

**LANGUAGE AND CULTURE IN INTERNATIONAL
ARBITRATION:**

THE IMPACT ON PARTIES' *DUE PROCESS* RIGHT

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Abstract

Over the last decades, the significant rise in international commercial transactions has led to the need for a harmonized dispute settlement system that is capable of resolving conflicts among the parties at the international level both quickly and effectively. In particular, this directly relates to the most effective alternative dispute resolution method for cross-border commercial transactions, namely the International Commercial Arbitration. Interestingly enough, the latter allows parties coming from different countries and different legal cultures to settle their dispute without necessarily going through litigation before courts. However, this can have an impact on how the national arbitration laws are drawn up in the various legal systems and on the parties' expectations on the conduct of the arbitration proceedings.

This article will therefore analyze how the different languages and different legal systems of origin of both parties and arbitrators might lead to misunderstandings – both verbally and in writing – that undermine the precise conduct of the arbitration procedure. Subsequently, a selection of civil law and common law systems (Italy, Germany, Spain, United Kingdom, United States) since the adoption of the UNCITRAL Model Law on International Commercial Arbitration in 1985 are taken into analysis in order to demonstrate how language plays a key role not only in the international arbitration discourse and practice, but also in impacting the parties' due process right, which would be infringed if they were not able to properly understand and follow suit with the arbitration procedure.

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Keywords

International commercial arbitration - ADR - Language - Culture - Due process - UNCITRAL model law

1. Introduction

In the last decades, international commercial arbitration (ICA) has become the most widely used alternative dispute resolution method (ADR) for settling international commercial disputes. Parties who resort to such a method decide to agree on having their dispute settled by a third party – namely, a single arbitrator or a tribunal consisting of more than one arbitrator – instead of going through litigation before

courts. The third party is also appointed in accordance with specific rules that are adopted by the parties by mutual agreement¹.

Specifically, arbitration is considered particularly effective thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is a very successful transnational law instrument with 169 signatory states. The aim of this convention is to facilitate the recognition and the enforcement of arbitral awards almost everywhere in the world². Because of its high probability of enforcement, traders and businesses usually resort to arbitration in the event that a dispute arises³.

In 1985, the United Nations General Assembly additionally introduced the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration with the aim of providing guidelines to states in developing and updating their arbitration laws. Such a model law has constituted a fundamental step for the harmonization of international trade law as it was adopted integrally by a great number of countries that incorporated it into their national legislations, although in some cases with substantial modifications⁴.

Nevertheless, to this day such a model law fails to ensure a complete uniformity among the different national legislations as each country has used and translated its original English text in different manners according to their legal traditions and to the cultural and linguistic constraints of each system. English – which is the *lingua franca* since the beginning of the XX century – is indeed the dominant language used for

¹ M. Gotti, C. Candlin, V. K. Bhatia, *Discourse and Practice in International Commercial Arbitration: Issues, Challenges and Prospects* (Routledge 2012).

² M. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2017).

³ S. Tung, 'The Importance of Languages in International Arbitration and How They Impact Parties' Due Process Rights' (2017) 10[1] *Contemporary Asia Arbitration Journal* 113 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2979139> accessed 15 April 2022.

⁴ V. K. Bhatia, C. Candlin, J. Engberg, *Legal Discourse across Cultures and Systems* (Hong Kong University Press 2008).

international businesses and legal proceedings at the global level⁵. It is possible to state that English language represents a fundamental part of the ‘infrastructure of globalization’⁶ and, therefore, of the international arbitration context as well. However, at the international level, arbitration is not only characterized by the use of English⁷, but also by the participation of a multitude of subjects having very different cultural and linguistic backgrounds, which in some cases are particularly distant from each other.

The matter of linguistic and cultural issues affecting and undermining the arbitration procedures is a cause for concern as it can generate serious misunderstandings, and it is therefore important to investigate the impact of the abovementioned different linguistic and cultural backgrounds of the participants in the arbitration procedures. Also, it is crucial to understand to what extent the different backgrounds in terms of legal education of the participants in arbitration influence the expectations of the parties and the arbitrators.

This paper therefore aims at analyzing how the different languages and different legal systems of origin of both parties and arbitrators can lead to confusion, further arguments and disagreements that undermine the precise conduct of the arbitration procedures, and at discussing the possible strategies to implement in order to minimize such negative outcomes.

2. Multicultural and multilingual arbitration: what role do the different linguistic and cultural backgrounds play in international arbitration?

As mentioned in the previous section, one of the most important aspects of international arbitration is that it allows both parties and arbitrators coming from different countries of the world to settle their dispute without necessarily going

⁵ J. P. O’Regan, ‘English as a Lingua Franca: An Immanent Critique’ (2014) 35[1] *Applied Linguistics* 533 <<https://academic.oup.com/applij/article/35/5/533/175252>> accessed 15 April 2022.

⁶ *Ibid.*

⁷ A. Riley, *Legal English and the Common Law* (2nd edn, CEDAM 2012).

through litigation before courts⁸. Thus, participants in arbitrations are often speaking different languages. The context of international commercial arbitration can therefore be described as ontologically multilingual and multicultural. Cultural and linguistic aspects have a very strong impact on arbitration at two important levels:

- The arbitration law level, which is related to the differences existing among the arbitral texts that are produced in the various legal systems;
- The procedural level, as the parties can have different expectations on how the arbitration procedure will be conducted.

There are indeed many ‘dark sides’ that characterize international arbitration at the different levels on which it is necessary to shed light. The major cultural and linguistic differences in international arbitration undoubtedly depend on the country of origin of the participants who have different backgrounds in terms of native language and in terms of legal culture, philosophy, and education⁹.

With regard to the differences between the different legal systems, there are some important aspects that need to be highlighted in order to prove how the different specificities of the individual systems influence the expectations of the participating actors in the international arbitration. As a matter of fact, there are important differences between *common law* and *civil law* systems. Such differences generate both linguistic issues – for instance, in terms of concepts and expressions used in the two types of legal systems that lack equivalent terms in other legal systems, or in terms of linguistic misunderstandings between the participants involved in the arbitration procedures – and issues connected with the manner of conducting legal proceedings in the systems which are involved¹⁰.

8 Bhatia, Candlin, Engberg (n 4)

9 Ibid.

10 A. Kocbek, ‘Language and Culture in International Legal Communication’ (2006) 4[3] *Managing Global Transitions. International Research Journal* 231 <https://www.fm-kp.si/zalozba/ISSN/1581-6311/4_231-247.pdf> accessed 15 April 2022.

For instance, misunderstandings may arise due to the different terms existing in the various legal systems referring to the role of the legal representative: in most continental countries, such a role is referred to as *Rechtsanwalt* in German, *avvocato* in Italian, *abogado* in Spanish, and it has a basic role in each *civil law* system¹¹. On the contrary, in the English legal system the corresponding translation could be either the *barrister* – namely a qualified legal professional who offers legal advice and represents, advocates, and defends its clients in courts – or the *solicitor* – namely a qualified legal practitioner who prepares the legal documentation before and during a court case¹². Even in the US there are two terms referring to such roles, namely *attorney-at-law* and *lawyer*. The latter are considered synonyms as the *Cambridge Business English Dictionary* defines *lawyer* as “someone whose job is to give advice to people about the law and speak for them in court”¹³, whereas the *Cambridge Advanced Learner’s Dictionary & Thesaurus* defines *attorney-at-law* as “the formal name for a lawyer”¹⁴. However, there is an additional – not so subtle – difference between the two terms as *attorney-at-law* is often used to refer to “a person who has successfully passed the bar examination administered by the American Bar Association”¹⁵, whereas the term *lawyer* is used to indicate a person who has not passed the bar exam and, therefore, cannot represent clients in court¹⁶. Given the difficulty of translating some terms from one language and from a specific culture into another, during arbitration it becomes crucial for the translator, the interpreter, and the arbitrator/s to be aware of this issue so as to prepare thoroughly and avoid any translation mistakes that could evolve into misunderstandings between all participants.

¹¹ Ibid.

¹² Ibid.

¹³ Cambridge Business English Dictionary. <<https://dictionary.cambridge.org/it/dizionario/inglese/attorney-at-law>> accessed 15 April 2022.

¹⁴ Cambridge Advanced Learner’s Dictionary & Thesaurus. <<https://dictionary.cambridge.org/it/dizionario/inglese/lawyer>> accessed 15 April 2022.

¹⁵ Dictionary.com. <<https://www.dictionary.com/e/lawyer-vs-attorney/>> accessed 15 April 2022.

¹⁶ Ibid.

With regard to the different manners of conducting procedures, the *common law* procedure is called ‘adversarial’, hence the parties are considered ‘adversaries leading the proceedings’¹⁷. Through the discovery of documents, the parties hand over documents and information that are considered relevant for the matter at stake, by allowing the judge and the counterparty to access that information. On the contrary, the *civil law* procedure is called ‘inquisitorial’. In such a procedure, the judge plays an active role by being in charge of clarifying the issues and examining the witnesses. Moreover, in *civil law* systems, parties are not required to provide documents to the counterparty; instead, the latter has to ask the court to have the opportunity to access documentation¹⁸.

Another important difference concerns the role of the witnesses during the trial. In the *common law* systems, the cross-examination represents one of the most important principles. Oral evidence is particularly relevant and generally prevails over written evidence. On the contrary, in the *civil law* systems written evidence prevails over oral evidence. Therefore, in the case of a document contradicting a statement from a witness, the document will usually prevail¹⁹.

In the light of the above, if the parties or the arbitrators come from a *civil law* country, they are likely to have certain expectations on how the procedure will be conducted. Likewise, participants coming from a *common law* country are likely to have their own expectations based on the typical methods of conducting legal proceedings in their own legal system. As Lalive stated

Participants in international arbitration have different origins or places of businesses, different educations, methods, reactions or *Weltanschauungen*. In short, what has perhaps struck me more than anything after many years of arbitral practice, either as advocate or as arbitrator, is the capital role played by what may best be called ‘conflicts

¹⁷ C. Pejovic, ‘Civil Law and Common Law: Two Different Paths Leading to the Same Goal’ (2001) 40[155] *Poredbeno Pomorsko Pravo* 7 <<https://hrcak.srce.hr/en/file/170467>> accessed 15 April 2022.

¹⁸ *Ibid.*

¹⁹ Pejovic (n 17)

of cultures' between the parties (as well as their respective counsel) and, as a result, by difficulties of 'communication' between them and arbitrators²⁰.

In this connection, it is self-evident that language plays a key role in law and in international legal communication, as the genre of legislation is indeed expressed through words and concepts that have to be used with "mathematical precision"²¹. Clearness is a fundamental aspect both in oral discourses and, most importantly, in written texts for the correct transmission of legal meanings. As a matter of fact, if the language is ambiguous, the interpretation of the message conveyed may be distorted. For example, this is particularly relevant with regard to the European Member States. In this case, legal drafting and translation take a very important role, as the European legislation must be translated correctly in order to be incorporated in the national legislations of the individual states without generating doubts or uncertainties. Indeed, many of the legislative texts used at the national level are translations of other legislative texts elaborated at the supra-national level²².

If the matter of language is important in law, it is even more so in the context of international arbitration. Given the purely multicultural nature of international arbitration, one of its greatest challenges is precisely that of acting as a bridge between people belonging to different nations²³. For this reason, the choice of the language to be used during the proceedings is particularly relevant, although such an issue is often not taken into account both by the parties and the arbitrators. In some cases, this can even lead the parties to waive their right to determine the language in the arbitration

²⁰ P. Lalive, 'On Communication in International Arbitration' (1992) 3 *The American Review of International Arbitration*, 80.

²¹ Bhatia, Candlin, Engberg (n 4) 9

²² M. Gotti, 'Globalisation in the Legal Field: Adopting and Adapting International Commercial Arbitration Rules', in C. Pérez-Llantada and M. Watson (eds.), *Specialised Languages in the Global Village: A Multi-Perspective Approach* (Cambridge Scholars Publishing 2011).

²³ S. Wilske, 'Linguistic and Language Issues in International Arbitration - Problems, Pitfalls and Paranoia' (2016) 9[2] *Contemporary Asia Arbitration Journal* 159 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2879479> accessed 15 April 2022.

agreement²⁴. However, knowing with certainty which language will be used has a positive impact on the efficiency of the proceedings. Choosing the language and indicating it in the arbitration agreement positively impacts the communication between the participants²⁵. If this does not happen, the first steps of the arbitration could be made in different languages, and this could generate confusion and misunderstandings.

3. Linguistic and cultural issues in international arbitration

Most of the misunderstandings in international arbitration derive from two types of linguistic and translation issues: the first one involving documents, and the second one involving witnesses. With regard to the issues involving documents, the *Kılıç v. Turkmenistan* case shows how linguistic issues connected with legal documents can generate substantial disagreements and further conflict between the parties. In particular, the case dealt with the question whether the Turkey-Turkmenistan Bilateral Investment Treaty (hereinafter referred to as ‘BIT’) contained a local courts requirement establishing that the Turkish Claimant should first go before the Turkmen courts for one year before initiating arbitration proceedings²⁶.

It is relevant to point out that there were two authentic versions of the BIT recognized by the arbitral tribunal: one written in English and one in Russian, with the English version defined as “grammatically incorrect”²⁷ in some parts and “its meaning ambiguous or obscure”²⁸. Due to the presence of some controversial linguistic elements in the English authentic version, one of the most controversial aspects of

²⁴ V. Faienza, ‘The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?’ (2014) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2014/05/06/the-choice-of-the-language-of-the-proceedings-an-underestimated-aspect-of-the-arbitration>> accessed 15 April 2022.

²⁵ Ibid.

²⁶ Wilske (n 18)

²⁷ *Kılıç v Turkmenistan* (2012) ICSID ARB/10/1, 25.

²⁸ Ibid. 47

this case concerned the interpretation of specific parts of the two English translations (the authentic version and a certified version) of the BIT. Specifically, parties strongly disagreed on the interpretation of Article VII.2 of the BIT. The main linguistic issue concerned the use of the word ‘if’ in the second line of sub-paragraph (c) of the first authentic version which distorted the meaning of the original sentence. As shown below, the first authentic English version stated that

2. If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investor’s choice to

(a) ...

(b) ...

(c) The Court of Arbitration of the Paris International Chamber of Commerce, on the condition that, if the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.

Instead, the second English translation of the Russian version of Article VII-2 of the BIT stated that

2. If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investor’s choice to

(a)

(b) ...

(c) The Court of Arbitration of the Paris International Chamber of Commerce, on the condition that the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.

In the latter translation, the translators justified the removal of the word ‘if’ from the second line of sub-paragraph (c) by stating that the addition of such a word in the sentence implies a literal word-for-word translation – a translation strategy carried out in the authentic version indeed – which does not correctly convey the meaning of the Russian version of the Article VII.2 of the BIT. More specifically, the addition of such a term creates a syntactical error which prevents the correct understanding of the meaning of the sentence²⁹. For these reasons, the translators deleted the word by making the sentence grammatically correct and, therefore, more understandable.

Such a translation mistake was the reason for many discussions between the parties. However, based on the tribunal’s understanding of the two authentic versions of the BIT, the tribunal concluded that the most accurate translation is the one in which the word ‘if’ is removed from the second line of sub-paragraph (c) and, therefore, it required investors to try to settle their disputes before the Turkmen courts for one year without receiving a final judgment before they could try to settle their dispute through arbitration³⁰. As the tribunal pointed out, “[A]ccurate translation of, for example, a sentence in one language into another, requires something more than a literal and word-for-word translation of each and every word employed in the text that is being translated.”³¹ In the light of the above, it is therefore necessary to make sure that the translation of the legal documents is as accurate as possible in order to avoid potential problems related to the misinterpretation of the text itself which may lead to different conflicting interpretations.

With regard to the linguistic issues involving witnesses, the latter are considered less predictable than the issues involving documents. For this reason, such issues often require spontaneous decisions³². For instance, one of such issues concerns Chinese-speaking witnesses. In 2011, it was noticed that in the US the number of litigation involving Chinese companies had significantly increased, so there has been an increase in the number of Chinese-speaking witnesses since then. In his article, Sant reported

²⁹ *Kılıç v Turkmenistan* (n 22)

³⁰ *Wilske* (n 18)

³¹ *Ibid.* 168

³² *Ibid.*

that when a Chinese-speaking witness is involved in the proceedings “there is near certainty that significant miscommunication will occur”³³. This is due to many linguistic and cultural reasons: for instance, contrary to what happens in the English language, Chinese verbs do not conjugate and do not often differentiate between present and past tense or between ‘he’, ‘she’ and ‘it’. Moreover, Chinese nouns do not have singular and plural forms³⁴.

Such linguistic challenges often require interpreters to make assumptions about the meaning of the deposition of the witnesses, and the various cultural aspects connected with the body language do not often help to correctly detect what the witness intends to say. Therefore, as Sant states, “some of those assumptions will likely be wrong”³⁵. For instance, in *He v. Ashcroft*, the description of Mr. He of “ten men driving and jumping out of a vehicle” was considered as not credible because of some linguistic issues that led to miscommunication between Mr. He and the interpreter. In this case, the latter did not mean that “ten individuals jumped out of one car”, but rather more than one car. However, the interpreter translated the sentence by using the singular form ‘a car’ by making a translation mistake and generating confusion. The issue related to the fact that Chinese people do not usually distinguish between singulars and plurals, which is the reason why originally the interpreter guessed that the issue concerned only one car, and thus continued using the singular form throughout the translation³⁶.

The examples regarding the potential linguistic issues concerning Chinese-speaking witnesses involved in U.S. proceedings underline the importance of being careful when dealing with arbitration at the international level, which is a context characterized by individuals coming from different countries and speaking different languages thus generating misinterpretations and miscommunication easily generate. Nevertheless, as mentioned in the previous section, the matters connected with the

³³ G. Sant, ‘Commentary: Overcoming Language Traps in Depositions of Chinese-speaking Witnesses’ (2011) 24[2] NYSBA International Law Practicum 100.

³⁴ Sant (n 28)

³⁵ Sant (n 28)

³⁶ Ibid.

language are often underestimated and considered as minor issues. Specifically, there are three types of attitudes that are often adopted by the participants in the arbitration. A first type of attitude is that of merely ignoring linguistic issues, which rarely turns out to be successful and often undermines the effectiveness of the proceedings³⁷. A second kind of attitude adopted in international arbitration is related to the decision to invest financial resources on lawyers, on travel or the accommodation rather than on the quality of translators or the linguistic experts³⁸. However, it should be pointed out that such decisions are often dictated by the lack of financial resources, rather than on an underestimation of the problem. Finally, a third kind of attitude is having the arbitration proceedings run exclusively by native English speakers, as it is assumed that they are going to have an excellent understanding of the language. Nevertheless, even if it is true that the linguistic competence of the participants influences the result of the proceedings, such an approach is very costly and does not always represent the optimal strategy as the final outcome of the international arbitration does not exclusively depend on the linguistic skills of the witnesses or the arbitrators³⁹.

4. Due process in international arbitration

After having discussed the linguistic problems that may arise in the arbitration proceedings, a very relevant aspect to tackle is the one concerning the *due process* right of the parties. As a matter of fact, such a right is likely not to be respected because of the abovementioned linguistic issues. The concept of due process can be defined in various ways, but it is commonly accepted that it entails that “no one should be deprived of his or her rights without the due process of law”⁴⁰. Such a concept originates from the English *common law* system. As a matter of fact, the *Magna Carta*

37 Sant (n 28)

38 Wilske (n 18)

39 Wilske (n 18)

40 M. S. Kurkela, S. Turunen, *Due Process in International Commercial Arbitration* (2nd edn, Oxford University Press 2010) 1.

of 1215 already established the rights of a subject against the authority of the king in order to ensure the ‘constitutional’ right of due process by stating in Charter 39 that “no free man shall be seized, or imprisoned... except by the lawful judgment of his peers, or by the law of the land...”⁴¹. More specifically, the expression ‘due process of law’ first appeared in 1354 during the reign of King Edward III in Chapter 3 of the Liberty of the Subject Act which stated that “no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law”⁴². In 1608, Sir Edward Coke wrote a treatise in which he discussed the meaning of *Magna Carta* and further explained that

No man shall be disseised, that is, put out of seison, or dispossessed of his free-hold (that is) lands, or livelihood, or of his liberties, or free customes, that is, of such franchises, and freedomes, and free customes, as belong to him by his free birth-right, unless it be by the lawfull judgement, that is, verdict of his equals (that is, of men of his own condition) or by the Law of the Land (that is, to speak it once for all) by the due course, and process of Law⁴³.

The concept of due process has then developed over time and nowadays courts generally recognize worldwide that three important conditions have to be ensured in order for a process to be considered as ‘due’:

41 Magna Carta 1215.

42 Liberty of Subject Act 1354.

43 F. M. Gedicks, ‘An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, And the Fifth Amendment’ (2009) 58 Emory Law Journal 585 <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1275&context=faculty_scholarship> accessed 15 April 2022.

- A first important condition is procedural fairness, including the proper notice to the parties of what the case is about and how the trial will take place, by taking into account time and cost issues as well;
- Secondly, another important condition concerns the equal treatment, which must be ensured by the impartiality of the judges and the lawyers⁴⁴;
- Thirdly, the right to be heard must be ensured. This includes the right to present the case, to defend oneself and to confront the counterparty or any witnesses⁴⁵ - a right which greatly involves the possibility for the participants to fully express themselves in the language chosen for the proceedings.

Moreover, ‘due process’ usually refers to a set of criteria that have to be respected in order to protect individual rights in relation to the State and authorities. However, as arbitration is a private system of resolving disputes to which parties voluntarily – in most cases – resort to, at first glance such a concept may not seem to be relevant. Nevertheless, as previously mentioned, the arbitral awards produced by the arbitral tribunals are enforceable in a very large number of countries thanks to the New York Convention. One of the greatest advantages of arbitration is indeed represented by the enforceability of the final awards. Therefore, in order to ensure such an enforceability, the arbitral proceedings are required to meet specific quality standards and constraints in compliance with the ‘due process’ conditions⁴⁶; hence, the due process right can therefore be considered relevant in arbitration as well.

Also, as the arbitration agreement can prevent a party from starting a procedure in a court, some procedural standards need to exist in order to compensate for such a ‘deprivation of right to access to court’. As a matter of fact, for instance, the European

⁴⁴ See e.g., UNCITRAL Model Law, art. 12 (I-2); UNCITRAL Rules, art. 12 (I); LCIA Rules, arts. 5.2, 10.3.

⁴⁵ Tung (n 3)

⁴⁶ Kurkela, Turunen (n 35)

Court on Human Rights has ruled that the right of access to court and a public trial in a court of law may not be respected if the parties have agreed on resolving their dispute through arbitration via an agreement⁴⁷. Furthermore, the European Convention on Human Rights (“ECHR”) established in its Article 6(1) that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”⁴⁸, which is a principle that can be directly applicable to arbitration as well in order to protect individuals when going through arbitration, especially since the principles of the ECHR shall be horizontally applied to private subjects and protected by the states.

As the principles contained in the human rights conventions could be indirectly applied to arbitration, the latter therefore requires certain procedural requirements of quality to ensure fairness⁴⁹. As a matter of fact, when specific principles are violated during the arbitration procedure, the award could be considered null and void and deprived of its enforceability⁵⁰. As previously mentioned, such principles involve the right for the parties to understand the language of the proceedings and to express themselves throughout the arbitration. For instance, an award can be considered null because the right of the parties to present the case or confront the counterparty has not been respected or because the language of the clause contained in an arbitration agreement is so vague that the parties’ intent cannot be determined⁵¹.

Moreover, Article 6(3) of the ECHR specifies the most important procedural requirements concerning criminal charges by stating that “everyone charged with a criminal offence has ... [the right] to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”⁵². Criminal cases are not resolved through international commercial arbitration, but

⁴⁷ Ibid.

⁴⁸ European Convention on Human Rights 1953.

⁴⁹ Kurkela, Turunen (n 35)

⁵⁰ Ibid.

⁵¹ Moses (n 2)

⁵² European Convention on Human Rights 1953.

once again this is to emphasize the importance of ensuring due process rights – which includes the right to be able to correctly understand throughout the proceedings – and to highlight that both in litigation and arbitration procedures differences in terms of linguistic skills unfairly preventing a party's right to properly participate in the proceedings lead to an infringement of the due process right of that party.

5. Requirements of due process in arbitration at national and international level:

language as a fundamental right of the participants

National arbitration laws usually impose due process requirements of quality, although they do not generally contain a complete definition of due process. As a matter of fact, the requirements and the quality standards of due process vary depending on the legal system in question⁵³. However, at the international level, arbitration conventions and models do provide requirements of due process by listing the reasons why an award may not be recognized and enforced, thus ensuring that this right is effectively observed. For instance, Article V of the New York Convention contains detailed grounds for the non-enforcement of the arbitral award, with some of them stemming from violations of due process rights of the parties. Specifically, Article V(1)(b) of the New York Convention states that an award may not be enforced when the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case⁵⁴.

Furthermore, the UNCITRAL Model Law on International Commercial Arbitration states in Article 18 that

53 F. Fortese, L. Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3[1] Groningen Journal of International Law 110 <<https://ssrn.com/abstract=2611337>> accessed 15 April 2022.

54 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case⁵⁵.

The UNCITRAL Model Law also states in its Article 24(2) that

The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents⁵⁶.

According to the UNCITRAL Model Law, many countries have introduced such rights of procedural fairness, equal treatment and of being heard in their national laws, in some cases by making some minor modifications while maintaining their core concepts. A few examples are given below:

- a) The English Arbitration Act contains many provisions based on the Model Law, but it has not adopted it in its entirety. Indeed, in its Section 33(1)(a), Article 18 of the Model Law is not fully reproduced. On the contrary, the following sentence is stated, thus not using the expression ‘full opportunity’ but rather ‘reasonable opportunity’. Specifically, the article states that

The tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.⁵⁷

55 UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration 1985.

56 UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration 1985.

57 Arbitration Act 1996 s 33(1)(a).

The concept of reasonableness is indeed deep-rooted in *common law* systems, thus constituting a fundamental pillar in the legal discourse of such systems and differentiating themselves from other types of legal systems⁵⁸.

- b) In the case of France, the latter has not adopted the UNCITRAL Model Law. Hence, there are some differences between the French arbitration law and the Model Law. By taking into consideration Article 18 of the Model Law, it is possible to notice that the French Civil Code of Procedure does not produce a faithful version to the original text while still retaining the core principles of the due process right as it states in its Article 1485 that

Le tribunal arbitral ... statue après avoir entendu les parties ou celles-ci appelées.⁵⁹,

[The arbitral tribunal ... shall decide after hearing the parties or the so-called parties]

Based on this article, it is implied that the right of the parties to be heard is fundamental for the arbitral tribunal in order to produce the final award. One of the main principles of due process is therefore included in the French Civil Code of Procedure.

- c) Italian law is also not explicitly based on the Model Law. Indeed, Italy has not adopted the Model Law. However, most of the principles contained in the UNCITRAL Model Law are accepted and included in the Italian arbitration law. Specifically, in the Fourth Book of the Italian Code of Civil Procedure – which governs arbitration in Italy – the due process principle is implicitly established in Chapter IV Article 829(9), which states that

58 G. P. Fletcher, 'The Right and the Reasonable.' (1985) 98[5] Harvard Law Review <<https://doi.org/10.2307/1340881>> accessed 31 March 2023.

59 Code de procédure civile 2005 (France)

L'impugnazione per nullità è ammessa, nonostante qualunque preventiva rinuncia ... se non è stato osservato nel procedimento arbitrale il principio del contraddittorio.⁶⁰

[The grounds for setting aside arbitration awards are valid, despite any prior waiver ... if the adversarial principle has not been observed during the arbitration proceedings.]

Specifically, in the Italian article the '*principio del contraddittorio*' is included. This principle literally translates to 'adversarial principle', namely a fundamental principle of the Italian procedural law which establishes that everyone who has a legally qualified interest in obtaining a court judgment may participate in the judicial process with the right to defend themselves as permitted by law⁶¹. Therefore, in the Italian law reference is made to one of the principles of due process as well.

- d) Unlike the three countries that have been previously discussed, Germany had adopted the UNCITRAL Model Law. As a matter of fact, the Tenth Book of the German Code of Civil Procedure – which governs arbitration in Germany – provides a completely faithful version to the original text in its Chapter 5 Section 1042(1) by stating that

Die Parteien sind gleich zu behandeln. Jeder Partei ist rechtliches Gehör zu gewähren.⁶²

[The parties shall be treated equally. Each party shall have a right to be heard],

This clearly establishes the due process right of the parties. Specifically, both the principles referring to the right for the parties to be treated equally and to be heard are included in the article under consideration.

⁶⁰ Codice di Procedura Civile 2006 (Italy)

⁶¹ Enciclopedia Treccani. <<https://www.treccani.it/enciclopedia/principio-del-contraddittorio-diritto-processuale-civile/>> accessed 15 April 2022.

⁶² Zivilprozessordnung 2005 (Germany).

- e) Finally, Spain has adopted the UNCITRAL Model Law as well. With regard to the due process right, the Spanish Arbitration Act 60/2003 clearly establishes the right of the parties to be treated equally and to be given equal opportunity to enforce their rights in Article 24 by stating that

Deberá tratarse a las partes con igualdad y darse a cada una de ellas suficiente oportunidad de hacer valer sus derechos.⁶³

[The parties shall be treated equally and they should be given sufficient opportunity to enforce their rights.]

As it can be noticed, the principle of due process with its main conditions is present in all the national legislations taken into account, although with different formulas and expressions. As Gotti states, the articles included in UNCITRAL Model Law are drawn up as clearly and precisely as possible. This is because the main goal of the model law is to avoid conceptual and terminological ambiguity⁶⁴. Such an approach is similar to the one adopted by common law systems in their legislation. However, in the case of the UNCITRAL Model Law the language is even more plain as the text is drafted in order to be universally applicable. Indeed, the concepts and the terms that are used must be as neutral as possible as the main goal is for them to be incorporated into the national laws of as many legal systems as possible.

Also, it is important to highlight that no arbitral law – neither nationally nor internationally – includes the linguistic proficiency and/or the assistance of an interpreter who allows a party to understand throughout the procedure and, therefore, to correctly participate in the procedure as a fundamental due process right of the parties. However, as discussed in Sections 2 and 3, language plays a crucial role in impacting parties' due process rights, and it may be convenient to include specifications in this regard in order to point out that the choice of the language and the right to understand the proceedings shall be included in the due process rights of the parties. As a matter of fact, language can interfere with the correct conduct of the

⁶³ Ley 60/2003 de Arbitraje (Spain).

⁶⁴ M. Gotti, 'Translating International Arbitration Norms into the Italian Language and Culture', in L. Cheng, K. Kui, and A. Wagner (eds.), *The Ashgate Handbook of Legal Translation* (Routledge 2016) 193-207.

arbitral proceedings by undermining the fundamental principles of procedural fairness, of equal treatment and of the right of being heard⁶⁵. Specifically, procedural fairness requires that parties must be given proper notice, that they must be able to understand throughout the procedure and be aware of how the procedure will take place. As mentioned above, this simply entails that if the parties do not understand correctly the language used for the procedure, their due process right is not respected⁶⁶.

Also, the fact that an arbitration procedure is defined as international will certainly entail that one or more parties will be using a secondary language; hence, a procedural meeting between the parties and the arbitral tribunal should occur before the actual procedure so that each party can provide their own opinion on the language to be used during the proceedings. If this does not happen, parties may not be able to accurately describe all the relevant facts during the trial, and the language could be chosen by the arbitral tribunal without having taken into account the will of the parties. On the contrary, if parties decide in advance the details of the arbitration procedure – including the language to be used – they will be given equal notice of the proceedings and will know precisely what to expect from the procedure⁶⁷.

Finally, language is also relevant with regard to the right to be heard. In particular, parties have the right to appoint the arbitrators and the right to have arbitrators who are independent and impartial, which is an obligation that is established at the international level by many laws and rules such as the UNCITRAL Model Law, the UNCITRAL Rules, the LCIA Rules, the ICC Rules⁶⁸. Therefore, parties have the right to choose arbitrators because of their impartiality and because of their fluency in all the relevant languages to the case⁶⁹.

65 Tung (n 3)

66 Ibid.

67 Ibid.

68 Moses (n 2)

69 Tung (n 3)

6. Concluding remarks

Based on the above, the matter of the language to be used during the arbitration proceedings is extremely important for the whole arbitration procedure and for the enforcement of the award. Indeed, if the rights of the parties are not respected, the award is likely to be declared as non-enforceable. For this reason, it is important that both parties and arbitrators recognize the importance of languages, their impact on the proceedings and on their rights, and that they carefully address such issues. It should also be stressed that language is a crucial matter especially for the parties to a contract who might eventually become parties involved in the arbitration procedure. Specifically, the parties – as well as the arbitrators – should be aware of the importance of choosing and knowing the language of the contract, which could indeed become the language of the arbitration procedure. The more arbitration cases increase at the global level, the more the issue of dealing with the interculturality of arbitration becomes more and more urgent. Therefore, it is important to discuss and address the importance and the impact of linguistic and cultural differences in international arbitration in order to develop methods and strategies that could settle potential conflicts arising in international arbitration.

On the one hand, it is already possible to agree on certain aspects that can be addressed and decided in order to facilitate multicultural proceedings. Firstly, at the beginning of the arbitration procedure parties should agree on the language to be used. This would eradicate a great number of potential problems⁷⁰. Furthermore, participants could strategically appoint an arbitrator who speaks the languages spoken by the parties. This would restrict the number of potential arbitrators; however, at the same time it may lead to a win-win solution. With regard to this second point, however, it is important to point out that it is fundamental that arbitrators do not accept any case in which they are not proficient in the language spoken by any of the parties. Indeed, Article 2 of the IBA Rules of Ethics states that,

⁷⁰ T. Várady, 'Language Issues and Language-Related Strategies Prior to the Constitution of the Arbitral Tribunal' (2006) 7[2] *Across Languages and Cultures* 209.

“a prospective arbitrator shall only accept appointment if he is fully satisfied that he is able to discharge his duties without bias, if he is fully satisfied that he is competent to determine the issue in dispute, and also if he has an adequate knowledge of the language of the arbitration”⁷¹.

Finally, in connection with the above, parties should strategically hire an arbitrator who has an ‘adequate command’ of the language chosen for the arbitration⁷². It is also important to highlight that in such an international context it is particularly relevant – both for parties and probably even more for arbitrators – to keep an open mind that allows them to deal with individuals coming from different parts of the world and to be aware of the many conflicts that can arise due to misunderstandings stemming from cultural differences. In order to conduct the arbitration as efficiently as possible, arbitrators should know which are the most controversial issues during the proceedings and should be prepared to tackle them promptly. In this connection, the early meeting at the beginning of the procedure to discuss those aspects – including the issue of language – that usually generate arguments, conflicts and misunderstandings would be very convenient in order for the arbitration procedure to be successful.

On the other hand, however, further investigation needs to be conducted with regard to the strategies to be adopted in international arbitration to facilitate the discussion between the participants by transcending the linguistic and cultural boundaries that separate them. The multicultural and multilingual education of the arbitrators, the early meeting and the strategies mentioned above would certainly be a fine start to address the problem. However, improved methods and techniques still need to be implemented in order to effectively ensure that fewer misunderstandings and conflicts occur during international arbitration proceedings, to minimize the risk of affecting the successful outcome of the arbitration procedures. Specifically, such improved methods should be employed to guarantee the right of due process.

71 IBA Rules of Ethics.

72 Várady (n 70)

