ISSN : 1875-4120
Issue : (Provisional)
Published : March 2022

This article will be published in a future issue of TDM (2022). Check website for final publication date for correct reference.

This article may not be the final version and should be considered as a draft article.

Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.transnational-dispute-management.com

© Copyright TDM 2022
TDM Cover v2.6

Transnational Dispute Management
www.transnational-dispute-management.com

Summary of Young-OGEMID Symposium No. 13: "Effective Legal Writing: Written Submissions in International Arbitration (October 2021)" by E.S. Delgado

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Summary of Young-OGEMID Symposium No. 13: “Effective Legal Writing: Written Submissions in International Arbitration (October 2021)”

by Earvin S. Delgado[1]

Executive Summary

Young-OGEMID, conducted its thirteenth virtual symposium, ***Effective Legal Writing: Written Submissions in International Arbitration*** (“Symposium”) last October 4th to 13th of 2021. It focused on the important role which written submissions play in the field of international arbitration.

The Symposium observed written submissions in international arbitration by combining the knowledge, expertise, and experience of leading legal practitioners and arbitrators from across the world.

The Symposium sought to help the participants understand what was needed in their written submissions and aid them to improve their rapport and communication within the arbitral setting.

The esteemed panelists covered a range of topics, from their real-life experiences to their professional advice.

Below is the list of speakers who generously agreed to share their insights as well as their respective schedules and topics:

1. October 4th, 2021 - **Hagit Muriel Elul, Hughes Hubbard** - ***Virtues of Brevity in Written Advocacy***
2. October 6th, 2021 - **Michael Nolan, Independent Arbitrator** - ***Arbitrators' Views on Written Advocacy***
3. October 8th, 2021 - **Crina Baltag, Stockholm University** - ***Cross-Border Issues involving Written Advocacy***
4. October 11th, 2021 - **Ali Yeşilırmak, İbn Haldun Üniversitesi Rektör Yardımcısı** - ***Effective Legal Writing***

The participants, who consisted of members of the Young-OGEMID listserv, were junior practitioners, junior academics, and law students from different parts of the world. A number of them made relevant contributions by sharing their commentaries to the rest of the listserv, and in asking relevant questions to further enrich the discussions.

Dr. S.I. Strong[2] acted as moderator of the Symposium.

[1] Earvin S. Delgado is a trained arbitrator at the Philippine Dispute Resolution Center, Inc. (PDRCI) and is one of Young-OGEMID’s regional rapporteurs. He regularly reports on the Young-OGEMID listserv regarding developments in arbitration and investment law in the Asia-Pacific and Middle East regions.

[2] Dr. S.I. Strong is the moderator of Young-OGEMID. She is also an Associate Professor of Law in The University of Sydney Law School. She works in the area of international dispute resolution and comparative law, with a particular emphasis on international commercial arbitration and large-scale class and collective suits. Dr. Strong

Speaker 1: Hagit Muriel Elul, Hughes Hubbard - Topic: *Virtues of Brevity in Written Advocacy*

Dr. Strong officially opened the first session by introducing the first panelist, **Ms. Hagit Muriel Elul**[3].

In her opening post, **Ms. Elul** quoted William Shakespeare's *"Hamlet",* where he wrote, *"Brevity is the soul of wit."* She shared that brevity should also be *"the soul of legal persuasion."* She emphasized that *"less is more in legal writing*."

She then illustrated the following situation: *"A bored or frustrated reader may abandon your brief, research the issue independently or — even worse — turn to opposing counsel for guidance. In an era where the average person has the attention span of 8-seconds, the value of making your point quickly cannot be underestimated."*

Ms. Elul then outlined three important suggestions to declutter one's work:

1. The *first* was to "**Have the Courage to Cut**." **Ms. Elul** quoted another prolific English writer, Mark Twain, when he said *"I apologize for such a long letter - I didn't have time to write a short one."* This illustrated her point that for one, *"to become excellent advocates, lawyers must embrace writing as a process of rewriting."* She noted that *"Young lawyers often suffer from excessive pride in authorship and a tendency to be overinclusive in making arguments. Having the courage to cut is the key to effective legal writing. There is seldom any prose that cannot be improved by ruthless editing."*
2. *Second* was **"Don't Forget The Reader Is Smart Like You." Ms. Elul** noted that most legal briefs suffer from repetition, and such can *"be a symptom of insufficient editing."* She further explained that repetition is the *"result of the mistaken belief that saying something several times will somehow get the point across."* To which, the contrary is true. She expounded that *"Repetition suggests that the writer doubts the decision-maker's ability to get the point. It is often more annoying than it is helpful. Trust the reader to be able to understand the point you are conveying without beating them over the head with it excessively."*
3. *Third* was to "**Use Fewer Words.**" She cited the late Justice Antonin Scalia[4] of the United States Supreme Court: *"Any word that does not help is a hindrance because it distracts."* She added that one should *"consider each word in a sentence and whether the sentence can be phrased more succinctly. Eliminate hyperbole which can undermine your argument by overstating it. Avoid hollow modifiers — such as "clearly" or "manifestly" — which do not communicate any new information to the reader and can give your reader an excuse to distrust you."*

---

has published numerous books and articles in Europe, Asia and the Americas, and her work has been cited as authority to the U.S. Supreme Court and in ICSID awards.

[3] Hagit Muriel Elul is the Co-Chair of Hughes Hubbard's International Arbitration practice group and is a New York-based partner of the firm. She is also the chair of the Arbitration Committee of the International Institute for Conflict Prevention & Resolution (CPR) and an Executive Board Member of the New York International Arbitration Center. Her experience handling billion-dollar-plus commercial disputes has earned her recognition in multiple publications as a leading practitioner of international arbitration and dispute resolution.

[4] Justice Antonin Gregory Scalia was an American jurist who served as an associate justice of the Supreme Court of the United States of America.

Ms. Elul then presented her point using the following example:

> *"Clearly, Respondent egregiously breached the contract."*

She explained that *"if you haven't already made the breach clear, your claim that it's clear will not convince your reader. If you have made it clear, then you don't need to say it. And saying the breach is egregious does not make it so. The advocate's job is to demonstrate the egregiousness of the breach through a straightforward application of the facts to the law."*

To end her opening post, **Ms. Elul** reminded the participants that persuasive writing was continuous and that it was something that lawyers must continue to work on throughout their careers.

Dr. Strong then asked the following questions based on her own experience in practice:

1. *"First, with respect to having the courage to cut, what does a junior associate do about the partner that keeps adding things in or saying "you have to mention this?" Drafting by committee - which is often the norm in legal practice - means there are multiple perspectives on what is important and can lead to long (and occasionally overly complicated) arguments.*
2. *Second, regarding the concept of repetition, we all know about the problem of including something once only to have readers miss the point. We're all used to it - the reader (a professor or senior partner) says "why didn't you mention X," leading you to respond, "it's on page six, paragraph two." Having been the professor/senior lawyer, I can say that I have been that person that missed something and usually find the reference to be not as clear as the author thought it was (which goes to the question of how to write clearly), but sometimes I just miss it if it's a single line. How do you know what to emphasize and for how long? How does that differ from the type of repetition you're (rightfully) concerned about?*
3. *Third, your admonition about using fewer words is great, though I would perhaps say use better words. Strong verbs instead of weak ones, showing rather than telling (meaning demonstrating why the breach occurred instead of just saying the breach occurred), etc. However, sometimes being clearer does use more words. Also, there are cultural differences in linguistic style - having practiced in both the US and the UK, I can say that the US style of muscular, emotive text does not go down well in the UK, where understatement and objectivity is the norm. While that might be a topic for another panelist (though you are welcome to comment on it in this context), I realized that British English requires more words than American English. Similarly, some languages - Spanish for example - uses more words than others. I remember when I was writing a bilingual text with some Spanish colleagues, they bemoaned the word count I gave them because everything took more words in Spanish (which is absolutely true from my limited knowledge of Spanish). It may be that the word counts in jurisdictions that feature those languages take that linguistic element into account, but there may be differences within the language family just as there are in British English v(ersus) American English."*

Ms. Elul proceeded to answer **Dr. Strong**'s questions as follows:

1. *"On drafting by committee – we have all been there. Certainly there will be the need to account for – and in some instances defer to- other views. It is important to build in time in the drafting process to account for the "Frankenbrief" that results from collaborative drafting. My suggestion for associates is to start with an initial outline of the key points they need to prove their position. They should then take a hard look at the brief once the initial drafting phase is done and see if the expansion from the initial outline is additive or dilutive. I have a process of moving secondary arguments to footnotes and then from there cutting out all extraneous footnotes. I have worked with some colleagues who simply do not allow footnotes at all in their briefs on the theory that if the point is worth making, it should be made in the text. Everyone has a different style that needs to be balanced – but there is always a role for rigor in drafting.*
2. *Repetition can play a role reinforcing strategic points. I simply would caution against "needless repetition". If you find yourself repeatedly writing "as stated previously" and repeating the point entirely again, then it is time to pause and consider why you are restating the point again. Is it because you haven't taken the time to organize and edit your arguments? Is it because the brief is very long, and if so, can it be condensed? Is it because you are not sure if the point was convincingly made the first two or three times? Having someone else review your brief can be a good reality check. The impartial reader is sensitive to needless repetition and can tell you – "Yes I got the point the first two times you made it."*
3. *I fully agree on using better words. It is important to know your audience and draft accordingly. Even in the U.S. context, emotive words or grandstanding inspire little other than eye-rolling on the part of the reader. On the issue of weak v. strong words I could prepare a whole other post on passive voice and why it is rarely appropriate in legal advocacy. In my view the only time passive voice makes strategic sense is when someone is trying to avoid responsibility – e.g. "a cookie was eaten" (as one of my children informed me last night)."*

Mr. Mark Kantor[5] also weighed in on the topic. He drew the attention of the participants to one of the points which **Dr. Strong** had made on *"showing rather than telling."* He highlighted the said point when he shared that *"too often, counsel assert conclusions but do not explain 'why.' Persuasive advocacy should always include "because."*

Dr. Strong discussed more on the point of showing vis-à-vis telling. She shared that one of her *"pet peeves"*, both as a professor and arbitrator, was *"when students and counsel believe that they are saying 'why' when they just tell… fact after fact after fact."* She explained that one needed to, first, tell what the law was. This meant that one should be informed of the legal standard that should be used to judge the issue at hand. After which, it should be shown *"how the facts in the case do or do not live up to that standard."* She had also observed how *"people get caught up in the factual argument without adding the legal element."* If she was not presented in the written submission, for instance, why certain facts of a case would show a breach of contract under the governing law, then the said counsel would not be making his case.

---

[5] Mark Kantor is an arbitrator and mediator in commercial and investment disputes, and as an Adjunct Professor at the Georgetown University Law Center. Mr. Kantor is a member of the World Bank Group Sanctions Board. He is also Editor-in-Chief of the online journal Transnational Dispute Management. Know more about his profile at www.mark-kantor.com.

Dr. Strong also reiterated **Ms. Elul**'s point on brevity where *"the more clearly and concisely you can show that breach, the more persuasive you will be. Arbitrators tend to reward clarity, because it shows the advocate is confident in her/his/their case."*

Another panelist of the Symposium, **Mr. Michael Nolan**[6], also shared that when he read about the discussions on *"drafting by committee"* and the *"Frankenbrief"*, it reminded him of his previous boss, Mr. Michael Hirschfeld.

He recounted his experience as follows:

> *"At a time when many law partners in New York still didn't have even one computer monitor, Michael had three. There was one monitor on his side of his desk. And there were two monitors on the other side for his associates to huddle around. This was so that everyone, with Michael typing, could work on briefs together in real-time. Configured that way, "we" wrote a lot of briefs when I was Michael's associate. I think some were quite good. I am sure we all had a lot of fun doing it.*
>
> *For decades after, Michael continued that same way. I and Michael's other partners at my old law firm Milbank were happy that he did. We thought associates enjoyed working that way and benefited from it. But none of us ever copied Michael's setup. I have only a few times even used the technology for shared work to "draft by committee" in the literal sense. Like a lot of people (I think but don't know), I typically have used that sort of technology only so that individuals can work on the same document in sequence, not together in real-time.*
>
> *I know of one prominent practitioner in many international arbitrations who sometimes works with his teams in a conference room along the lines that Michael did with his.*
>
> *I wonder whether participants on the list have had experience drafting together with others in real-time, whether across a desk or "virtually"/remotely. If so, I would be curious to hear thoughts about it.*
>
> *By the way, I out Michael because I know he wouldn't mind. If anyone runs into him in New York City, I bet he would be happy to hear that I did."*

Dr. Strong shared some of her own experience in practice as well:

> *"When I was practicing in London, the tradition there (not just at my firm but at other firms as well) was to have "trainees" sit in the same office as more senior people so that the junior people could observe more closely what was going on, ask questions, assist with projects, etc. Though this arrangement may have been partly have been due to necessity (London commercial real estate is pricey), it also had the benefit of providing some of the hands-on training that your colleague gave you."*

---

[6] Michael Nolan is an independent arbitrator based in New York and Washington, D.C. in the United States of America. He specializes in international disputes arising from commercial contracts, concession agreements and other government contracts, and investment protection treaties. He is also at Georgetown University Law Center a course on international commercial arbitration. In the early 2000s, together with Mr. Mark Kantor, he developed and co-taught a course on investor-State dispute settlement in the Georgetown University Law Center.

Dr. Strong then asked the participants, in particular those who have gone through traineeships, if they found it useful to write well or undertake any other tasks. She explained to those unfamiliar with the legal system in the Commonwealth that *"after a prospective solicitor leaves university and professional education, she/he/they must serve two years traineeship at with a qualified solicitor before becoming fully qualified. Trainees have it better than pupil barristers, in that trainees are paid and barristers are typically not (though when I was practicing, there were at least some scholarships to help pupil barristers get through their pupillages if they didn't come from a wealthy background)."*

An anonymous query from the listserv, from a member who identified himself as *"**a junior English practitioner**",* was then subsequently shared by **Dr. Strong**.

The said participant asked:

> "*... many young arbitration practitioners are aware of the key points which have been raised by you but may not know how to successfully implement them.*
>
> *I have been lucky to do this area of work, but I have not been given any training on drafting legal submissions, nor on when it is appropriate to use strong verbs. I have been improving my drafting skills by reviewing submissions prepared by other practitioners.*
>
> *For practitioners such as myself, could you please recommend books to read in order to improve our writing skills?"*

In response, **Ms. Elul** recommended the book, *"Making Your Case. The Art of Persuading Judges"*[7] by Justice Antonin Scalia and Bryan Garner and "*The Elements of Style*"[8], by Strunk and White.

Ms. Elul also responded to the question of *"collaborative brief-writing in real-time"* where she thought her associates would not have tolerated something similar from her, but noted it as an *"excellent training idea."*

Dr. Crina Baltag[9], also one of the panelists, added her list of recommended materials to help improve one's writing skills. The materials were as follows:

1. Edwina Higgins and Laura Tatham, "*Successful Legal Writing*" (2015);
2. Robert McPeake, "*Advocacy – 20th edition*" (2020);
3. Global Arbitration Review, "*The Guide to Advocacy – 5th edition*" (2021);
4. John Knowles and Philip Thomas*, "Effective Legal Research"* (2012);
5. D. Bishop and E. Kehoe, "*The Art of Advocacy in International Arbitration*" (2010);

---

[7] Antonin Scalia, *Making Your Case. The Art of Persuading Judges* (2008).
[8] William Strunk Jr. and E.B. White, *The Elements of Style* (1918).
[9] Dr. Crina Baltag, LL.M., M.Sc., Ph.D. is an Associate Professor in International Arbitration at Stockholm University and qualified attorney-at-law, with extensive practice in various aspects on international dispute resolution, private and public international law. She is also the co-director of the Master in International Commercial Arbitration Law at Stockholm University and member of the Stockholm Chamber of Commerce Arbitration Institute (SCC) Board. She also serves as the editor of Kluwer Arbitration Blog, co-managing editor of ITA Arbitration Report and is a member of editorial boards of prestigious journals and book series in the field, including of the Journal of International Arbitration and Bloomsbury's Global Energy Law and Policy.

6. ITALAW, *available at www.italaw.com*;
7. and NAFTA, or other treaties with transparency provisions case.

Participant **Mr. Bhavik D. Rajani**[10] also contributed his insights:

> *"1. In some common law jurisdictions (e.g. India, where I come from), (e)specially in litigation - evidence adduced by any of the parties, for which a foundation is not present in the pleadings, could be disregarded. I feel on this aspect parties should be cautious and bear in mind when setting the outer limits of 'brevity' particularly where a pleadings approach is being followed in an international arbitration, i.e. relevant facts should be set out in 'sufficient' detail.*
>
> *2. Secondly, when deciding how long or how short the submissions should be, I think it's also important to prioritizing the strongest points first, and make sure these are explained persuasively, but in simple language. The use of bold fonts, underlines and inverted commas are an effective tool, to grab the attention of the reader, whilst keeping control on the number of words.*
>
> *3. Sometimes it might be more effective to set out the legal proposition first and then show how it applies to the facts. This could give direction and sometimes narrow down the scope of the inquiry by the Arbitral Tribunal within the four corners of the legal proposition being explained."*

Dr. Strong also added her list of book recommendations, namely:

1. S.I. Strong, "*How to Write Law Essays and Exams"*[11] (2018);
2. S.I Strong, "*How to Write Law Essays: IRAC Perfected"*[12] (2021).

She recommended the first book to English law students and described it to be suitable for law students and practitioners in the United Kingdom and the Commonwealth. She then recommended the second book to the American audience.

Mr. Nolan also added *"Politics and the English Language",* the essay by George Orwell, as a another recommended reading.

Dr. Strong then discussed more on the topic of methods and standards used in writing for international arbitration. She explained that *"the IRAC method - whether used in law school scenarios or in practice (and there is an entire chapter in both books on how to adapt IRAC for use in legal practice) - is an excellent way to structure your arguments."* She expounded that it could hopefully avoid the mistake of repetition which **Ms. Elul** had mentioned, and that it also utilized the *"show, don't tell"* technique that was advocated by **Mr. Kantor**. She also added that *"IRAC can help streamline legal writing and make it more persuasive on a structural level, so is somewhat different than what some of the panelists are saying about word choice."*

---

[10] Bhavik D. Rajani is a Fellow of the Chartered Institute of Arbitrators.
[11] S.I. Strong, *How To Write Law Essays and Exams* (2018, Oxford University Press, 5th ed.).
[12] S.I. Strong, *How to Write Law Essays: IRAC Perfected* (2021, West Academic Publishers, 2nd ed.).

She further remarked that the suggestion of **Mr. Rajani** on *"making your important points first"* to be a *"good one and is mentioned in the IRAC books."*

She also explained that the issue of not being able to prove anything that was not included in the initial documents, in reference to pleadings in Australian procedural parlance, was correct. She, however, emphasized that one does not need to prove the entire case in the pleadings, and instead *"simply need to introduce the topics."* She further relayed that *"while there is scope and a need for telling the story in… pleadings in international arbitration, brevity often works to your favor."*

Dr. Strong then backtracked to one of the points which **Mr. Rajani** made on the use of different fonts. She replied that *"while helpful when used sparingly, too many people use that technique to avoid learning how to write properly. When I see that technique used, either as an arbitrator or a professor, I start to feel like the author doesn't trust me to read carefully or thinks I'm stupid - which violates Hagit's* (**Ms. Elul**) *second point - or that the author is just too lazy to write a properly compelling submission. Take the time to write well - and it does take time. Your second draft is still not your best draft."*

Dr. Strong also said that she liked **Dr. Baltag**'s suggestion that *"junior practitioners read submissions, judgments, awards and other materials that are publicly available."* She, however, warned on such advice that *"not all judges, arbitrators and practitioners write equally well, and just because someone (even someone from a major firm) does something doesn't mean it's good and should be copied."*

Dr. Strong also discussed that there are *"some differences remain between investment/treaty arbitration and commercial arbitration based on the public/private international law distinction*." She recounted that she *"was teaching a course on legal reasoning to some European judges and was asked by the Chief Judge to find some way to get his colleagues to stop putting 'legal boilerplate' into every opinion they wrote. These traditions and conventions often no longer necessary/helpful and work against us in our desire to write well."*

And with this, the first part of the Symposium concluded.

Speaker 2: Michael Nolan, Independent Arbitrator - Topic: *Arbitrators' Views on Written Advocacy*

Dr. Strong opened the second part of the Symposium by introducing the second panelist, **Mr. Nolan**.

Mr. Nolan then referenced one of the discussions from the first part of the Symposium on various books about good writing, and quoted a passage from *"Point Taken: How to Write Like the World's Best Judges"*[13] by Ross Guberman:

> *"Judge Learned Hand [for those of you who didn't go to law school in the US, this was a real person, and a giant of a judge] once mused … in a conversation with his clerk, Archibald Cox, who would become the famed Watergate prosecutor. 'To whom am I responsible?' Hand asked. 'No one can fire me. No one can dock my pay. Even those nine bozos in Washington, who sometimes reverse me, can't make me decide as they*

[13] Ross Guberman, *Point Taken: How to Write Like the World's Best Judges* (2015).

want. Everyone should be responsible to someone. To whom am I responsible?' Hand paused and then gestured over to a stack of law books. 'To those books about us! That's to whom I am responsible!'"

He explained that "*there are no end of differences between US judges and international arbitrators, and some similarities. A lot that Judge Hand supposedly told Archibald Cox couldn't be said of international arbitrators."* He, however, contrasted that such was not his point.

Mr. Nolan emphasized *"that being an effective advocate has something to do with understanding what matters to the decision-maker to whom your advocacy is directed. Judge Hand gave some valuable insight into what mattered to him, as a judge, when writing decisions."*

He then posed the following question to the participants: *"What do you think matters to international arbitrators when they write their decisions?"*

While he waited for responses from the listserv, participant **Dr. Joshua Karton**[14] recommended what he referred to as a *"slightly unusual source"* for the other participants. He cited the work of Justice David Stratas[15] titled, *"Some Thoughts on Legal Writing and Written Advocacy*"[16] which he described as, *"well-stocked with examples that illustrate many of the points made by other commenters."*

He also recommended two more works from the same justice namely, *"Writing Up the Facts and Winning Big: Some Secrets of the Best Writers of Legal Submissions*"[17] and *"Appellate Advocacy: My Latest Take.*"[18] **Dr. Karton** explained that some of the advice of Justice Stratas was *"specific to appellate advocacy in courts, but most of it is equally applicable to arbitration."*

Participant **Ms. Suzana Cosic** then thanked **Dr. Karton** for his recommendations. She also corresponded that she loved the points that he made and summarized that *"in other words, writing should be clear and in plain language - it is just like storytelling."*

Mr. Nolan then replied that he also agreed with **Ms. Cosic**. He then mentioned that he looked at the slides that were shared by **Dr. Karton**, and highlighted the portion on Justice Stratas' *"Golden Rule"* which said: *"Always write for your audience."* He emphasized that it was, *"Wrong thinking while you draft: 'I like what I'm writing'"*, and that *"Right thinking while you draft: 'My reader will find this clear and compelling."*

He then referred back to the first day of the Symposium where the participants focused on the *"clear part"* and how *"brevity was the gateway for broader discussions."* He shared that the

---

[14] Dr. Joshua Karton is an Associate Professor and Associate Dean of Graduate Studies and Research at the Queen's University Faculty of Law. He also serves as the Managing Editor of the Canadian Journal of Commercial Arbitration, and a Book Review Editor in the American Journal of Comparative Law.

[15] Justice David Stratas is a Canadian jurist. He is a justice of the Federal Court of Appeal of Canada.

[16] David Stratas, *Some Thoughts on Legal Writing and Written Advocacy* (March 8, 2021). Available at SSRN: https://ssrn.com/abstract=3800057 or http://dx.doi.org/10.2139/ssrn.3800057

[17] David Stratas, *Writing Up the Facts and Winning Big: Some Secrets of the Best Writers of Legal Submissions* (April 24, 2016). Available at SSRN: https://ssrn.com/abstract=2769588

[18] David Stratas, *Appellate Advocacy: My Latest Take* (April 26, 2016). Available at SSRN: https://ssrn.com/abstract=2770442

participants *"should have more to say today about what makes writing in arbitrations 'clear' for arbitrators"*, and invited them to share more thoughts and opinions about the topic.

Mr. Nolan then advised the participants that when writing pleadings and briefs directed to arbitrators, they should ask themselves what was compelling, engaging and what matters to the said arbitrators.

He determined what made writing *"compelling"* for arbitrators "*has to do with what arbitrators believe their job to be, and also what – in the mind of the arbitrator(s) to whom you are speaking – constitutes doing his or her job well."* He further asked, *"What do arbitrators believe their job to be? To whom do arbitrators think of themselves as being accountable?"*

He then described how accomplished and celebrated the person of Judge Hand during his time. Judge Hand was described to be a *"then-clerk who went on to be a Watergate prosecutor."* In the past, the standards came down *"to the books on the shelves."* But in the present, arbitrators are considered to be *"in trade"* in a way that Judge Hand, with his lifetime appointment, was not.

To quote, *"Judge Hand had his 'nine bozos.' Who do arbitrators have? How do they compare in the lives of arbitrators? Do they function differently with respect to arbitrators' awards than those whom Judge Hand said 'sometimes reverse me' but still 'can't make me decide as they want?'"*

Mr. Nolan shared his thoughts on the said passage:

> *"When I first came across the quotation I sent to you in Ross Guberman's book, I noted that Judge Hand, an appellate judge, who sat together with other appellate judges all the time, didn't have anything to say about them. What do you think arbitrators, in a similar conversation, might say about their co-panelists?"*

Mr. Kantor then responded to the question on what he thought mattered to international arbitrators when they wrote their decisions. He enumerated the following elements:

1. *"Ethics*
2. *law,*
3. *justice,*
4. *the Parties*
5. *counsel,*
6. *the arbitral institution,*
7. *the tribunal members,*
8. *any reviewing court."*

Mr. Kantor also cited **Canon I.A** of the **AAA/ABA 2004 Revised Code of Ethics**[19] which stated: *"An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility*

[19] *American Arbitration Association Revised Code of Ethics for Arbitrators in Commercial Disputes* (March 1, 2004).

to the public, to the parties whose rights will be decided, and to all other participants in the proceeding."[20]

He exclaimed that the said provision was *"fine words"* but *"fail to address how to rank or balance all of those potentially competing responsibilities in any particular scenario."* He illustrated how *"arbitrators may not write an award for the eyes of a reviewing court if they believe the matter will not go to court. If, in contrast, it seems clear to the arbitrator that the disputing parties may continue the dispute by bringing the award to a court for enforcement or vacatur, then the arbitrator may care deeply about how the award will be seen by judges (and in what jurisdiction)."* He also added that one thing he was sure about, *"is that the allegation some critics make that what matters to arbitrators is prolonging the proceeding in order to be paid more is sloppy and false."*

Mr. Kantor also described arbitrators to be *"complex creatures."* He explained *"that complexity is magnified when there are three members of a tribunal who must seek to reach a common result."* **Mr. Kantor** also added that the practical answer to the question posed by **Mr. Nolan** on what mattered to international arbitrators in decision-writing was *"necessarily complex, not simple"*, and was, *"usually site-specific."*

Dr. Strong then added an excerpt from her book "*Legal Reasoning Across Commercial Disputes: Comparing Judicial and Arbitral Analyses*"[21] to answer questions on the thought process of an arbitrator in writing awards.

To quote Chapter 2 of the said book:

> *"Although the survey section on drafting was relatively short compared to other sections, the discussion generated some useful insights. For example, the level of detail reflected in a reasoned decision or award is highly influenced by the difficulty, complexity, and novelty of the dispute as a matter of fact and of law. Judges and arbitrators also found the act of writing a reasoned decision or award to be useful in helping them think through the issues in the case, although that process did not mean respondents considered themselves to be an 'audience' for their decisions or awards.*
>
> *Instead, respondents tended to focus on the losing party as the primary audience member, although courts or tribunals undertaking subsequent reviews ranked equally highly if two categories of review (substantive and procedural) were combined. Otherwise, respondents tended to view counsel and the winning party as the next most important audience members.*
>
> *The survey also sought to pinpoint the hallmarks of a well-written decision or award. Interestingly, the respondents clearly elevated process-oriented considerations (i.e. those relating to the clear statement of the relevant legal standard and how the facts do or do not meet the standard identified) over outcome-oriented concerns (i.e. that the dispute was resolved correctly as a matter of law). Furthermore, those two factors (process and outcome) were significantly more important than other alternatives by a significant order of magnitude. While the data was not conclusive about the relevant*

---

[20] *Ibid.*

[21] S.I. Strong, *Legal Reasoning Across Commercial Disputes: Comparing Judicial and Arbitral Analyses* (2020, Oxford University Press).

> *importance of several of the lower-ranked features, the results from this question provide a useful baseline for future empirical and theoretical research."*[22]

After which, **Dr. Strong** asked the following question back to **Mr. Nolan**, **Mr. Kantor**, and the other panelists who have also served as arbitrators: *"What do international arbitrators want to see when they see submissions from counsel?"*

She explained that most readers of Young-OGEMID *"are or will be involved in international arbitration as advocates, and it would be useful to have the perspective of experienced arbitrators like yourself on what is most effective in terms of written submissions."*

Mr. Nolan commended the list that **Mr. Kantor** provided was an *"excellent list of what may matter to international arbitrators."* He also added that *"It is commonly remarked upon that awards in International arbitrations tend to be long. That is often said to be true particularly for investor-State arbitration awards."*

He then wondered which of the considerations **Mr. Kantor** laid out, or others factors that he might not have mentioned, do participants thought to have contributed to the length of certain awards.

He also responded to the question of **Dr. Strong** on what international arbitrators wanted to see when they read various submissions. **Mr. Nolan** answered that *"engagement of the other side's arguments"* is one thing that is, *"helpful for arbitrators to see in written submissions"* that counsel does not see it to be.

He illustrated that *"Especially among U.S. counsel, there is sometimes concern about 'repeating the direct.' That is, counsel may worry that, by stating and addressing an argument against their side, they will give emphasis to the argument, possibly improve the argument through re-statement, or press adversary counsel to improve the argument in the next round by challenging it. Thus, avoidance can be a matter of strategy and tactics – and I am not saying that avoidance is necessarily a 'bad' strategy or tactic."*

Mr. Nolan highlighted that *"there are reasons why arbitrators want to identify and close out issues."* According to him, *"Continuous engagement by both sides through a sequence of written exchanges helps arbitrators to close out issues."*

He also recognized that the issue of whether counsel wished to help arbitrators with that part of their job or to do something else instead, was a different matter and that he was *"sidestepping"* on the part of the question presented by **Dr. Strong** about the most effective practices in written submissions.

Dr. Strong then replied that she agreed with **Mr. Nolan** completely. She shared that in her experiences when she sat as an arbitrator, she *"absolutely hate(s) it when parties ignore what each other have said and simply hammer home their talking points."*

She then presented an analogy to the participants who have not yet experienced sitting as arbitrators. She said *"it is similar to politicians evading a journalist's questions simply to focus on their talking points - it doesn't fool anyone and instead diminishes the credibility of the*

[22] *Ibid.*

person speaking." She expounded the statement by recommending that it is *"much better if advocates recognize the difficulties in their cases and provides a reasonable response."* She explained that *"arbitrators have all been counsel and realize that no client and no case is perfect. Recognizing difficulties can actually strengthen your credibility and thus your likelihood of success"*, of which she described it to be *"counterintuitive, but true."*

Dr. Strong then proceeded to loop the discussion back to the point which **Ms. Elul** made about the use of footnotes. **Dr. Strong** asked, *"Where do you put these semi-admissions?"* She explained her question on account of her experience where she had *"seen lots of briefs where the troubling information went into a footnote."* She then explained that as an arbitrator, she would always read the footnotes, that she saw through the technique *"for what it is",* and that she was able to *"at least appreciate the attempt to engage with the issues rather than evade them."*

Dr. Strong then asked the other panelists and listserv members on the best way to deal with troubling facts or law in a written submission.

Mr. Nolan highlighted that *"hiding stuff in footnotes is terrible."* He expounded that it only worked when one had *"successfully taken advantage of the laziness of arbitrators."* Although he shared that some arbitrators do not always read the footnotes, he warned that *"when you come across one, or three, and manage to take advantage of that fact, the arbitrators may end up feeling pretty bad about themselves when the trick eventually comes to light."* The arbitrator(s) will likely end up feeling bad about the counsel. **Mr. Nolan** settled that *"even if more could be said as to whether this sort of thing is 'effective advocacy', it is a pretty miserable way to conduct a professional life."*

Mr. Kantor then pointed out that **Mr. Nolan** had raised *"a bigger issue than just misuse of footnotes."* It is on, *"the extent to which counsel appear to assume in oral and written advocacy that arbitrators are not very smart."* He relayed that he was *"too often frustrated by counsel who make arguments that do not pass the 'red face' test", and that he "understand(s) that counsel have a responsibility to use their best efforts to represent the interests of their clients."* He cited the books on advocacy of Scalia and Garner and pointed out that *"defending the indefensible comes back to bite the advocate's (and client's) credibility."*

Mr. Nolan then responded that **Mr. Kantor** had made a significant point about something important — ***the advocate's credibility***. He thought that what the latter had said was so clear and correct that he will not try to add to it. Instead, he returned to the discussion on footnotes and how to use them effectively. According to **Mr. Nolan**, he disliked it when footnotes were used to hide or *"bury"* what the counsel did not want the arbitrators to see. But, he was also of the opinion that the use of many footnotes, when done well, can be effective.

Mr. Nolan then recounted an exchange he had on the use of boldface, italics, and big fonts:

> *"... some liked those as ways to direct attention. Others thought differently. But we live in a world of long pleadings and long awards, so the impulse to direct attention to what truly matters is understandable.*
>
> *Some counsel use footnotes that way. Rigorously stripping out materials of secondary or supporting importance, and putting that sort of thing in footnotes, instead of the text. This can result in sentences appearing like Christmas trees, with footnotes hanging like*

decorations. This style of presentation isn't easy to execute well or common, but when well done can be effective." He added, *"Extra points when memorials are written this way but don't use tiny text or single spacing for the footnotes. Instead, the footnotes can be presented in the same way as the text, just below it."*

Dr. Strong then shared another anonymous contribution from the listserv. A participant aptly aliased as ***"Anonymous"*** offered thoughts on the earlier discussion about dealing with problematic law or facts. **Dr. Strong** stated that the comment underscored what has been discussed on credibility and candor.

To quote participant ***"Anonymous'"*** comment:

"I have seen one particularly bold approach to 'bad facts', whereby these were not hidden, but "admitted" in plain and open terms at the very outset.

This took the wind out of the other side's sails (robbing them of their one big talking point). It put the tribunal at ease, as it signaled that the advocacy from this side would be forthright at all times. It also functioned as a taunt to the other side to admit their rather more damaging "bad facts" – an admirable approach, in the right circumstances, I should think.

As to 'bad' law, I should think: distinguish, distinguish, distinguish."

This was followed by another comment from **Mr. Rajani** where he said *"it would be useful for younger practitioners and aspiring arbitrators to learn if and how the panelists have tried to deal with such issues (tricks) e.g. in their case management conferences or procedural orders."*

Mr. Rajani then asked the panelists whether they *"believe that parties should, in an arbitration, disclose all relevant facts in their written submissions (e.g. statement of claims/statement of defense, and more) or limit these only to facts that the party relies upon."*

Dr. Strong responded that *"Some arbitrators give directions regarding footnotes, but you have to balance making your expectations known vs. having the parties think that you don't trust them. Thus trying to forestall 'tricks' can often backfire, particularly since the list of such bad behavior is very, very long. As for the number of facts, you need to include enough to present your case adequately as a matter of pleading without getting so into the nitty-gritty that you put off or lose your reader. It's something you learn over time."*

Participant **Dr. Damien Charlotin**[23] also contributed to the discussion, and said that he *"wanted to push back against the idea… go as far as to call it a lieu commun - that brevity is so important."* He shared that most of the time such idea was put to test, "*empirics does not find that shorter submissions lead to greater success"* but most often, it is the opposite that happens. He continued, *"For instance, in a very interesting study of briefs before appellate courts in the US* (citing *"Too Many Notes' An empirical study of advocacy in Federal Appeals"*[24]), *Gregory Sisk and Michael Heise found that 'for appellants, briefs of greater*

---

[23] Dr. Damien Charlotin is a writer and reporter in the international litigation and arbitration sphere. He is currently an Editorial Contributor to IAReporter.

[24] Gregory C. Sisk and Michael Heise, *Too Many Notes: An Empirical Study of Advocacy in Federal Appeals*. 12 Journal of Empirical Legal Studies (2015).

length are strongly correlated with success on appeal. Sisk together with other authors replicated this finding in a later study[25] that also discusses the weight of counsel's experience in appellate success.'"

Dr. Charlotin also shared that he had been working on a dataset of submissions in the context of the Jessup Public International Law moot, which consisted of some 6,000 briefs over five years. He described the dataset in which *"for each year all memos deal with the exact same case on both sides of the issue, and they are all graded out of 100."*

He highlighted that the participants of the said moot court competition were limited to 9,500 words and that they would have lost points due to penalties when their memos crossed the word limit – and yet, the submissions never crossed the limits, *"at least not until they really write too much."*

He then expressed a disclaimer that, *"as with any empirical studies, what's true for the average case is not necessarily true of the singular case"* and that he had, *"no doubt that some counsel benefit from brevity."* He also added that he doubted that it was just the length per se that mattered in the discussion and said that *"maybe it works as a kind of signaling of the seriousness of a case."*

In response to **Dr. Charlotin**'s posts, **Mr. Nolan** added the following:

> *"I looked at the local rules for the US Federal Court of Appeals for the 7th Circuit, which years ago was at the forefront of a trend in the US courts to impose page limits on briefs. Local Rule 32(a)(7) requires that 'principal briefs not exceed 30 pages unless it contains no more than the greater of 14,000 words or 1,300 lines of text if a monospaced face is used' (emphasis in original).*
>
> *What is thought to be 'good writing' can have a lot to do with what the community making the assessment has seen and expects. The scorers of Jessup briefs might not much like a brief that 7th Circuit judges might think a model of what an excellent piece of legal writing should be. That observation could probably be flipped around. Recognizing this, I think all of us in the arbitration community can and should give thought to what kind of writing we want to be doing for one another, which is just what we are doing in this virtual symposium. For me, short and sharp has a lot of appeal, in part because we seem to trend in the other direction.*
>
> *Your empirical observation about the correlation between length and success for appellants is interesting – and the sort of thing very much to be taken on board, all the more for me because it cuts against my inclinations."*

To this, **Dr. Charlotin** replied:

> *"Yes, in fact Sisk and Heise discuss the word limit rules at the appellate level, and suggest there may be a misalignment of interest between the interests of litigants and*

[25] Adam M. Samaha, Michael Heise, and Gregory C. Sisk, *Inputs and Outputs on Appeal: An Empirical Study of Briefs, Big Law, and Case Complexity*. NYU Law and Economics Research Paper No. 20-14, Cornell Legal Studies Research Paper No. 20-26, NYU School of Law, Public Law Research Paper No. 20-14 (2020), Available at SSRN: https://ssrn.com/abstract=3555841 or http://dx.doi.org/10.2139/ssrn.3555841

judges - the former want more breadth to make their case, the latter prefer brevity. While that makes sense to me, I am not sure it is entirely transposable to the arbitration sphere. And in any case I agree with you that other considerations should enter into play, such as what should be a more optimal equilibrium, or the fact - you are quite right - that there seems to be a trend away from brevity.

I don't have the data on hand for submissions, but in my thesis[26] *I indeed found that international awards and judgments are increasingly long. As someone whose job is to read investment awards from A to Z, believe me I in fact join the calls for more brevity!"*

Dr. Strong then commended **Dr. Charlotin**'s injection of the topic of empirical evidence to the discussion. She added that what she thought was throwing the discussion off was *"binary thinking - that we either have to consider writing short and sweet or long and dull or repetitive. In fact, it's possible to be long and packed full of novel content. The problem is that many people who think they're being long and packed full of novel content when they're not."*

Dr. Strong also shared her experience to the discussion:

"As someone who tends to write long and very complete (my scholarly work has been called 'dense' in the best possible way), I know that that type of writing takes a lot of revision - I don't let anyone see anything until five drafts at the minimum, and often ten. I also do a lot of comparative analysis, which takes more space than purely domestic work.

With judgments and awards, my experience with reading awards and working with international judges is that many judges and arbitrators believe they must put A LOT of boilerplate in, both regarding the procedural history and regarding basic principles of law. These principles are often not hotly disputed, but the arbitrators and judges feel the need to include it out of concerns about procedural fairness and/or avoiding reversal/vacatur. Thus, to some extent, we the practitioners have created our own monsters by being too quick to appeal/vacate decisions. There are many practitioners (and not just clients) who believe that any decision against them is wrong, when in fact they just didn't have the facts or the law (or the skill in presenting said facts or law) to prevail."

Dr. Charlotin responded that he fully agreed that *"there is an element of making sure the award won't be challenged."* He also thought that *"when it comes to undisputed basic principles of law, that they serve as basic blocks of reasoning: e.g., the VCLT is nearly always cited as a sort of stepping stone to start an argument on treaty interpretation… such references also work as a kind of (written) captatio benevolentiae."*

He then went back to the previous discussion on footnoting and formatting and that it reminded him of the *"monument of arbitral cautiousness"* found in one investment award, which stated:

"The Tribunal's use of one Party's terminology is without prejudice and in no way reflects the Tribunal's understanding of a particular issue. Rather, effort has been

[26] Damien Charlotin, *"Authorities" in International Dispute Settlement: a Data Analysis* (2020) (Doctoral Thesis, University of Cambridge) (on file with the Cambridge Repository, University of Cambridge). Available at https://www.repository.cam.ac.uk/handle/1810/312324

made to use consistent terminology throughout this Award to facilitate understanding. Likewise, the order in which the references are presented is not a reflection of a particular source's value in the eyes of the Tribunal. Instead, effort has been made to format the footnotes consistently."

To conclude his contributions, **Dr. Charlotin** shared that when one had to defend his formatting decisions, then *"maybe things are going too far."*

Dr. Strong relayed that she had experienced sitting as an arbitrator on matters that she was *"absolutely sure are going to be challenged"*, and that she has *"undertaken similar efforts to ensure the award is challenge-proofed."* To quote:

> *"In my case, it led to an exhaustive discussion both of jurisdictional issues (despite the fact the matter made it to me after two court orders) as well as a more in-depth analysis of law and fact demonstrated in the papers than I normally would have undertaken. In that case, I was not writing for the losing party - which is often what judges and arbitrators do - but for the reviewing court. The award was indeed brought for confirmation and was indeed upheld. I felt vindicated, though I shocked the arbitral institution with the length of the award..."*

Dr. Strong also shared that her book, "*Legal Reasoning in Commercial Disputes*"[27] contained interview and survey data on who arbitrators and judges believed they were writing for, as well as empirical data on how often arbitrators and judges used different types of law, various evidence, and the level of depth needed. She described the data to be *"fascinating and shows relatively little difference between judges and arbitrators in broad-brush measures, though some small distinctions."* She also shared that the book discussed the *"relative length of awards and judicial decisions in different jurisdictions (UK, US, and Canada) for domestic and international disputes."*

Participant **Mr. Joseph M. Matthews**[28] commented that he found the contributions of **Dr. Charlotin** to be fascinating. He shared that *"as a longtime proponent of brevity in written (and oral) advocacy, the data he references are completely counter to my assumptions and to my teaching. Thank you for challenging what I have not previously questioned."*

He also added the following comments:

> *"As a longtime proponent of brevity in written (and oral) advocacy, the data he (**Dr. Charlotin**) references are completely counter to my assumptions and to my teaching. Thank you for challenging what I have not previously questioned. Forgive me if I offer a comment to the group that is slightly off-angle, but my strong support for brevity in connection with lawyer advocacy has been based not only on effective persuasion, but also on speed and cost, which in turn impact access to justice. I have (perhaps inappropriately) equated delay and excessive cost to advocates who make massive submissions to obsessively insure they touch every possible issue rather than exercising the judgment to identify truly critical issues, and to decision-makers (judges and arbitrators) who feel the need to write massive tomes to support their decisions. I have*

[27] S.I. Strong, *Legal Reasoning in Commercial Disputes* (2020, Oxford University Press).
[28] Joseph M. Matthews, P.A is an advocate and an arbitrator. He currently serves exclusively as an arbitrator to domestic American and international commercial disputes.

perhaps unfairly criticized both in the past for a lack of courage to make judgments that are critical to effective advocacy and decision making.

In the past few years I have, as sole arbitrator, authored several of the longest awards of my career and, as a panel member in several others, participated in lengthy awards, that would have embarrassed me not long ago. I want to suggest a possible explanation for this that does not necessarily mean I no longer care about the cost of delivering arbitral dispute resolution (It is entirely possible that I have lost some courage, or at least developed greater humility in my judgments).

I rarely utilize case secretaries and I am a sole practitioner now so I have no juniors to assist me when I author an Award. However, information technology assists me greatly, without increasing significantly the cost of my drafting.

*Michael's (**Mr. Nolan**) story about his mentor who shares computer monitors with associates and collaboratively develops persuasive memoranda, reminded me of something I now increasingly request from advocates. I regularly invite them to "help me write the award you want me to enter for your client." I am inviting them to submit briefs (I routinely ask that they include Word versions from which I can easily cut and paste sections) that include the logical syllogisms (Major premise – legal principle with authority; Minor premise – application of facts to legal principle; Conclusion – resolution of issue) I can use to support the conclusions essential to my awards.*

As advocates have increasingly done what I request, I have increasingly cut and pasted these segments from opposing submissions and reached my conclusions by including both and then choosing or modifying the ones I think most persuasive. I believe that I am more able to address a larger number of issues, authorities, facts and arguments today in a single award than I was able to address just a few years ago. It is not only that the technology is so much better (though I think it is). I am also more comfortable incorporating it into my decision-making process. I almost always begin the process of drafting the award BEFORE I have decided the outcome. I think I was one of Stacie's contributors and I think I shared that with her. I now regularly draft sections of an award that reach a conclusion and then abandon that conclusion because I am not convinced by what I have written (or cut and pasted from an advocate's submission).

I have not analyzed the actual costs in specific cases, which are hard to compare, but my gut tells me that I am not charging significantly more than I did in the past for cases that go to final award, even though the length of my awards is clearly increasing.

*As 'advice' to young advocates, I am not ready to abandon my long-held view that great advocacy does not stretch the attention span of decision-makers. To the contrary, I still think a beautifully chosen "le mot juste" is the essence of great advocacy. However, Damien's (**Dr. Charlotin**) statistics have shaken my conviction and I will need to adjust."*

And with this, the second part of the Symposium concluded.

Speaker 3: Dr. Crina Baltag, Stockholm University - Topic: *Cross-Border Issues involving Written Advocacy*

Dr. Strong opened the third part of the Symposium by introducing the third panelist, **Dr. Baltag**.

Dr. Baltag referenced back to **Mr. Kantor**'s earlier contributions which referred to arbitrators and the decision-making process. To quote: *"Arbitrators are complex creatures. That complexity is magnified when there are three members of a tribunal who must seek to reach a common result."*

According to **Dr. Baltag**, *"Culture is one of the cross-border elements which has (significant) impact on this decision-making process: in the way arbitrators think and act, and in the way a culturally diverse arbitral tribunal interacts and deliberates."*

She quoted that Won Kidane, in his book on "*The Culture of International Arbitration"*[29], explained that culture in international arbitration was an *"underappreciated variable*." She also compared how **Dr. Karton**, in his book on "*The Culture of International Arbitration and The Evolution of Contract Law"*[30], highlighted that *"(a)n explanation of arbitral decision-making that does not at least acknowledge cultural realities cannot hope to be complete."*[31]

Dr. Baltag shared that, *"Cultural diversity in international arbitration is certainly something that should be celebrated and encouraged. Nonetheless, this diversity brings with it significant challenges. As Jan Paulsson once explained, "[t]he effect of cultural differences on perceptions of the legitimacy of the international arbitral process as a whole is ... a matter of fundamental importance."*[32] She also presented a disclaimer that her discussion will not address the selection of the arbitrators or that of the counsel although the said process plays an important part in the overall discussion of the impact of culture on arbitration.

Dr. Baltag then proceeded with the main part of her discussion:

> *"**1. Cultural Diversity: What We Need To Know***
>
> *There is a wealth of literature addressing culture and dispute resolution, culture and (contract) negotiation, culture and business, etc. I started paying attention to culture while studying for my master degree in International Business (an MBA with international focus), where their focus was on cross-border commerce, products and disputes. It became clear to me that counsel acting in any field involving cross-border issues must understand culture, be it of the opposing side, or when framing a contractual arrangement, or of a product, of the place where the contract is performed, of the arbitrators, of various national courts and so on.*
>
> *What is culture? Oxford Dictionary defines 'culture' as "the customs and beliefs, art, way of life, and social organization of a particular country or group". It is thus*

---

[29] Won L. Kidane, *The Culture of International Arbitration* (2017).

[30] Joshua Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (2013).

[31] *Ibid.*

[32] Jan Paulsson, *Cultural Differences in Advocacy in International Arbitration,* TDM 1 (2011), www.transnational-dispute-management.com. Available at https://www.transnational-dispute-management.com/article.asp?key=1649.

accepted that 'culture' includes values, rituals, and symbols, and there are, of course, different layers of culture: national, regional, gender, generation, social, and even organizational culture."

Dr. Baltag then referred to the following works in understanding culture and how it can become relevant to law, and included short descriptions of each one:

1. *"Geert Hofstede: his book on Cultures and Organizations. The Software of the Mind (https://www.amazon.com/Cultures-Organizations-Software-Mind-Third/dp/0071664181), a bestseller, has shaped the understanding of culture in cross-border settings. (and more recently, https://www.hofstede-insights.com/).*
2. *Hofstede's Dimensions, power distance, collectivism vs. individualism, femininity vs. masculinity, uncertainty avoidance, long-term vs. short-term orientation are useful in particular when trying to understand and resonate with the (diverse) members of an arbitral tribunal.*
3. *Also relevant for written advocacy is Edward T. Hall's distinction between high low context cultures (see The Silent Language[33], The Hidden Dimension[34] and Beyond Culture[35]): (i) high-context cultures (Middle East, Asia, Africa, South America) are collectivist and intuitive and words are not so important as context (including non-verbal communication); while (ii) low-context cultures (North America, Western Europe) are logical, individualistic, and communicators are straightforward and concise.*
4. *Other very useful studies include Jeswald W. Salacuse's Ten Ways that Culture Affects Negotiating Style: Some Survey Results (Negotiation Journal 14, 221–240 (1998)) with interesting findings, such as the attitude towards risk-taking (France, India, China, UK – high; Brazil, Mexico, Spain, Japan - low)."*

Dr. Baltag then continued to the second part of her discussion on how to persuade in a multicultural context. She reflected that *"international arbitration, as already mentioned, will likely see the multicultural setting discussed by Hofstede, Hall, Salacuse and others. What is the influence of culture on the arbitration proceedings, and, specifically, on written advocacy? The immediate answer would be: significant. However, one must also acknowledge that international arbitration has a culture on its own."*[36]

Dr. Baltag then shared more of her reflections in detail:

1. *"Know the audience! It is of utmost importance to know the arbitrators, their culture, attitudes and beliefs, to be able to develop that (flexible) advocacy which will resonate with a (likely) multicultural tribunal. No doubt that a 'good lawyer knows the law, but a great lawyer knows the judge'. Or, as Doak Bishop and James Carter explain, "[a] basic concept of persuasion is that the advocate should understand the motivation of the decision-maker and design the case to appeal to his or her values, attitudes and opinions."*[37]
2. *as such, do not use the same advocacy style you use in domestic arbitration and litigation. For example, in international arbitration, Asian arbitrators may not*

[33] Edward T. Hall, *The Silent Language* (1973).
[34] Edward T. Hall, *The Hidden Dimension* (1990).
[35] Edward T. Hall, *Beyond Culture* (1977).
[36] Joshua Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (2013).
[37] Doak Bishop and Edward G. Kehoe, *The Art of Advocacy in International Arbitration* (2010).

appreciate the forceful, very argumentative, style used by US counsel in domestic litigation.

3. *the fact that an arbitrator comes from a high or low context culture (see above) may have more relevance when it comes to oral advocacy; however, counsel should take this into consideration when drafting the submissions, as unspoken word and circumstances may be given more weight depending on arbitrator's profile.*
4. *counsel should consider the civil law-common law divide (although nowadays, most of international arbitration practitioners are dual qualified) when it comes to, for example, the impact on arbitrator's perceived powers which may mirror (or be understood to mirror) the ones of judges: civil law judges have the power to ascertain the truth, they know the law (iura novit curia), and give full credit to the contradictory debate (see the Prague Rules).*
5. *arbitrators coming from civil law jurisdictions, with an inquisitorial system which relies heavily on written evidence, may appreciate longer and detailed submissions (and their awards may be equally lengthier); conversely, arbitrators qualified in common law jurisdictions may prefer shorter written submissions and have more interest in the oral advocacy – see discussion of yesterday! (see an interesting article on the oral-written advocacy relevance before common law courts: Melissa Perry, The Art of Persuasion through the Written Word in Appellate Advocacy, Adelaide Law Review 28, no 1, (2007), 139-144).*
6. *effective written advocacy means that you speak with (as opposed to 'to') the arbitrators; this may be challenging in a multicultural setting, but certainly not impossible.*
7. *and, do not forget that in a collegiate arbitral tribunal, cultures are likely to interact: in the deliberations, in the administrative issues, in the coffee breaks, etc."*

Dr. Baltag then proceeded to focus more on the common values. According to her, "*Written advocacy is important: this was highlighted by my colleagues in the first days of the Symposium. A written piece of advocacy – the Request for Arbitration and the Answer, respectively – is the first interaction between the parties, and between the parties and the arbitrators. Ultimately, the parties must persuade the arbitrators (on the balance of probabilities or on their full conviction, depending on their legal culture) and prevail in the arbitration. Advocating in a multicultural setting may be challenging, but counsel must also maximize the common points arbitration practitioners share."*

With this, she then enumerated the following advice:

1. *"Language is an important component of culture and English is the lingua franca of international arbitration. This is an important level playing field element. (But always be mindful to the fact that translations will not always convey the full meaning a word has in its original language, and that non-native English (French, Portuguese, etc.) speakers may not appreciate all the nuances of the words used by a native speaking counsel).*
2. *New York Convention, IBA Guidelines and Rules, CIArb guidelines, ICCA taskforces, UNCITRAL Model Law, UNCITRAL Arbitration Rules and institutional arbitration rules, in general, reflect "worldwide consensus on key aspects of international arbitration practice" (see UNCITRAL on the Model Law). Arbitrators sitting in international arbitrations will be well familiar with this common practice of arbitration. Also, other common (and broader) denominators,*

such as private international law/conflict of laws rules and public international law, are also relevant.

3. *International arbitration has created extraordinary personal and professional bonds, probably unparalleled in other areas of law. The spirit of collegiality of the arbitration community can help overcome perceived clashes of cultures. Postgraduate programs in arbitration, and any other qualification programs, as well as the multitude of excellent mentoring programs for young and even more senior practitioners (see RAI), and of initiatives specifically addressing diversity in international arbitration (Arbitral Women, R.E.A.L.) or offering a platform for discussions (as Young OGEMID does), all are telling us that diversity should be celebrated and encouraged. As Won Kidane rightfully summarizes, "[f]ew, if any, legal processes regularly bring together multiple legal cultures into one room as much as international arbitration does."*

Participant **Mr. Christian Campbell** then added his comments to the discussion, and highlighted how the comments of **Dr. Charlotin** against the effectiveness of brevity had also given him *"food for thought."*

Mr. Campbell wondered if the use of moot 'limits' skewed the conclusions. He commented that 9,500 words were *"very few to adequately address the issues of each year's Jessup case; similarly with 16,000 words in the FDI Moot or 35 pages in the Vis Moot (often including a general recitation of facts or allegations in the moot case file). Practically, these limits seem to be more in the nature of 'targets.'"*

Participant **Mr. Michael McIlwrath**[38] also added some comments based on his experiences in teaching and practice:

> *"I've taught legal writing at Bocconi for several years, and here I am taking notes and gathering tips for myself and for my students. That's because writing is a life-long journey. No one is a perfect writer. The more you recognize the importance of writing, the more you enjoy looking for ways to do it more effectively.*
>
> *With that said, some observations from different perspectives.*
>
> *First, an as a long-time in-house counsel: Never take off your lawyer's hat. Advocacy is just one part of being a lawyer. Sometimes, the right thing is to say no to the client.*
>
> *Often you will not see the real merits of a case until you are deep into writing. So, to take an example already discussed, if you see an argument is so weak that it would be better if it were buried in a footnote, you may be doing the client a service by advising them to bury it completely. Most clients will be grateful to get the bad news before wasting a lot of money or being ordered to pay an adverse costs award. I appreciate that not everyone works in an environment that encourages or even tolerates young lawyers pushing back, so this advice is relative to each situation. And yet I can think of many lawyers who built their careers because they knew when and how to stand their ground, and more senior lawyers (and clients) respected them and were grateful for it.*

[38] Michael McIlwrath is the Founder and CEO of M Disputes.

Second, an observation as an instructor of legal writing: Most published materials on legal writing have a particular, domestic legal system in mind. The "exercises book" that I use in my courses is Bryan Garner, Legal Writing in Plain English, which I recommend also for self-study. But I only use about 30% of it with my students, because so much of the book focuses on how to write effectively as a lawyer in the US. And since I teach at an Italian university, I feel I should be preparing my students to be effective international lawyers, not associates at a US law firm.

And, finally, a lesson from Thomas Walde, the founder of OGEMID:

Thomas once told me that he thought the most successful lawyers in international arbitration were those who could tell the story. He said effective writing makes the tribunal want to rule a certain way. This seems obvious but, again, it's harder than it sounds. To the point above, domestic legal writing is often about scoring points on the law or making sure you check the right boxes. For example, an English QC may write that the claim or defense should succeed because, "it's simply black letter English law." But… what if the arbitrators are not English QC's, and instead their legal cultures have strong notions of good faith in performance? This does not mean you ignore the black letter law; it means you also have to tell the story on why applying the law is the right thing to do. I've seen the same argument put forward by professors of civil law who say, "the claim will succeed because of Article 1.234 of the Civil Code", and then they fail to explain why applying Article 1.234 of the Civil Code would be a just result.

*To echo Crina's (**Dr. Baltag**) point about domestic styles, the typical pleadings of many legal systems are frankly incomprehensible to those on the outside. The Indian pleadings, which seem to require a decoder ring with the names of the parties; the Italian memoranda, about which you have no idea of their purpose until the last page; the American answers to complaints that deny paragraphs 13-17, admit paragraph 18, and deny paragraphs 19-25, and so on. Applying these styles (and I've seen far too many examples) are almost always missed opportunities in an international arbitration.*

As Thomas said, you need to tell the story."

Dr. Baltag replied to **Mr. McIlwrath** and expressed that she can only *"resonate"* with his remarks, *"in particular with the one on always wearing the lawyer's hat and the writing process. For arbitrators, it is valid that the writing process is a complex one and often 2:00 A.M. thoughts will shape the best parts of an award, when well involved in deep writing."*

Dr. Baltag also added further readings and links related to culture in arbitration:

1. Kun Fan, *"Localized Globalism"*[39] (2021);
2. Michael McIlwrath, *"The New Year Arbitration Quiz: 2020"*[40] (2019);

[39] Kun Fan, *Localized Globalism* (The Social and Psychological Underpinnings of Commercial Arbitration in Europe, 2021). Available at https://commercialarbitrationineurope.wordpress.com/2021/10/08/localised-globalism/

[40] Michael McIlwrath, *The New Year Arbitration Quiz: 2020* (Kluwer Arbitration Blog, 2019). Available at http://arbitrationblog.kluwerarbitration.com/2019/12/31/the-new-year-arbitration-quiz-2020/

3. Michael McIlwrath, *"New Year's Quiz Answers, Winner…*[41] (2020).*"*

Dr. Strong then commended **Dr. Baltag**'s discussion and how the latter, *"showed that long contributions are sometimes necessary and warranted, especially when they are packed as full of content as yours."*

She added more points:

> *"First, the concept of being aware of the differences between litigation and arbitration styles is critical. The oral analogue is not using your 'big lawyer voice' – i.e. the booming and formal voice used to project in a big open courtroom. Arbitrations are held in conference rooms, and advocates need to be quieter, appropriate to the room. The same needs to be reflected in written submissions - you are not subject to formal litigation conventions (in reference to* ***Mr. Mcilwrath****'s comments), so know your audience and your setting and draft accordingly.*
>
> *Similarly, knowing your audience from a cross-cultural perspective is vital. The high context/low context element is very important, as is knowing the more problematic elements of your own national style. Often you will not appreciate these until you live and practice in another country, though you can ask your colleagues from other jurisdictions about what is said most about your own country. I remember a story (I think on this listserv) about someone who overheard a couple of arbitrators at the Vis, discussing the last presentations. One person said, 'I really disliked team X. They were too loud, too argumentative, too emotive. Very unpersuasive!' The other person said, 'Really? I thought they were very persuasive. I found team Y disappointing - too formal, too quiet, too much focused on the fine legal points.' Of course, the distinction was between a US-style team (team X) and a civil law-style team (team Y). The teams might have been culturally unaware or they might have not known quite what to do because their panel included arbitrators sympathetic to each of their styles (one assumes the first arbitrator was from a civil law perspective and the second from a US perspective). Though the exam comes from oral arguments, the exact same thing is true in written submissions.*
>
> *Something I want to say with respect to telling the story - I think that a lot of lawyers, especially those trained in the US, think that it's all about the facts and emotion. That's not true for all US-trained arbitrators (like me!) and certainly not true about arbitrators around the world. "Telling a story" means putting all the building blocks together in a satisfying manner - making it fit. That can be done without trying to tug at heartstrings or demonize the opponent. Telling the story includes facts, but it also includes the law. So often advocates who try to "tell the story" forget about the role that the law plays. You need both - law and fact - to write a really convincing story for an arbitrator."*

Participant **Mr. Maurice Mendelson**[42] also contributed to **Dr. Baltag**'s discussion, in particular, what she had mentioned on *"2:00 AM thoughts."* He shared:

[41] Michael McIlwrath, *New Year's Quiz Answers, Winner*... (Kluwer Arbitration Blog, 2020). Available at http://arbitrationblog.kluwerarbitration.com/2020/01/15/new-years-quiz-answers-winner/

[42] Mr. Maurice Mendelson Q.C. is a consultant moderator at OGEMID.

> *"I distinctly remember when I was in a case in the ICJ when I worked for 18 hours on the first day, 20 on the second and 18 on the third, and then at breakfast said to one of my distinguished and more senior colleagues than I had suddenly thought of an argument which would win the case. He replied, "Maurice, that is the sort of idea that one gets at 4 o'clock in the morning!" And he meant that kindly, but not in a positive way!"*

To add to **Mr. Mendelson**'s comments, **Dr. Strong** brought up another empirical tidbit:

> *"Studies have shown that people do NOT write better when they are pushing up against a deadline - the whole idea that the adrenalin of the deadline makes for better and more focused writing is just empirically wrong. I was mentioning this to one of my colleagues at my old institution, a former Supreme Court journalist and someone who is very interested in the topic of legal writing. He agreed completely - except for when it came to him. He, he asserted, did write better on a deadline.*
>
> *Two things come from that story: First, "blind spot bias," where you see shortcomings in others but not yourself, is alive and well among lawyers. Second, waiting until the last minute will not improve your writing. When I was at my last firm, I was renowned - along with another senior partner - for finishing my submissions days in advance. I then let the document sit a few days - excellent for revision, although I often didn't end up revising anything before submitting the document at the appropriate deadline. There is no rule that says you have to push your drafting until the last minute. Do it early, do it well and then let it go, even if you have several additional days in your schedule. The last minute-futzing is not always beneficial, as Maurice's example suggests. Your clients will also appreciate the cost savings and lack of last-minute stress. Instead, you will look - and be - highly professional."*

Mr. Nolan also added the following to **Dr. Baltag**'s discussion and to the subsequent comments it received:

> *"Cross-examination can highlight the diversity of legal cultures among and between even common lawyers. Many US lawyers are trained to do what can be done well on cross-examination and to be rigorous about not trying to do anything else. They may for that reason avoid "risking their case" by asking a question that may elicit an unwanted answer to a hostile witness, even when that means that Stacie's "storytelling" for the decision-maker will be limited/distorted during a particular witness examination. In contrast, for common lawyers from some non-US jurisdictions, it is fundamental to "put the case to the witness", meaning that "fairness" - and thus effectiveness at least to the eye of a decision-maker sharing the same legal culture - means that questions the examiner might not want to ask nonetheless are asked.*
>
> *In international arbitrations, these two different legal cultures can be on display, sometimes in the same case, and sometimes before tribunals made up of arbitrators from neither legal cultures."*

Mr. Kantor then shared:

> *"At the risk of pointing out an issue parochial to many US-trained counsel, due to the nature of the US judicial system, US attorneys often learn how to cross-examine witnesses at pre-trial depositions as part of the idiosyncratic US discovery process.*
>
> *Depositions of a witness can, under many US court rules, continue for as long as seven hours. Usually, no judge or magistrate supervises the deposition. The "audience" for the examination is the transcript, which is used inter alia for information, for admissions by the witness against interest (if any), and as possible impeachment material at the later trial.*
>
> *The witness being examined at the deposition may maintain a narrative or answer different from the narrative or answers preferred by the examining counsel. Because there is no supervisory judge at the deposition to keep the process moving during those many hours, US-trained attorneys learn to ask the same question repeatedly, perhaps varying the way they ask the question, to try to get the witness to agree with the attorney's preferred narrative.*
>
> *Attorneys who learn that approach to examining a hostile witness may, in my experience as an arbitrator, carry that examination approach towards questioning over into an arbitration hearing in an effort to get the witness to agree with the attorney's preferred narrative.*
>
> *However, the "audience" at the hearing is usually the arbitrators, not the transcript. Arbitrators are human (despite rumors to the contrary). The constant repetition of narrative question and opposing narrative answer becomes wearying to tribunals, and can cause the tribunal members to become impatient with the persistent attorney who refuses to move on unless and until the recalcitrant witness concedes to the attorney's narrative.*
>
> *So, for US-trained attorneys, the lesson is to remember that (a) arbitration hearings are not depositions, (b) the audience in an arbitration is the tribunal, not the transcript, and (c) repetitive questioning on the same issue of a witness with a firmly-held contrary narrative can cause the tribunal to become frustrated with an attorney who carries on the repetitive questioning beyond a reasonable time.*
>
> *Repetition does have advocacy value, but over-repetition can backfire on the counsel. Deciding when it is time to rely on the arbitrators to understand your preferred narrative and move to the next point requires understanding your audience on the tribunal.*
>
> *I suggest the same point applies to written advocacy, not just oral advocacy."*

With this, the third part of the Symposium concluded.

Speaker 4: Ali Yeşilırmak, İbn Haldun Üniversitesi Rektör Yardımcısı - Topic: *Effective Legal Writing*

Dr. Strong opened the final part of the Symposium by introducing the last panelist, **Mr. Ali Yeşilırmak**[43].

Mr. Yeşilırmak shared some advice on effective legal writing during various stages of an arbitration.

He began his discussion on the what's and how's during the early stage of arbitration.

According to **Mr. Yeşilırmak**, one must, *"get all information and documents regarding the dispute before taking any steps. For this purpose, all relevant correspondence."* He gave examples of such information to be e-mails and WhatsApp messages. He said that messages should be reviewed, and all the witnesses should be interviewed too. He advised that in acquiring such information and documents, it would generally be useful to meet with the relevant people involved, and interview them more than once. He added that *"In some cases, preparation of the full file for application for arbitration and using it as a negotiation tool may assist to settle the dispute through negotiation. It is highly sensitive to use this technique. It is imperative that one should not be seen or taken as a threat."*

He then continued his discussion to the application stage of the arbitration.

Mr. Yeşilırmak relayed that *"it is generally considered that submitting a very detailed notice of arbitration could be considered as a dangerous exercise given that the facts and legal bases of the case are frozen early on, without the possibility of adjusting the position later on. To this end, the golden rule would be: the shorter the notice, the safer and the better."*

He added that *"on a couple of occasions, when the cases were not complicated and (he) was sure that (he) had all facts in the file and had a very strong case, I had very lengthy notices of arbitration with the aim of settling the disputes at an early stage of arbitrations. I should confess that such strategy was fruitful on the above occasions!"*

Further, *"in some cases, preparation of the full file for application for arbitration and using it as a negotiation tool may assist to settle the dispute through negotiation. It is highly sensitive to use this technique. It is imperative that one should not be seen or taken as a threat but should rather be softly used as a negotiation tool.*

Finally, **Mr. Yeşilırmak** talked about what to do during the proceeding itself.

Mr. Yeşilırmak advised to *"make a cost-benefit analysis and prepare your written advocacy strategy accordingly."* The counsel should be prepared to develop his or her strategy in considering the submissions and evidence provided by the counter-party. According to **Mr. Yeşilırmak**, *"in arbitration proceedings, each party tells a story of its own. Such stories are*

[43] Ali Yeşilırmak is an independent arbitrator, mediator, a vice president and a professor at Ibn Haldun University Law Faculty, and a visiting lecturer at the School of International Arbitration, CCLS, Queen Mary College; University of London. He acts as advisor to the Finance Office of the Turkish President. He has served as an arbitrator and counsel in several ad hoc and institutional arbitrations. He is listed as arbitrator in the Permanent Court of Arbitration and of the Chinese International Economic and Trade Arbitration Centre. He is a member of the Court of Arbitration and Mediation at the Istanbul Chamber of Commerce (ITOTAM).

generally based on facts. Thus, establish the facts and link them with the required norms of the applicable law." One should tell his story as simple as he could as, *"it would make it easier for arbitrators to grasp the story of your side."*

Dr. Strong then asked **Mr. Yeşilırmak** to elaborate on the cost-benefit analysis which he referred to in his discussion. She inquired as to what sorts of issues were being weighed at, or considered.

Dr. Strong also posed another question as to what **Mr. Yeşilırmak** can advise when the fact or law of one's case was quite complicated, or when one needs to educate the arbitrator about a specialty area of law. **Dr. Strong** added that *"simplicity may be beneficial, but it obviously has to be weighed up against completeness and accuracy",* She also asked how young practitioners can make such a determination.

Mr. Yeşilırmak responded to **Dr. Strong**'s questions as follows:

> *"As to the cost-benefit approach the test is rather simple: less is more: unless it is helpful to your case (for instance, directly related to your story and/or legal analysis), skip unrelated or irrelevant facts and/or arguments.*
>
> *As to the simplicity versus completeness and accuracy in submissions, they all can be done in a sensible way. Submissions should focus on relevant facts and legal arguments avoiding irrelevant facts, arguments, witness statements, etc. It would also be useful to avoid (full) repetitions in the same and/or various submissions although references for reminding important points could obviously be done."*

Dr. Strong concluded the Symposium by thanking the panelists for taking the time to share their knowledge and insights with the participants.

Transnational Dispute Management is a peer-review online journal publishing about various aspects of international arbitration with a special focus on investment arbitration.

This article was made available as a free download from www.transnational-dispute-management.com/.

Young professionals and students with an interest in transnational disputes, international investment law developments and related issues, are hereby invited to join the Young-OGEMID discussion group. Membership is free.

Simply visit www.transnational-dispute-management.com/young-ogemid/ and fill in the registration form. Other summaries of our Young-OGEMID virtual seminars focussing on career development can also be found there.