In this article, we argue that making a stronger effort to converge the best aspects of civil and common law procedure would help tackle one of the most urgent challenges that international arbitration is faced with today: overly lengthy and costly proceedings, which are leading many clients to call into question the usefulness of international arbitration. We think that Singapore should be alert to this development and will attempt to show how a stronger integration of aspects of civil law procedure will make for faster and cheaper arbitration proceedings.

A Grain of Civil Law – Some (Not So) New Chords for the International Arbitration Jazz

Chief Justice's Clarion Call

Sundaresh Menon CJ has taken issue with the lack of efforts by the international arbitration community which had not acted with dispatch to address the problem of rising costs although "the past few years have seen costs evolve from being a key attraction to becoming the **primary bane** of international commercial arbitration"[2] (emphasis in original). In in a keynote address at the Chartered Institute of Arbitrators' International Arbitration Conference in Penang, Malaysia, given in August 2013, Menon CJ identified the heightened need for stakeholders to take the lead in developing responses to the challenges faced by the arbitration industry,[3] including the point on cost.[4] At the time, he made two suggestions: (i) that codes of ethics be developed and implemented to set uniform standards for arbitrator and counsel conduct; and (ii) that arbitral institutions "play a larger role in the development and implementation of a regulatory framework to apply and enforce such standards, perhaps by working in tandem with some of the leading arbitral think tanks".[5]

When Menon CJ pointed out the need for all stakeholders to take the lead in developing responses, he mentioned arbitral institutions and arbitral think tanks particularly. We believe that his core rationale is worth to be heeded by all arbitration

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practitioners alike. Arbitral institutions and think tanks may indeed be the best forums where to ponder on codes of conduct and regulation of third-party funding etc. Therefore, these particular issues will not be addressed in this article. But all of us should be concerned about the increasing challenges caused by serious delays and exploding costs in international arbitration. It is in this respect, that based on Menon CJ's observations, we propose to take his suggested problem-solving approach somewhat further.

In order to take Menon CJ's approach further, we need to call it to mind. When making the case for a uniform code of ethics, Menon CJ dealt with the potential counter-argument that might be raised with a view to "diversity" as follows:

> International arbitration is inherently transnational in nature. **It cannot be suggested in this setting, that each player is entitled to act solely in accordance with his or her personal code and disregard widely accepted standards.** The values which inform the ethical norms of any given forum must hold little, if any, weight in the *international* arena, where primacy is instead accorded to the values of transparency, fairness and consistency in the practice of international commercial arbitration. These values act as a filter to draw out the principles which the international arbitral community finds most favourable and exclude those which do not serve their needs. **The end result is the convergence of the best aspects of the civil and common law systems**[6] (emphasis in italics in original, emphasis in bold type added).

Menon CJ's message is clear: the approach to a solution is **not** to apply our respective own codes alone while disregarding the well-accepted standards of others. Instead, we should be led by overarching ethical values of international arbitration, ie values that are not only rooted in one particular legal system or country. Our view and the approach to be followed must be significantly broader. A solution to the ongoing challenges that international arbitration is faced with must draw on all available legal systems and values. Only then can we reach the "end result" of a best practice solution, which "is the convergence of the best aspects of the civil and common law systems".

Tackling the Challenges of Time-consuming and Costly International Arbitration

We submit to apply and put into practice exactly the same approach that Menon CJ proposed for the handling of widely varying ethical rules, but this time with regard to how international arbitration can become less time-consuming and less costly.[7] Our proposal is to insist less on customary solutions that are rooted in one legal system only (common law), but rather to increase the focus on other well-accepted solutions (civil law). In our opinion, apart from the values of transparency, fairness and consistency, as referenced to by Menon CJ, we should also be guided by the **other** overarching principle that distinguishes international arbitration from conventional Court dispute resolution, namely that "it is a **flexible** method of dispute resolution – in which the procedure to be followed can be tailored by the parties **and the arbitral tribunal** to meet the law and facts of the dispute"[8] (emphasis added).

Just as transparency, fairness and consistency act as a filter to draw out which ethical principles are most favourable to the international arbitral community, at the same time excluding those ethical principles which do not serve their needs, the value of flexibility will separate the principles which should be considered viable principles to resolve the other perceived shortcomings of international arbitration, serious delays and exploding costs, from those principles which are not. Once again, the end result and overall goal should be the convergence of the best aspects of the civil and common law systems.

Discussing the relevance of civil law principles for international arbitration in a common law jurisdiction might sound like a heresy to some of us. But as will be shown below, arguments against this "combined approach" ultimately seem to lack merit.

Finding the Best Aspects of Common Law and Civil Law

What are the differences between civil law and common law? And which of these differences would be suited not only to further flexibility in international arbitration as a value in and of itself but to help address some of the challenges international arbitration is faced with? In particular, which civil law principles could be best aspects of "both worlds"?

Juxtaposing civil law and common law implies that there are indeed significant differences between these two major legal systems. We will elaborate on them further below.

Looking at common law legal systems, it is certainly true that there are also vast differences between, say, the law of New York and the law of England and Wales, both of them common law systems. The same is true for the civil law systems of Germany and France. Yet we do not think it is futile or arbitrary to focus on the difference between common law and civil law because there are certain common features and fundamental legal principles that

seem to distinguish all common law legal systems from all civil law systems throughout.

First, there are structural differences with regard to legal techniques and methods in common law and civil law respectively. At the outset, common law tends to be more inductive and problem-oriented, whereas the approach of the civil law tends to be more deductive and solution-oriented. There can be no doubt that common law and civil law have grown closer from these opposite starting points. The absolute preponderance of statutory law, if there ever was one, belongs to the civil law of the past. Conversely, there is a tendency in common law to accept the services of the legislature and the academia in the interest of standardisation, rationalisation and simplification of the law. This tendency is plain and not only in Singapore. At the same time, the idea of the development of law by the Judge and an inductive, problem-oriented way of thinking are increasingly gaining ground in civil law jurisprudence. One field on which this confluence is taking place today, serving as a catalyst perhaps, is of course the field of international arbitration.

Second, structural differences between common law and civil law are also found in legal procedure. These differences still remain and despite certain convergence trends, they are still strong. We shall turn to these differences shortly.

Is There Anything New at All?

Do we not have all this convergence already? Is it not already going on? Similar to how the convergence of best ethical standards is reflected in the *IBA Guidelines on Party Representation in International Arbitration*,[9] which, as Menon CJ highlighted, recognise the practice of counsel assisting witnesses in the preparation of their testimony, does not, for example, the recently-published *ICC Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration*[10] do the same to further the value of flexibility in international arbitration with positive consequences?

There are certainly many multi-facetted proposals out there.[11] And we are by no means suggesting that all the existing and newly published rules, guidelines and recommendations are merely of academic value. But all they can do is provide us with theoretical background, essential as it may be. To that extent, they are helpful tools. But it is not the tools that do the job, as we shall explain shortly. Suffice to say at this point that we are of the opinion that being (more) guided by the value of flexibility in international arbitration requires that we are **acting** in a (more) flexible manner.

This Problem Will Go Away! (Will it Really?)

Where arbitral tribunals are not being flexible (or not being flexible enough), thereby resulting in arbitration proceedings to be slow and costly, is this not less of a problem of there being too many inflexible arbitrators out there, but rather one of there being too many inexperienced ones? Paulsson discusses this topic under the heading "Ethical Challenges" and in the end even considers it "a good case for supporting the emergence and recognition of an elite corps of arbitrators", whereby he understands "elite" as a meritocracy and makes the attempt to interpret "corps" broadly.[12] In any event, the objection goes, this is a phenomenon on the wane, in view of all the educational measures available today that teach flexible case management – rules, guidelines and recommendations, not to forget literature and conferences. Hence it is possible that the problem will be solved in a few years.

If this is true, then only to some extent. There is indeed a lot of excellent instructive material fit to enhance the skills and knowledge of every arbitrator. But just as one will not learn to play the piano by reading musical scores only, studying every new arbitration guideline and book and attending every arbitration-related conference will not bring forth – to step into the realm of jazz – the next Herbie Hancock of international arbitration. To play piano with skill, a pianist's fingers have to be flexible. It is trite: such desired flexibility cannot be achieved by mere reading. This ability needs to be applied. It needs to be **practised**.

How then should (more) flexibility be practised in international arbitration, and how will this help reduce the issues of delay and increasing costs of international arbitration today?

Solutions from In- and Outside the Box

There is surely no shortage of proposed technical solutions. Some of them helpfully address the handling of proceedings by arbitrators. They pertain to the exterior of arbitration and are usually organisational.[13]

Other solutions attend to the arbitral proceeding itself. But it seems that many of these solutions focus exclusively on the principles of one legal system alone (often a common law system or the common law as a whole),[14] while the principles of other systems (notably a civil law system or the civil law altogether) are neglected, sometimes completely, but at any rate, to a large extent. It seems obvious that the end result of such a restricted view cannot foster the convergence of the best aspects and approaches of **all** legal systems. On the contrary, such a view leads to the domination of one legal system, thereby excluding the solutions other legal systems may have to offer, and thus decreasing the total number of available solutions to the perceived shortcomings of international arbitration such as costliness and lengthiness. Such an approach is rather unfortunate, because a really flexible approach will lead to more variety, which ultimately means more options to choose from in order to achieve the convergence of the best.

The Difference between Exercise and Practice

Interestingly, many of the various rules, guidelines and recommendations referred to above often do factor in the principles of more than one legal system in a quite comprehensive manner. In those "fusion" cases, the end result obviously comprises the best aspects of all systems surveyed. But it seems to us that many of these proposed solutions are like – to borrow from music again – collections of *études*.

An *étude* provides exercise material for perfecting a particular musical skill.[15] As such, it is an essential tool, but an *étude* is always only an aid to achieve the final skill. It is not what the audience in a jazz club would expect to hear from the jazz pianist.[16] In the language of dispute resolution: guidelines, rules and recommendations on international arbitration are merely of auxiliary nature; they will not make up for an actual application of a flexible mindset ready to look at other legal systems and jurisdictions for solutions to a problem.

In this respect, the aforementioned *ICC Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration* is a good example. It fleshes out many a favourable flexibility principle indeed. It does so (despite being addressed to in-house counsel and party representatives) by appealing to **all** participants (including arbitral tribunals) to commit jointly to an efficient case management, so that the dispute can be resolved in a time- and cost effective manner.[17] Without any doubt, this makes this new Guide highly recommendable to in-house counsel, party representatives and arbitrators alike. The appeal to joint interaction and mutual co-operation between participants, however, seems to be the strength but also the weakness of this Guide. More often than not, real-life representation of interests will not allow counsel to play along, and it is in scenarios like these where the tribunal may have to fly the flag for flexibility on its own, with an eye on a time- and cost effective resolution of the dispute. The Guide does not seem to be made for discordant situations such as these. While it concedes that, failing agreement of the parties, the arbitral tribunal will usually have the power to determine fast and cheap procedures (after consultation with the parties),[18] it does not **identify** the underlying

principles by which the tribunal can and should be guided. As such, the Guide is a most valuable collection of *études*, but it does not seem to give the arbitrator a theme and chords for his own arbitration performance practice.

This brings us back to our submission, which is that flexibility in international arbitration ought not only to be studied and exercised in much detail, but all the more be **practised** "on stage", by taking into account **all** legal aspects that can be found.

Solutions from a Different Box

It is not our aim to publish a comprehensive theme selection here. But perhaps this is the right place to identify some principles of civil law that deserve to be considered when thinking about the time- and cost effective resolution of a dispute – a few "chords" from the civil law world, if you will, which the arbitrator "pianist" can apply as he thinks fit and on which he can improvise when he must create his theme in a flexible manner.

Certain principles of civil law are, of course, principles of substantive law. They are not really part of the flexibility discussion. Principles of substantive law are about whether – to borrow from music again – the pianist knows how to play his instrument in the first place, not about whether he has reached a level where he can do so flexibly and improvise live on stage. As stated before, international arbitration is "a flexible method of dispute resolution—in which *the procedure* to be followed can be tailored by the parties and the arbitral tribunal to meet the law and facts of the dispute"[19] (emphasis added). Without much digressing, however, one point we would like to make is the – obvious – point that the challenge of time-consuming and costly international arbitration will also be met very effectively by arbitrators whose training and background match the substantive law of the dispute. It goes without saying that a tribunal that is familiar with the law that governs the dispute can dispense with time and cost-intensive expert statements on such law. One recent example that the authors have encountered is a tribunal that dwelt on the lack of consideration – in a civil law matter. Another example is a tribunal that mulled over the tortious nature of a claim which was solely based on a medical treatment agreement governed by a civil law system. In a similar vein, an arbitrator who does not understand that without further ado specific performance will **not** be the primary claim in a dispute because the dispute is governed by a common law system, may add to the duration and cost of the proceedings. Likewise, an arbitrator who does understand where a common law trust does not simply create legal effects between the parties but avails against persons generally or universally, will not have to spend time and (the parties') money on a lesson in trust law.

If principles of substantive civil law are not really part of the discussion about what can contribute to the best aspects of the civil and common law systems, with a view to flexibility in international arbitration, then which principles are? What will further the convergence of the "best aspects"? These other civil law principles are of course those that pertain to procedure.[20]

As opposed to the so-called adversarial nature of common law procedure, civil law procedure is often characterised as being inquisitorial. This is because of the much more active role of the civil law Judge.[21] The Judge and not the parties (or their representatives) lead the proceedings and investigate the subject matter of the dispute. That includes the fixation of issues, the examination of witnesses, and it practically rules out cross-examination by parties' counsel. It is the declared task of a civil law Judge to ascertain the

truth, but only as far as claims are made and within the facts as provided by the parties (the so-called principle of formal truth). Based on the principle that *iura novit curia* ("the Court knows the law"), the parties need not even plead the law. Where they do so anyway (which some Judges find preposterous while others find it helpful), the Court is not bound by any of it even where, based on the same facts, the parties plead the same law.[22]

The Adversarial vs the Managerial Approach – More Chords for the Great Theme

Moving from an adversarial to a more managerial approach in international arbitration is tantamount to a shift of paradigm and ultimately means giving the arbitral tribunal significantly more power.[23] Again, this may seem as heresy to a common law-trained counsel since this move might be viewed to lead to reduced party autonomy. But not only is this approach fully in line with the characterisation of arbitration as being a flexible method of dispute resolution, it also provides further options for a tribunal to choose from when resolving a dispute. We have experienced substantial time and ultimately cost savings with the managerial approach.

Here are some principles of civil law procedure and how they can serve to render arbitration proceedings less lengthy and costly if given a proper chance. Not yet another "*étude*", just some "chords".

Civil law procedure is not concerned with investigating the facts of a case at the outset of the proceedings in order to have it "all there", regardless of whether the facts will come into play or not. As a consequence, in civil law, there is no formal pre-trial stage to begin with. Instead, a dispute comes into existence by the plaintiff's statement of claim being served on the defendant. Such statement of claim must, apart from the designation of the parties and of the Court, include **exact** information on the subject matter and **all** factual grounds for the claim, as well as a **precisely specified** petition. No more, no less. The plaintiff sends his statement of claim to the Court where a Judge will examine whether it fulfils these criteria. If this is the case, the Court, not the plaintiff, will arrange for service on the defendant.

As can be seen from its emphasis on a substantiated subject matter and a precise petition, civil law procedure focuses on the parties' claims under the leading guidance of a Judge. Every legal claim is based, positively, on the fulfilment of certain legal requirements and, negatively, on the absence of legal defences (German: *Einwendungen*, French: *exceptions*) and objections (German: *Einreden*, French: *objections*).[24] Hence, a civil law Judge is not as much interested in establishing The Whole Truth as in ascertaining whether the claimant presents enough facts to fulfil the legal requirements of the claim, and if this is the case, whether the obligor presents any facts that form a defence or objection. And nothing else.

Where there is a dispute over an alleged fact, the burden of providing evidence **for this fact** lies on the party which relies on its verity. The Judge will decide on the basis of the evidence thus gained.

While evidence is to be introduced by the parties, by way of "offer of evidence", it is collected by the Judge, as an examiner-in-chief. In general, it is no obligation of either party to produce documents to another party. Exceptions apply, but the Court will have to make a respective order.

Fully in line with the concept of a "strong" Judge are the civil law rules on admission and weight of evidence, or rather, is the far-reaching lack of such rules.[25] Where facts are in dispute between the parties, admissible means of evidence are the submission of documents, judicial inspection, expert statements, and witness statements. Within these parameters, there are no admissibility rules such as hearsay or best evidence, and it is solely for the Judge to evaluate how much weight to accord to the evidence he collects.

Similarly, it is solely for the Judge to "collect" evidence from witnesses. As it is the Judge, not the parties, who examines witnesses, there is by and large no room for cross-examination. This is not to say that no civil law courtroom has ever been the scene of interrogations of witnesses by parties (or counsel). But where this happens, it happens because it is permitted by the Judge. Where the Judge decides to examine the witnesses all by himself, the parties have to accept it.

In accordance with the parties' reduced role, there is no room for witness preparation. In fact, it is strictly forbidden for a party to prepare a witness and counsel who does so may face stiff disciplinary sanctions.[26] Also, it is solely for the Judge to decide how to record witness statements. The usual practice is that the Judge listens to what a witness has to say and then dictates his own summary thereof. Unlike common law procedure, civil law procedure does not consider this a denial of basic procedural fairness. It is simply for the Judge to decide how much of a reminder he will need for his later reflections.

In this context, it is no surprise that in the civil law hierarchy of evidence, written testimony and evidence rank much higher than any other kind of oral evidence, especially witness statements. In fact, one can hardly over-emphasise how low witness statements rank in importance. Without meaning to give a value judgment about individual witnesses, there is

consensus that witness accounts, due to their subjective nature and the fallibility of man, are much less reliable than any of the other means of evidence. In the same vein, due to the risk that a party succumbs to the temptation to bend its testimony into shape, a party cannot be a witness in its own case.

In keeping with the aforesaid, where facts need to be proven by way of expert statements, such statements will not come from expert witnesses appointed and paid by the parties, but from Court-appointed experts who are expected to render an impartial (usually written!) opinion. While the parties do have a say in the nomination of suitable experts and may even reject an expert (usually for the same reasons for which a party is entitled to challenge a Judge), there can be no doubt that the expert is, by design, the Court's expert. Consequently, Court's expert fees are determined like Court fees, namely by statute.

The Right Sound

Paper is patient, as the saying goes, and theory and practice are two very different things, but notwithstanding this, the above civil law principles impress with simplicity and efficiency. Greater weight is put on the decision-making body than on the parties' counsel. Giving the Court more authority than the parties' counsel leads to savings of time and costs. Furthermore, the above civil law principles provide that both the Court and the parties will only be involved significantly if there is a proper dispute that requires resolution in the first place. The existence of a dispute must be substantiated at the very beginning, by way of a complete statement of claim, and for as long as one dispute lasts, it can never reach beyond the claims that are duly made within its confines.

The above principles on the burden of fact pleading and evidence production also provide for relatively fast and cheap determination of facts. By reducing the fact finding to the claim (and nothing but the claim), parties are highly incentivised to retain in advance and produce later evidence that is truly relevant to their case, without need (or chance) to fish for it first.

The overarching concept of a strong decision-making body – stronger than the bodies that present the case – further works towards a reduction to the essential, be it at the stage of witness statements or other means of taking evidence, such as expert statements.

On the downside, applying the above principles (inflexibly) would run the risk that a claimant cannot prove his claim or an obligor cannot prove an objection or defence, because he is not in the possession of the necessary evidence. Arguably, these cases are rare. But where they do occur, civil law procedure provides exceptions: for example, by imposing an obligation on the opponent to submit a record or document; or where, for want of better means, it allows evidence by examination of a party, but always by court order. Being what they are, however, these rarely-used exceptions do not take up many resources, in contrast to the common law where discovery and witness preparation (which may include the parties) often forms the bulk of the process, and where time and cost incurred in collecting the facts can be disproportionate to the return.

Furthermore, the application of principles of civil law procedure relies heavily on the skills and knowledge of the decision-making body. This is evident with a view to the management of a case but perhaps even more so with a view to the decision-making process itself. Where, at least potentially, the parties plead facts only but strictly no law because they do not have to, the decision maker is indeed on his own.

Nevertheless, in our view, these are best aspects of the civil law that should be part of the overall picture. Only by including them in a holistic approach can we be sure that, eventually, the most favourable flexibility principles will be filtered out, thus making international arbitration less time-consuming and costly.

Where is the Club?

Stepping again into the realm of music, another objection comes to mind: is there even an appropriate jazz club where one can play these (not so) new "civil law chords"?

Well, if our comparison of international arbitration to jazz music is not entirely false, then there should be no real need to confine oneself to themed establishments. In Singapore, for example, jazz is performed at such different places as the Event Plaza at Marina Bay Sands, the Esplanade, the Botanical Gardens or pubs. Moreover, jazz is fit to be played ad hoc. But for those who prefer a "typical" surrounding nevertheless, there sure is such a place.

In its Annual Report for 2013, the Singapore International Arbitration Centre (SIAC) lists 509 new cases by nationality of parties, 41 of which (8 per cent) involve continental European parties, that is parties with a civil law background.[27] 140 cases (27.5 per cent) involve parties from non-European civil law jurisdictions such as Brazil, the People's Republic of China, Indonesia, Japan, Panama, Philippines (mixed civil and common law), South Korea, Taiwan, Thailand, Uruguay, or Vietnam.[28] It is submitted that all these cases together (181 out of 509 new cases, or 35.6 per cent) are in one way or the other linked to a civil law system and thus provide a fitting environment to practise some of civil law's best aspects. In addition, according to the Annual Report, 16.4 per cent of the contracts in dispute managed by the SIAC in 2013 were governed by what is referred to as unspecified or "other" laws (as distinguished from the common law of Singapore, England and Wales or India which are expressly itemised).[29] Where unspecified or "other" law means that these disputes are governed by a civil law without overlapping with the aforementioned cases which involve parties from civil law jurisdictions, these disputes too provide a fitting environment to put aspects of the civil law to practice.

Why All That Jazz?

The widespread perception that all in all international arbitration takes too long and is too costly is getting more challenging by the day. Despite an increasingly competitive environment – or rather precisely because of it – everyone in the arbitrating world should feel the need to overcome that challenge. We have tried to make our case for sounding some **"**civil law chords**"**, for the sake of more flexibility, to serve that need. To quote Menon CJ's speech of 2013 again:

> Arbitration emerged as a response to the shortcomings of the traditional domestic litigation system. For many decades, it was seen as litigation's poor cousin. But today, it has come to be seen as a critical foundation of transnational trade and commerce by providing the primary framework for the resolution of cross-border commercial disputes. I suggested last year that this is the golden age of arbitration. It would be a shame if we missed the opportunity to consolidate this position. [30]

And one more time, in conclusion:

> We have the opportunity to steer **the practice** of international arbitration in the right direction[31] (emphasis added).

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Notes

1 Lucy Reed, "More on Corporate Criticism of International Arbitration" (2010); available at: http://tinyurl.com/ksdvbjg; Queen Mary/PWC, "International Arbitration, Corporate Attitudes and Practices 2006"; available at: http://tinyurl.com/p6le37u, ch 2; see also Sundaresh Menon, "Some Cautionary Notes for an Age of Opportunity"; available at: http://tinyurl.com/pczoseh, para 15; Ben Giaretta/Michael Weatherley, "The Evolution of International Arbitration" (2014); available at: http://tinyurl.com/l4recj9; Prell & Partner, "Ousting the Arbitrator for Delaying Proceedings?" (2014); available at: http://tinyurl.com/olnhwab; Berwin Leighton Paisner LLP, "Research-based Report on Perceived Delay in the Arbitration Process" (2012); available at: http://tinyurl.com/nasf8ac.

2 Menon, *op cit*, paras 15 and 16.

3 *Ibid*, para 17. Another challenge that is threatening fairness and integrity in international arbitration lies in different concepts of what is ethically acceptable

professional conduct; see Menon, *op cit*, paras 3-7; see also *Financier Worldwide Magazine*, "International Arbitration Roundtable"; available at: http://tinyurl.com/pgycwqq; generally Alan Redfern, J. Martin Hunter *et al*, *Redfern and Hunter on International Arbitration* (5th edition, 2009), paras 3.227 *et seq*, 4.73, 5.73 *et seq*. Somewhat more recently, third-party funding in international commercial arbitration – or rather: the current lack of regulation in this area – has been added to the list of challenges; see Menon, *op cit*, paras 8-14; *Financier Worldwide Magazine*, *loc cit*.

4 *Supra* (note 2 above), para 15.

5 *Supra* (note 2 above), para17.

6 *Supra* (note 2 above), para 36 (footnotes omitted).

7 Let it be understood that this is indeed a true need of the international arbitral community. In our opinion, it would be foolhardy and tantamount to biting the hand that feeds if anyone in the international arbitral community tried to exploit the current situation by making money out of protracted proceedings, or worse, by protracting them.

8 Redfern/Hunter, *op cit*, para 1.73.

9 "IBA Guidelines on Party Representation in International Arbitration" (2013); available at: http://tinyurl.com/puawavm.

10 "Effective Management of Arbitration – A ICC Guide for In-House Counsel and Other Party Representatives"; available at: http://tinyurl.com/km8hed4.

11 See also Hermann Bietz, "On the State and Efficiency of International Arbitration" (2014) SchiedsVZ, p 121 *et seq*; available at: http://tinyurl.com/mzkgwdh; Giaretta/Weatherley, *loc cit*; Steven Seidenberg, "International Arbitration Loses Its Grip" (2010); available at: http://tinyurl.com/q32dmdr; Peter Griffin, "Making Arbitration Better" (undated); available at: http://tinyurl.com/k3orxr5.

12 Jan Paulsson, "The Idea of Arbitration" (Oxford University Press, 2014), ch 5.8, p 171: "It would be intolerable if [such a corps] were a closed shop by any standard (culture, gender, nationality). Nor could this be a small circle of friends; the needs of the international community are certainly commensurate with a corps of several hundred first-rate commercial arbitrators".

13 Reed, *loc cit*, gives a short overview and makes her own suggestions – "we can go farther"; Ben Giaretta/Michael Weatherley, "Ten tips for saving time and cost in international arbitration" (2014); available at: http://tinyurl.com/k4efk2v.

14 Bietz, *loc cit*.

15 Merriam-Webster, "étude"; available at: http://tinyurl.com/oo5uks7.

16 For in the world of dispute resolution, international arbitration is like jazz. We do note that according to Joseph Tirado, mediation is: "If mediation were a genre of music, it might be described as jazz" (cited in Julian Matteucci, "Conflict or consensus"; available at: http://tinyurl.com/kmb8zbg). Therefore, we suggest some segmentation: while proceedings in international arbitration can have a lot in common with swing, bebop or cool jazz (as the case may be), mediation seems to be more like modal or free jazz.

17 "ICC Guide for In-House Counsel and Other Party Representatives", *op cit*, p 3.

18 *Ibid*, p 4.

19 Redfern/Hunter, *op cit*, para 1.73.

20 In the following we borrow from Caslav Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001); available at: http://tinyurl.com/mpmxt62. Similar discussions can be found in Javier Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective" (2004); available at: http://tinyurl.com/mnpmr5e, or Siegfried H. Elsing/John M. Townsend, "Bridging the Common Law Civil Law Divide in Arbitration" (2002); available at: http://tinyurl.com/krswvam. For a more comprehensive and instructive (yet older and somewhat biased) account, see John H. Langbein, "The German Advantage in Civil Procedure" (1985); available at: http://tinyurl.com/mq7n9xj. Seminal: Konrad Zweigert/Hein Kötz, *Introduction to Comparative Law* (3rd edition, 1998).

21 In our opinion (which we share with Pejovic), there is a somewhat negative connotation to this. Saying civil law procedure is inquisitorial because its Judges have a more active role to play is the same as saying a common law Judge is passive simply because his role is a more arbitrating one.

22 The strong role of the civil law Judge, its origins and embeddedness in the big picture is vividly explained by Langbein, *op cit*, at V (using the example of Germany).

23 An excellent summary and comparison between common procedural law and civil law procedural approach is given by Bietz, *loc cit*.

24 Where the facts show the existence of an *Einwendung* or *exception*, the Court will have to observe it *ex officio* whereas if the facts show the existence of an *Einrede* or *objection*, its application will be subject to the obligor's invoking it.

25 There is a touch of irony in the fact that nevertheless, German civil procedure speaks of "strict proceedings for the taking of evidence" (*Strengbeweisverfahren*), perhaps owing to historical ignorance of common law procedure.

26 With that, the wheel has come full circle and we are back at Menon CJ's point on the different conceptions of what is ethically acceptable conduct.

27 SIAC Annual Report for 2013; available at: http://tinyurl.com/mpl9tqe.

28 *Ibid*.

29 *Ibid*.

30 Menon, *op cit*, para 58.

31 *Ibid*, para 56.