supra* note 38, 14.
[67] Svantesson, *supra* note 63, 231; Brkan, *supra* note 62, 338.
[68] Azzi, *supra* note 11.
[69] Paul Bernal, Internet Privacy Rights: Rights to Protect Autonomy, 113 (2014).
[70] Korff, *supra* note 31, 13.
[71] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art. 17 (1) (2012).
[72] Terms of Service (2022), https://www.facebook.com/terms.php (last visited April 19, 2023).
[73] User Agreement (2022), https://www.linkedin.com/legal/user-agreement (last visited April 18, 2023).

condition the usage of their services upon the Terms of Service which can trigger the contractual arrangement.

Furthermore, the similarity between these legal fields is based on the fact that both the data subjects and consumers are of unequal bargaining power as weaker parties in their contractual relationship in relation to the other contracting party.[74]

Based on the above-mentioned, the data subjects and consumers can be treated alike in most cases, so there is no well-grounded hindrance to using the interpretation of the criterion of *"directing activities"* under the consumer protection law in the analysis of the criterion of *"the offering of goods or services"* under the data protection law.

b. The Criterion of Directing Activities under the Consumer Protection Law

The concept of directing activities in the framework of the consumer protection law is regulated under both Article 17 (1) (c) Brussels I Regulation and Article 6 (1) of the Rome I Regulation. The former states that the jurisdictional rules over the consumer contracts are applicable if the professional directs its business activities towards the EU Member State,[75] in turn, the latter prescribes that the consumer contracts shall be governed by the country of a domicile of the consumer if the professional directs its business activities towards that country.[76] Meanwhile, the CJEU cases intended for the analysis of the directing activities under these Regulations, specifically the Brussels I Regulation, are of relevance in the understanding of the criterion under Article 3 (2) (a) of the GDPR.

i. Joined cases of Pammer and Hotel Alpenhof

The cases of Pammer and Hotel Alpenhof were instituted separately, nevertheless, the identical nature of these cases necessitated their joining by the CJEU in one proceeding for a preliminary ruling.

Regarding the Pammer case, the dispute between Mr. Pammer who resided in Austria, and a German-based company arose from the contract, which was related to the voyage by freighter concluded between Mr. Pammer and a German-based intermediary company.[77] In this case, Mr. Pammer booked his voyage through the website of the intermediary company. However, by arguing the non-compliance of the website conditions with the real vessel conditions, he sued a German-based company before the Austria District Court. In turn, a German-based company dismissed such a claim on the ground that it did not pursue or direct any business activities in Austria and

[74] Brkan, *supra* note 32, 12-13.
[75] *Supra* note 71, art. 17 (1) (c).
[76] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art. 6 (1) (2008).
[77] Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller, Joined Cases, C-585/08 and C-144/09, Judgment, para. 14 (2010).

the court lacked jurisdiction. In the end, the first instance court upheld Mr. Pammer's claim. Nevertheless, by appealing to the appellate court, a German-based company succeeded in the dismissal of the ruling of the first instance court. In any case, the case was referred to the Supreme Court by Mr. Pammer. As a result of the conflicting issues, the Supreme Court submitted this case to the CJEU for preliminary ruling with two questions one of which is concerned with the criterion of directing activities.

With respect to the Hotel Alpenhof case, the dispute arose between a consumer, Mr. Heller, who resides in Germany and the hotel Company, the Hotel Alpenhof, which was located in Austria. Mr. Heller had reserved a number of rooms through the website of the hotel concerned.[78] However, he found fault with the hotel's services and left his bill without any payment. Accordingly, the Hotel Alpenhof filed a lawsuit before the Austrian District Court on the basis of its domicile. As opposed to this lawsuit, Mr. Heller raised an objection on the ground that the court lacked jurisdiction, and the lawsuit should have been filed before the court of the Member State of his domicile due to being a consumer. Both the first instance court and the appellate court dismissed the claim of the Hotel Alpenhof on the same ground which was raised by Mr. Heller. As a last resort, the Hotel Alpenhof appealed to the Supreme Court to hear this case. As in the Pammer case, the Supreme Court stayed the proceedings and referred the case to the CJEU for a preliminary ruling with the question concerning the directing activities. The CJEU was asked to determine through which criteria a trader's business activity offered on its website or on that of its intermediary can fall under the cloak of the criterion of directing the activity to the Member State of the consumer's domicile, within Article 15 (1) (c) of Brussels I Regulation.

Primarily, the Court approached this issue from the perspective of the subjective intention of the trader. Specifically, it questioned whether the directing business activities relate to the trader's intention in targeting the Member State or refer to any activity which *de facto* targets the Member State regardless of the existence of any intention.[79] In this regard, the CJEU took the view that the trader's intention should exist in relation to be considered as the directing business activities towards the Member State.[80] The Court justified its reasoning on the ground that in case of disregarding such intention, the mere accessibility of the website can trigger the criterion of directing business activities. Likewise, if this was intended by the drafters of the Regulation, the accessibility of the website would have been spelt out rather than directing business activities.[81] By providing this reasoning, the CJEU also relied on the opinion of the Advocate General which stated that *"it is essential for there to be*

[78] *Id.*, para. 26.
[79] *Id.*, para. 63.
[80] *Id.*, para. 75.
[81] *Id.*, para. 71.

active conduct on the part of the undertaking, the objective and outcome of which is to win customers from other Member States".[82] Accordingly, the CJEU formulated that the trader should envisage the business activities with the mind to conclude a contract.

After finding the subjective intention as an integral part of the criterion of the directing activities, the CJEU shifted its focus to the objective factors for revealing such intention.[83] By doing so, the Court intended to prevent the absolute confinement of this criterion into the subjective test and add certain objectivity to simplify the assessment process. The non-exhaustive list of these factors was spelt out by the CJEU as the following: the international nature of the business or commercial activity, the indication of telephone numbers with an international code, mention of itineraries from other Member States for going to the place where the trader is established, the usage of a language or a currency other than the ones generally used in the Member State where the trader is established, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in the other Member States, the usage of a top-level domain name other than the one of the Member State where the trader is established, and mention of an international clientele composed of customers domiciled in various Member States etc.[84] Furthermore, the Court further took the view that these factors are of importance as evidence rather than essential conditions in determining the criterion. Therefore, a case-by-case analysis is necessary for this purpose.

In light of the fact that the criterion of directing activities and the offering of goods or services resemble each other, the reasoning of CJEU in the Pammer and Hotel Alpenhof joined cases can provide ample guidance in evaluating the criterion of the offering of goods or services under Article 3 (2) (a) of the GDPR.[85] Primarily, the non-exhaustive list of the factors spelt out in this case is of a higher relevance on this matter. Specifically, a number of these factors, e.g. the use of language or currency of the directed Member States, the availability of the email and contact details with an international code, and the international nature of the business activities, are also specified in Recital 23 of the GDPR. Moreover, both the reasoning of the CJEU and Recital 23 of the GDPR are tailored to envisaging the business activities for analyzing each of these criteria.[86] Accordingly, it can be drawn that the GDPR followed the traces of the reasoning of the CJEU in this case when formulating its own criterion.[87] Owing to such similarity, it does not seem problematic to utilize

[82] *Id.*, para. 64.
[83] *Id.*, para. 93.
[84] *Ibid.*
[85] *Supra* note 38, 17.
[86] *Supra* note 71.
[87] *Ibid.*

the other factors, which are not included in Recital 23, of this reasoning in gauging the criterion of the offering of goods or services.

In addition, the CJEU ruling in the Pammer and Hotel Alpenhof joined cases plays a significant role in relation to the interactivity of the websites.[88] To put it simply, the question arises as to whether the distinction between passive or active websites is relevant to the assessment for the criterion of directing business activities. Such a distinction between websites is rooted in the USA legal system and came into the picture after the landmark Zippo judgment,[89] which divided the websites into three categories, (passive, interactive and active ones), on the basis of which the jurisdictional questions on the Internet-based disputes could be inquired.[90] On this issue, the CJEU in this case set forth that the distinction between the websites is of no relevance when determining the criterion of directing business activities.[91] The CJEU justified its reasoning on the ground that the firm dependence of this criterion on the technical features and interactivity of the website can impair the major objective of Article 15 (1) (c) of the Brussels I Regulation.[92] In this case, the traders can easily circumvent the applicability of this criterion by just operating a passive website and concluding a contract through traditional means. By means of analogy, this is also the case under Article 3 (2) (a) of the GDPR. Accordingly, such a distinction can lose the whole meaning of this Article by ensuring the data controllers or processors evade the GDPR's application by targeting just the passive websites.

ii. The Emrek Case

The dispute, in this case, occurred between Mr. Emrek, who resided in Germany, and Mr. Sabranovic, who resided in France.[93] As he operates a second-hand car dealership, Mr. Sabranovic used an Internet website which included the location of his place, and mobile and fax address with an international dialling code. Even though the information about this dealership existed on the website, Mr. Emrek heard about this business through traditional acquaintances. Furthermore, he went to France and concluded the contract of sale with Mr. Sabranovic. Later on, Mr. Emrek brought a suit against Mr. Sabranovic under the claim concerning the warranty clause of the contract before the German District Court. However, the Court dismissed the claim on the grounds that Mr. Sabranovic had not directed his business activities towards Germany. As an appeal, Mr. Emrek submitted this case before the Supreme Court, which stayed the proceedings and referred it to the

[88] Zhen Chen, *Internet, Consumer Contracts and Private International Law: What Constitutes Targeting Activity Test?* 32 Information & Communications Technology Law 23, 34 (2021).
[89] Zippo Manufacturing Co v. Zippo Dot Com Inc., 952 F. Supp. 1119 (1997).
[90] *Ibid.*
[91] *Supra* note 77, para. 79.
[92] *Ibid.*
[93] Lokman Emrek v. Vlado Sabranovic, C-218/12, Judgment, para. 10 (2013).

CJEU on the question of whether the causal link between the "directing" of the trader's activity and the consumer's decision to enter into the contract should exist or not.

Prior to analyzing the concerned question, the CJEU recalled and reasserted its previous findings towards the criterion of directing business activities in the Pammer and Hotel Alpenhof joined cases. Specifically, the importance of the non-exhaustive list of the factors in the Pammer and Hotel Alpenhof joined cases was re-emphasized in determining whether a business activity is directed to the Member State.[94] Upon such assertion, the CJEU started to delve into the main question concerning the causal link. The Court decided that the existence of the condition concerning the causal link between the business activities directed to the Member State and the consumer's decision to enter into a contract stood in stark contrast with the context and objective of Article 15 (1) (c) of the Brussels I Regulation.[95] The CJEU stated that the conditions of Article 15 were formulated in an exhaustive form; therefore, the addition of unwritten conditions, such as the causal link, can load this Article unnecessarily and diminish its applicability to the rare cases.[96] Nevertheless, the Court also contended that such reasoning did not lead to the irrelevancy of this criterion as a whole. Namely, it is an undeniable fact that such a causal link is of an evidentiary role in assessing the directing business activities within Article 15 (1) (c) of the Brussels I Regulation.[97] Accordingly, the CJEU expanded the scope of the list of the non-exhaustive factors set out in the Pammer and Hotel Alpenhof joined cases by adding this factor.

As prescribed above-mentioned, the reasoning of the CJEU in the Emrek case can also be utilized in the assessment of the relevant criterion under Article 3 (2) (a) of the GDPR. To put it simply, the criterion of the causal link might have the evidentiary role in assessing the criterion for the offering of goods or services set forth under the GDPR.

c. The Sliding Scale between the Subjective Intention to Target and the End Result of This Targeting

As put forward both in Recital 23 of the GDPR and in the Pammer reasoning, particular attention is drawn to the subjective intention of the data controllers, processors, or the traders, respectively, in the targeting criterion. Likewise, they added the flavour of objectivity to this criterion by listing several factors revealing the subjective intention of the concerned parties. Despite such resemblance, it is worth noting again that the criteria for directing business activities and the offering of goods or services are not identical in their entirety. If this had been the case, the denomination of the

[94] *Id.*, para. 27.
[95] *Id.*, para. 22.
[96] *Id.*, para. 24.
[97] *Id.*, para. 26.

directing business activities would have remained as it was in Article 3 (2) (a) of the GDPR. In this vein, the analysis of the offering of goods or services departs, to a certain extent, from its counterpart in the Brussels I Regulation. Such departure is militated by the approach taken by the CJEU towards the notion of directing business activities in the Pammer and Hotel Alpenhof joined cases. As per this approach, the criterion of directing business activities indispensably requires a conscious and active conduct on the side of the undertaking, the objective and outcome of which are intended for winning the customers from the Member States.[98] The problematic issue with this viewpoint is concerned with the last part of the previous sentence, which focuses on both the undertaking's intention and the end result of such intention conjunctively. As Svantesson contends, it is practically possible to have situations in which the undertaking is of an intention to win the customers, however, such an outcome is not achieved.[99] Conversely, there might be cases in which the outcome of the undertaking's activities can end up winning the customers without having such intention.[100] To this end, the more favourable approach, according to Svantesson, is to solely focus on the end result when evaluating the directing business activities.

Nevertheless, this article partly agrees with Svantesson's approach. Primarily, differentiating between the subjective intention itself and that of the outcome, and only focusing on one of them seem evidently tenable. However, this article, as opposed to Svantesson, puts the main emphasis on the subjective intention rather than the end result in assessing the criterion for offering goods or services. Firstly, such an approach is in line with Recital 23 of the GDPR which centres on the data controllers' or processors' subjective intentions.

Furthermore, this approach is derived from the question of whether the GDPR hinges on real targeting by encompassing only the global actors specifically targeting the EU or it rests upon disguised targeting, which holds all companies acting globally without requiring intentional targeting.[101] Regarding this dilemma, Article 3 (2) (a) of the GDPR has been plagued, at initial times, with criticisms by high-calibre scholars. At this juncture, Kuner stood in such a position that the GDPR extraterritorially applied in a black-or-white fashion and lacked sophisticated boundaries to prevent excessive extraterritoriality.[102] Likewise, Svantesson argued that the formulation of Article 3 (2) (a) of the GDPR ensures uncertainty for the parties with respect to its applicability.[103] As a common point, they argued that the targeting

[98] *Supra* note 77, para. 63.
[99] *Supra* note 63, 232.
[100] *Ibid.*
[101] *Supra* note 17, 240-241.
[102] Christopher Kuner, *Extraterritoriality and regulation of international data transfers in EU data protection law*, 5 International Data Privacy Law 235, 241-242 (2015).
[103] *Supra* note 63, 232.

criterion rests on the straightforward rationale as *"you might be targeted by EU law only if you target"*.[104] Nevertheless, the uncertain and ill-determined formulation of this rationale, according to them, in Article 3 (2) (a) of the GDPR casts more doubts about the exorbitant applicability of this Regulation than what it is intended for. In this regard, this article contends the mere concentration on the outcome and disguised targeting can excessively loosen the applicability of Article 3 (2) (a) of the GDPR and bring approximately all actors acting globally under the umbrella of this Regulation. It further undermines the legitimacy and proportionality principles by paving the way for excessive extraterritoriality.[105] At first glance, such a situation can be referred to solidify the personal data protection of EU individuals; however much deeper examination reveals that it does so illegitimately and disproportionately.

In addition, the disregarding of the subjective intention of the data controllers or processors sidetracks the question of *"who takes the initiative?"*.[106] To put it differently, the role of the data subjects taking a leading initiative in targeting should not be underestimated, and the data subjects have an independent market choice to opt for or opt out of the services offered by the global actors. At this time, the actual party targets is the data subject, and it seems unreasonable to bring such global actors under the cloak of the GDPR.[107]

Based on the above-mentioned examination, this article suggests that particular attention should be drawn to the data controllers' or processors' intention when determining the criterion of the offering of goods or services. In this regard, this article further suggests that the subjective intention of the data controllers or processors shall be evaluated in the light of the objective factors, which wipe out the absolute subjectivity in the assessment process. In other words, the criterion of objective intention should be applied in relation to the assessment of the offering of goods or services.

3. The Monitoring of the Behaviors of the EU Individuals

The second criterion which outstretches the long arm of the GDPR beyond the EU borders is related to the monitoring of the behaviours of the EU individuals under Article 3 (2) (b). This criterion is involved in the composition of the GDPR with the objective of refurbishing the equipment criterion under Article 4 (2) (b) of the DPD and adapting it to the dynamic changes of modern technologies.[108] That is to say, the evolution of smart technologies has made non-EU-based companies reach the EU data subjects

[104] *Supra* note 17, 238.
[105] *Id.*, 239.
[106] *Id.*, 241.
[107] *Ibid.*
[108] Christopher Kuner, Lee A. Bygrave, Christopher Docksey and Laura Drechsler, The EU General Data Protection Regulation (GDPR) A Commentary, 89 (2020).

more easily and conduct data processing activities without any foothold presence. Accordingly, Article 3 (2) (b) intends to prevent the easy circumvention of the rigorous EU data protection legislation by non-EU-based companies through operating remotely.

a. The Notion of the Monitoring of the Behaviors under Article 3 (2) (b)

As a novel concept under the GDPR, this concept has been consecrated to much statutorily and scholarly attention. At the outset, this article can recourse to the analysis of this criterion provided by the GDPR itself and the EDPB. The GDPR stressed the explanation of this criterion through Recital 24 in the following manner:

"…In order to determine whether a processing activity can be considered to monitor the behavior of data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analyzing or predicting her or his personal preferences, behaviors and attitude".[109]

Pursuant to this explanatory note, it is manifestly emanated that the monitoring criterion can embrace a broad array of activities ranging from tracking to profiling of the data subjects who are in the Union.[110] Despite this broad formulation, the EDPB extends this criterion much further by covering the overlooked issues of Recital 24. Whereas Recital 24 considers the tracking of the data subjects only on the Internet, the EDPB also includes the tracking through other types of networks or smart devices.[111] Accordingly, the widespread monitoring activities include the following:[112]

a) geo-localization activities – these activities are widely used by the data controllers or processors through the Wi-Fi technologies. By using geo-localization technology, the non-EU data controller or processor can identify the exact location of the data subject and offer him/her the nearest services for marketing purposes;[113]
b) closed-circuit television (hereinafter CCTV) – Monitoring by means of CCTV includes the filming or recording of individuals through the video surveillance facilities. However, not any kind of such video recording is considered as monitoring, the necessary requirement is that the natural persons should be identified;[114]

[109] *Supra* note 18, recital 24.
[110] Article 29 Data Protection Working Party, Guidelines on Data Protection Officers ('DPOs'), 8 (2016).
[111] *Supra* note 38, 19.
[112] *Id.*, 20.
[113] *Ibid.*
[114] Douwe Korff, The Territorial (and Extra-Territorial) Application of the GDPR With Particular Attention to Groups of Companies Including Non-EU Companies and to Companies and Groups of Companies That Offer Software-as-a-Service, 49 (2019). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3439293 (last visited Apr. 19, 2023).

c) cookies – a cookie is a *"piece of text stored by a user's web browser and transmitted as part of an HTTP request"*.[115] It includes the information and set by a web server. By using this technology, the website operators can track or monitor the data subjects visiting such website and determine their behavioral activities;
d) behavioral advertising – behavioral advertising is considered compound activity by containing other monitoring activities. It means that the data subjects' behavior is analyzed on the basis of their preferences by embracing various forms of monitoring, including, but not limited to, online tracking, geo-localization, profiling;[116]
e) market surveys – as its name suggests, the major objective of this monitoring activity is concerned with the marketing purposes. By using both online or offline activities, the data subjects' behaviors are identified through the interviews, various forms of questionnaires or surveys and etc.[117]

It is worth mentioning that the criterion on the monitoring of the behaviours does not come into play in an unbridled fashion, it also requires a couple of requirements to be satisfied as being in the criterion on the offering of goods or services. The primary yardstick which clarifies the boundaries of Article 3 (2) (b) is concerned with the question of where the monitoring of the behaviours of the data subjects takes place. This yardstick explicitly stems from the criterion that the data subjects should be within the EU. As explained above, this criterion plays a role of nexus between the EU and the data processing activities and the GDPR seeks to promote the nexus with the EU to a sufficient level.[118] By doing so, it aims to eliminate the overly extraterritorial application of the GDPR on the basis of the mere fact that the data subject resides in the EU. In a similar vein, the EDPB contemplated that as a cumulative criterion, the monitored behaviour should first relate to the data subjects being in the EU and further takes place within the EU.[119] Regarding the duration of the presence of the data subject within the EU, a much looser approach is taken in order to retain the applicability of this Article at a maximum point. It is emphasized that this prerequisite should be evaluated at the moment when the triggering activity takes place. To put it differently, the presence of the data subjects within the EU is required only when the monitoring activities concerned take place.[120] Before or after such monitoring activities, the location of the data subjects is not a decisive factor.

Furthermore, the notion of the monitoring is conditioned upon the requirements of the tracking of the data subjects and the potential subsequent

[115] ENISA, Privacy Considerations of Online Behavioural Tracking, 6 (2012).
[116] *Supra* note 38, 20.
[117] *Ibid.*
[118] *Supra* note 11.
[119] *Supra* note 38, 19.
[120] *Id.*, 20.

use of the personal data processing techniques.[121] To furnish more illustration, the EDPB sets out that this criterion requires the data controllers or processors to collect, process and subsequently (re)use the relevant data about the EU individuals' behaviours with a specific purpose. It highlights that the mere collection and analysis of the concerned data are not sufficient to be counted as monitoring, in addition, the subsequent behavioural analysis, processing, profiling and use of such data should be demanded.[122] Accordingly, the monitoring is a composite criterion which involves two cumulative operations: while the first one is called data warehousing which refers to the collection and storage of the relevant data, the second operation relates to the analysis of the stored data and making predictions for the data subjects' further interests and preferences.[123]

Based on the above-mentioned examination, the composition of the monitoring criterion is constituted by the amalgamation of the targeting approach and data processing. Herewith, it is worth noting that the targeting approach will be inquired about in the following part, henceforth the role of the data processing within the monitoring will be touched upon here. Even though the monitoring activity is not indicated as an element of the data processing in Article 4 (2) of the GDPR, separate structural elements of this activity, however, are listed within the mentioned Article of the GDPR. In other words, the collection, recording, analysis, storage, and profiling, which are an integral part of the monitoring, are counted as the data processing in Article 4 (2) of the GDPR.[124] Consequently, the monitoring itself can fall within the ambit of the data processing activities in a roundabout way.

b. The (Un)intentional Targeting under the Monitoring Criterion

As put forward in the above-mentioned, the monitoring criterion also contains the targeting approach as the criterion of the offering of goods or services. In this regard, the question comes to the forefront that the targeting approaches under these two criteria are twin or alter-ego with each other.

Prior to focusing on the side of the monitoring, it is worth recalling the question of how the targeting approach is formulated under the offering criterion. As afore-mentioned, the offering criterion requires the data controllers or processors to have an intention to specifically target the EU individuals. That is to say, Recital 23 of the GDPR, the EDPB, and the scholarly writings reinforced that the existence of intentional targeting on the part of the undertaking is an indispensable prerequisite for the applicability of Article 3 (2) (a). To this end, it is further indicated that the mere accessibility

[121] *Supra* note 18.
[122] *Supra* note 38, 20.
[123] Council of Europe, The Protection of Individuals with regard to Automatic Processing of Personal Data in the Context of Profiling, Recommendation CM/Rec (2010)13 and explanatory memorandum, 25 (2010).
[124] *Supra* note 18, art. 4 (2).

of the website is not sufficient to bring the data controller or the processor under the same Article of the GDPR.[125]

With respect to the targeting approach under the monitoring criterion, the issue of the peculiarity of this approach has attracted much more statutory and scholarly attention due to its complexity. Primarily, Recital 24 of the GDPR does not consider any acumen concerning the targeting approach and remains silent on the existence of this approach.[126] Thereunder, it comes to the mind that such silence is done on purpose and unintentional targeting is also captured by the monitoring criterion.[127] To delve into much deeper, such premise is, however, muddled with several plights by the high-calibre scholars. As Svantesson argues, if unintentional monitoring takes place, it cannot include the subsequent use of the data processing techniques (such as profiling etc.), which is a precondition of the monitoring criterion, over the collected data.[128] Namely, profiling a data subject and making predictions about their interests, and preferences, according to Svantesson, require a certain level of intention on the part of the data controller or processor.[129] Accordingly, in case of unintentional monitoring, the data processing activities cannot be deemed as monitoring due to the lack of one of the major preconditions.

Such an intricacy concerning the targeting approach has been, to some extent, relieved by the reasoning of the EDPB. At the outset, the EDPB also reinforced that the requirement of intention to target is not explicitly introduced in both Article 3 (2) (b) and Recital 24. Nevertheless, by bearing in mind the deficiencies of unintentional targeting, the EDPB took the view that the monitoring criterion requires a specific purpose in mind for the collection and subsequent use of the relevant data.[130] Unfortunately, the EDPB does not go much further and does not provide any guidance on how to comprehend "the specific purpose in mind".

In this regard, this article seeks to shed more or less light on this finding of the EDPB. Primarily, it is worth mentioning that the monitoring of the data subjects' behaviours is a much more lenient criterion rather than the offering of goods or services due to covering a broad range of activities. Such leniency can be evidenced by the fact that the mere operation of websites through just using cookies can fall within the ambit of the monitoring criterion,[131] as opposed to the offering criterion which expressly denies the mere accessibility of websites for its applicability. Accordingly, as a matter of the same logic, the

[125] *Id*., recital 23.
[126] *Id*., recital 24.
[127] *Supra* note 63, 232.
[128] *Ibid.*
[129] *Ibid.*
[130] *Supra* note 18.
[131] Serge Gutwirth, Ronald Leenes, Paul de Hert, Reforming European Data Protection Law, 37 (2015).

targeting approach under the monitoring criterion is not as stringent as the one under the offering criterion. At this juncture, the approaches taken towards the targeting under these two criteria are diametrically diverging in comparison with each other. To elaborate much further, the targeting approach under the offering criterion is related to the active intention to target the EU whereas the targeting approach under the monitoring criterion is related to the passive intention to target the EU, which does not require the active conduct on the part of the data controller or processor. To put it simply, if the data controller makes the website accessible to the entire world and places the cookies for tracking the behaviours of the data subjects, it is implied that the data controller has a passive intention to monitor the behavioural activities of the website users. The reason lies in the fact that modern technologies, such as geo-blocking technologies, can provide data controllers or processors to confine the accessibility of the website to particular territories.[132] Accordingly, by not using such technologies, the data controllers or processors have the implied or passive intention to target everyone. Consequently, the global actors targeting the entire world can also trigger the applicability of the monitoring criterion under Article 3 (2) (b).

III. The Interplay between the GDPR and Determination of Applicable Law

The determination of applicable law has been at the heart of private international law at all times. Likewise, the applicable law has always weighed much significance within the EU. Accordingly, the EU has taken several essential legislative initiatives, which ended up with the adoption of secondary legislations – Rome I Regulation, and Rome II Regulation – in preventing the conflict of jurisdiction or applicable law between the Member States. Besides such legislative acts, the regulation of the applicable can also permeate into the specific legislative acts concerning the different legal fields within the EU. By the same token, the issue of applicable law is also regulated by the EU data protection regime – the DPD in a discrete manner.

Specifically, the spatial scope under Article 4 of the DPD had been devised in the manner of the applicable law clause and such formulation is no coincidence due to the legislative form of the DPD. Considering that the DPD sought to approximate and harmonize the relevant Member State laws, it would be much more likely that the national laws could be devised differently by the Member States. Accordingly, Article 4 was expressly formulated as a conflict-of-law clause and provided its own connecting factor to prevent the overlapping of the national laws of different Member States.[133]

[132] *Id*., 19.
[133] Christopher Kuner, European Data Protection Law: Corporate Compliance and Regulation, 112 (2nd ed. 2007).

Article 4 drew primarily its attention to the notion of the establishment as a connecting factor, which is inspired by the traditional territorial principle in the private international law.[134] Owing to this rule, this Article can provide clear-cut and straightforward guidance on how to resolve the conflict of national laws in most cases. To put it simply, the law of the Member State in which the data controller is established is applied to the concerned data processing activities in so far as such data processing is carried out within that establishment of the Member State. Regarding the case where the data controller is not established in the EU, the DPD determined the law of the Member State where the equipment for the data processing is located.[135]

In light of the above-mentioned, this chapter will examine the possibility of the overlapping of the Member States' laws within the GDPR in the first instance. Furthermore, this chapter will delve into the possible solutions to the issue of determining the applicable law in case of the overlapping of the Member States' laws within the GDPR.

A. The Overlapping of Member States' Laws is an Inevitable or Neglected Issue within the GDPR

As of 25 May 2018, the European data protection regime came into a new phase through the entry into force of the GDPR. Accordingly, the European data protection regime has started to become directly applicable and binding in all Member States. The primary objective behind such change lies in the fact of precluding the legal fragmentation and inconsistencies across the EU in its entirety. This aim is also conceded by Recital 13 of the GDPR in the following: "*a Regulation is necessary to provide legal certainty and transparency for economic operators, ... and to provide individuals in all Member States with the same level of legally enforceable rights and obligations*".[136]

By bearing this objective in mind, the spatial scope of the GDPR is formulated under Article 3 in a different manner from its counterpart in Article 4 of the DPD. On the one hand, the first major difference is concerned with the restructuring of the applicability of the GDPR into non-EU-based undertakings, on the other hand, the second change, which is at the forefront of this chapter, applies to the avoidance of any rule concerning the applicable law between the national laws.[137] Such avoidance might seem tenable due to the fact that the GDPR is of direct applicability throughout the whole EU.[138] Considering that the GDPR is aimed at establishing the common and universal data protection regime which is harmoniously applied in all Member States, the identification of the applicable law would have been presumed to become no longer a concern before the GDPR. Even though the

[134] *Supra* note 12, art. 4.
[135] *Ibid.*
[136] *Supra* note 18, recital 13.
[137] Chen, *supra* note 1, 321.
[138] Karen Davies, Understanding European Union Law, 75 (5th ed. 2013).

premise of being a single law and having no need to reconcile anymore with the determination of the applicable law can sound promising and feasible, the accuracy of such premise just remains in theoretical confinement.[139] The closer examination revealed that the role of the national laws has still secured its relevancy within the GDPR in practical parlance. The relevancy of the national laws is primarily evidenced by two perspectives, which will be analyzed in the following.

Firstly, the GDPR does not set out any restriction on the Member States to decide the matters, which are not regulated by the GDPR in its entirety, on their own.[140] In this regard, the avoidance of such restrictions by the GDPR can bring about the second perspective which contemplates that the GDPR gives leeway to the Member States to turn away from its provisions and determine their own regulation on certain matters. This is even explicitly acknowledged by the GDPR itself in Recital 10, which contends that the Member States shall be provided with a margin of manoeuvre to specify and maintain its national provisions for the processing of sensitive data or for the processing of personal data in the public interest or in the exercise of official authority.[141]

Recital 10 refers to Article 6 (1) (specifically points c and e) and Article 9 which are concerned with the legal grounds on which the processing of the sensitive data is legitimized. Namely, Article 6 (3) expressly sets out that the data processing under the condition of compliance with the legal obligation or the performance of the action in the public interest can be determined by the Union law or Member State law.[142] Accordingly, the GDPR paves the way for the applicability of the national laws within its framework, and worse than that, such matter is not just confined to the articles concerned. In this regard, Jiahong Chen states the list of 37 issues, which potentially give rise to the conflict of national laws within the GDPR.[143]

Regarding the list of these matters, not all of them are completely procedural rules, which unlikely raises the problem of the applicable law. Furthermore, the matters under this list are divided into the ones having high, moderate and low levels depending on the susceptibility to the issue of the applicable law.[144] Firstly, the issues of the low levels are substantially concerned with either the data processing by the public bodies or the data processing in the pursuit of the public interest. The low susceptibility of these cases to the problem of the applicable law is evidenced by the fact that the law of the Member State in which the public body is established, or the public

[139] *Supra* note 1, 312.
[140] *Ibid.*
[141] *Supra* note 18, recital 10.
[142] *Id.*, art. 6 (3).
[143] *Supra* note 1, 314.
[144] *Supra* note 1, 313.

interest arises is mainly applied to such cases.[145] Accordingly, the situations within the public law domain can fall under the category of low risks. On the other end of the spectrum, the cases which are highly prone to the conflict of national laws exist in the list. To put it differently, the discretion of the Member States over the matters, e.g., the minor's consent, and the processing of the sensitive data are much more likely to give rise to the conflict of national laws.[146] Unlike the situations of the low risks, the cases of the high risks can refer to the private law domain. As a middle ground in causing the applicable law issue, such cases are epitomized under the moderate level. Due to its middle role, it can be said that the cases of moderate risks are wandering between the public and private law frameworks.[147] By way of illustration, Article 9 (2) (j) which is related to the processing for scientific, historical and statistical purposes entails both the involvement of the public and non-public bodies.

It is inferred from the above-mentioned analysis that the Member State laws have still resumed to matter within the GDPR. The GDPR conceivably provides the Member States with the room to manoeuvre independently on certain matters.[148] Nevertheless, the non-existence of perfect uniformity is not the major deficiency within this Regulation. Instead, the GDPR put its developments in peril by not containing the clause of the applicable law.[149] The lack of any rule on how the potential overlapping of the national laws is reconciled can undermine the legal certainty and convergence brought by the GDPR.[150] Accordingly, the GDPR inadvertently lag behinds what the DPD has warranted instead of leaving behind the DPD. To this end, any guidance put forward by the GDPR would be a welcomed action to secure its uniformity at the intended level.

As a counterargument to the above-mentioned deficiency, some might contend that this problem would be precluded by the Member States by following the approach taken by the DPD – the establishment rule. However, the possibility of this case is too low due to the fact that the DPD's approach had not been followed by Member States with enough consistency when this Directive had still been in force.[151] In this regard, Korff conducted an in-depth analysis of the differences within the Member State laws and concluded the viewpoint concerning the territorial applicability that the rules determining the applicable law are construed differently in the Member State laws and

[145] *Supra* note 18, art. 6 (1) (e).
[146] *Id.*, art 8 and art. 9 (2) (a).
[147] Jan-Jaap Kuipers, *Bridging the Gap: The Impact of the EU on the Law Applicable to Contractual Obligations, Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht*, 76 The Rabel Journal of Comparative and International Private Law 562, 573 (2012).
[148] *Supra* note 1, 314.
[149] Brkan, *supra* note 62, 336.
[150] *Supra* note 1, 314.
[151] *Id.*, 315.

such differences can cause the overlapping of national laws in practice.[152] Accordingly, it is unlikely that this rule would be taken by the Member States in the same manner in case of the absence of such a rule within the GDPR. Therefore, it is much needed to examine the other possible solutions to this problem in the context of the GDPR.

B. Private International Law as a Possible Solution

As mentioned at the very beginning of this chapter, private international law steps in and takes a role to establish the conflict-of-law mechanisms to prevent the overlapping of different laws and ensure legal certainty. In order to struggle with the issue of the applicable law, such mechanisms are specifically construed through the Rome I Regulation and Rome II Regulation within the EU. Accordingly, it would be an intriguing question whether the GDPR's deficiency in the applicable law can be healed by the EU's private international law mechanisms. In this vein, the following parts will delve into the analysis of the possible solutions in determining the applicable law within the GDPR.

1. The Relevancy of the Data Protection within the Rome Regulations

Prior to analyzing the relevancy between data protection and the Rome Regulations, it is necessary to provide brief information about the Rome I and Rome II Regulations. Rome I Regulation is a legal instrument of the European Parliament and Council which came into effect in 2009 and governs the applicable law to the contractual obligations.[153] Pursuant to Article 1 (1) of the Rome Regulation, it governs the determination of the applicable law when the issue relating to the contractual obligation in civil and commercial matters is at hand.[154] Likewise, the contractual obligations of the private law matters are required to trigger the applicability of the Rome I Regulation. Contrarily, the Rome II Regulation is a legal instrument which came into effect in 2009 but governs the applicable law to non-contractual obligations. Article 1 (1) of the Rome II Regulation, it intends to identify the applicable law regarding non-contractual obligations in civil and commercial matters.[155]

In light of this information, it is plausible to analyze the interrelation between data protection and the Rome Regulations. Firstly, it can be argued that the data protection regime lies entirely outside the framework of the Rome Regulations.[156] The main reason behind this argument lies in the scope of the matters over which they exert influence. As mentioned above, both the Rome I and Rome II Regulations permeate civil or commercial matters, and

[152] *Supra* note 31, 24.
[153] Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) (2008).
[154] *Id.*, art. 1 (1).
[155] Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome II), art. 1 (1) (2007).
[156] *Supra* note 62, 330.

the public law matters are beyond their applicability scope.[157] It is, however, so much difficult to conceptualize the data protection regime as private law or public law matter. Specifically, data protection falls into the grey area between the public and private law matters.[158] To put it simply, the GDPR provides both administrative and civil remedies for the breach of its provisions. To this end, the conceptualization of the data protection regime is dependent upon the factual analysis of each case at hand.

Likewise, this article takes the view that the relevancy between these two regimes should not be examined as an all-or-nothing concept. To put it differently, the decision depends upon determining the factual circumstances of the case. If the data protection issue raises private law matters, the Rome Regulations can come into the picture, on the contrary, there is no room for the applicability of these conflict-of-law mechanisms.

Upon finding the initial relevancy between these two regimes, further examination is required in relation to the Rome Regulations separately. Regarding the Rome I Regulation, the mere fact that the data protection issue adheres to civil or commercial matters does not directly lead to the applicability thereof. In addition, the contractual arrangements within the civil or commercial matters should exist to trigger the Rome I Regulation.[159] In this vein, it is worth contending that nowadays most of the data processing activities are carried out on the contractual arrangements.[160] Without going into much deeper, the consent, which is given by the data subjects to the privacy policies or settings of social websites, which can bring the data processing to the level of the contractual arrangement. Such consent can be flatly deemed as a contract,[161] which is also reinforced by the Working Party of the DPD that the validity of the consent is assessed in the light of the conditions of the valid contract set down by civil law.[162] For this reason, in case the overlapping of Member States' laws arises out of the contractual arrangement within the framework of the GDPR, the Rome I Regulation could be employed in determining the applicable law.

In relation to the data protection issues arising from the non-contractual arrangements, the Rome II Regulation can come into play in determining the applicable law. Nevertheless, the applicability of the Rome II Regulation to data protection issues is not as straightforward as the Rome I Regulation. Unlike the Rome I Regulation, the Rome II Regulation explicitly excludes the non-contractual obligations arising from violations of privacy and rights

[157] *Supra* note 153, art. 1.
[158] Christopher Kuner, *Internet Jurisdiction and Data Protection Law: An International Legal Analysis (Part 1)*, 18 International Journal of Law and Technology 176, 178 (2010).
[159] *Supra* note 18, Art. 1 (1).
[160] Article 29 Data Protection Working Party, Opinion, 15/2011 on consent, 6-8 (2011).
[161] *Supra* note 1, 318.
[162] *Supra* note 160, 6.

relating to personality from its scope.[163] To put it simply, privacy-related matters are not regulated by the Rome II Regulation. Accordingly, the question of whether the privacy-related matters under this Regulation also contain data protection is a debatable issue. Indeed, such debate refers to the longstanding question of whether data protection and privacy are distinct rights or whether data protection is an integral part of privacy.[164] On the one end of the spectrum, it is argued that these two rights have a separate scope of application, which is grounded on the fact of having distinct provisions for data protection (Article 8) and privacy (Article 7) in the European Charter on Fundamental Rights.[165] Likewise, it is asserted that while these two rights might partially overlap, privacy also encompasses other issues than personal data as a broader concept.[166] Pursuant to this viewpoint, the non-contractual obligations arising from the data protection do not fall within the scope of the Rome II Regulation. On the other end of the spectrum, it is contended that these two rights are inextricably intertwined with each other. This approach is often taken by the CJEU in its rulings by referring to both data protection and privacy in conjunction.[167] Based on this argument, data protection and privacy are inseparable rights from each other.

In this vein, this article holds the hybrid role with respect to the relation between these two rights. Firstly, from the perspective of fundamental rights, this article takes the former approach which asserts the separation of data protection from the privacy right. Nevertheless, for the perspective of teleological and systemic analysis of the Rome II Regulation, takes the latter approach as contending the inseparable nature of these two rights. Otherwise, the exclusion of privacy, but not data protection, from the scope of the Rome II Regulation would cause difficulties in delineating the boundaries between these two rights and determining the applicable law. To give an example, as Brkan notes, if the disclosure of the data subject's health data and his/her opinions on his/her health state is made by the provider of the health app, it would be much more difficult to draw the line between the issue concerning the privacy (for which Rome II Regulation is not applied) and data protection (for which Rome I Regulation is applied). Likewise, this article takes the viewpoint that the data protection issues are also excluded from the scope of the applicability of the Rome II Regulation.[168] Accordingly, it can be contended that as opposed to the Rome I Regulation, the Rome II Regulation

[163] *Supra* note 155, art. 1 (2).
[164] *Supra* note 1, 318.
[165] Juliane Kokott, Christoph Sobotta, *The Distinction Between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR*, 3 International Data Privacy Law 222, 223 (2013).
[166] Maria Tzanou, *Data Protection as a Fundamental Right next to Privacy? 'Reconstructing' a not so New Right*, 3 International Data Privacy Law 88, 90 (2013).
[167] Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, Joined Cases, C-293/12 and C-594/12, para. 32-37 (2014).
[168] *Supra* note 62, 331-332.

is not applied as long as the overlapping of Member States' laws arises from the non-contractual arrangement within the GDPR.

2. The General Conflict-of-law Rules

As a substitute for the applicability of the Rome Regulations, the general conflict-of-law rules can play a significant role in determining the applicable law in the data protection context. The bulk of the conflict-of-law rules enshrined in the Rome Regulations has existed much longer than the entry into force of these Regulations.[169] Accordingly, most of these rules have been integrated into the national laws of the Member States, which contain much more similarities with each other. Owing to this similarity, these rules advance into the general nature and become an alternative solution to determine the applicable law.

Regarding the data protection issues arising from contractual obligations, the conflict-of-law rule contending the place where the consumer (data subject) resides can be an applicable law. The reason lies in the fact that most times the data subjects have the weaker position like the consumers and the residence rule of these subjects would be an effective approach. With respect to the data protection issues arising from the non-contractual obligations, the better approach could be the general doctrine of *lex loci delicti commissi* determining the place where the tortious breach happened.[170] In light of this doctrine, it can be argued that the law of the place where the data processing activities happened could be an applicable law to the case at hand.

3. The "subject to" Approach as an Applicable Law

Even though the GDPR lacks any rule to determine the applicable law between the Member States' laws on certain matters, a much deeper analysis reveals that the GDPR drafts its relevant provisions in a cautious form by anticipating the potential problem of the applicable law. This cautious formulation is conditioned upon the approach of "subject to".[171] By way of example, Article 6 (1) (c) sets out "the compliance with the legal obligation to which the controller is subject" or Article 6 (3) determines that the legal basis for the data processing can be laid down by either the Union law or the Member State law to which the data controller is subject. They can indicate that the GDPR does not take an open-ended approach to the Member State law, on the contrary, it contains the "subject to" qualifier to limit the applicability of the Member State laws. Nevertheless, this qualifier does not directly resolve the question of the applicable law, since the GDPR is silent on the meaning of the notion of the "subject to".[172]

[169] *Supra* note 1, 319.
[170] European Commission, MainStrat, Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, Final Report, 79 (2009).
[171] *Supra* note 1, 321.
[172] *Ibid.*

The potential possibility in determining the meaning of this qualifier is concerned that the law of the Member State to which the data controller is subject is analogous to the law of the Member State to which the data controller is established. This approach stands in the same line with the applicable law clause under Article 4 of the DPD.[173] However, this approach cannot resolve the issue in its entirety, since the data controller might be subject to the law of the Member State in which it is not established.[174] The possibility of this situation is also reinforced by the GDPR itself through its provisions that it can be applicable to the data controllers not having been established in the EU.[175] Hence, even though the qualifier of "subject to" is included in the relevant provisions of the GDPR, the lack of any guidance on the meaning of this qualifier undermines, to a larger extent, the operability of this approach. Accordingly, the guidance taken by the GDPR for determining the meaning of this qualifier would be welcomed.

4. The Agreements on the Applicable Law for the Data Protection

The further solution is concerned with the agreements concluded by the parties which rest upon the bedrock rule in EU private international law – the principle of party autonomy.[176] This principle is enshrined in Article 3 of the Rome I Regulation and it allows the parties to subject their contract to any legal system as they please without requiring any territorial or other connection to the chosen law. To this end, the question arises as to whether the parties can freely deviate from the GDPR and choose other data protection regimes under the principle of party autonomy.

Prior to analyzing this question, it is worth determining in which cases the GDPR can be potentially disregarded by the parties. As mentioned above, nowadays most of the data processing activities are conducted between the parties not having equal position. To put it simply, the data controllers or processors are mostly the tech giants or huge corporations in the contemporary period. As an example, when the data subjects utilize the online services of the tech giants, e.g. Facebook, Amazon, Google, and Alibaba, there is no room for the data subjects to alter the terms or conditions of such online services as they please. Nevertheless, the party autonomy belongs to the providers of the online services as the data controllers or processors in determining the terms and conditions of these services. Hence, the question comes into the picture as to whether the providers of online services can expose the data processing activities over the EU individuals to the data processing regime other than the GDPR in case of the applicability thereof.

[173] *Supra* note 12, art. 4.
[174] *Ibid.*
[175] *Supra* note 155, art. 3 (2).
[176] Jürgen Basedow, The Law of Open Societies. Private Ordering and Public Regulation in the Conflict of Laws, 115 (2015).

Regarding this issue, some authors argue that the agreements on the applicable law concerning data protection are possible due to the fact that such agreements are not expressly precluded by the Rome I Regulation.[177] According to these authors, the data protection regime under the GDPR does not also have the nature of the overriding mandatory provisions. However, this article takes the opposing viewpoint which argues that the GDPR cannot be disregarded by the parties as far as its applicability is concerned. The reason lies in the fact that the data protection regime under the GDPR is of the nature of the overriding mandatory provisions and it is applicable regardless of the law chosen by the parties.[178] In this regard, it is worth examining the rationales behind this approach.

Prior to analyzing the role of the GDPR in overriding mandatory provisions, it is necessary to give the definition of the overriding mandatory provisions. As per Article 9 (1) of the Rome I Regulation, overriding mandatory provisions are provisions that are regarded as "crucial by a country for safeguarding its public interests".[179] The nature of the GDPR as overriding mandatory provisions is firstly evidenced by the CJEU rulings in Ingmar,[180] Honyvem Informazioni Commerciali,[181] Semen[182] and Unamar cases,[183] which held that not only provisions of Member States' laws but also the provisions of EU law itself can be qualified as such provisions. Henceforth, as an EU legal instrument, there is not any barrier before the GDPR to be regarded as overriding mandatory provisions.

Secondly, the norm needs to have the purpose of pursuing the public interest to be qualified as overriding mandatory provisions.[184] In this vein, the role of the GDPR as such provisions is reinforced by the following reasons. Primarily, the data protection regime under the GDPR contains the administrative provisions and administrative enforcement which trigger the public interest objectives.[185] Furthermore, the public interest of the GDPR can be grounded on the fact that the functioning of the internal market by ensuring the free movement of personal data is pursued as one of the main objectives. In addition, the GDPR is aimed at safeguarding the fundamental rights of data protection, which constitute the rudimentary values of society and fall within the category of overriding reasons of public interest. Meanwhile, this is also reinforced by the German case law – *Facebook v. Independent Data Protection Authority of Schleswig Holstein* – which stipulated

[177] *Supra* note 62, 334.
[178] *Ibid.*
[179] *Supra* note 153, art. 9 (1).
[180] Ingmar GB Ltd v. Eaton Leonard Technologies Inc., C-381/98 (2000).
[181] Honyvem Informazioni Commerciali Srl v. Mariella De Zotti, C-465/04 (2006).
[182] Turgay Semen v. Deutsche Tamoil GmbH, C-348/07 (2009).
[183] United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare, C-184/12 (2013).
[184] *Supra* note 62, 334.
[185] *Supra* note 18, recital 148.

that pursuant to the Rome I Regulation, it is possible to make an agreement on the applicable law for the contract, but not on data protection law, since its provisions fall within the concept of overriding mandatory provisions. Hence, it can be evidenced that the data protection regime under the GDPR can fall within the scope of the overriding mandatory provisions.

Conclusion

This article provided an overview of the applicability issue in the EU data protection regime, specifically in the framework of the GDPR. The applicability issue has been analyzed from two different angles: 1) the applicability of the GDPR itself; and 2) the determination of the applicable law within the GDPR.

As regards to the applicability of the GDPR, its territorial scope includes two forms of data processing activities: 1) territorial and 2) extraterritorial. The *"establishment"* criterion plays a significant role in assessing the territorial applicability. Meanwhile, this criterion is given a flexible definition which means that one person's physical presence with necessary technical resources can be sufficient to be deemed as established in the EU.

Regarding the extraterritorial applicability, the GDPR includes two cases in which the processing activities are related to the *"offering of goods or services to data subjects in the EU"* or to the *"monitoring of the behavior of those data subjects"*. As per our analysis, the criterion of the *"offering of goods or services"* is conditioned upon 1) the envisaging of offering services to the data subjects in the EU and 2) having the intention to do so. In this vein, this criterion contains the targeting approach and it is analogous to the criterion of *"directing business activities"* in the consumer protection law. Accordingly, this article suggests that the targeting approach under this criterion ought to be assessed in the frames of the objective intention, which means, on the one hand, the existence of subjective intention, on the other hand, the determination of subjective intention in the light of the objective factors. In relation to *"monitoring the data subjects' behaviors"*, this criterion requires the tracking of the individuals and the potential subsequent use of personal data processing techniques for profiling the individual. Likewise, the monitoring criterion requires the existence of intention on the part of the data controllers or processors. This article suggests that the degree of intention under the monitoring criterion is less stringent than the one under the offering criterion. To put it simply, the offering criterion contains an active intention to trigger its applicability whereas the monitoring criterion requires a passive intention for its applicability. Accordingly, the mere accessibility of the website is sufficient to trigger the applicability of the monitoring criterion as opposed to the offering criterion.

This article was further consecrated to the issue of determining the applicable law within the GDPR. Considering that the GDPR is a universal

law throughout the EU, it does not include any rule on determining the applicable law. Nonetheless, the Member States' laws still matter within the GDPR and the possibility of the conflicting of the Member States' laws is not eliminated in its entirety. Considering this, the following alternative mechanisms have been analyzed to alleviate this vexing issue: 1) the EU conflict-of-law instruments (Rome Regulations); 2) the general conflict-of-law rules; 3) the *"subject to"* approach under the GDPR; 4) the principle of party autonomy. Based on this analysis, this article suggests that the Rome I Regulation can be applied in case the conflict of the Member States' laws arises out of the contractual arrangement. On the contrary, the general conflict-of-law rule (*lex delicti commissi)* is employed as far as the conflict of the Member States' laws arises from the non-contractual arrangement.

Akram Alasgarov[*]

DECRIMINALIZATION PROCESS OF DEFAMATION: ESCAPING FROM THE LABYRINTH OF CONFLICTING LAWS ON COMPARATIVE ANALYSIS

Abstract

Defamation law is one of the contemporary issues affecting the protection and maintenance of freedom of the press. The laws regulating defamation foster the free expression of thoughts, ideas, opinions, attitudes or emotions and, consequently, take a guarantor role for the development of human beings in a democratic society. Thus, such laws not only decriminalize defamation but also shield the fundamental principles and values. However, taking highly democratic states as role models, most developing countries do not consider the adoption of decriminalization laws on defamation. Meanwhile, common law countries have established specific defamation law practices to protect free speech and the rights of media workers from the superiority of private rights. The Council of Europe also recommended State Parties to take legal actions for decriminalizing defamation. The French and German legal systems, which are top continental law countries in the region, made an effort for the adaptation to that recommendation.

However, Azerbaijan, one of the Member States of the Council of Europe, still contains criminal sanctions prohibiting the dissemination of defamatory statements. Disproportionate punishments and even disproportionate sanctions in civil cases caused European Court of Human Rights to deliberate multiple decisions against Azerbaijan in violation of Article 10. For analytic purposes, two chosen judgments of European Court in violation of freedom of expression are discussed. In the end, recommendations are highlighted for the elimination of those constitutional problems and possible legal solutions are advised.

Annotasiya

Diffamasiya hüququ mətbuat azadlığının qorunması və təmin edilməsi ilə bağlı aktual məsələlərdən biridir. Diffamasiyanı tənzimləyən qanunlar düşüncələrin, ideyaların, rəylərin, münasibətin və ya emosiyaların sərbəst ifadə edilməsinə şərait yaradır və nəticədə, demokratik cəmiyyətdə insanların inkişafını təmin edir. Beləliklə, bu qanunlar təkcə diffamasiyanı dekriminallaşdırmaqla qalmır, həm də əsas prinsip və dəyərləri qoruma altına alır. Buna baxmayaraq, inkişaf etməkdə olan ölkələrin əksəriyyəti qabaqcıl demokratik dövlətləri örnək götürərək diffamasiyanı dekriminallaşdıran qanunları qəbul etməyi nəzərdən keçirmir. Bu əsnada ümumi hüquq sistemi ölkələri söz azadlığı və media işçilərinin hüquqlarını şəxsi hüquqların dominantlığından qorumaq üçün xüsusi diffamasiya hüquq təcrübəsi formalaşdırmışdır. Avropa Şurası da iştirakçı dövlətlərə diffamasiyanın dekriminallaşdırılması üçün hüquqi tədbirlər görülməsini tövsiyə etmişdir. Regionun əsas kontinental hüquq dövlətləri kimi tanınan Fransa və Almaniyanın hüquq sistemləri qeyd olunan tövsiyəyə uyğunlaşmaq üçün bir sıra cəhdlər göstərmişdir.

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Avropa Şurasına üzv dövlətlərdən biri olan Azərbaycanda diffamasiya xarakterli bəyanatların yayılmasını qadağan edən cinayət sanksiyaları hələ də mövcuddur. Qeyri-mütənasib cəza təyinləri və hətta mülki işlər üzrə qeyri-mütənasib cərimə sanksiyaları Konvensiyanın 10-cu maddəsinin pozulması ilə əlaqədar Avropa İnsan Hüquqları Məhkəməsi tərəfindən Azərbaycana qarşı çoxsaylı qərarların çıxarılmasına səbəb olmuşdur. Analitik məqsədlər üçün ifadə azadlığının pozulması ilə bağlı Avropa Məhkəməsinin iki seçilmiş qərarı müzakirə edilir. Sonda məqalə boyu sadalanan konstitusional problemlərin aradan qaldırılması ilə bağlı tövsiyələr vurğulanaraq müvafiq hüquqi həll yolları təklif olunur.

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Introduction

The freedom of the press has an important role in the protection of democracy. The free flow and various types and forms of ideas allow people to seek truth, deepen their knowledge, and participate in decision-making processes. Without freedom of the press, it is not possible to obtain accurate and impartial information about the actions or policies of governments.

The media has to provide truthful news, and accurate information, analyze problems, and commentary to the public. This information is an essential tool for the development of society and for finding solutions to problems. Without freedom of the press, a large segment of society cannot access information, which hinders the right to social development.

The duty of the press to convey information and opinions, which are the subject of debates in political and public areas, is completed with the right of the public to receive these information and opinions. According to the view emphasized by the European Court of Human Rights, only in this way does the press fulfil its duty of being the "public watchdog", which is vital for democracy.[1]

Today, freedom of the press is also one of the fundamental freedoms that is often subject to restrictions. Recently, international human rights organizations have stepped forward to prevent negligence towards the development of the press. In 2021, UNESCO published its Global Report related to the freedom of expression and media development. The global statistics overall indicated that 85% of the world population contemplated a decline in the freedom of the press in their country over the past five years.[2] On June 24, 2022, the UN Special Rapporteur on freedom of opinion and expression, stated in her Report about the significance of the independent press as follows: *"Independent, free, and pluralistic news media is crucial for democracy, accountability, and transparency and should be nurtured by States and the international community as a public good"*.[3] However, in recent years, especially because of the COVID-19 pandemic, the financial support for media outlets has drastically decreased. According to the Global Report, global newspaper circulation declined by 13%, and over one-fifth of the journalists and other media workers have been exposed to salary cuts.

According to the confirmed facts, many countries have adopted bills and regulations and established new legal policies towards the media sector, which put the protection of freedom of the press at stake.[4] Since 2016, 57 laws have been adopted across 44 countries for the application of new standards in the media sector.[5] In general, most of the laws restricted access to certain official documents, as well as the prohibitions on the dissemination of certain materials. Recently, in the time of clash between freedom of expression and other fundamental rights, newly established domestic laws give more weight to the protection of other rights and freedoms than opening the doors for freedom of the press. It should be highlighted that the laws, which distinguished the number of sanctions and punishments that threaten freedom of the press, contained overly unclear language. Therefore, those

[1] *See* Barthold v. Germany, ECHR No. 8734/79, § 58 (1985).
[2] UNESCO Global Report, Journalism Is a Public Good: World Trends in Freedom of Expression and Media Development, 10 (2022). Available at: https://www.unesco.org/en/world-media-trends (last visited Apr. 22, 2023).
[3] Ensuring media freedom and safety of journalists requires urgent concrete action backed by political will: UN expert (2022), https://www.ohchr.org/en/press-releases/2022/06/ensuring-media-freedom-and-safety-journalists-requires-urgent-concrete (last visited Apr. 22, 2023).
[4] *Ibid.*
[5] *Ibid.*

restrictions and prohibitions were substantiated on grounds of privacy rights, the protection of health and morals, and public security.

Considering the mentioned problems, this article is devoted to analyzing defamation – one of the most important press issues in modern society, to reveal the reasons rooted in the problems, to analyze the relationship between press freedom and the right to privacy, to eliminate the ongoing clash between fundamental rights and freedoms, and to present the possible solutions to maintain the effective realization and protection of freedom of the press.

Therefore, in the first paragraph, the actual birth of English defamation law will be discussed broadly. The elements of defamation and the expressions which are controversial and do not fall within the scope of defamatory statements will be enumerated. In the second paragraph, the American Supreme Court methods of dealing with defamation via chosen benchmark cases will be explained. In the third paragraph, the continental legal system will be targeted for comparative purposes, to perceive the existing defamation approach. The final chapter will be devoted to the current situation in Azerbaijani jurisprudence, and selected cases against Azerbaijan ruled by the Strasbourg Court will be contemplated. In the end, some conclusions will be drawn, and recommendations will be outlined about the measures that should be taken as soon as possible. The major goal of the work is to contribute those suggestions to the relevant domestic legal system to prevent uncertainty in the legal texts and to fill the legal spaces in practice.

I. English Law as a Guide in Decriminalization Process of Defamation

The law on defamation is one of the long-debated questions of constitutional law. Defamation in natural law is an ideal repercussion of democracy and a free flow of speech without boundaries in society. In positive law terms, defamation becomes a sort of striking a balance between freedom of expression and individual rights. Even if the positive law on defamation significantly reduces the ideal version of freedom of ideas and opinion, it still makes the defamation legitimate. Whereas today a number of top democratic countries, such as France, Germany, Norway, Sweden, etc. maintain punitive provisions in their criminal laws against defamatory speech.[6] In the United States, at least fifteen states still hold the criminal libel provisions in force despite the decriminalization at the federal level.[7] Meanwhile, according to a principle of unification of laws in international law, developing countries tend

[6] Scott Griffen, Defamation and Insult Laws in the OSCE Region: A Comparative Study, 32-33 (2017). Available at: https://www.osce.org/files/f/documents/b/8/303181.pdf (last visited Aug. 11, 2023).

[7] A. Jay Wagner & Anthony L. Fargo, Criminal Libel in the Land of the First Amendment, Special Report for the International Press Institute, 27 (2015). Available at: http://ipi.media/wp-content/uploads/2017/02/IPI-CriminalLibel-UnitedStates.pdf (last visited Aug. 11, 2023).

to give preference to the legal culture of highly democratic countries and thus, the prior jurisprudences take similar solutions to those of the latter ones whenever a global constitutional issue emerges.[8] However, a chilling effect on fundamental freedom in a clash with another right might result in one of the core rights significantly losing its essence.

From that point of view, the United Kingdom is one of the few countries that succeeded in establishing a special protection mechanism in favour of journalists and other media representatives. In 2013, after receiving the final Royal Assent, the British Parliament collaborated on the case-law experiences in a single Defamation Act.[9] In 2021, a separate Defamation and Malicious Publication Act has been adopted in Scotland as well.[10] In general, those acts, inherently more or less similar to each other, were devoted to the elimination of restrictive provisions on free speech and to the refashioning of existing defamation practices with the requirements of a democratic society.[11] Moreover, being focused on filling in concrete gaps with regard to freedom of the press, the Westminster Act clarifies neither the elements of the act that make it defamatory nor the types of defamation. Whereas the Scottish Act implements a more detailed approach, in terms of the actionability of the defamatory act[12] and thus, it would be useful to briefly discuss the nucleus of the defamatory act before analyzing the justification methods in favour of the defendant side in English law.

Article 1 of the Scottish Defamation Act construes defamation as a statement about a person that causes harm to his/her reputation (that is if it tends to lower the person's reputation in the estimation of ordinary persons).[13] As can be seen from the provision, the definition of defamation indirectly establishes the rights and obligations of parties. Thus, it is a fundamental right to defend people against adverse statements or any other type of communication that is made and pervaded about them (plaintiff-side). On the other hand, people have to take responsibility for information that could accidentally or deliberately have a negative impact on a third party's reputation (defendant side). The first positive side of the 2013 Act is that it

[8] R.H.Graveson, *The International Unification of Law*, 16 The American Journal of Comparative Law 4, 6 (1968).
[9] Defamation Act 2013. Available at: https://www.legislation.gov.uk/ukpga/2013/26/contents/enacted (last visited Aug. 11, 2023).
[10] Defamation and Malicious Publication (Scotland) Act 2021. Available at: https://www.legislation.gov.uk/asp/2021/10/contents (last visited Aug. 31, 2023).
[11] Alastair Mullis & Andrew Scott, *Tilting at Windmills: The Defamation Act 2013*, 77 The Modern Law Review 87, 87 (2014). Available at: https://www.jstor.org/stable/pdf/24029690.pdf?refreqid=excelsior%3Adc411cd852699ed76bfad32184d6641b&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=&initiator=&acceptTC=1 (last visited Aug. 11, 2023).
[12] *Supra* note 10, art.1.
[13] *Id.*, art. 1 (4) (a).

imposes "serious harm"[14] criteria for the act to be considered defamatory. To put it with other words, a statement will not be as defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the plaintiff.[15]

The defamatory statements could prejudice the reputation of the plaintiff in various forms. Inherently, there are also specific merits of the defamatory content that could be sued by the plaintiff. A plaintiff is entitled to bring a legal suit for two types of defamatory speech: slander is explained as a form of spoken defamation, and libel is attributed as a written or permanently documented form of defamation.[16] Meanwhile, in the contemporary world, the global integration of Internet communication into the different spheres of society has instigated the classification process of defamation law. Expression of opinions and ideas on Facebook, X, or Instagram happens in a more accelerated way, and those social apps supplement the information to people within seconds without being found in the place of the actual event. Hence, the emergence of social media accounts and other electronic media outlets helped to distinguish libel from slander much more clearly.

The qualification of the committed act, either as libel or as slander, varies depending on the level of public reach, the pervasion speed, and the characteristics of permanency. Firstly, the libel requires a collection of evidentiary documents, while the slander is actionable on its own and the relevant loss and harm sustained can be concluded or assumed from that actual event.[17] Another factor that lessens the slander in comparison with the libel is the episodic character of the former, however, for the action to be considered libel, there must be tangible proof of evidence.[18] To put it in other words, any defamatory speech made spontaneously during the discussion can potentially qualify as slander and is ruled within civil law cases. Thus, the vast majority of the defamatory conduct produced within social media or internet media outlets would possibly be considered libel.[19]

In general, either libel or slander, English law attributes the defamatory actions only under the civil law umbrella and the resolutions are achieved only through the civil litigation methods. Does the dissemination of headings unfairly impact the social network of the plaintiff, the defendant side should

[14] Satisfaction of "serious harm" criteria was discussed in the court practice for a long time. It was only *Lachaux v. Independent Print Ltd.* case that brought final clarification to the issue. Supreme Court decided that a meaning of statement does not suffice for the legal countermeasures, it should have a factual impact on the reputation of plaintiff, or the phrase should have a potential to cause future harm. According to paragraph 2, section 1 of 2013 Act, in the case of trading bodies, "serious harm" will be evaluated on the serious financial loss.

[15] *Supra* note 9, art. 1 (1).

[16] Freedom of Expression, Media Law and Defamation, 6 (2015), https://www.mediadefence.org/wp-content/uploads/2020/06/MLDI.IPI-defamation-manual.English-1.pdf (last visited Aug. 11, 2023).

[17] Kenneth H. Craik, Reputation: A Network Interpretation, 170 (2008).

[18] *Ibid.*

[19] *Id.*, 171.

bear the civil liabilities that came together with the commission of the act. Thus, the production sequences of the defamatory statement and which ingredients contain defamation will be scrutinized in the subsequent subchapter. In the British legal system, the burden of proof lies on the defendant side and he/she has the responsibility to prove the general credibility of the information, meaning that the objected heading is far from biased. This is why the second subchapter will study the ways that the defendant can rule out himself/herself from the obligation of publishing contentious material.

A. Elements of defamatory statements

One of the most interesting points in connection with defamation is the content and execution process of that wrongful act. In the Anglo-Saxon common law system, there are 3 elements to bring an action for defamatory statements*: imputation, publication, and identification.*[20] Those elements alone cannot be considered a potential act of defamation; therefore, the unification of those elements in one committed act is rather essential. The defamatory imputation should be a statement organized such that any sober-minded or reasonable person can elucidate that it is damaging to his/her reputation, or, on the whole, to any other person's reputation. Therefore, a statement should have the capacity to produce an assumed outcome-meaning direction of speech in a way to disrepute relevant personae. For the completion of the imputation phase, it is not necessary to present specific damage as a result of the defamatory speech.[21]

Defamation is generally described as a poison in the body;[22] according to American legal literature, it can revolve dormant and might not cause any negative influence unless it is released.[23] To put it in other words, a plaintiff may become aware of the defamatory speech about themselves after a long period, and that initially could be propagated latently within the reputational network of the relevant person. This is why collecting evidentiary documents for the loss and harm sustained might not be realizable or even obtainable. The legal mechanism for the evaluation of the case is all up to the jury. Historically, in the fifteenth century, in England, there were only limited grounds for taking legal action on the defamatory statements; if the person was accused of criminal commitment, the case was ruled by the civil courts, if the person was guilty of sin, then the case was taken to the ecclesiastical courts.[24] Later, political changes occurred in the society, and the growth of the economy caused the tables to turn; the church had lost its prior reputation and

[20] *Id.*, 149.
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Id.*, 150.

free people engaged in commercial relations were considered as much more significant for society. Therefore, the progress of trade expanded the legal grounds for accusations of a person's reputation. That tradition could be affirmed by the 1985 case in which lawyers Paul Tweed and Bob McCartney sued Sunday World for publishing them.[25] According to a Dublin newspaper, they had a fight with words in a Holywood bakery shop because of the last chocolate eclair before closing time, and each alleged to the other that he first entered the shop. The newspaper, in turn, confessed that there was no truth share of the so-called act, but rebutted that the act amounted to libel. However, the newspaper was obligated to pay each claimant £50,000 in compensatory damages.[26] Consequently, the legal historical background demonstrates that the premise for defamatory cases has developed from sinful and criminal commission to the extensive protection of personality.

As for the publication element, the plaintiff must present that the defamatory information was published, meaning that the statement crossed the communication between the respondent and the recipient of that information and was at least delivered to the knowledge of one-third party.[27] This requirement might seem minimal at first sight; however, several classic English case law samples show that even the existence of an intended recipient of the information was sufficed to evaluate the action as defamatory as there is an element of circulation.[28] For instance, if the letter is mailed with the indication "confidential" or "for the third addressee's eyes only" on the envelope, the defendant cannot justify himself/herself from the probable disclosure of the mailed letter by an executive secretary.[29] Therefore, as soon as one-third party is involved in the communication, the defamatory statement could be delivered to an unspecified and unrestricted number of persons within the reputational network of the plaintiff; and the latter is not obliged to gather the proof of evidence or document those individuals who became aware of the defamatory statement about him/her.

In the case of online communication systems, Section 5 of the 2013 Act entitles website operators to prove that the dissemination of the statement is not dependent on them.[30] However, upon the plaintiff side's query, if the website intermediary unable to find an actual person who spread the information, then the operator is encountered with 3 options: obtaining the poster's consent to reveal their identity to the claimant, second, if such permission is refused, it must inform the claimant of such refusal and also

[25] Peter Robinson to sue Irish politician for libel over Twitter remarks (2015), https://www.theguardian.com/politics/2015/sep/18/peter-robinson-sue-irish-politician-libel-mick-wallace-twitter-remarks (last visited Sep. 10, 2023).
[26] *Ibid.*
[27] Craik, *supra* note 17, 152.
[28] *Ibid.*
[29] *Ibid.*
[30] *Supra* note 9, art. 5 (2).

possible refusal by the poster about the removal of the offending statement; or, finally, removal of the contentious material.[31] If the website operator does not fulfil one of those conditions, the defence under Section 5 is waived.

The last element that produces potential defamatory information is the identification of the relevant subject. The statement should be structured in such a way that it is addressed directly to the third party and not any other individual. In the same manner as "gossip sessions", the reputational circle of the plaintiff can clearly assume after getting acquainted with the information that the subject of the defamatory topic is only the plaintiff.[32]

As for the harmed party to the case, the claimant is entitled to seek remedies for the loss and damage sustained and, hence, can bring a lawsuit in an open court. The defendant could be obliged to cease and abstain from further publishing the defamatory statements about the plaintiff.[33] Moreover, the defendant party could be sought to refute the libellous declaration, and as a next step, it would be intended to inform society that the information is defamatory and wrong.[34] An official apology should also be covered by the defendant for the harmful allegation subjected to the address of the plaintiff.

Last but not least, three types of monetary compensation could be sought by the plaintiff: 1) compensation for the reputational harm sustained by the plaintiff; 2) aggravated damages, the defendant party attempt to reiterate a libellous allegation in the courtroom; 3) exemplary damages, which is intended to establish a signal effect across the media outlets, to demonstrate that defamatory conducts are punishable by law.[35]

B. Methods of justification

The daily lives of human beings can hardly be imagined without the possibility of talking about other persons. While doing it, the information learnt by people becomes pre-owned, and therefore, the share of credibility and precision gets lowered. Even if any person becomes the cardinal observer of the event about others, the information processed by the brain might be incorrect, misleading, or harmful to the reputation of others.[36] Otherwise, what we contemplate might actually be obviously true, however, with the conveyance of that third-parties we can defame the respective person directly or indirectly.[37] In conclusion, we might be the heroes of the defamed person's victimization and exposure to the disadvantage, harm and attack by the reputational network. Taking into account the abovementioned criteria, the

[31] Mariette Jones, *The Defamation Act 2013: A Free Speech Retrospective*, 24 Communications Law 117, 128 (2019).
[32] *Supra* note 17, 153.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] *Id.*, 154.
[37] *Ibid.*

defendant's risk can be noticed in two aspects: first and foremost, putting the plaintiff's reputation at stake either accidentally or deliberately, and realizing the loss and harm in the account of the plaintiff either as being aware of libelling and slandering or as a person who is seriously inexperienced and negligent in social communication about other persons.[38]

Once an individual is summoned as a defendant in a civil law case for the conduct of libel or slander, the respondent party is entitled to shield himself/herself with basic elements according to the claimant party's allegations. First of all, the defendant can refute the allegations and notify that the opposite side was misled by the content of the statement, meaning it was not directed to him/her. Secondly, the respondent can argue that the evidentiary documents proving the allegation are insufficient with regard to the publication and dissemination of the contentious announcement to the reputational circle. Thirdly, it can be inferred by the defendant that the plaintiff failed to cover the content of the statement and the correct interpretation of the content was not libellous or defamatory.[39]

If the substantiations by the defendant are not able to be disputed, then, following this, the respondent party has several ways of defence. Such a defence could be realized through the methods of *justification, fair comment, or qualified or absolute privilege.*[40] On the whole, defamatory speech should indicate the reality and the statement must be substantiated with factual background.

1. Justification

In common law, a publisher can not be held responsible if the disseminated material indicates the facts. With the justification method, it can be proven that the statement made about the plaintiff is potentially correct, despite the defamatory content. The respondent has to substantiate the burden of proof, and he is innocent unless proved otherwise. In the English civil law system, the respondent party is obliged with the burden of proof; however, it is the plaintiff who is innocent unless the jury decides otherwise.[41] Pursuant to the Defamation Act, slight incorrect imputations do not harm the plaintiff's reputation unless the material facts of the imputation are incorrect.[42] After successful verification, if the contended material appears to carry out the share of the truth, then the plaintiff carries a heavy risk of facing the judicial endorsement of justification.

[38] *Ibid.*
[39] *Id.*, 154-155.
[40] *Id.*, 155.
[41] *Ibid.*
[42] *Supra* note 9, art. 2 (4).

In the United States, the situation changes reverse: it is the plaintiff's obligation to prove the falsity of information.[43] In case the words have multiple libellous interpretations, a defendant side is entitled to substantiate the one he/she specifically meant or prove that the plaintiff is wrong. However, it is rarely observed that the disseminator of the content succeeded in convincing the proceeding participants of the misunderstanding between him/her and the plaintiff. Thus, statistical results on the media libel action indicated that plaintiffs generally believed the published article about themselves to be false (63%), in comparison with violating their privacy (4%), damaging personal reputation (7%), damaging their professional or business reputation (20%), or other respective criteria (6%).[44] To recapitulate, their main concern was the falsity of the information, and their main target was the correctness of the defamatory statement.[45]

2. Fair comment

The defendant side is also free to give opinions and thoughts when the content casts public interest. In this method, the defendant is protected from defamatory ground because of the involvement in the conversation or communication which allures broad public interest, together with holding opinions or beliefs about the contradictory actions or conduct of public figures.[46] Thus, it turns out that when the issue is in the interest of the public, freedom of expression should possibly prevail over the right to privacy. However, the defence method has been extended to private matters under the Defamation Act 2013. Thus, any fact or any privileged statement that is alleged as fact is protected under the fair comment umbrella.[47] To put it briefly, a statement needs not to only be of public interest, but completely private information might be open for the defence.[48] Whereas special caution should be given when the contentious material pertains to the private sphere of life. A distinction should be made between the fact and the comment. For the private action to be considered as fact, it must be an inference or conclusion of something, secondly, it should have the capacity to be substantiated by the defendant.[49]

[43] Robert Dunne, An Introduction to Basic Legal Principles and Their Application in Cyberspace 69, 69 (2009).
[44] *Supra* note 17, 156.
[45] *Ibid.*
[46] *Id*., 157.
[47] *Supra* note 9, art. 4.
[48] Jason Bosland, Andrew T. Kenyon & Sophie Walker, *Protecting Inferences of Fact in Defamation Law: Fair Comment and Honest Opinion*, 74 The Cambridge Law Journal 234, 235 (2015). Available at: https://www.jstor.org/stable/pdf/24693878.pdf?refreqid=excelsior%3Adf52df6c7a4bfe08f18045daa911c809&ab_segments=&origin=&initiator=&acceptTC=1 (last visited Aug. 12, 2023).
[49] *Id.*, 239-240.

When the information is about the public figure, the respondent party can defend himself/herself on the grounds of the corresponding facts, however, the main point was that those facts should be significantly precise.[50] While ruling on the case, a judge might encounter questions about what links the issue to the public interest, who is the public figure, what is the put opinion and what is the fact, and to what extent the relevant information is correct in light of the alleged statement.[51] Moreover, there are certain other criteria that should be taken into consideration within the judge's evaluative decision, such as the kind of malicious conduct committed by the defendant, the fact of the actual loss and harm done to the plaintiff's reputation, the state of mind of the defendant while declaring or disseminating the material, and so on.[52] For the qualification of the conduct on grounds of fair comment, the action should also be realized in a way that it is open to publicity; for instance, on Internet websites, social media accounts, marketplaces, or other types of public forums.

3. Privilege

There are also circumstances where the production and pervasion of information are curtailed and directed to the view of a restricted number of individuals about specific persons. Such situations are encountered within the third method, so-called privilege. The privileged communication is made on the grounds of qualified or absolute privilege. In the qualified privilege method, the respondent should be involved in a situation in which he or she has a social, moral and legal duty to give an answer to the inquiry of another individual in connection with the specific third person.[53] In turn, the recipient should have the right or interest in obtaining such kind of information. For instance, it might be a case where a person submits his/her portfolio to one of the job vacancies and that person's former employer gives his or her recommendation about the candidate to the potential employer. The qualified privilege method protects the defendant from being charged with defamation, even if the dispatched information is misleading and incorrect. That kind of misinformation could be tolerated by the judiciary and thus would qualify as privileged communication made with "honesty of purpose", relieved from malice.[54]

The deliberateness and goodwill of the communication shelter the defendant party in that situation. It must be highlighted that it is the circumstance that enjoys qualified privilege; goodwill and conscientiousness are the two elements that produce the mentioned method.[55] Therefore, one

[50] *Supra* note 17, 157.
[51] *Ibid.*
[52] *Ibid.*
[53] *Id.*, 158.
[54] *Id.*, 159.
[55] *Ibid.*

must make sure that the information will be relayed to the person who has the right and interest in receiving or obtaining that. Any kind of negligence and crossing the borders of those limitations would consequently deprive the respondent party of recourse to that method.

It was the *Reynolds v. Times Newspapers Ltd.* case, where the English Court expanded the rights of the media on freedom of speech and by taking the "public interest" element into account enlisted the ten non-exhaustive factors to be entertained by the press on grounds of qualified privilege.[56] The Court emphasized that media freedom will be shielded once the statements made by the press meet the requirements and are "of sufficient value to the public that, in the public interest, it should be protected...".[57] Those factors covered whether the respondent journalist applied the cardinal requirements such as the credibility of the source, whether he/she took the measures to authenticate the information and if the response was in connection with the material quested from the plaintiff.[58] However, Section 4 of the Defamation Act 2013 abolished the *Reynolds doctrine* and hereinafter any statement that is of public interest or reasonably believed to be of public interest could be defended on grounds of qualified privilege.[59] Thus, Section 4 substituted the "responsible journalism" criteria with that of "reasonableness of belief"[60]; the first one required objective evaluation by the media worker while the latter one gave permission for subjective evaluation.[61]

In cases of absolute privilege, there are a restricted number of grounds for statements that are public, false, defamatory, or leading to malice; however, the action is protected from the qualification of libel or slander.[62] Those kinds of statements include speech made in judicial proceedings by the witnesses, lawyers, and judges, as well as those made in parliamentary proceedings while flowing the opinions and beliefs about something so that to reach out to the legislative deliberations.[63] Taking into account the maintenance of the regular functioning of those bodies, individuals are deprived of legal remedies for the defamatory information made in that case by the enumerated persons.

In the same manner, as considering an act as a defamatory ground, the potential list of persons that could be considered public figures has been exposed to the evolution and, therefore, historically expanded. In the

[56] Jason Bosland, *Republication of Defamation under the Doctrine of Reportage – The Evolution of Common Law Qualified Privilege in England and Wales*, 31 Oxford Journal of Legal Studies 89, 90 (2011).
[57] *Supra* note 17, 159.
[58] *Ibid.*
[59] *Supra* note 9, art. 4 (1).
[60] Jones, *supra* note 31, 17.
[61] *Id.*, 19.
[62] *Supra* note 17, 160.
[63] *Ibid.*

contemporary world, any individual might inadvertently or unwillingly appear in the stories of the e-news or find himself/herself on the third page of the gazette. This could suffice for the jury to evaluate the plaintiff as a public figure. It should be mentioned that the spheres of life that can be demonstrated about public figures have also expanded.

"Rumor repetition rule" is not an accessible method for the respondent party to defend himself/herself and in that case, the defendant is fully obliged for the burden of proof.[64] If we elaborate on this method, we can conclude that one cannot justify the publication and dissemination on the grounds that other sources have previously published the relevant material and that the defendant referred to those persons' or media sources' allegations. Meanwhile, it can change depending on the legal system; for instance, in the United States case-law, there is a shelter of so-called "neutral reportage" practice, which is often resorted when the newspapers become the party to the lawsuit.[65]

In general, defamation law embodies the balance between freedom of expression and the right to privacy or protection of reputation. Such balance is obtained through the intrusion of those enumerated methods. Each of the three methods has a protective umbrella from prosecution as long as the speech is made on events that concern the public interest. Justification is an applicable method in cases where the information is generally correct, despite the defamatory content. Unlike justification and privilege methods, a fair comment is a form of defence on its own. It is a statement of one's opinion on a certain set of facts. The produced speech must be an expression of ideas rather than an assertion of facts. However, opinions can only be formed on verified information, since comments on fake news cannot be considered fair. On the other hand, once the goodwill of the disseminator is ensured, qualified or absolute privilege entrenches the guarantee of protection in case the statement is incorrect. Once the information is right within the context, more or less, the person who produced and disseminated that statement is fully protected. If the information is true and at the same time unfavourable with regards to the subject of that information, then the producer should take responsibility for social risks that arise from his/her social role.

II. Case-law Related to the Defamation in American Court System

Despite the First Amendment having the potential to be a defence method in defamation cases, American courts had burdened the proof on the defendant's side for a long time. With the *Sullivan v. New York Times* case, the protection of reputation was restricted in favour of free speech; from then on,

[64] *Supra* note 17, 155.
[65] *Ibid.*

public officials were required to prove the falsehood of the published statement. Whereas the burden of proof was the defendant side's responsibility to the moment that case was ruled by the Supreme Court. Meanwhile, even partly correctness of the information was sufficient for the Court to resolve the dispute in favour of the defendant side. However, the *Gertz v. Robert Welch* case restricted the First Amendment guarantees and once the falsity was revealed, the defence should have been defeated. *Firestone v. Time* case further extended the restrictions to the notion of public figures and the Court decided that public interest in the dispute was not satisfactory to define the defamed person as a "public figure".

A. Sullivan v. New York Times case

American defamation law is specifically distinct for the regulation mechanism of the procedural obligations between the plaintiff and defendant side in freedom of speech cases. Transferral of the proof obligation to the plaintiff side indicates that everyone can publicly spread his/her opinion unless the significant impact of false information on the reputational network is proven. A benchmark case *Sullivan v. New York Times*[66] had an indispensable contribution in that regard, as the burden of the proof on the plaintiff side was the repercussion of to what extent free speech prevail over other grounds.

According to the facts, The New York Times published an article supporting Martin Luther King Jr. on criminal prosecution.[67] However, that statement covered several imprecise and contradictory pieces of information. One of the individuals was L.B. Sullivan, who sustained loss and damage to his reputation because of his subordinates. Despite the fact that he was not explicitly mentioned in the statement, due to the harmful effect on him, he submitted a notification to the New York Times for the article to be withdrawn.[68] He indicated that, as a public figure, Alabama legislation entitled him to claim compensatory damages. Following this, The New York Times rejected the claim, then Sullivan sued in a libel action against the New York Times, and several African American ministers were indicated in the announcement. A state court upheld the complaint and awarded him five thousand dollars in damages.[69] The state Supreme Court also agreed to the first-instance court decision, and then the Times appealed from that decision.

The Supreme Court of the United States, however, decided that the claimant was obliged to demonstrate the falsity and negligence omitted in the statement according to the First Amendment, setting aside the verification of

[66] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Available at: https://supreme.justia.com/cases/federal/us/376/254/#tab-opinion-1944787 (last visited Aug. 14, 2023).
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*

the information in advance. Therefore, the Court unanimously ruled in favour of the Times. When an advertisement is linked to public figures, the falsity of the statement is not sufficient for liability, but the respondent party should be aware of the inaccuracy of that information, or it should be published as a consequence of negligent conduct. Brennan J. used the term "actual malice" to define the notion of falsity, and he did not include the ordinary meaning of malice in that definition.[70] In libel law, "malice" had meant knowledge or gross recklessness rather than intent, since courts found it difficult to imagine that someone would knowingly disseminate false information without bad intent.[71]

Later, the *Sullivan* safeguard mechanism for the defendant side was extended to the circle of private persons. It was in the *Rosenbloom v. Metromedia* case that the Court put forward the same protection standard for cases related to private persons. The Court provided that the defamatory statement was made in the discussion of a matter of "public or general concern".[72] To put it in other words, even if the subject matter of the case is private persons, once the action attracts the attention of the public, the defendant side will be protected under libel law.

To recapitulate, the *Sullivan* case was a benchmark case in the history of the United States in terms of establishing a fundamental principle under First Amendment guarantees; it paved the way for the press to openly express their opinions about public officials and criticize government affairs, thereby constitutionalizing the defamation law. Prior to the Supreme Court decision, allegations about defamatory statements were at the disposal of state laws. With the Sullivan case, however, defamation law was liberated from the subjection of state regulations, and its implementation mechanism began to be determined through the First Amendment.

B. Gertz v. Robert Welch case

However, a broad framework for libel cases did not last too long, as some critics adduced that proving the actual malice was a complicated situation for the plaintiff side. Thus, the "public or general concern" standard was also restricted in *Gertz v. Robert Welch, Inc.*[73] and the Court emphasized that the First Amendment does not guarantee such a wider protection of the press.[74] Thus, it was ruled that once the "fault" is discovered, the defendant party is liable for the intrusion into the private matters or privacy of public figures. Another alluring aspect was the definition of fault, what should be

[70] *Id.*, § 281.
[71] *Id.*, § 282.
[72] Alfred Hill, *Defamation and Privacy under the First Amendment*, 76 Columbia Law Review 1205, 1211 (1976). Available at: https://www.jstor.org/stable/1121666 (last visited Feb. 18, 2023).
[73] Gertz v. Robert Welch, Inc., 418 U.S. 346, 323 (1974). Available at: https://supreme.justia.com/cases/federal/us/418/323/#tab-opinion-1950909 (last visited Aug. 14, 2023).
[74] Hill, *supra* note 72, 1212.

understood as fault and to what extent an action is considered libel. In 1975, the American Law Institute clarified that the "fault" requirement is satisfied once negligence is proved.[75] It was also stressed that a lesser malicious act than the "fault" could accordingly amount to a less strict liability.[76]

The Gertz case was also prominent due to the coverage of the "public figure" definition. Pursuant to the ruling of the Court, public figures should be considered individuals who hold a public office or are candidates for such office, and that is why they attract the attention and comment, or individuals who played a significant role in social relations or plunged themselves forward in the midst of specific conflicts so that they could be the ones to tackle the problem and produce a solution.[77] However, those individuals should not be reckoned as public figures in all spheres of their lives, other than in exceptional circumstances.[78]

C. Firestone v. Time case

Contraction of First Amendment guarantees was expanded in the constitutional system of the United States after the *Firestone v. Time* case.[79] It had a substantial impact in two aspects: first and foremost, the case brought clarity that attracting public interest is not a sufficient factor with regards to the injured person to be considered a public figure; secondly, the safeguard mechanism of the First Amendment cannot be taken into account without the existence of "public or general concern" within the coverage of a specific declaration.[80]

Pursuant to the background of the case, the Firestones were one of the affluent families who had a reputational network in "Palm Beach Society". Mrs. Firestone brought a divorce lawsuit before the court, and her husband filed a counterclaim. The court proceeding was intensive, with shocking charges and countercharges, and therefore, the press did not miss that chance in Florida. Mr. Firestone was granted a divorce, and it was illuminated in the headings of Time. Following this, Mrs. Firestone organized some press conferences and filed a lawsuit against Time because of the libellous statements made about her, and she won the case.

The Supreme Court decided that, pursuant to the *Gertz* standard, Mrs. Firestone should be considered a private person. Mr. Justice Rehnquist, who combined the major opinion of the jury in his speech, emphasized that Mrs. Firestone had not "*thrust herself into the forefront of any public controversy in order*

[75] *Ibid.*
[76] *Ibid.*
[77] *Id*., 1213.
[78] *Ibid.*
[79] Time, Inc. v. Firestone, 424 U.S. 448 (1976). Available at: https://supreme.justia.com/cases/federal/us/424/448/#tab-opinion-1951611 (last visited Aug. 14, 2023).
[80] *Supra* note 72, 1213.

to influence the resolution of the issues involved in it".[81] He additionally highlighted the fact that even if Mrs. Firestone voluntarily plunged herself into the attention and commentaries of the public, she still would be considered a private person since the content of the conflict was not the public one in accordance with the *Gertz* case. He substantiated that despite the fact that the destination of Mrs. Firestone was on the level of public excitement, she neither tackled the problem nor presented a solution to it, within the meaning of public controversy. Mr. Justice Marshall was the only member of the jury who disagreed with the majority and noted that it was "not of the sort deemed 'legitimate' or worthy of judicial recognition".[82] According to him, the case "resurrects the precise difficulties that I thought *Gertz* was designed to avoid".[83]

On the whole, with the *Gertz* case, the Court established a new standard mechanism that the public figure element is more significant than the event that drew the attention of the public. The Court decision on the *Firestone* case availed the society of law to clearly distinguish between "public figure" and "public interest" elements as soon as the plaintiff sues the defendant party. However, it is highly questionable which of those two has more weight in the development of society. From the perspective of the *Gertz* standard, I personally assume the publicity of an actor should be of second-degree importance in comparison with the importance of an actual occasion.

Generally, the cessation of marriage is not a type of case that would attract public interest, and, Mrs. Firestone's private life was involuntarily publicized. However, another point that remained untouched was that Mrs. Firestone had held a press conference during proceedings, and it was not even attempted to be evaluated as thrusting herself into the focus of the press by the Court. Backing to the raised approach in the former paragraph, the abovementioned case was a simple divorce, and it could significantly impact people's moral thoughts. For instance, there can be a situation when a well-known musician, with the action he or she is involved in, obtains more influence in the shaping of the cultural orientation of people than that of a country's prime minister ("public figure"). Thus, I believe the Supreme Court's approach in that direction would be better upheld as it was until the *Rosenbloom* case, since the *Gertz* formula causes the priority of the right to privacy over First Amendment guarantees in cases that require the application of defamation law.

III. Defamation in Continental Law System

Unlike the English common law system, there are criminal sanctions for defamatory statements in continental law system jurisprudence.[84] Depending

[81] *Supra* note 79, § 454.
[82] *Id.*, § 487.
[83] *Ibid.*
[84] Paul Mitchell, A History of Tort Law, 334 (2014). Available at: https://doi.org/10.1017/CBO9780511803147.018 (last visited Feb. 19, 2023).

on the specific country, the punishment alters when the content of the libellous information falls under criminal prosecution. For instance, in Germany, the criminal sanctions are similar to those of English tort law, while in countries like France or Italy, the criminal nature of the offence varies from that of precedence law.[85] Moreover, plaintiffs are entitled to choose the compensation for damages either in collaboration with a criminal prosecution or in a separate civil action in a civil court.[86] Finally, the continental system does not allocate defamation either in civil or criminal legislation. Depending on the level of perilousness, the defamatory content can be scrutinized in connection to one of those two branches.

Another prominent factor is that, unlike English law, one cannot witness the distinction between the definitions of libel and slander. However, analogical distinctions might be observed within the Roman law branch of the continental system, which detaches *iniuria re* and *scriptis et verbis*[87] – delict expressed orally or in writing. This variation was further developed by the numerous elements and entailed the emergence of the following types of defamation: a) whether the injured person is alive or deceased (Italy); b) public or private defamation (France); c) whether the information covers wrong statements or solely humiliation of the party (France and Germany); d) if wrong, whether the information was made in bad faith or merely consciously; e) whether the statement was directed at the personal dignity or social reputation of the injured party.[88]

The continental legal system does not differentiate between the facts of whether the defamatory statement was made in a newspaper, via the internet, or social media, or whether it was made in writing (picture, letter, poster) or verbally, meaning it does not distinguish between libel and slander. Since every single defaming statement is considered defamation in continental law, there is no protection umbrella for justification, fair comment qualified, or absolute privilege as it is in English law.

A. Defamation in French law

The Parliamentary Assembly of the Council of Europe (PACE) affirmed its determination to stand for the decriminalization of defamation in its Resolution 1577 Towards decriminalization of defamation (2007) and the corresponding Recommendation 1814 (2007).[89] The Council of Europe further challenged its members to repeal the prison sentences for defamation without delay and recommended solely civil procedures for the protection of the

[85] *Ibid.*
[86] *Ibid.*
[87] *Id*., 335.
[88] *Ibid.*
[89] Reply of Parliamentary Assembly to Recommendation 1814 (2008), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=11944 (last visited Aug. 31, 2023).

dignity and reputation of individuals. Moreover, it was also admonished to the civil courts of State Parties that the proportionality principle should be taken into account with regard to the awards for damages.[90]

France is one of the 46 states that have membership in the Council of Europe. Defamation is criminalized as an offence under French law and is penalized according to the Articles 32 and 33 of the Law on Freedom of Press. Nevertheless, any defamatory act[91] or insult[92] committed by means of criminal provocation will be punished only by a fine of 12,000 euros. Hence, the French defamation system can be considered exemplary, since it was adapted to the Recommendation of the Council. The only issue with that is individuals are still "criminally" prosecuted for the defamatory actions.

French legal system also endorses the fact that 3 separate elements unify the action of defamation: allegation, imputation, and proposal. The notions of allegation and imputation are assessed flexibly by the French judge. According to the definition of the term "allegation" given by Littré, it is an assertion, a proposition put forward by someone else.[93] The Trésor dictionary additionally states that this "proposal" is something ill-founded, even misleading.[94] Imputation, on the other hand, is an act of attributing to someone an action, a fact, or a behaviour that is generally considered blameworthy.[95] Therefore, these two definitions are very close, although the allegation is often perceived as more doubtful and the imputation as necessarily pejorative.

For the sake of precision, an allegation is completed when there is an evocation of a fact exposed by a third party or even by a public rumour. Inherently, the imputation element is satisfied when there is a direct expression of a strictly personal affirmation, or it should be assumed as such.

An allegation or imputation element is also satisfied even in the case of specific language in an undercover manner used by the disseminator, and it will be considered punishable by the judge.[96] With some writing techniques, a propagator can conceal the abrupt or malicious character of the remarks stressed in the statement. Since it is difficult to distinguish these hypocritical precautions from honestly scrupulous nuances when in doubt, the judge retains the malicious potential of the remarks.[97]

Moreover, even in case of limited interpretation of words, in which an interrogation mark should not be defamatory, the courts consider that the

[90] *Ibid.*
[91] Law of July 29, 1881, on Freedom of Press, art. 32. Available at: https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006070722 (last visited Aug. 13, 2023).
[92] *Id.*, art. 33.
[93] Mathilde Hallé, Le Délit de Diffamation par voie de Presse, 10 (2007). Available at: https://tribu-ohayon.com/assets/uploads/2014/09/voie-de-presse.pdf (last visited Feb. 25, 2023).
[94] *Ibid.*
[95] *Ibid.*
[96] *Supra* note 91, art. 29.
[97] Hallé, *supra* note 93, 11.

"prosecuted offence" (that offence is defamatory content) is likely to hide under the true meaning of the word.[98] Hence, after the entire examination of the article by the judge, if the statement tends to reveal and bring out polemical, satirical, and even sometimes critical content, the imputations made in interrogative form might be considered to produce defamation.

The French Court of Cassation defines a precise and determined fact as "one which can easily be the subject of proof and a contradictory debate".[99] Therefore, the facts must be precise and detailed. This is the objective side of the assessment of allegedly defamatory statements. The fact must certainly be determined, but not that detailed; the allegation must be clear, significant, and unequivocal.

Precision does not mean accuracy here. Because, in the end, the accuracy of the imputed or alleged fact is irrelevant. It is defamatory information that is punished and not the distortion of facts (despite the fact that the truth share of defamatory facts is rarely admitted), since "the truth is indifferent to the constitution of the defamation".[100]

In general, the publication of a defamatory statement is an offence. Indeed, the comments must have been published, that is, brought to the attention of others, to be prosecuted as defamation. P. Bilger notes in this respect that "the offence of the press does not relate to solitary or wild thought but to the opinion which is intended to be social".[101]

This condition of publicity is absolute. Otherwise, the defamation is non-public and constitutes an offence of a different nature. It is a fine, and its sanction is subject to common law. Consequently, Article 23 of the Law of July 29, 1881[102] lists the methods of advertising. These are "speeches, cries or threats made in public places or meetings", and "writings, printed matter, drawings, engravings, paintings, emblems, images or any other medium of writing, speech or image, sold or distributed, offered for sale or exhibited in public places or meetings".[103] Thus, press publications satisfy this condition of publicity.

Written expression concerns the sale or distribution – considered not from a commercial angle but as a means of dissemination – in public places or meetings of writings or printed matter of any kind. The purchase of the material is not a necessary element for evaluative purposes by the judge. A diagnosis of defamation is made once the will to deliver the writing to the public is revealed.

[98] *Ibid.*
[99] *Id.*, 12.
[100] *Ibid.*
[101] *Id.*, 9.
[102] *Supra* note 91, art. 23.
[103] *Ibid.*

Public display of posters or placards is also affected when, in a fixed and public place, they allow passersby to be informed of what is displayed or published. Thus, the image or representation that significantly undermines an individual or collective interest may be prosecuted as public defamation.

In conclusion, French law on the Press holds the criminal sanctions useful with regard to defamatory statements. However, those penalties do not sanction imprisonment and suffice with monetary damages only. Thus, French defamation law is in accordance with the recommendations of the Council, and it successfully steps forward in the decriminalization process.

B. Defamation in German law

As one of the Member States at the Council of Europe, the abovementioned Resolution and Recommendation also cover the German jurisdiction.[104] German legislation preserves the criminal provisions for defamation and further sets prison sentences for the committed act. The cardinal criterion to be considered is whether the statement is false[105] or that it indicates only an insult to the relevant party).[106] While the former one is addressed to third parties, the actual presence of the injured party is significant for the latter. If the wrong statement is made in bad faith, with the entire consciousness that the information has no ground, then the defamatory action falls within a separate category.[107] Regarding the sanctions, they are considered the lowest for insults, higher for standard or ordinary defamation, and the highest for aggravated defamations.[108]

Those sanctions are an indication of the constitutional limitations on freedom of the press for the protection of fundamental rights and human dignity. While guaranteeing a broad spectrum of freedom of speech, Article 5 of the German Basic Law also puts limitations on expression in favour of personal honour and personal integrity.[109] From that perspective, to examine a violation of fundamental rights, it is necessary to record the content of the statement to clarify in what respect, according to the objective meaning of the statement, there is an impairment of personality. Since the meaning of a statement impacts the protection of fundamental rights, it must not be determined without considering the personal dignity at stake.

The focus here is on the understanding of an impartial and reasonable third party. The defamatory statement should not be determined solely from the victim's perspective. If there are several equally conceivable interpretations

[104] *Supra* note 89.
[105] German Criminal Code (Strafgesetzbuch), § 186 (1998). Available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1891 (last visited Jul. 22, 2023).
[106] *Id*., § 185.
[107] *Id*., § 187.
[108] Mitchell, *supra* note 84, 336.
[109] Basic Law for Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland), art. 5 (1949). Available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 (last visited Jul. 22, 2023).

that are not mutually exclusive, the legal assessment should be based on the most favourable interpretation of the utterer.[110] However, in order not to neglect the protection of honour, the following differentiation is necessary: if the plaintiff takes an action against a statement made in the past, the "principle of infringer-friendly interpretation" applies.[111]

This protection is considered for the utterer and is justified by the fact that he or she would otherwise have to fear punishment or damages because of an interpretation that misses the intended meaning. These possible sanctions could have an intimidating effect on the free formation and expression of opinion and thus affect freedom of opinion in its substance. On the other hand, if the plaintiff claims that future statements should not be made, then the legal control must be based on the infringing interpretation.[112] Since the utterer has the opportunity to express himself unambiguously in the future and to clarify which utterance content should be used as the basis for the review, the plaintiff is not shielded in this respect.[113]

Protection of the honour of public figures is another aspect of the determination of the severity of the encroachment on personal rights. In that regard, the question also arises whether the person concerned is a public figure. Anyone who deliberately goes public as a celebrity or politician, or who deliberately tries to influence the formation of opinion in political competition, has to accept greater public interest in his or her person.[114] In this case, freedom of expression prevails over the protection of honour. The protection of privacy is given a back seat, in particular when the objective of statements relates to public interest. According to the January 15, 1958, judgment of the Federal Constitutional Court, there is a presumption of freedom of speech in public life.[115] This results from the fact that communication is a process in which several people are always involved, in which the roles of communicator, deliverer, and recipient are played.

Obviously, intensive conflicting interests in a pluralistic society can produce quick statements, spontaneous reactions, and situational adjustments necessary in this process, with the result of unavoidable one-sidedness, sharpening, provisional errors, and inaccuracies. Therefore, unsettling, shocking, exaggerated, and hurtful language would have to be accepted as a matter of principle.[116] However, the presumption rule must not

[110] Üble Nachrede und Verleumdung Strafrechtliche Ahndung und zivilrechtliche Abwehr, 6 (2013). Available at: https://www.bundestag.de/resource/blob/407504/dfcdee163a8b5201de6ac33d17bfb524/WD-7-216-13-pdf-data.pdf (last visited Feb. 22, 2023).
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*

be misunderstood as a priority rule, so a weighing-up must be carried out in each case. If there are special reasons, such as the significant degradation of personal honour and creditworthiness of the respective person, the protection of personal rights can be preferred in individual cases.

Anyone who makes statements in public to contribute to the public opinion struggle must expect that his or her person will become the focus of the dispute. This is the only way to ensure that public opinion is formed with equal opportunities.[117] A sharp or exaggerated statement can provoke comparably harsh criticism in the sense of a counterattack.[118] However, the respondent's utterance must be a proportionate response in content and form.[119] The standard for this proportionality is, in turn, the type and severity of the challenging statement. The limit is exceeded when the only intention is to defame the opponent.[120]

The primacy of freedom of expression ends when the statement violates the dignity of private persons as a formal insult or contains abusive criticism.[121] In these cases, the utterer is no longer concerned with discussing the matter but with the intentional and exclusive disparagement and insult of the person. According to Section 192 of the Criminal Code (Strafgesetzbuch), in the case of defamation against a private person, this disparagement should be premised particularly on the form of the statement or the circumstances on which it is based.[122] Since such statements cannot contribute to intellectual debate and the formation of public opinion from the outset, they take a back seat to the protection of personal rights. However, in order to adequately do justice to the importance of freedom of expression, the term "abusive criticism" must be interpreted narrowly. Sharp devaluations and strong polemics, even through the use of swear words, do not automatically lead to an inadmissible expression of opinion. The extent of what is permissible is determined by the subject of the communication. The more the defamer pursues selfish goals and the less the defamation serves the intellectual battle of opinions, the more likely it is that the "abusive criticism" is inadmissible.[123] Conversely, the respondent does not have to resort to the mildest means of criticism because he has a legitimate interest in his defamatory statement attracting the desired attention, since only then can he make a contribution to public opinion-forming.

To sum up, decriminalization of defamation still remains as challenge in German law. Especially, Article 5 of the Basic Law stands as a constitutional ground for the possible restrictions on free speech via criminal provisions. An

[117] *Id.*, 7.
[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid.*
[123] *Id.*, 8.

interesting point is that Article 10, Section 2 of the European Convention also permits restrictions on "reputation of others" grounds. Meanwhile, neither the Treaty nor the case law prohibits domestic cases from being ruled on criminal chambers. As can be seen from the abovementioned recommendary texts by the Council of Europe, abolishment of imprisonment for defamation is the key target of the regional human rights organization. On the other hand, German domestic courts generally suffice with setting a certain amount of fine as punishment[124] and presumably, it is because of avoiding the possible clash with the protection standards of Strasbourg Court. In that case, criminal sanctions which considers prison sentences in Article 185, 186, and 187 are inevitably useless. There remains one probability for the maintenance of those sanctions: it is possibly retained in the Criminal Code because of the aggravated circumstances (such as discrimination, hate speech, and threat to public safety, health and morals) on defamation crime.

IV. Legal Approach to Defamation Law in the Azerbaijani Jurisprudence

Defamation remains an offence in the criminal legislation of the Republic of Azerbaijan. Despite being one of the Member States of the Council of Europe, the laws on defamation have not been adapted to the aforementioned Recommendations. Thus, the punishment of imprisonment for a certain number of years still holds a place among the sanctions for criminal defamation. Moreover, there are a number of European Court cases against Azerbaijan on defamation.

The main issue is *criminalization* and *disproportionate sanctions* for publishing defamatory information. In the previous chapter, English and American defamation laws were analyzed, and those systems are distinguished with decriminalized defamation. Such an approach serves to protect freedom of expression from dissolution and to balance fundamental freedom in clash with the protection of reputation. Hence, the recent laws in England and Wales focused on expanding the protection mechanisms in favour of the defendant side (press/media). Meanwhile, Azerbaijani laws criminalize the defamation of both public and private parties, Anglo-Saxon countries consider the defamation only as civil liability for private parties, nevertheless.

France, as Azerbaijani legal system, maintains defamatory actions as criminal; however, sanctions deem only a certain amount of fine as monetary damages. In Germany, judges tend to set fines for criminal defamation, despite imprisonment still exists in the sanction part. Therefore, the

[124] *See* Fuchs v. Germany, ECHR No. 29222/11, 64345/11 (2015), § 33-43. Available at: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2264345/11%22],%22itemid%22:[%22001-152442%22]} (last visited Apr. 22, 2023).

criminalization of defamation does not become a discussion topic when domestic cases are brought before the European Court. Whereas Azerbaijani courts set disproportionate amounts of fine on defendants even in civil disputes and domestic courts are regularly warned because of that sort of violations.

As an effective solution, the immediate adoption of defamation law is not due while criminal provisions still exist in the Criminal Code. Decriminalization of any "wrongful" act is a long process and a time-lapse is needed for society's adaptation to the required standards. In the first stage, there are lessons to be learned from French and German law practice and in the second stage, adoption of the special law on defamation is recommended and that law should be in accordance with Anglo-Saxon system standards. The legal allocation of defamation and its criminal applicability in the Azerbaijani legal system will be analyzed thoroughly in the next paragraph. Subsequently, the issues that criminal defamation entails in the regional court will be demonstrated and the ways of escaping from those challenges will be thought over.

A. Criminal law provisions related to defamatory statements

In Azerbaijan, personal honour and reputation are protected on a constitutional basis. Article 46 of the Constitution proclaims that everyone has the right to protect his/her honour and dignity.[125] The dignity of a person shall be protected under all circumstances, and there exists no justification for the humiliation of the dignity of a person.[126] The part "all circumstances" entails that human dignity and personal reputation are absolute rights and will always prevail over freedom of expression, irrespective of the reason for the clash of rights. Just like in other continental law countries, historical traditions and conventional rules in the culture preserved personal honour as superior to other rights and freedoms. Therefore, the violation of human dignity concludes with criminal prosecution, and general laws enshrine relevant sanctions about defamatory statements against human beings.

The Criminal Code of Azerbaijan distinguishes three types of criminal provisions in connection with defamation: *slander*, *insult*, and *defamation on the Internet*. According to Article 147 of the Code, slander is the distribution of obviously false data discrediting the honour and advantage of another person or undermining its reputation in a public statement, publicly shown work, mass media, or, in case of mass distribution, in information resource on the Internet.[127] Insult, which is indicated in Article 148, is the humiliation of honour and advantage of the other person, expressed in the indecent form in a public statement, publicly being shown work, mass media or, in case of mass

[125] Constitution of the Republic of Azerbaijan, art. 46 (1995).
[126] *Ibid.*
[127] Criminal Code of the Republic of Azerbaijan, art. 147 (1999).

distribution, in information resource of the Internet.[128] Finally, recently another provision has been added to the Criminal Code against defamatory statements in Internet resources. Slander or insult by public display using false usernames, profiles, or accounts on an Internet resource is punishable by Article 148-1 of the Criminal Code.[129] As can be seen from the provisions, the distinguishing features of slander are as follows:

a) humiliation of honour and dignity;

b) intentional commission of this act;

c) that the spread of information that is false (deliberately, that is, the person who spread the defamatory statement knew that the information was false).

Therefore, defamation is an insult to honour and dignity that involves a deliberate lie but may not be expressed in an obscene manner. Insult implies an obscene form and an insulting expression may not be a lie. However, in all cases, both insult and defamation have a common feature – intention. Defamatory information is produced by biased intention. In the meantime, several questions arise about the definition of defamatory content. When defining defamation, what does defamatory information mean, and how does it relate to disreputable information? Also, can defamatory and disreputable information be equated?

The Plenum of the Supreme Court of the Republic of Azerbaijan in its Decision, "On the experience of applying the legislation on the protection of honour and dignity by the courts", which dates back to May 14, 1999, explains that "*if information related to moral principles, production-economy, service, and social activity creates a negative opinion about a citizen among society, collective or individuals, such information is considered as humiliating honour and dignity*".[130] This is why grounds other than abovelisted ones, such as criticizing a person for his political, economic, or social activities cannot be considered insulting his honour and dignity.

In Azerbaijani legislation, information is considered disseminated when it is communicated to another person, to several persons, or an indefinite circle of persons. Dissemination is committed through various methods: by publishing written material, broadcasting that information on radio and television programs, showing it in newsreel programs, describing it in works, saying it in meetings, demonstrating it in letters, applications, and complaints, mentioning it in documents issued by offices, enterprises, and organizations,

[128] *Id.*, art. 148.

[129] *Id.*, art. 148-1.

[130] Şərəf və ləyaqətin müdafiəsi barədə qanunvericiliyin məhkəmələr tərəfindən tətbiq edilməsi təcrübəsi haqqında Azərbaycan Respublikası Ali Məhkəməsinin Plenumunun qərarı (Decision of the Supreme Court of the Republic of Azerbaijan on the experience of applying the legislation on the protection of honour and dignity by the courts), § 3 (1999). Available at: https://e-qanun.az/framework/17799 (last visited Apr. 22, 2023).

etc.[131] It is noteworthy that a private dissemination of information to the person to whom it relates shall not be construed as its disclosure.

The obscene form is given a dual meaning in national dictionaries. First, in general, the violation of the rules of behaviour (especially ethical behaviour in speech) accepted for that situation in the whole society or the social group in question; secondly, the use of words and expressions in an indecent manner, that is, related to the genitals, bodily secretions, or other things offensive to public morals.[132] Both concepts are completely subjective, and the legislative texts do not give a special definition to obscene form.

When a person is found guilty of defamation, he has a right to a remedy. However, the sanctions imposed are often punitive and disproportionate. It has already been seen that prison sentences for criminal defamation are widely considered disproportionate because of their impact on freedom of expression. Similarly, a gross number of fines, whether criminal or civil, are intended to punish the defamer rather than repair the harm done to the defamed. These challenges will be substantiated comprehensively in the next paragraph.

Wherever possible, relief in defamation cases should be non-monetary and aimed directly at redressing the harm caused by the defamatory statement, for example, by issuing an apology or correction. Monetary compensation (the payment of damages) should only be considered when other less intrusive means are insufficient to repair the harm caused. Compensation for harm caused (monetary damages) must be based on evidence quantifying the harm and demonstrating a causal relationship to the alleged defamatory statement.

B. Recent ECHR cases and feasible solutions to tackle the challenges

Human dignity is considered an absolute right in the jurisdictional system of Azerbaijan.[133] Whenever the clash of other fundamental rights and freedoms commences, human dignity and the rights related to it (such as the right to life, the right to freedom, reputational rights, as well as personal honour) reign. However, in the practice of the European Court of Human Rights, all the fundamental rights are respected, and any right or freedom, including human dignity, is not absolute. Therefore, depending on the case, freedom of expression might prevail over privacy rights or vice versa. With that regard, the Council of Europe emphasized in its recommendations the need to repeal the laws and regulations that withhold freedom of expression, especially in the context of defamation cases. Given the contradiction between

[131] *Ibid.*
[132] Azərbaycan Respublikası Cinayət Məcəlləsinin Kommentariyası: I hissə (The Commentary on the Criminal Code of the Republic of Azerbaijan: Part I), 520 (2018).
[133] *Supra* note 125.

domestic laws and international legal regulations, there are considerable violations facts revealed by the European Court against Azerbaijan.

1. Disproportionate damages

In one of the recent cases, *Azadliq and Zayidov v. Azerbaijan*[134], the violation of Article 10 was found in connection with Azerbaijan. According to the case, two defamatory statements were issued, featuring the support given to the former government official (T.A.) together with his relatives, emphasizing that the mentioned parties were involved in corruption.[135] T.A., in turn, brought a civil defamation lawsuit and successfully won the case against the defendant parties. The latter ones were attributed accordingly with 36,000 euros and 22,500 euros in compensatory damages to be paid to T.A. The Supreme Court upheld the decision of appeal. The Strasbourg Court ruled on the case and sanctuary payments directed to the defendants and found a violation of Article 10, in terms of freedom of expression. The Court, first of all, questioned the interference in connection with the "necessary in a democratic society" criteria indicated in Article 10 and if the superiority of protecting the rights of others against the freedom of speech served a legitimate aim. The articles were published in a way that they could attract the public's interest, as the issue was related to the corruption activities of government officials and other persons who run the state office. Moreover, the plaintiff T.A.'s name was enumerated several times throughout the text, blaming him for being a "corruption machine" and having participated in a "scale of corruption".[136] He was accused of taking certain advantages for himself and availing his close relatives to get benefits from the corruption activities. The specific characteristics of those obtained properties and assets were indicated in the statement. The plaintiff explained in his allegation that the expression "blue whales" was addressed to him for engaging in serious criminal conduct, such as embezzlement and corruption.[137] Therefore, the journalists were required to provide a burden of proof for their defamatory statements under the purposes of the European Convention.

In response, applicant journalists were not able to provide sufficient factual sources that supported the authenticity of the information. They referred to the abovementioned properties, claiming that those assets belonged to T.A. However, despite the applicants affirmation that the statements indicate "facts" while publishing the information, when it came to court proceedings, they notified the participants that the statements made by them leaned on "rumours", meaning the respective journalists did not take any specific

[134] Azadliq and Zayidov v. Azerbaijan, ECHR No. 20755/08 (2022). Available at: https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-218077%22]} (last visited Apr. 22, 2023).
[135] *Id.*, § 9.
[136] *Id.*, § 41.
[137] *Id.*, § 42.

measures for verifying the authenticity of the allegations.[138] That is why state authorities defended themselves, saying that the defamatory actions realized by the applicants did not fall within the scope of due diligence standards and the responsibility of journalists.[139] The State Party further noted that taking into account the gravity of the conduct of the applicants, the latter entailed the violation of the protected rights of T.A. under Article 8 of the Convention.[140] At the same time, there were no substantial grounds to complicate the authentication procedure for the applicants.

In reasoning its judgment, the Court analyzed another issue about the case: whether the domestic courts were able to strike a fair balance between the right to privacy and the freedom of expression under the Convention. It pointed out that the domestic courts summarized its substantive part shortly and did not dive into the details of the article or comment on the different statements made in the text. On the other hand, the compensatory sanctions of 36,000 euros imposed on the applicants were not proportionate to their regulatory income, especially during the difficult financial period of the newspaper. Furthermore, the second applicant was individually ordered to pay 22,500 euros in damages, which amounted to 9 years of the annual salary of the applicant and was 40 times higher than the minimum yearly wages in the country. Therefore, the Strasbourg Court found the violation of Article 10 of the European Convention, since the restrictions made against the applicant did not accomplish the requirements of a legitimate aim and therefore were not necessary "in a democratic society".[141] Moreover, the Court ruled that the compensatory sanctions directed to the applicants by the relevant judgment of the domestic court were not in accordance with the principles of freedom of expression.[142]

2. Disproportionate sanctions

Another case within the scope of freedom of expression under the European Convention is *Bagirov v. Azerbaijan*[143], in which a lawyer and a member of the Azerbaijani Bar Association was banned from engaging in law in practice due to the defamatory statements about the physical resistance of police and the functioning of the judicial system.

In February 2011, Mr. Bagirov participated in the meeting surrounded by other lawyers so that he could shed some light on the challenging problems that the legal profession faced in Azerbaijan. Following this, he mentioned the

[138] *Id.*, § 44.
[139] *Id.*, § 45.
[140] *Ibid.*
[141] *Id.*, § 50.
[142] *Id.*, § 49.
[143] Case of Bagirov v. Azerbaijan, ECHR No. 81024/12 & 28198/15 (2020). Available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22bagirov%20v%20azerbaijan%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-203166%22]} (last visited Apr. 22, 2023).

police brutality and the passing away of an individual E.A. while in custody, as the latter's mother was one of his clients. Later, those statements were disseminated via the mass media, and the Association initiated a disciplinary proceeding against Mr. Bagirov on grounds of the lawyers' confidentiality principle. The plaintiff was disbarred from engaging in law practice due to the abovementioned confidentiality principle. In response, Mr. Bagirov noted that he did not violate that principle since his client, the mother of E.A., was the first one to publicly speak about the issue.[144]

In 2014, Mr. Bagirov received another disciplinary sanction because of the expression he made while speaking about an opposition politician, I.M. The applicant was banned in July 2015, according to the decision of the domestic court. The domestic court substantiated in its reasoning that the statements made by Mr. Bagirov "cast a shadow over our State" and "tarnished the reputation of the judiciary".[145] The higher-instance courts upheld the decision. The European Court decided that there was a violation in terms of Article 10 of the Convention since the applicant did not breach the secrecy of the judicial investigation by speaking or releasing any documentary file in connection with the investigation, since he only repeated his client's statements.[146] The Court further elucidated that depriving the applicant of his professional legal activity was not in accordance with the domestic courts' justifications, and the sanctuary punishment made against the applicant was disproportionate.[147]

Despite the fact that the European Court found a violation in regard to Article 10 under the Convention, there are some points that should be compared in connection to the English-American case law. While analyzing the English practice in terms of defamation law, it was crystal clear from the common law practice that the correctness or incorrectness of the statements becomes immaterial once the material is published in a full, fair, and disinterested manner. The authors of such defamatory allegations are entitled to justify their statements on grounds of fair comment, qualified, or absolute privilege if there is some impreciseness without damaging or changing the whole context of the facts. Moreover, under the "reportage doctrine", which is widely referred to in previous chapters with regard to the American legal system, the disseminators can give reference to the allegations made by others in a neutral way without exaggerating amendments to the information or personal opinions of the author. At the same time, one of the basic requirements in English traditional law was that the mere repetition of defamatory information without verification or taking any measures on the authenticity of the statement was qualified as defamation and therefore, a violation of the rights of the defamation subject.

[144] *Id.*, § 45.
[145] *Id.*, § 77.
[146] *Id.*, § 93.
[147] *Id.*, § 102.

The above-discussed decisions of the European Court against Azerbaijan signal the need to decriminalize the laws that create contradiction. There exists a possible solution for the removal of opposition and balancing domestic laws with international standards. According to Article 151 of the Constitution, with the exception of the Constitution of the Republic of Azerbaijan and acts adopted by referendum, the priority of international treaties is stressed in the conflict of domestic and international laws.[148] It means that European Council Recommendations and European Court cases should be taken into account.

Meanwhile, Article 46 of the Constitution requires the defendants to bear the consequences for violating reputation, but it leaves the ground for determining the method of restriction to a legislator. Thus, criminal provisions in Articles 147, 148 and 148-1 are the legislative production of the Constitution's demands. However, criminal sanctions in those provisions are not in accordance with Recommendations by the Council, and therefore, not with the case law of the Strasbourg Court. Hence, I would kindly suggest the lawmakers consider the possible abolishment of defamation provisions from the Criminal Code in the future and conform them to the duties of the State before the European Court. As can be seen from the French sample, simply elimination of imprisonment could be a first step on that road. Finally, the principle of proportionality in Part 2 of Article 71[149] should be applied, and taking into account international obligations, the civil sanctions for violation of reputation and dignity should be proportionate to the due consequences by the State.[150]

Conclusion

Overall, one of the most challenging issues in the field of freedom of the press is related to defamation. In recent years, some of the Azerbaijani media outlets have published headings with regard to the parliamentary discussion on adopting a defamation law. First of all, neither Azerbaijan nor the other State Parties to the ECHR have adopted defamation laws. Continental law systems, such as France, Germany, and Azerbaijan, while deciding whether the act should be considered liable, first determine whether the information is wrong or is solely defamatory. However, in the American case-law system, not the wrongfulness but the intent of the disseminator ("bad faith") is the evaluative criterion. Nor does the defendant party carry liability under the "neutral reportage" doctrine.

In English defamation law, we can see that the "public interest" criterion and the fact of "indicating the source of allegations" outweigh the verification

[148] *Supra* note 125, art. 151.
[149] *Id.*, art. 71.
[150] *See* Cumpănă and Mazăre v. Romania, ECHR No. 33348/96, § 111 (2004). Available at: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2233348/96%22],%22itemid%22:[%22001-67816%22]} (last visited Aug. 13, 2023).

or correct/incorrect elements. This is why the Anglo-Saxon law system protects the freedom of the press at a more advanced level and preserves the defendant's freedom of expression. Whereas punitive sanctions in the Criminal Code of Germany and Azerbaijan, in relation to defamatory statements are disproportionate to the UN Human Rights Council and the Council of Europe Standards, which seek the decriminalization of defamation. Generally, relief for defamatory acts should be non-monetary; however, monetary sanctions might be allowed only in cases when the initial measures become unsatisfactory.

When it comes to the above-discussed cases of the European Court against Azerbaijan, the Strasbourg Court found the violation of Article 10 merely taking into account the maintenance of the balance between the clashing rights and, additionally, the proportionality of the civil sanctions to the improper conduct of the journalists and their financial situation. The Court further touched on the legitimacy point of the restrictions in the second case. Consequently, the limitations on free speech should only serve as one of the legitimate aims indicated in Article 10.

In conclusion, defamation remains as constitutional challenge in continental law system countries. France has taken prospective measures, thereby repealing all the imprisonment sentences from the Press Law. Meanwhile, punitive sanctions still remain in the German Criminal Code. However, it can be seen from European Court cases against Germany that judges do not apply imprisonment for defamatory statements and therefore, criminal defamation cases do not create a problem for the present. But still, the necessary changes challenge the constitutional systems of Member States. Elimination of imprisonment sentences or refraining from implementing such punishments still makes defamation as criminally existential act. Whenever individuals are prosecuted and found guilty, they are still criminally convicted for such commissions. Monetary sanctions do not free individuals from being criminal and being exposed to conviction. As for Azerbaijan, in order to find a reasonable solution for the removal of the dichotomy derived from national constitutional law, the Council of Europe's recommendations should be taken into account, and possible opportunities for the adoption of defamation law should be reconsidered. Criminal sanctions for defamation should be eliminated as soon as possible.

THE INAUGURAL AZERBAIJAN ARBITRATION DAY: CULTURE AND INTERNATIONAL ARBITRATION

TRANSCRIPT

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Preface

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

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

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

Ön söz

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FIRST PANEL: CULTURE AND INTERNATIONAL TRANSACTIONS

PARTICIPANTS:

***Paul KEY**, moderator*

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

James HOGAN

Senior Partner, Dentons Azerbaijan

Nurlan MUSTAFAYEV

Counsel for International Legal Affairs, SOCAR

Huseyn ALIYEV

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

Ruslan MIRZAYEV

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

Hélène BUZY-PUCHEU

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

been to, we usually chose the ICC in Paris or the London Court of International Arbitration for various reasons. Mainly because we know these institutions and their processes, that is mainly our approach, and it is well-thought. We do have a template. Although we go through negotiations, that template is basically what we end up with.

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

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

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

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

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

provisions built into a contract, whether as part of a resolution clause or as a separate, negotiated aspect of dispute resolution. So I am sure everybody has experience of this.

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

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

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

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

Moreover, I think there is a need for legislative reform. I can say that there is an initiative to reform the legislation from different perspectives to

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

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

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

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

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

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

Court) is in English. Furthermore, the client was very interested as well. It was cheap and very quick. So, I would not say the NCC is a competitor to the arbitration, but it is sometimes interesting to use it depending on the area. Local courts are more or less the same as arbitration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In some cases, courts would say: Okay, we recognize and enforce this decision because it aligns with the New York Convention and the national legislation. Moreover, you do not know what would have happened if that was not in line with the national legislation but in line with the New York

Convention. So there is no consistency. That is why there is no solid legal certainty from that perspective. However, overall, there is a will to improve that. Recently, in 2019, the Constitutional Court of Azerbaijan adopted a decision concerning notices in arbitration, which is one of the reasons for using enforcement. The Constitutional Court says the respondent must prove that the Party did not receive a notice. Lack of notice was the major reason for refusing recognition and enforcement in Azerbaijan. The respondent could decide not to respond to many arbitration notices and keep them somewhere. Then, at the end, he could say: Okay, I was unaware of this process, etc. And then, it was very challenging for the claimant to prove that there was a notification of the arbitration process. However, starting in 2019, there is a firm decision of the Constitutional Court saying that it is up to the respondents to prove that they did not receive the notice, which is very difficult from a logical perspective. Because it is much more challenging to prove that something does not exist than to prove that something exists. So that is a very pro-arbitration rule. I think that is why I can talk optimistically and say there is a will to improve. However, there is still a problem with the current system.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Andrew Clarke[*]

CULTURE AND PERSUASION IN INTERNATIONAL ARBITRATION

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

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

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

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

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

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

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

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

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

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

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

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

Let me start with a bold and provocative statement:

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

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

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

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

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

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

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

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

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

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

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

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

The advocate's primary task is to review the case from the client's point of view, analyse the facts and the law, and:
(1) help the client persuade its counterparty to reconsider their position; or
(2) persuade the arbitrator(s) appointed to agree with their interpretation of the law and facts and make an award in favour of their client.

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

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

Culture also affects communication styles, including language use, non-verbal cues, and even the optimal channels for communication. In arbitration, it is important to avoid misunderstandings or misinterpretations, so messages need to be crafted in a manner that resonates with the cultural communication

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

norms. Cultural sensitivity and awareness are essential to foster clear and meaningful communication among the parties involved.

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

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

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

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

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

Do you:

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

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

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

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

Persuasion, as a human activity, has attracted the attention of philosophers, theologists, merchants and many others from time immemorial. It is hard to imagine early camel traders not discussing how to get the best price for their livestock.

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

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

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

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

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

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

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

Persuasion plays a critical role in international arbitration, as the parties strive to convince the arbitrators of the merits of their case. It involves presenting compelling arguments, evidence, and legal reasoning to influence the final decision in their favour. At the same time, as we have already seen, culture plays a crucial role in persuasion by influencing the way people perceive and interpret messages.

Key aspects of persuasion in international arbitration include:

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

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

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

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

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

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

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

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

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

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

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

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

Thank you for your attention.

SECOND PANEL: CULTURE AND INVESTMENT ARBITRATION

PARTICIPANTS:

***Sergii MELNYK**, moderator*

Deputy Counsel, ICC International Court of Arbitration;
Lawyer in Ukraine & France;
Solicitor in England & Wales

Zeynab JAHAN

PhD in Maritime Law;
Specialist of Transcaspian International
Transport Route

Safar SAFARLI

Chief legal specialist, Economic Zones Development
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Hugo BARBIER

Professor of Law;
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Kamil VALIYEV

Member of the Azerbaijan Bar Association;
Partner, Dentons

Marina WEISS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sergii Melnyk: But coming back, you raised a very important aspect and new development. Because of the Russian invasion in Ukraine, it appears to us that Azerbaijan has a huge opportunity to export energy resources to Europe.

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

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

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

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

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

Zeynab Jahan: Some other thoughts?

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

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

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

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

Europe. So, there are a lot of insurance and support by the government, and a month ago, the new law on electrical power was enacted in Azerbaijan, which is diversifying and reforming the entire power sector. We should expect this to be done in three phases, which will go up to 2028 when the entire market is expected to be liberalised, and there will be less state involvement in the public generation.

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

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

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

So, the characteristics of the relations between the investor and our agency are twofold. Because our agency is, in part, a state agency providing the certificate to our residents, based on which they can get all those benefits of industrial zones. On the other hand, we are acting as operating companies for those industrial zones. Under that part, we have private relationships and commercial relationships with our investors. Arising out of these kinds of

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

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

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

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

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

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

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

***Hugo Barbier**:* Thank you. So yes, to give a quick definition of what we can call local business culture, I think it is the mindset of business people, the set of beliefs that they carry with them when they do business, and to what extent an arbitrator should take this mindset and set of beliefs into account when

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

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

Sergii Melnyk: You know, it should not be applied blindly. Yes. I agree. I think that the arbitrator should first focus on a set of facts, consider the nuances which can include cultural differences, and adequately assess the facts. Now, relate the question to Marina: Does the culture of arbitrators and parties' material impact the contract of investment arbitration? So, let us now enlarge the scope of stakeholders from arbitrators to the parties.

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

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

other codes, while still retaining specific core values that you might have had, you become stronger and more apt to deal with a much broader variety of situations. So, this is the background to my statement.

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

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

Why is that? California has previously granted the same type of authorization to other similar projects to the Glamis project. So, it was claimed as a sort of inconsistency and a betrayal of the legitimate expectations of these Canadian investors. It could have been a good opportunity for the arbitral tribunal to stick to the legitimate expectations of Glamis, to consider that the

state was at fault, and to compensate Glamis. Nevertheless, the reasoning of the arbitral tribunal was more settled than that. It explained that since the cultural value of lands of Native Americans entered into the public debate, it was necessary for the media that this Canadian investor should have lowered its expectations to be granted this authorization.

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

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

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

Kamil Valiyev: Well, from the Azerbaijani perspective to my knowledge, I am personally not aware of any case with the cultural heritage involved, and what has been happening in the practice that we have seen in such cases of a collision of the business interests with the protection of cultural heritage. There have been multiple cases where some solution was found for further resolution. Moreover, we have seen quite a huge infrastructure project in Azerbaijan over the last 30 years, which was trespassing on cultural sites. There has been quite a diligent approach to the extent that we are aware of the international companies operating in Azerbaijan to ensure this cultural heritage is preserved. However, at the same time, the project itself is devolved.

And so far, to my knowledge, there have not been disputes in this area. From the perspective of investment arbitration, my personal view on this matter is that there was a question of empathy, just mentioned by Marina, regarding how the more assertive parties should perceive the case. I think, from that perspective, of course, we are now talking about sustainable development. We are discussing the importance of ESG and other such international values in business transactions, especially with international and multinational companies. I think the question here also is, to some extent, an ethical question or ethical dilemma: To what extent should investors prioritize their investment, ambitions and appetite in protecting cultural heritage for specific countries? From this perspective, I believe that more weight should be given, especially at the legislative and international treaty levels, to the protection of international heritage and cultural heritage. Again, I have not done any homework in this respect. I could not explore these as profoundly as my colleague Hugo. That will be my answer to the question.

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

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

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

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

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

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

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

Audience member 4: The question is actually directly related to investment arbitration; but also to the second part of the topic, which is culture. Imagine, in a dispute between a company and its shareholders, there are different investment agreements, and two different tribunals can be established based on these investment agreements. So, what happens? Did you have such experience related to such a case? Or do you think, in this case, international *res judicata* can help if it exists?

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

Sergii Melnyk: Anyone else?

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

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

As to the cultural perspective of the upstream projects, if you look at the popularity of the upstream projects in Azerbaijan, you can divide these

projects into two parts. One part is onshore projects. These onshore projects have been under development for more than a hundred years. Azerbaijan is one of the pioneers of oil and gas production. So those projects onshore have been developing for more than 100 years, and state-owned companies, such as SOCAR, were involved. That is why, from the cultural heritage preservation perspective, we see that the interests of the state and the developers are aligned because the state develops it. I have not heard about any issues regarding cultural heritage preservation and the development of this onshore project. So main investment is made in offshore projects, and they are in the Azerbaijani sector of the Caspian Sea. From the upstream perspective, I have not heard of any cultural sites revealed in these territories on the Caspian Sea. So, there may be a remote risk of a clash of international and cultural heritage interests and upstream development.

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

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

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

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

DEBATE: DOES CULTURE MATTER IN ADJUDICATION?

PARTICIPANTS:

***Kamalia Mehtiyeva**, moderator*

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

Koorosh AMELI

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

Bernard HANOTIAU

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

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

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

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

Next, we have Professor Bernard Hanotiau. Professor Hanotiau is a member of the Brussels and Paris Bar. In 2001, Professor Hanotiau established a boutique law firm in Brussels, concentrating on international arbitration and litigation. Since 1978, Bernard Hanotiau has been involved in more than 600 international arbitration cases, both commercial and investment in all parts of the world. Maybe not Azerbaijan yet?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Furthermore, you asked how these differences manifest themselves. I would say that they manifest themselves in various ways. From the point of view of an arbitrator, they will manifest themselves in the first place at the procedural level. As Professor Claude Remond, a well-known arbitrator once said, participants in arbitration are generally not surprised or shocked by the fact that the law applicable to the merits differs from their own. However, on the other hand, they have more difficulties accepting that the applicable procedural law is different from their own. Moreover, of course, the role of the arbitral tribunal is to listen to the parties, try to see the expectations and adapt the procedure to these expectations.

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

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

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

Moreover, at the same time, “culture” can also refer to legal culture, which may be something that procedural lawyers forbid you to say at the university. Nevertheless, let us make that distinction between civil law and common law because that is quite a distinction. At the end of the day, it does exist. So, both of you refer to culture in both ways, classically and legally. Do you think that legal training and the difference between common law and civil law may make a difference from a cultural perspective? Moreover, it is a second

question, very closely related to the first one: Do you believe there is such a thing as belonging to a legal culture?

***Bernard Hanotiau*:** First, your question concerning civil law and common law. Indeed, there is a big difference between the two systems. Although we can see some compromises nowadays, this difference between the two systems remains. First, if we take the merits — the law itself, there are many points on which we do not have the same approach. I can take the pre-contractual negotiations as an example. In England, they do not take the role of pre-contractual negotiations to interpret a contract. We do so in the civil law. The law in England is considered a fact to be proven. In many legal systems on the continent, the court is considered to know the law, and it does not have to be proven.

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

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

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

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

because the big law firms in every country are predominantly English or American, unlike French law firms, for instance.

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

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

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

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

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

***Koorosh Ameli*:** Yes, I guess the second one is easier. I do not have a clear answer because I am on all sides in this regard. About the first question: Of course, differences does not exist only between common and civil law, there are also different variations of Islamic Countries. Even at common law, you cannot say Indian common law is the same as the British common law. Alternatively, Nigerian common law is precisely the same. We need to be able to distinguish between cultures, particularly those stemming from former colonies, and recognize how they have established their legal systems to

address these matters. This is evident even in civil law countries influenced by French law during the colonial era. For instance, Chinese law has been significantly altered, resulting in fundamental differences. One of the primary distinctions I observe is the prevalence of case law and legal precedent in common law systems, which is not present in the same manner in other regions, including civil law jurisdictions.

Furthermore, the practice of reporting and publishing judgments varies. In civil law countries such as Italy and France, they tend to publish only the decisions of the Supreme Court. Of course, it would result in concise decisions with very little analysis. The Iranians have given me several court of appeal decisions.

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

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

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

Kamalia Mehtiyeva: That is quite a litigation.

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

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

Moreover, Professor Hanotiau, you mentioned "Americanization"; I think that was the word you used. It is exciting to have your perspective that 45 years ago, the procedural management of cases was much more straightforward, even though the cases themselves may have been complex. Furthermore, a 500-page document production request is quite a request. I wonder if a new trend is emerging with the rise of boutique law firms – these smaller firms may now handle cases traditionally dealt with by big American or English law firms. So, in the landscape of actors in international arbitration, we have seen an increase in smaller law firms. Do you think this trend could impact the influence of American culture, which has taken over monopoly or the dominance of the procedural style in international arbitration? Or do you think this is neutral because the process is irreversible? As someone who has established a boutique law firm, you exemplify the atomization of actors in international arbitration. Now, you act as an arbitrator and advocate successfully against larger firms. Do you think this trend of smaller law firms gaining prominence offers a chance to neutralize or reduce the "Americanization" of a process?

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

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

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

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

Koorosh Ameli: Yes, it happens, but very rarely. Now, I think we get important and valuable experiences from the American style of writing, cross-examination. However, we are concerned by the abuse of that procedure and the extravagance this brings. In our tribunal rules, we were able, for example, to make the point that the Tribunal will put the question and may allow the parties to put questions. We did not use the word examination. However, these things prevented that extravagant cross-examination you see outside of document production. The Tribunal said that this necessity must be specific, or you have to establish the relevance. Some of these are circular and difficult.

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

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

Interestingly, you can enter the courtroom and hear cross-examinations, even though we are in the French state, before the French judge, and with applicable French civil procedure. They have inserted a few provisions in the procedural code, allowing them to cross-examine, rely on witnesses, and plead in English, thus offering a bigger choice. The late Emmanuel Gaillard

has organized a conference on that, and there is a publication in one of the French law reviews. So it is interesting that we, as civil lawyers, finally renounce our legal culture and adopt specific aspects from others, perhaps because it is a realistic view.

Koorosh Ameli: Really, it is not only a realistic view. You can consider it reasonable, although you miss it elsewhere. For example, when I went to the United States, I was impressed with the course on evidence. We do not have such a course to a significant extent. Of course, we have studied evidence law, a course in civil law — only a few lines here and there. That is it. That experience educated me and was a valuable part of my education.

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

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

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

Furthermore, parties should be able to adjust their behaviour to persuade the tribunal effectively. It is important to have lawyers who can speak the tribunal's language and use their legal analysis methods and writing style. In the International Court of Justice, you will see so many judges from various

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

backgrounds. Parties ensure they have counsel who can adapt to the diverse nature of the court, especially those whose vote may be controlling in delivering the judgment.

Kamalia Mehtiyeva: So, there is some strategy behind communication in international arbitration. Moreover, as Andrew Clarke stated during his speech earlier this afternoon, it is essential to consider who delivers and receives the message, right? Professor Hanotiau, what would your view be on that?

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

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

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

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

Koorosh Ameli: If the answer is standard, the neutralizer can do that. However, it depends on what kind of culture it is. I remember you saying that there is no bad culture. However, sometimes you will have to change certain aspects, like the bad culture of corruption in my country or other countries. We have to change. Although Islamic law has been against it for centuries, it

is difficult to change. So, they are all forcing the arbitrator to leak information. They think this arbitrator is your advocate. They appoint foreign counsel and arbitrators to avoid this perception, especially in unfamiliar environments like the sixth location. This tactic seeks to shape the proceedings to neutralise biased perceptions and ensure a more favourable environment for the tribunal. For example, I remember that in some cases, the Iranian arbitrator had presented 20 questions to the claimant against Iran, to the gentleman who was in English. He said: No, you are allowed no more than three questions, which must be short.

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

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

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

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

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

Bernard Hanotiau: It is thought in universities and is nonsense. In my country, for example, you go before a judge, and the judge listens to you and does not ask questions. In the civil law system, it is thought that a judge may order the production of a document, but they never do it. In England, it is totally the contrary; the judge always asked questions. Moreover, let me give you an example of a case. I presided over a case with a Canadian and an English arbitrator, and each party had one hour to make their opening statements. From the beginning, I would say that after just 30 seconds of the first opening statement, the English arbitrator started to ask questions

continuously. By the end of the hour, the poor guy had not been able to complete presenting their opening segment. I told the co-arbitrators that this was unfair, and I could not accept that. As a judge of the Supreme Court in Canada, the Canadian arbitrator was familiar with the practice of allowing questions during presentations. My English co-arbitrator said precisely the same. So, in other words, in England or North America, it looks normal for an arbitrator to ask questions all the time, even if it restricts the time allocated to the lawyer.

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

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

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

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

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

Bernard Hanotiau: In international arbitration?

Kamalia Mehtiyeva: Yes.

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

Koorosh Ameli: In that question, I think there is adjudication in decision-making. For me, that is the method of your deliberation, the method of making your mind, persuasion. That is a very important part. However, it is

an area lacking cultural norms or specific rules. Even when seeking guidance, I could not find established practices, not even in the International Court of Justice or domestic judicial proceedings. One example is that judges there are advised to convene a meeting after a hearing to compile a list of key issues. In practice, I think everybody would agree that arbitrators have a short exchange of views after the hearing is closed. Subsequently, they circulate the list of issues, allowing the co-arbitrators to provide written comments. Following this, a deliberation meeting is held, and based on the majority opinion, the chairman revises the draft accordingly. Of course, this aligns with the ICC rules stipulating that the chairman can issue the award independently if a majority is not reached. Therefore required for trying to take advantage, for example, in 1982, I was appointed as an arbitrator to a huge telecommunication case. In our jurisdiction, the majority did not agree with the court and the ICC Court as we can improve alternative opinion for the jurisdiction of the court.

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

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

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

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

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

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

You have been very generous with your time, and this debate could continue. However, I think we should end on this very optimistic note because you mentioned this international arbitration culture, which I did not think would be the conclusion or the spirit of the debate. When I think about this, I started today with a pro-culture manifesto in international arbitration. However, perhaps for a developing country like Azerbaijan, a new market not yet thoroughly familiar with international arbitration, we have discussed with certain Azerbaijani lawyers that because you do not know, you do not trust. Well, perhaps when you know there is a common culture, you must assimilate it as well. Once you do that, there is no inequality. So maybe that is the sort of a promise for developing markets, emerging arbitration markets, for the future development and acceptance of international arbitration as a dispute resolution mechanism.

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

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