ICC International Court of Arbitration 100 years

ICC Dispute Resolution Services

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Message from the President

Claudia Salomon
President, ICC International Court of Arbitration

Throughout the Centenary of the ICC International Court of Arbitration, we have taken this opportune time to reflect on our pioneering role in shaping dispute resolution over the last 100 years. Most importantly we are recommitting to the purpose of the ICC Court to promote access to justice and the rule of law. But what does the future hold?

With the launch of our Centenary, the ICC issued a 'Declaration on Dispute Prevention and Resolution', setting out 10 guiding principles for the future of dispute prevention and resolution.[1] Given the rapid developments in cutting edge technologies, I will highlight Pledge 7 in which we pledge to amplify the benefit of the digitalised economy and leverage technology to deliver efficient and pioneering dispute prevention and resolutions services.

So where do I see technology changing the future of dispute prevention and resolution?

I agree with Sundaresh Menon, Chief Justice of Singapore and Member of ICC's Governing Body on Dispute Resolution Services,[2] that artificial intelligence (AI) will both:

- shape the expectations that people have for assessing dispute resolution services, and
- create an opportunity to shape our services to advance access to justice.

At ICC, we are focused on both sides of that coin.

We are already in the midst of transforming how parties and other stakeholders access our services with the launch of 'ICC Case Connect',[3] which now enables more streamlined communication and file-sharing among parties, the arbitral tribunal, and case management teams.

But what about the potential role of AI in arbitral decision making? It is a truism that arbitration is only as good as the arbitrator. What if the arbitrator is AI?

As AI technology evolves at a rapid pace, so do the opportunities that it will present to substitute human decision-making instead of merely enhancing the ability to decide matters quickly and at lower cost.

As we approach this threshold, we must carefully consider and determine whether the lack of a human element in decision-making is acceptable to all those involved and whether AI might undermine trust in the process.

If parties only want a quick way to resolve a dispute, a coin toss is a viable option.

While this simple approach may be acceptable for trivial matters, such as which team gets the ball, or on which end of the field a team will play, a random approach for substantive or significant disputes is typically not acceptable.

Likewise, we would not accept a decision based on a statistical likelihood of liability or culpability. Each person's case should be decided based on the facts and law applicable to that case, free of bias and pre-judgment. A presumption of innocence is a cardinal principle of justice.

Lawyers and the public alike understand that a legitimate system of decision-making requires something more. Procedural justice is an essential element of the rule of law and includes fairness in the process, transparency, an opportunity to be heard, and impartiality in decision-making.

1 ICC Centenary Declaration on Dispute Prevention and Resolution - ICC - International Chamber of Commerce (iccwbo.org)

2 https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon-speech-delivered-at-mass-call-2023

3 https://iccwbo.org/news-publications/news/icc-launches-icc-case-connect-secure-online-case-management-made-easy/

Considering these pillars of justice, AI in arbitration raises five key issues:

1. Bias

Certain groups are often excluded from the data, or there is a lack of diversity in the data – what Dr. Joy Buolamwini, who founded the Algorithmic Justice League, calls 'pale male data'.[4] We see this already in the problems with facial recognition software or tools used to scan and select resumes. The insufficiency of the data undermines the fundamental reliability of any tools based on it.

Theoretically, AI-based decision-making could be superior to human decision-making because computers would be immune to cognitive biases or undue influence of extraneous factors. But if the underlying data contains human bias, the technology only repeats and amplifies existing biases in society and ourselves. If we are going to depend on the data to make decisions and have it widely used, we need to know it is not only fast and cheap but also reliable.

2. Opacity

The opacity surrounding what data is actually used and how it works algorithmically raises another concern. If the data is in a black box, which does not reveal any information about its inner workings, and there is a lack of transparency around the data and algorithms – the legitimacy of the entire technology is undermined.

3. Sufficiency of the data set

A mature AI model needs to be provided with large amounts of data so it can conduct a reasonable and informed analysis. However, due to confidentiality arrangements between the parties or under the applicable laws and rules, arbitral awards are not made available to the public in most cases. Will enough data be available for machine learning purposes? This is rapidly changing as the details of arbitral awards become part of the public domain, either through paid-subscription databases or free-of-charge websites.

4. Outdated data

Even with large quantities of new data entering AI algorithms, the essence of machine learning is based on past data. Yet as policies and approaches change, this data may be outdated and not reflect current thinking and considerations.

5. Need for reasoning

An arbitrator must decide the issues in dispute, and that process involves reasoning. Is it possible for AI to reason as required in an arbitral award? Current AI can make predictions based on previously recognized patterns, but is current AI technology able to consider novel legal questions that involve complex facts or legal arguments? Not yet.

AI is a promising tool but currently imperfect. With backlogs in courts globally and the costs of resolving a dispute sometimes prohibitive, will global business – and especially small and medium-size enterprises – accept an AI-generated process, blockchain, or other mechanisms, rather than no process at all? What tradeoffs between robust due process and faster, less expensive decisions will parties accept?

I expect that parties in the not-too-distant future will be able to choose an AI-generated award, or a hybrid award that is AI-generated but human-reviewed, instead of an award completely drafted by humans. But there are still issues to be sorted out before we reach that point, and not all relate to the decision-making capabilities of the technology.

The legitimacy of decisions depends on the parties' trust in the process, grounded in the quality of procedural justice. Otherwise, we will have, at best, powerful and complex technology generating outcomes that parties will not trust as reliable.

4 https://www.wliw.org/radio/news/if-you-have-a-face-you-have-a-place-in-the-conversation-about-ai-expert-says/

Welcome from the Editors-in-Chief

Julien Fouret and Yasmine Lahlou

Dear Colleagues,

The Editorial Board is proud to bring to you this year's last issue of the Bulletin, whose length reflects the vitality of arbitration law and the broadening of ICC activities worldwide. This issue opens with a thoughtful **personal remembrance of William Laurence ('Laurie') Craig**, who passed away in June, by one of his prominent mentees, **Amal Bouchenaki**.

As part of our series celebrating the **ICC Court's Centenary**, we publish the opening addresses to various annual conferences celebrating that milestone: former English Supreme Court judge **Lord Neuberger** addressed the history of the rule of law and international arbitration before the ICC UK Annual Conference; French Justice Minister **Eric Dupond-Moretti** highlighted before the ICC French Committee's Annual Conference the role of the French Legislator and judiciary in the development of France as a leading arbitration centers; and the Vice President of India **Shri Jagdeep Dhankar** opened India's ICC 6th Arbitration Day reflecting on his time at the ICC Court and calling for more diversity among arbitrators. You can also read the reports by **Sara Nadeau-Seguin**, **Rafael Rincón** and **Daniela Walteros** on the 13th World Chambers Congress dedicated to 'Achieving Peace and Prosperity through Multilateralism'.

Global Developments opens with two decisions by the **US** Supreme Court: **Diogo Manuel Pereira** comments on the ruling on the automatic stay of proceedings pending an appeal against the denial of a motion to compel arbitration, while **Carlos Ramos-Mrosovsky** and **Mary Kate Wagner** discuss the availability of a civil racketeering claim against parties evading the enforcement of a foreign award. Staying in the Americas, **Diego Rueda** and **Gonzalo Salazar** walk us though the recent bilateral investment treaty between **Colombia and Venezuela**. From Asia, **Mansvini Jain** analyses how **Indian courts** have treated foreign entities in consortium with Indian companies in the arbitration context; **Fakhruddin Valika** celebrates a recent ruling enforcing a foreign award as the confirmation of **Pakistan**'s pro-arbitration policy; and **Margaret Joan Ling** explains how **Singapore courts** balance confidentiality and the publicity of court proceedings in arbitration-related cases. In **Europe**, **Sokol Elmazaj** gives us an overview of **Albania**'s 2023 comprehensive arbitration statute.

In **Practice and Procedure,** ICC Court Members **Affef Ben Mansour, Olivier Caprasse, Éamonn Conlon, Giuditta Cordero-Moss** and **Alejandro Escobar** share their views on the thorny issue of the applicability of ***jura novit curia*** in international arbitration. **Aníbal Sabater** developed a series of **optional provisions for the Terms of Reference and Procedural Order No. 1** – a useful tool and checklist to assist practitioners confronted with the diversity of arbitration proceedings.

The **Commentary** section opens with editorial board member **Angeline Welsh**'s review of the proposed reforms of the **English Arbitration Act**, a process likely to be completed in 2024. **Galo M. Márquez Ruiz** analyses the various problematic provisions found in arbitration clauses inserted in the terms and conditions of **digital platforms,** which many of us agree to but never read.

Recent **ICC DRS Activities** include **Dr. Aline Tanielian Fadel** and **Christophe Dugué**'s summary of the joint conference between **ICC and the Union of Arab Banks** in May, addressing the suitability of arbitration as a means to resolve financial disputes, especially in the context of Islamic finance and in smart contracts. **Diane Peng** and **Yvonne Mak** report on the **8th ICC Asia-Pacific Conference**, which took place in June after a three-year hiatus. **Suraj Sajnani** attended for us the '**Tech Disputes and Arbitration'** event, which took place in August. Finally, **Priscilla Villa Nova** summarises the content of the impressive **ICC Institute Training on Complex Arbitration**, which took place in New York in September, on the eve of the ICC New York Conference.

Our first **Book Review** is by **Daniel Schimmel** and **Jose M. Garcia Robolledo**, who have read for us Chris Seppälä's clause-by-clause commentary of the FIDIC Red Book Contract. This is followed by Professor **George Affaki**'s review of the second edition of Dr. Gordon Blanke's commentary of arbitration law in the UAE. **Lucas de Medeiros Diniz** reviews, in French, Aécio Filipe Coelho Fraga de Oliveira's book on the enforcement abroad of arbitral interim measures. Last but not least, **Florian Renaux** offers us his lively take on the exceptional trajectory of the Honorable Charles Brower, who has recently published his memoirs.

In Memoriam William Laurence Craig (1933 – 2023)

Amal Bouchenaki
Partner, Herbert Smith Freehills, New York, Latin America Group

The international arbitration community lost William Laurence (Laurie) Craig on 30 June 2023, just a few months before his 90th birthday. Over a career that spanned 50 years and started in the late fifties (before international arbitration as we know it), Laurie Craig has been widely recognized as a key actor in the creation of the private system of international adjudication that exists today, for both commercial and investor-state disputes.

The list of 'leading lights in the field' who contributed to his 2015 *Liber Amicorum* is a telling snapshot of the many eminent practitioners, judges, and scholars who benefited from Laurie Craig's knowledge, wisdom, strategic thinking, and mentorship.[1]

Michael Reisman, a long-time friend of Laurie, described international arbitration as a system which 'invention, maintenance, and through time … adjustment has always been assigned to the custody of the private bar', described as 'a small group of a distinguished practitioners'.[2] Among them, Professor Reisman wrote, Laurie Craig stood out as '*primus inter pares*'.

A Williams College and Harvard Law School ('57) graduate, and a U.S. Navy Captain,[3] Mr Craig, as we all called him for some time before we felt we could start referring to him as Laurie,[4] started his legal career as a lawyer in the U.S. navy, then an associate at Covington & Burling in Washington DC, before joining Coudert Brothers, which name in Paris was Coudert Frères. At Coudert, Laurie built a legendary arbitration group that attracted to Paris generations of young graduates from all continents, all legal systems. Laurie Craig discovered the value of diverse teams decades before diversity became a slogan. He once credited the fact that he valued the strength of diversity of backgrounds in his team to his experience in the navy, attributing some of the successes of the U.S. navy to its ability to federate diverse individuals and profiles to put their best toward the achievement of a common goal. Inspiring team members to be at their best was a talent Laurie Craig mastered to perfection.

Alongside William (Rusty) Park and Jan Paulsson, he co-authored three editions of one of the seminal books on ICC arbitration, which puts ICC practice in the perspective of international commercial arbitration more generally.[5] The book captured many of the practices he and his team had pioneered. But you would not know this simply speaking to Laurie. As one of the grunt workers on the third edition of 'International Chamber of Commerce Arbitration', I had to discover for myself that he and his team were at the root of many of the cases I was researching for the book. It was 'the first comprehensive book on the rules of a major arbitration institution'; '[l]egend has it that Laurie conceived the book in 1980 while flying home to Paris after counselling a client in Dubai'.[6] It was only logical that, a few decades later, he went on to co-chair the drafting committee for what became the 2012 revision of the ICC Arbitration Rules, which laid the ground to their modernization.

An American lawyer by training, Laurie Craig never sought to implement in a mechanical way processes imported from his home jurisdiction. Nothing about Laurie's thinking process was mechanical. After a few years practicing in France, he obtained a PhD in French private international law from *Université Paris II Panthéon Sorbonne*, under the direction of another legend, Berthold Goldman. Laurie never stopped deepening his understanding and reflections on the legal and procedural systems that intervene in international adjudication. Armed with exceptional knowledge and thoughtfulness, Laurie tackled issues from a multitude of angles, which made him a formidable strategist, displaying highly effective and precise advocacy.

1 Preface to *Liber Amicorum en l'Honneur de William Laurence Craig* ('*Liber Amicorum*') (LexisNexis, 2016), Michael Reisman, pp. XVII, XVIII, at XVIII.

2 Id. at XVIII.

3 Alison Ross, 'Laurie Craig 1933-2023' (GAR, 30 Aug. 2023).

4 Jan Paulsson, 'Laurie Craig: Reflections on Mentorship', *Liber Amicorum*, pp. 265-274, at 266.

5 Laurence Craig, William Park, and Jan Paulsson, *International Chamber of Commerce Arbitration* (Third ed.) (Oxford University Press, 2000).

6 Wiliam W. Park, 'Challenging arbitral jurisdiction: the role of institutional rules', *Liber Amicorum*, pp. 231-273, at 231.

His intellectual curiosity seemed infinite. He corresponded and exchanged views with many other leading luminaries in the field, always grateful to receive well-developed view-points, even those, or should I say, especially those he did not share. As an arbitrator, he almost never dissented and yet, he showed great interest for Judge Brower's positions about the value of dissents in international arbitration.[7] He was not a proponent of the need for consistency in investor-state awards, and saw value for both investors and states in a system of bespoke treaty awards, to be interpreted in light of their own facts and specific treaty language. Laurie pondered carefully the calls for more consistency in investment treaty arbitration. Always considerate with adversaries, he mastered the balance between fierce advocacy and respect for opponents. The integrity and rigor with which he conducted himself as counsel and arbitrator personified the guidelines of conduct for arbitrators and counsel as they continue to develop today.

But beyond his standing as a pioneering figure and leading advocate and adjudicator in international arbitration, Laurie Craig left his mark as a unique mentor and friend, who, alongside Penny, his wife and intellectual partner in life, empowered many practitioners and scholars in the field of international adjudication.

The late Marc Lalonde wrote that when asked to advise young lawyers about how to become arbitrators, '[he] could not resist saying: "Pray that you will meet a Laurie Craig on your way!".'[8] Those of us who have will be forever grateful.

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7 Charles N. Brower, Michael Pulos, Charles B. Rosenberg., 'So Is There Anything Really Wrong With International Arbitration As We Know It?', 6 *Contemp. Issues in Int'l Arb. and Mediation: The Fordham Papers*, 1, 7-9 (2012).

8 Marc Lalonde, 'Some reflections', *Liber Amicorum*, pp. 181-183, at 183.

History of Rule of Law and International Arbitration

Lord David Neuberger

Lord Neuberger is an English judge who became Master of the Rolls, the second most senior judge in England and Wales in 2009 following his service as Lord of Appeal in Ordinary. He then served as President of the Supreme Court of the United Kingdom (2012-2017), He now serves as a Non-Permanent Judge of the Hong Kong Court of Final Appeal and the Chair of the High-Level Panel of Legal Experts on Media Freedom.

The author expresses his thanks to Lindsay Reimschussel and Deniz Guzel for their considerable help in preparing this keynote address.

Lord Neuberger's keynote address was presented at the ICC United Kingdom Annual Arbitration and ADR Conference 'Promoting the Rule of Law' on 5 October 2023, which celebrated 100 years of ICC Arbitration.

'I suppose international arbitration can be seen as having three principal strands: arbitration between states, arbitration between commercial entities, arbitration between commercial entities and states.

Let me start with **inter-state arbitration**. The notion that arbitration can play an important role in disputes between states is not new. In what is perhaps the foundational work on modern international law, the 1625 treatise "On the War of Law and Peace",[1] Hugo Grotius cited the 5th century BC historian of the Peloponnesian War, Thucydides, as stating that "[i]t is not lawful to proceed against one who offers arbitration just as against a wrongdoer",[2] which suggests pretty clearly that, two and a half millennia ago, the famously quarrelsome Greek city states did not always resolve their disputes by wars, but often submitted their disputes to arbitration.

Moving forward 1,500 years, Grotius also cites a 12th century treaty between the Kings of Castile and Navarre, under which they agreed to refer any disputes to King Henry II of England.[3] As the English King was uncle of one and nephew of the other, one would have thought that these days he would have been conflicted and therefore disqualified – or maybe he gave full disclosure, or maybe the parties thought that the conflicts would cancel each other out.

The idea of arbitration was taken up by the United States and Great Britain in 1794 when they entered into the Jay Treaty which established Commissions to settle outstanding disputes between the two countries following the U.S. War of Independence. Over the next decade, the Commissions issued over 500 awards, a number of which identified the precise location of the Canada-US border.[4] And three-quarters of a century later, in 1872 the two countries agreed to arbitrate a claim by the U.S. that Britain had violated its duty of neutrality by building ships for the Confederacy during the U.S. civil war, and this ended in an award of US$ 15.5 million in favour of the U.S. which was honoured by the British.[5] Three years later the Russian Tsar Alexander II acted as sole arbitrator in a dispute between Peru and Japan,[6] arising from the Japanese courts impounding a Peruvian ship carrying kidnapped Chinese slaves.[7] Somehow, I cannot see any states today, other perhaps than Belarus, agreeing to an arbitration with Mr Putin as sole arbitrator.

Around this time, there were many who supported the setting up of a permanent international arbitration court, to avoid the effort of setting up *ad hoc* tribunals who would then be unclear as to the applicable law. This led to the formation of the Permanent Court of Arbitration (PCA) under the 1899 Hague Convention. One of its early cases was the 1906 *Dogger Bank* case, which arose when the Russian fleet, on its trip three-quarters' way round the globe only to be destroyed by the Japanese, attacked British fishing vessels in the North Sea in the mistaken belief that they were Japanese torpedo boats. The Russian defence of mistake was rejected on the facts.[8] However, the PCA was ultimately only a facilitating body, not a permanent court of judges. A Permanent Court of International Justice was founded by the 1919 Paris Peace Conference, but it foundered with the onset of World War II.

1 H. Grotius, *De Jure Belli ac Pacis Libri Tres* 1646.

2 Ibid, Book II, chap xxiii, sec 8 and Book III chap xx, sec xlvi-xlvii.

3 M. O'Connell and L Vanderzee, *The History of International Adjudication Part 1, Chap 3 in The Oxford Handbook of International Arbitration*, C Romano, K Alter, L Vanderzee (eds.).

4 Supra note 3, Part 2.

5 Ibid. *The Alabama Arbitration*.

6 The *Maria Luz* case – AM Stuyt 'Survey of International Arbitration' no 104 (1990).

7 https://en.wikipedia.org/wiki/Mar%C3%ADa_Luz_incident Against the prevailing views of most other countries (except the UK), the Tsar found in favour of Japan.

8 M.W. Janis, *The International Courts for the Twenty-First Century* (Brill, 1992).

Following the setting up of the United Nations, the International Court of Justice (ICJ) was founded, with its 14 judges on nine-year terms. It is not perfect, not least because its jurisdiction is limited to actions by and against states, and states can elect whether to be subject to its jurisdiction – and the permanent members of the UN Security Council can veto enforcement of its rulings. And much more important for global commerce is the World Trade Organisation's Settlement Body, which decides more inter-state disputes than any other tribunal.

In what seems to be an increasingly fractured international scene, the prospects of more universal or global arbitration rules, arbitration laws, and arbitration tribunals appear dim, but let's hope that that slightly gloomy observation turns out to be pessimistic.

As to **arbitrations between commercial entities**, as the late Lord Mustill has pointed out "[a]ll trade potentially involves disputes, and successful trade must have a means of dispute resolution", and therefore some form of arbitration-type resolution has existed for thousands of years.[9]

Although arbitration was being used to resolve commercial disputes in Britain, it was pretty defective by modern standards until the 19th century. Either party could revoke its commitment to arbitrate, neither party could stop the other party litigating, and awards were hard to enforce.[10] As the industrial revolution gathered pace, the detrimental effect of these defects on trade led to a series of statutes which got rid of these problems, so that by 1854, arbitration law in the UK was reasonably coherent. However, until the First World War, arbitration in the UK, as in other countries, was a very domestic affair. The growth in international trade and the economic and political benefits of encouraging more growth was reflected in the formation of the ICC in 1919, with its aim of 'serv[ing] world business by promoting trade and investment, open markets for goods and services', and the creation of its Court of Arbitration four years later.[11] Other institutions followed, including trade associations which developed their standard forms of arbitration agreement for parties contracting in a particular trade, and arbitration institutions, such as the Hong Kong International Arbitration Centre (HKIAC), and the Singapore International Arbitration Centre (SIAC), and hybrid organisations such as the World Intellectual Property Organisation (WIPO).

So far as the substantive law of commercial arbitration is concerned, writing in 1988, Lord Mustill referred to the recent "flurries of legislation" in various countries resulting in statutes which "seem to have practically nothing in common".[12] Since then, many countries, including the UK, have enacted further arbitration legislation, and while there are significant differences between different countries, there has been a general and beneficial tendency to converge and learn from each other. In the UK we had the 1996 Arbitration Act, which introduced a new, coherent structure aimed at reflecting modern best practice, and now 27 years on, the Law Commission of England and Wales is currently proposing some relatively small, and generally sensible amendments to that Act, reflecting developments and problems over the past quarter-century.

And, of course, there have been moves to introduce a sort of universal set of rules relating to arbitration. The most successful has been the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. With 172 signatories, it represents one of the great attractions of arbitration over litigation, but still suffers from the fact that some domestic judges, particularly in jurisdictions where the judiciary is not properly independent, can latch onto one of the exceptions to justify refusing enforcement against a resident entity in circumstances where the exception seems clearly inapplicable. Another attempt at universality which has achieved some success is the 1985 UNCITRAL Model Law and its Arbitration Rules, which is not infrequently invoked; indeed, the Model Law founds the basis of some domestic arbitration statutes.[13]

When I embarked on my legal career nearly 50 years, ago, arbitration was generally thought to have six advantages over litigation, namely privacy, enforcement, tribunal selection, informality, cost, and speed. Not much has changed in relation to privacy, and nothing has changed so far as enforcement and tribunal selection are concerned, but much has altered in relation to informality, cost, and speed.

When it comes to informality, in the hearings themselves, there is no longer much difference between courts and arbitral tribunals, at least in my experience. And when it comes to practice and procedure, it seems to me that there has been an actual reversal of the position 50 years ago: technicalities are, if anything,

9 M. Mustill, *Arbitration: History and Background in International Maritime Arbitration* (1988). See also the magisterial books on the history of arbitration in England by Derek Roebuck, e.g. *Early English Arbitration* (Oxford: Holo Books, The Arbitration Press, 2008).

10 Ibid.

11 https://en.wikipedia.org/wiki/International_Chamber_of_Commerce.

12 See supra note 9.

13 E.g. Australian International Arbitration Act 1974, and also in Canada and indeed Hong Kong.

more, rather than less, important when it comes to arbitration. The growth over the past half century in the concern with procedural correctness in arbitrations is in part attributable to the increasing fetter on appeals on points of substantive law. Losing parties, thwarted in their ability to appeal on a point of substantive law, cast around to find some ground for arguing that there was a procedural flaw or injustice, and run that point in order to quash the award or to resist its enforcement. This in turn leads to parties and tribunal members becoming, at times, positively obsessed with procedure – the so-called due process paranoia.

As to cost, this more elaborate approach to procedure in arbitration inevitably has led to costs increasing. And, as this has been happening during a time when, at least in most common law jurisdictions, judicial control over legal costs has, I suspect, meant that litigation may actually be cheaper than arbitration. There has been an increased awareness of the public duty of judges to ensure that cases do not take up a disproportionate amount of court time, because they have to bear in mind the cost to the public purse and the need of other litigants to get to court. There is also a view that judges have a duty not simply to ensure that a losing party only reimburses the winner's reasonable costs, but also to ensure that neither party spends too much on litigation. Arbitrators get less involved in curbing costs than judges – partly because arbitration is a consensual exercise, partly because arbitrators do not have the public duties of judges, but also, some might think, because arbitrators do not want to upset the parties' lawyers (as they would like fresh appointments).

Many of the points I have made about cost and procedure apply to the third factor – expedition. From initiation of the resolution process to a final tribunal decision, I doubt that there is now much difference between a trial judge and an arbitral panel, as litigation has become (at any rate some people might say) more efficient and arbitration has become more procedurally hidebound. But at least if you are after finality, arbitration has the advantage of no appeals on substantive legal issues – although, if you have been at the losing end of an award which has got the law wrong, you may feel rather differently.

Having discussed international commercial arbitration, let me turn to **arbitrations between state and non-state parties**. The past forty-five years have seen the development and growth of investor state disputes, ISDS, arbitrations, many under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) arising out of bilateral investment treaties, BITs. A BIT is a treaty between two states, under which each undertakes to follow the rule of law in relation to inward investors, who are nationals of the other state, and to submit to arbitration in any case where there is alleged to be a breach of that undertaking. Knowing the rule of law is in force and that there is access to effective tribunals to enforce rights and to identify and compensate for wrongs encourages investment, and many countries enter into BITs to stimulate inward investment.

ICSID is now publishing awards which, provided it does not undermine the attraction of arbitration, I would strongly support as being consistent with the rule of law for two reasons:

- As any law student knows, open justice is a fundamental requirement in any court system, and, as arbitration becomes more and more significant, the argument for openness becomes stronger and stronger.
- Particularly in a common law system, many aspects of the law develop by reference to case-law, and as more and more commercial cases are arbitrated rather than litigated, there is a danger of commercial law ossifying unless arbitral awards are made available like judgments.

But there have been some rule of law concerns expressed about ISDS awards: because an ICSID tribunal can consider the actions of all arms of the state, such a tribunal has power to consider and condemn what it considers are unjustifiable domestic court decisions, even Supreme Court decisions, which have resulted in a loss to a foreign investor.[14] Although tribunals overruling Supreme Courts may appear unsettling to some people, I would suggest that it is an inevitable consequence of an international judicial or tribunal system.

It is appropriate to mention the EU's Court of Justice's decision in the *Achmea* case in 2018,[15] which basically held that BITs entered into between EU member states were unlawful because they could result in arbitral tribunals ruling on an EU law issue without the Court of Justice being able to consider that issue. In my view, the only good aspect of this decision is that it provides some consolation to those who regret Brexit, as it shows that there are some benefits for the UK in having ceased to be an EU member.

14 See e.g. Chief Justice Robert French AC, 'Investor-State Dispute Settlement – A Cut Above the Courts?' (Speech delivered at the Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014).

15 *Slovak Republic v. Achmea B.V.* (Case C-284/16) (ECLI:EU:C:2018:158, EU:C:2018:158, [2018] 2 CMLR 40, and see *Republique de Moldavie (Energy Charter Treaty - Inapplicability between Member States - Judgment)* [2021] EUECJ C-741/19, and *PL Holdings (agreement between Belgium and Luxembourg & Anor - reciprocal promotion and protection of investments - Judgment)* [2021] EUECJ C-109/20.

But let me now turn to address directly a vital point which I have occasionally touched on so far, namely that it is a fundamental aspect of the rule of law that disputes can be resolved by referring them to an impartial tribunal whose decision will be reached by reference to established principles and will then be respected and enforced. Indeed, it encapsulates one of the most important features of the rule of law, namely access to justice.

Although this is a pretty fundamental statement, it may seem to be pretty trite especially when pronounced among a group of dispute-resolving lawyers. However, it is always worth reminding ourselves of the fact that our work in international dispute resolution is not only important for the parties involved in the particular dispute: it also has a wider importance for the rule of law. That reminder is not to tell ourselves how wonderful we are, but it is to help ensure that we remember how important it is that we maintain high standards in our work.

And it is an observation which is worth unpacking in a number of ways.

Why is this observation true? Why do we need access to justice? Well, if disputes are not resolved through competent effective tribunals, nobody knows where they are in their private lives, in their commercial dealings or in their relationship with the state. Even where there are clear laws, if no-one is able to enforce them through an effective tribunal system, they have no value. The strong, the violent, and the dishonest would prevail against the weak, the reasonable and the honourable. Domestically, family, social and work life would fall apart, and businesses would not invest or expand. And internationally, wars would become more likely and cross-border trade would wither.

What does this observation, what does access to justice, involve? It requires (i) laws which are clear, accessible and respected, (ii) a tribunal system (arbitral or court) which is effective and respected, (iii) tribunals which are impartial, honest, expert and respected, (iv) lawyers who are independent, expert, honest and respected to advise and act for parties, and (v) a reliable and respected system for enforcing tribunal decisions.

You will note that in each of those five categories (laws, system, tribunals, lawyers, enforcement), I included the adjective "respected". This requirement reflects the principle that the rule of law not merely requires justice to be done: it also requires justice to be seen to be done.[16] It is no good having a good system if people do not trust it. So when we as dispute resolution lawyers are advising or representing clients, or when we as tribunal members are conducting hearings or issuing decisions, we should always bear in mind the lay parties' perspective. In this connection, there is a substantial body of research which supports the notion that parties' views as to the procedural justice meted out by a tribunal has a profound effect on their respect for and confidence in the ultimate decision of the tribunal.[17]

Connected with this, there is the relationship between domestic courts and arbitration tribunals. The very existence of arbitration can be said to be attributable to a degree of distrust of at least some courts: if potential litigants had faith in courts, why would they want to arbitrate? To an extent this is a fair point. Some countries have a court system whose integrity is tainted; other countries have judges whom the parties do not want to risk trying their cases, and in the international transaction world, neither party may be prepared to trust the domestic courts of the other party. But there are of course many other reasons for preferring arbitration, namely increased party autonomy, confidentiality and enforceability of awards thanks to the New York Convention.

But far from having a competitive or mutually antagonistic relationship, arbitrators and judges have (at least mostly) a friendly and supportive relationship. Thus, as the UK Supreme Court expressly recognised in a case decided two weeks ago, the English judiciary "like many other legal systems, adopts a pro-arbitration approach",[18] which includes favouring:

> "a liberal interpretation of an arbitration agreement in order to respect the autonomy of the parties in determining how their disputes are to be resolved".

This is not only due to the court's respect for party autonomy; it is also convenient for an over-burdened court system to be relieved of a significant number of potentially demanding cases.

As for the relationship the other way, it can fairly be said that the whole arbitration system is ultimately dependent on the courts, and therefore on access to justice and the rule of law. Without an effective court system to enforce their procedural directions and awards, arbitrators would be toothless. In other words, the success of arbitration not only contributes to, but is entirely dependent on the rule of law. And it is

16 See e.g R. Hollander-Blumhoff and. TR Tyler *Procedural Justice and the Rule of Law: Fostering legitimacy in Alternative Dispute Resolution 2011 J Disp Resol 1, passim.*

17 See e.g. *T.R. Tyler Procedural Justice, Legitimacy and the Effective Rule of Law* (2003) 30 *Crime & Just* 283, p 2862011 *J Disp Resol* 1, *passim*.

18 *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32, [45] and [46].

therefore obviously sensible for arbitration to return the compliment and do its not insignificant best to uphold and further the rule of law.

In adopting a "pro-arbitration approach", the UK and other domestic courts are following the legislatures, which in virtually every country have enacted legislation which heavily restricts or prohibits appeals on findings of fact or law made by arbitral tribunals, thereby imposing on arbitration lawyers and arbitrators a particularly heavy responsibility, as any substantive error of law made by a tribunal is unlikely to be put right on an appeal to a judge. To that extent the responsibility of arbitrators can be said to be greater than that of domestic judges, whose decisions, whichever jurisdiction they sit in, are almost always more easily appealable. Of course, the courts still have an important role in correcting procedural injustices in arbitrations, but that is a pretty limited function.

It is not of course just the legal profession, the arbitrators, the courts and the legislators who have a part to play in ensuring that arbitration is conducted in accordance with the rule of law and retains public confidence. The institutions play an increasingly significant role, and they recognise their duty in this connection. Thus, the very first point of the ICC's Centenary Declaration is a statement that it is committed to:

> "ensure access to justice and the rule of law by providing accessible, affordable, predictable and efficient dispute prevention and resolution services to everyone, every day, everywhere".

And other institutions such as the Permanent Court of Arbitration, the World Intellectual Property Organisation, the London Court of International Arbitration or the Hong Kong and Singapore International Arbitration Centres adhere to similar laudable and principled principles.

A final feature of the rule of law when it comes to international arbitration is the increasing awareness of the need for greater diversity in arbitral tribunals.[19] The need for fairness when it comes to selecting members of tribunals who are to mete out justice is self-evident. Also, it is mathematically obvious that the wider the pool the greater the potential quality of the tribunal selected from the pool. And more diverse tribunals, provided they are competent, will engender greater public and party confidence. I am not convinced that diversity on the tribunal will of itself affect the actual outcome, but I accept that it may do so.

The rule of law is close to the heart of any lawyer, and perhaps particularly any judge or arbitrator. It is all the closer in my case as I have the honour of being the President of the British Institute of International and Comparative Law, which unsurprisingly has carried out much work on arbitration topics, e.g. studies in the effectiveness of ISDS arbitrations,[20] and runs seminars on arbitration topics, e.g. the impact of sanctions on arbitrations and reviews on the 1996 Act.[21]

As this is the ICC Court centenary conference, and I am talking about the rule of law, perhaps I could end by identifying one or two projects which the arbitral institutions could consider to help further the rule of law. With a view to making arbitration more effective:

- They could offer guidance to judiciaries to encourage consistent arbitration-friendly approaches when it comes to challenges to, and enforcement of, awards.
- They could consider toughening their rules to enable arbitrators to be more robust and less concerned about due process.
- The institutions could also take steps to encourage courts in countries with backlogs of cases to refer or to encourage parties to refer cases to arbitration, which would often also involve building up a cadre of expert and respected arbitrators.
- Finally, they could play a more proactive part in encouraging diversity.'

19 It is the subject of a thoughtful article - L Hamzi, *Ethnic Diversity in Arbitration: Bridging the Gap in England and Beyond, Chap 3 of International Arbitration in England: Perspectives in Times of Change (2022).*

20 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration (British Institute of International and Comparative Law, 2021).

21 Arbitration (https://www.biicl.org/).

Opening Address - Annual Conference on International Arbitration, ICC French National Committee

Eric Dupond-Moretti, French Minister of Justice

On 16 October 2023, Eric Dupond-Moretti welcomed the participants of the ICC France Annual Conference on International Arbitration celebrating the centenary of the ICC International Court of Arbitration founded in 1923, the cooperation of arbitral tribunals and state courts, and the role of the French legislature and judiciary in the success of Paris as a worldwide arbitration hub.

« Monsieur le Président du Comité national de la Chambre de Commerce Internationale en France,

Madame la Présidente de la Cour internationale d'arbitrage,

Messieurs les anciens présidents de la Cour internationale d'arbitrage,

Chers Maîtres, Mesdames, Messieurs,

Quel honneur pour moi d'être présent parmi vous à l'occasion du centenaire de la Cour internationale d'arbitrage de la Chambre de commerce internationale en France.

Arbitres, avocats, experts, interprètes et professeurs, vous êtes, Mesdames et Messieurs, très nombreux à vous être réunis en cette occasion festive. Votre présence est un signe fort du rayonnement de la Cour internationale d'arbitrage sur la place de droit parisienne et, bien sûr, au-delà de nos frontières. Au nom du gouvernement français, je vous souhaite, à toutes et à tous, la bienvenue !

À travers ces dix décennies que nous célébrons aujourd'hui, la Cour nous invite à nous remémorer les grandes étapes de son histoire. Forte et fière de son passé, elle est désormais prête pour entamer son prochain siècle et relever les défis qui ne manqueront pas de se présenter à elle.

C'est en 1923 que la Cour internationale d'arbitrage de la Chambre de commerce internationale voit le jour. Elle prend son siège au cœur de notre capitale française, Paris. Au-delà de son objectif de régulation économique, la Cour internationale d'arbitrage fut dès cette époque un outil géopolitique avant-gardiste dans l'histoire des relations internationales.

Née au lendemain de la Première Guerre Mondiale, elle s'inscrit dans le souhait, relayé par la toute nouvelle Société des Nations, de développer des outils de résolution des différends qui offriront une alternative crédible à l'usage de la force et des armes.

Il s'agit donc de privilégier le dialogue pour résoudre de manière durable les litiges transfrontaliers, entre entreprises comme entre Etats. Son objectif est ambitieux : « la paix mondiale par le commerce mondial », selon la devise du ministre français Etienne Clémentel, premier Président de la Chambre de commerce internationale.

Et il est vrai que l'accès à un for neutre permettant de régler de façon rapide et efficace les litiges du commerce international est apparu à l'époque comme une condition importante du développement des échanges internationaux et de la croissance mondiale.

Et les mots prononcés par Benjamin Constant à l'époque résonnent encore aujourd'hui :

> Le commerce a rapproché les nations, et leur a donné des mœurs et des habitudes à peu près pareilles : les chefs peuvent être ennemis ; les peuples sont compatriotes.

Effectivement, à l'époque de sa création, le recours à l'arbitrage était conçu comme une manière douce de résoudre les différends entre honnêtes hommes.

La Cour d'arbitrage a ainsi participé au chantier colossal de la construction d'un environnement mondial régulé et efficace pour les entreprises. S'il fallait citer ce soir l'un de ses succès, je citerais son action déterminante dans la signature de la Convention de New York de 1958 permettant la reconnaissance et l'exécution des sentences arbitrales dans la plupart des Etats du monde.

Rapidement devenue l'un des principaux centres d'arbitrage dans le monde, la Cour internationale d'arbitrage va donc superviser la résolution des litiges transfrontaliers, conformément au Règlement d'arbitrage de la Chambre de commerce internationale, tout en s'adaptant aux évolutions et nécessités de son temps.

Car, Mesdames et Messieurs, ne vous y méprenez pas : la Cour d'arbitrage, bien que centenaire, n'a pas une

ride. En témoigne la confiance accordée par les acteurs internationaux à notre Cour : depuis sa création, près de 28 000 affaires lui ont été soumises.

Son activité est plus que jamais florissante :

- elle traite en moyenne 700 affaires par an;
- le montant moyen du litige est de 154 millions de dollars américains en 2022;
- l'affaire la plus importante qu'elle a eu a connaître portait sur un montant de 77 milliards de dollars américains,
- les parties peuvent être nombreuses et les nationalités variées.

Mais pourquoi un tel succès ? Pourquoi une telle place pour l'arbitrage dans l'ordre juridique international ?

C'est indéniable : l'arbitrage permet avant tout une grande souplesse. Il rend les parties maîtresses de la résolution de leur litige. Elles décident des voies de recours ouvertes à la sentence obtenue ou des modalités de constitution de la formation arbitrale, pouvant ainsi inclure un membre appartenant à chacune de leur tradition juridique.

Ce mode alternatif de règlement des différends commerciaux permet aussi de régler des litiges avec une grande rapidité, un avantage majeur pour le monde des affaires. Pour consolider cet atout, la Chambre de commerce international a créé en 2012 un arbitrage d'urgence aux fins d'obtention de mesures provisoires sous un délai de quinze jours.

Puis, en 2017, elle a instauré une procédure accélérée permettant d'obtenir une décision sur le fond en six mois, avec succès. Encore récemment, un grand nombre de praticiens ont salué son efficacité et sa rapidité. Je ne peux que m'en réjouir aussi !

En ce moment-même, sur le plan international, le ministère de la justice s'engage aux côtés de la justice arbitrale en participant activement aux groupes de travail de la Commission des Nations Unies pour le Droit du Commercial International.

Nous partageons avec vous cet objectif commun : offrir aux acteurs du commerce international des procédures efficaces, notamment dans les situations d'urgence.

Réputée être l'institution d'arbitrage préférée au monde, devant les grandes places de New York, Londres ou Singapour, la Cour d'arbitrage parisienne attire aussi grâce à son ouverture internationale. Ses langues de travail officielles sont le français et l'anglais, mais pas seulement. Votre belle institution est polyglotte : espagnol, allemand, chinois, arabe, italien... Toutes les principales langues du monde sont maîtrisées par les professionnels de haut niveau qui y exercent.

Surtout, les opérateurs du commerce international s'emparent de l'arbitrage car ils souhaitent consulter des autorités neutres, indépendantes et de confiance. Or, si ces critères sont pleinement remplis en France, et j'y reviendrai, ils ne sont pas toujours remplis par les juridictions locales de pays tiers.

Lors de votre élection, Madame la Présidente, vous disiez d'ailleurs :

> C'est grâce à nos liens avec la communauté des affaires internationale et au reflet de leurs valeurs que nous sommes considérés comme un véritable partenaire de confiance des entreprises.[1]

Et a raison : votre promotion d'une culture de transparence et d'impartialité est l'un de vos atouts phares.

Cette culture, vous parvenez à la mettre en valeur avec succès dans votre pratique, mais aussi à travers l'organisation de centaines d'évènements annuels à travers le monde. Forts de vos convictions, vous proposez des conférences et des formations à l'arbitrage et à d'autres modes alternatifs de règlement des litiges.

Vous le savez peut-être, je suis moi-même un fervent partisan des modes alternatifs de résolution des différends. En tant que Garde des Sceaux, j'en ai fait ma priorité en lançant la politique de l'amiable afin de rapprocher les citoyens de leur justice.

Mais pourquoi donc le ministère de la Justice serait-il un allié fidèle d'un mode alternatif comme celui de l'arbitrage, me demanderiezvous ? Il est vrai que le tribunal arbitral n'applique pas nécessairement le droit français. Et, même s'il l'applique, il peut d'ailleurs rendre des décisions différentes des juridictions nationales.

Pendant un court instant, certains ont donc pu croire que le juge arbitral et le juge judiciaire pourraient se concurrencer. Mais très vite, il a fallu se rendre à l'évidence : le juge judiciaire et le juge arbitral, ces vieux frères qui grandissent ensemble, sont complémentaires et s'enrichissent de leurs pratiques respectives.

Incontestablement, l'arbitrage et le contentieux reposent, à leur manière, sur un grand nombre de valeurs communes : poursuite d'un objectif de justice, recherche d'efficacité et de rapidité dans le traitement des litiges,

1 'Claudia Salomon becomes President of ICC Court', www.iccwbo.org, 1 July 2021.

confidentialité et impartialité de la procédure ou encore respect des principes fondamentaux protégés par la Convention européenne des droits fondamentaux.

Mais avant tout, l'arbitrage prend racine dans un environnement juridique adapté, entre les mains duquel il remet les éventuelles contestations quant aux décisions rendues. La réglementation française et les règles offertes par la Chambre de commerce internationale en matière d'arbitrage international nous ont donc offert de véritables synergies.

Car, je le dis sans ambages, l'attractivité de la Cour internationale d'arbitrage parisienne doit beaucoup au soutien des juridictions étatiques. C'est en effet pour les nombreuses qualités du cadre juridique français que la Cour d'arbitrage a choisi de s'y ancrer.

Depuis maintenant cent ans, la justice française est au rendez-vous. Ses juridictions commerciales, ses juges hautement qualifiés œuvrent pour donner toute sa portée, je dirais même toute sa puissance, à la sentence arbitrale.

Sur le fond du droit, nous disposons tout d'abord d'un droit de l'arbitrage accessible et clair. Ses grands principes ont été codifiés dans le Code civil et le Code de procédure civile. Dans leurs décisions, les juges français assurent ainsi l'efficacité des sentences arbitrales en limitant les recours à leur encontre, tout en garantissant le respect de l'ordre public international.

Ces contentieux sont traités par des magistrats hautement spécialisés : ils relèvent, depuis le 1er janvier 2019, de la compétence de la Chambre internationale de la Cour d'appel de Paris, dont nous fêterons cette année les 5 ans. En mai 2022, sur près de 200 affaires dénombrées au rôle, 60% concernaient des recours en annulation des sentences arbitrales. Cette procédure spécialisée est adaptée au contentieux international et intègre certaines souplesses de la « common law ».

Surtout, en offrant aux parties la possibilité de plaider en anglais et publiant des résumés de ses décisions dans plusieurs langues, la Chambre internationale de la Cour d'appel de Paris rend des décisions citées et analysées dans le monde entier. De l'Afrique à l'Amérique Latine, en passant par le Moyen-Orient, de nombreux droits étrangers ont été inspirés par sa pratique.

Bien plus, c'est tout un écosystème au service de la justice commerciale internationale qui s'est mis en place en France au cours des dernières décennies.

Si elle est la dernière-née, la Chambre internationale de la Cour d'appel de Paris est en effet venue s'ajouter à d'autres formations spécialisées, telle que la Chambre internationale du Tribunal de commerce de Paris, en fonction depuis 1995.

Quelle avancée pour notre pratique de l'arbitrage ! Quelle chance pour nos entreprises françaises et étrangères !

Le cadre juridique français a ainsi été un terrain fertile pour le développement et le renforcement de l'arbitrage de votre Cour, et nous ne pouvons que nous en réjouir. Je me félicite d'ailleurs de la réouverture en 2024 d'un nouveau centre d'audiences dédié à l'arbitrage à Paris, projet soutenu par les autorités françaises.

Car Paris est plus que jamais « the place to be » pour les juristes internationaux. Il le sera encore plus l'année prochaine, avec la délocalisation à Paris du Tribunal arbitral du sport à l'occasion des jeux olympiques, et dans les prochaines années grâce à l'attractivité de notre écosystème juridique.

Car la Chancellerie, et en particulier la direction des affaires civiles et du sceau, demeure un interlocuteur de choix pour accompagner et favoriser le développement de l'arbitrage international au sein du système juridique et juridictionnel français. Nous avons en effet une volonté et une responsabilité commune : offrir aux entreprises françaises et internationales un environnement juridique sécurisé, adapté à leurs contraintes et aux enjeux du commerce mondial.

Puisse ce centenaire renforcer les liens entre justice arbitrale et justice étatique ainsi que le rayonnement de notre place de droit française. Je souhaite donc un très bel anniversaire à la Cour internationale d'arbitrage ! »

ICC Court Centenary

'Mr President of the National Committee of the International Chamber of Commerce in France,

Ms President of the International Court of Arbitration,

Dear former presidents of the International Court of Arbitration,

Dear Counsel, Ladies and Gentlemen,

What an honor it is for me to be present among you on the occasion of the centenary of the International Court of Arbitration of the International Chamber of Commerce in France.

Arbitrators, lawyers, experts, interpreters and professors, ladies and gentlemen, so many of you have gathered on this festive occasion. Your presence is a strong sign of the influence of the International Court of Arbitration in the Parisian legal arena and, of course, beyond our borders. On behalf of the French government, I welcome you all!

Through the ten decades we are celebrating today, the ICC Court invites us to remember the major stages of its history. Strong and proud of its past, it is now ready to start its next century and meet the challenges to come.

The International Court of Arbitration of the International Chamber of Commerce was founded in 1923. It is headquartered in the heart of our French capital, Paris. Beyond its objective of economic regulation, the International Court of Arbitration was, from the beginning, an avant-garde geopolitical tool in the history of international relations.

In the aftermath of the First World War, it was born from the desire, relayed by the brand new League of Nations, to develop tools for resolving disputes that would offer a credible alternative to the use of force and weapons.

This means giving priority to dialogue to resolve cross-border disputes in a sustainable manner between companies and between States. Its objective is ambitious: “world peace through world trade”, according to the motto of French Minister Etienne Clémentel, first President of the International Chamber of Commerce.

Access to a neutral forum allowing international trade disputes to be resolved quickly and efficiently appeared at the time as an important condition for the development of international trade and global growth.

And the words spoken by Benjamin Constant at the time still resonate today:

> Trade has brought nations closer together, and given them morals and habits that are more or less the same: leaders can be enemies; people are compatriots.

Indeed, at the time of its creation, arbitration was designed to resolve disputes in a soft way between honest men.

The ICC International Court of Arbitration thus participated in the colossal project of building a regulated and efficient global environment for businesses. If I had to cite one of its successes this evening, I would cite its decisive action in signing the New York Convention of 1958 allowing the recognition and enforcement of arbitral awards in most states in the world.

Quickly becoming one of the main arbitration institutions in the world, the ICC International Court of Arbitration would therefore supervise the resolution of cross-border disputes, in accordance with the Arbitration Rules of the International Chamber of Commerce, while adapting to contemporaneous developments and necessities.

But, ladies and gentlemen, do not be mistaken: the ICC Court – although a hundred years old – does not have a single wrinkle. This is evidenced by the trust placed by international actors in the ICC Court: since its creation, just over 28,000 cases have been submitted to it.

Its activity is flourishing more than ever:

- it handles on average 700 cases per year;
- the average amount in dispute was 154 million US dollars in 2022;
- the highest value case it dealt with involved an amount of 77 billion US dollars,
- the parties can be numerous and the nationalities varied.

But why such success? Why such a forum for arbitration in the international legal order?

It is undeniable: above all, arbitration allows a great deal of flexibility. It gives parties control over the resolution of their disputes. Parties decide on the avenues of appeal open to the award obtained or the terms of constitution of the arbitral tribunal, which can thus include a member belonging to each of their legal traditions.

This alternative method of commercial dispute resolution also allows disputes to be resolved very quickly, a major advantage for the business world. To reinforce this advantage, the International Chamber of Commerce created an emergency arbitration procedure in 2012 for the purpose of obtaining provisional measures within fifteen days.

Then, in 2017, it successfully introduced an expedited procedure allowing a decision on the merits to be obtained in six months. Even recently, a large number of practitioners have praised its effectiveness and speed. I can only agree!

At this very moment, the Ministry of Justice is committed to arbitral justice by actively participating at the international level in the working groups of the United Nations Commission on International Trade Law. We share with you this common objective: to offer those involved in international trade effective procedures, particularly in emergency situations.

Renowned as the world's favorite arbitration institution, ahead of other major arbitration centers in New York, London and Singapore, the Parisian Court of Arbitration is also attractive thanks to its international outlook. While its official working languages are French and English, it is not limited in this respect. The institution is multilingual: Spanish, German, Chinese, Arabic, Italian... All the most widely spoken languages of the world are mastered by the high-level professionals who work there.

Above all, international trade operators are embracing arbitration because they wish to consult neutral, independent and trusted authorities. However, although these criteria are fully met in France, and I will come back to this, they are not always met by the local courts of other jurisdictions.

When you were elected, Madam President, you stated:

> It is because of our connections with the international business community and our reflection of their values that we are considered a true, trusted partner of business.[2]

And rightly so: the promotion of the values of transparency and impartiality is one of the ICC Court's key assets.

The ICC Court successfully highlights these values in its practice, but also through the organisation of hundreds of annual events around the world. Strong in its convictions, it offers conferences and trainings in arbitration and other alternative methods of dispute resolution.

As you may know, I am myself a strong supporter of alternative dispute resolution. As Minister of Justice, I made it a priority by launching the policy of "amicable resolution" in order to bring citizens closer to justice. But why would the Ministry of Justice be a faithful ally of an alternative method such as arbitration? It is true that arbitral tribunals do not necessarily apply French law. For a short period of time, some believed that the arbitrator and the judge could compete with each other. But very quickly, we had to face the facts: the judge and the arbitrator – these old brothers who grew up together – are complementary and are each enriched by their respective practices.

Undoubtedly, arbitration and litigation are based, in their own way, on a number of common values: the pursuit of justice, efficiency and speed in the handling of disputes, confidentiality and impartiality of the procedure and respect for the fundamental principles protected by the European Convention on Human Rights.

But above all, arbitration takes root in a suitable legal environment, into whose hands it places any disputes regarding the decisions rendered. French regulations and the rules provided by the International Chamber of Commerce in matters of international arbitration have therefore offered us genuine synergy.

I will say it bluntly: the attractiveness of the Parisian International Court of Arbitration owes a lot to the support of state courts. It is because of the many qualities of the French legal system that the Court of Arbitration has chosen to anchor itself there.

For a hundred years now, French justice has been there. Its commercial courts and highly qualified judges work towards giving full scope, I would even say full power, to arbitral awards.

In substance, we have an accessible and clear arbitration law. Its main principles have been codified in the Civil Code and the Code of Civil Procedure. French judges, in their decisions, ensure the effectiveness of arbitral awards by limiting recourse against them, while guaranteeing respect for international public order.

These disputes are handled by highly specialised magistrates: since 1 January 2019, they have come under the jurisdiction of the International Chamber of the Paris Court of Appeal, who will celebrate its fifth anniversary this year. In May 2022, of nearly 200 cases listed on the docket, 60% concerned actions to annul arbitral awards. Such specialised procedures is adapted to international litigation and incorporates flexibilities of the "common law".

2 'Claudia Salomon becomes President of ICC Court', www.iccwbo.org, 1 July 2021.

By offering parties the option to plead in English and publishing summaries of its decisions in several languages, the International Chamber of the Paris Court of Appeal renders decisions that are cited and analysed all around the world. From Africa to Latin America to the Middle East, numerous foreign laws have been inspired by its practice.

What's more, an entire ecosystem serving international commercial justice has been set up in France over the last few decades. The International Chamber of the Paris Court of Appeal is just the latest addition to a set of other specialised formations, such as the International Chamber of the Paris Commercial Court, which has been in operation since 1995.

What progress for arbitration! What luck for our French and foreign companies!

The French legal framework has thus been fertile ground for the development and strengthening of arbitration for the ICC Court, which is something we can only celebrate. I also welcome the reopening in 2024 of a new hearing center dedicated to arbitration in Paris - a project supported by the French authorities.

Paris is, more than ever, "the place to be" for international lawyers. It will be even more so next year, with the relocation to Paris of the Court of Arbitration for Sport for the Olympic Games, and in the coming years thanks to the attractiveness of our legal ecosystem.

The Chancellery, in particular the civil affairs and law reform department, remains a key partner in supporting and promoting the development of international arbitration within the French legal and jurisdictional system. We share a common desire and responsibility: to offer French and international companies a secure legal environment, adapted to their constraints and to the challenges of global trade.

May this centenary strengthen the links between arbitral and state justice and enhance the reputation of our French legal system. I wish the International Court of Arbitration a very happy birthday!'

Keynote Address – Inaugural Session, 6th ICC India Arbitration Day

Shri Jagdeep Dhankhar, Honorable Vice President of India

On 2 December 2023, in a keynote speech at the 6th ICC India Arbitration Day, the Vice President of India, Shri Jagdeep Dhankhar reflected on his time as an ICC Court member, described the benefits of the ICC Court scrutiny process and called for more diversity in the appointment of arbitrators.

'Very warm good morning to all of you.

President, ICC International Court of Arbitration, Ms Claudia Salomon – a gifted personality committed with passion to arbitration for decades. Her presidency is a milestone achievement.

Mr Alexander G. Fessas is the Secretary General of the ICC International Court of Arbitration. We heard him unfold his thoughts.

Mr Tejus Chauhan - Director, South Asia, ICC Arbitration and ADR.

I must recognize the presence of very distinguished professionals like Ms Pinky Anand. She has contributed to the system enormously. I must recognise the presence of Mr Rajit Punhai Secretary, Rajya Sabha. His presence would mean a lot as we will be in a position to take forward certain things on which I will be reflecting.

I have been associated with the ICC International Court of Arbitration ('ICC Court'), also ICC Commission on Arbitration and ADR ('ICC Commission') and all that I say may not be construed as supporting an institution as compared to other institutions that are holding the field. But surely, I'm not doing that also.

This inaugural session of 6th annual ICC India Arbitration Day is coming at a very opportune time. We are in our Amrit Kaal.[1] India, home to 1/6th of humanity is witnessing phenomenal economic rise. Already having overtaken the economies of the United Kingdom and France, we are positioned as the fifth largest global economy. By the turn of this decade, our Bharat[2] would have overtaken the economies of Germany and Japan to become the third largest global economy. That means enough work for those who are in this room, and we need to have a very robust mechanism.

Celebration of the centenary of ICC Court is a very glorifying moment. I recall my days both in the ICC Commission and in the ICC Court. It was learning every time I went there. Getting in touch with distinguished professionals in the field was always an enriching experience. This is a platform beyond the normal arbitral process that you see. Some of the greatest minds on the globe scratch their brains, get together to make a contribution to the spine of an arbitration process. The journey of the institution has been great.

I would like to extend a very warm welcome to Ms Claudia Salomon. We have seen the rise of women and that rise globally has been very stressful and difficult. Her election marks a momentous occasion as she becomes the first woman to hold this prestigious position but it is climaxed by another significant event in the centennial year of the ICC Court. With her extensive experience as an arbitrator and also as an emergency arbitrator, because this particular field will be occupying more space in times to come, she joins the ranks of trailblazing women who have broken barriers in the legal system.

We lost just a week back or less than that, Justice Sandra Day O'Connor, the first woman Supreme Court Judge of the United States – which they call an associate judge; only the Chief Justice is called Chief Justice. And that took place when the Supreme Court was 190 years old. We recently lost one of our very distinguished Judges, the first woman Judge of the Indian Supreme Court, Ms Fathima Beevi, it took us less than 40 years. The ICC Court is somewhere in the middle.

For me, this is a great personal opportunity to share my thoughts with the people who matter in this country. Presence of everyone here is very impactful, but the presence of some who are dominating the arbitration process in this country who are occupying major spaces as arbitrators; their absence is equally impactful.

This event is a powerful testament to the growing importance of arbitration in India and this is indispensable. If growth has to be an incremental trajectory, we are having explosive economic growth. India's economy is rising as never before. World entities have held out us as a favourite destination of opportunity and investment.

1 Amrit Kaal or 'The Era of Elixir' is the vision for New India for 2047, a new dawn for blue print for an empowered and inclusive economy. See the Press Information Bureau, https://pib.gov.in/PressReleseDetailm.aspx?PRID=1894876

2 Bharat is another official name for India.

The kind of progress we have recorded and the rate at which we are going has matched the world. There are bound to be disputes, disputes are natural to commercial activity. They happen because people have different perceptions about a particular point of view. We therefore are in need of having a system that is robust, fast, scientific, effective, and delivers with the best of human brains.

In this process, I greatly commend the steps taken by ICC for the first session titled "Recent trends in Indian Arbitration – Leaning towards Harmony or Disorder"; nothing could be more timely, nothing could be more appropriate, nothing could be more to put us in a reflective zone. We have to think within. The subject itself offers an answer the moment we go deep into it. I'm sure discussions and deliberations will take us a long way.

Friends, I'm sharing my thoughts. Nowhere on the planet, in no other country, in no other system, there is such a tight fist grip on the arbitral system by retired judges. In our country, this is it at large and I'm in the sound company of a distinguished jurist, a great legal luminary, a brilliant mind, who is changing the landscape of judiciary in this country. I am referring to the Chief Justice of India, Shri Chandrachud, who reflected on this. He reflected on the lack of diversity in appointing arbitrators and what he said next is a very powerful statement; only he could make it. His deep commitment to clean the system, to make the system robust, very functional; he could speak out. It takes a lot of courage to speak out so objectively about a fraternity to which you belong and he said retired judges dominate the field. He goes on to add – and I salute him for this – that while other qualified candidates are overlooked, he implied that this reflects an 'old boys club' mentality within the arbitration space. He elaborated stating that the retired judges dominate arbitral appointments and, in the process, several promising candidates are overlooked. I pause here for a moment. India is known for its human resources. In every domain, in every walk of life, we have people who can take a look at it. But they are not built up to adjudicate an arbitrary process.

Time has come when we need to introspect, move forward by bringing about necessary changes, including, if required, by legislation. I cannot but uphold the bold statement, the timely statement by the Chief Justice of India, the statement that will go a long way in making the arbitral process in this country spinally strong.

Friends, institutional arbitration as compared to *ad hoc* has many advantages. I have been exposed to that while being a Member at the ICC Court. It affords you a mechanism where things are taken care of by brilliant mechanisms and best brains in the world and that is why ICC Arbitration is a brand unrivalled. It has hold the test of time.

However, judicial interventions in this country and elsewhere have reduced arbitration just as a tier in the normal litigation process. If you analyse an arbitrary decision-making process, it starts with the rendering of an award and by the time you reach the making of the award there is enough scope for judicial interventions. Brilliant minds, some of whom are present here, know how to exploit the judicial system to get interventions and they are legitimised by law, so nothing wrong in that. You have an award and there is a challenge by no objections. My statutory appeal is provided, if you are a State sector or public sector undertaking, you are well advised to knock the doors of the highest court because until that is done you will not be performing your duty well.

We have to evolve a mechanism where the arbitration process does not suffer judicial interventions. I am not aware at the moment of what the ICC Court is doing. While I was there, they had a unique mechanism of amicable dispute resolution and it was amazing that you do not render a judicially enforceable package, which you normally do when you take recourse to an arbitral process, but amicable means it is in house. Brilliant minds who have domain expertise are selected and they help parties to come to a consensual approach.

I think the time has come when we need to focus more on it. I know when disputes last long, a fraternity to which I belong at one point of time gains invariably but our physical gain cannot be at the cost of national gain, prosperity. The world economic order will gear up and go to greater heights; there will be evenly spread out progress for everyone if the dispute resolution mechanism is fairly equitable and conclusive. Most contractual stipulations provide that the arbitration award will be final but then in certain legal regions, ours being the robust one, access to the judicial system is a fundamental right and no contract can have a provision that antidotes it or neutralizes it. So access to the judicial system in respect of arbitration process or final outcome of arbitration is inescapable.

This can be contained only when we go to amicable dispute resolution. I am sure we must work out a mechanism that will help everyone including the economy and the people involved therein.

We are living in very tough times. Even before the technological invasion has taken place in full bloom, we are alarmed, we are worried. Disruptive technologies, will like you to know, are a part of our life. We are their

bedfellows. We have to continue to live with them and disruptive technologies bring in their wake, disputes that would require instant resolutions.

We have one among us, the president of the ICC Court, acting as emergency arbitrator. Earlier decades ago, we used to know only about intervention, interim orders that used to be very fast but now we have to be faster and the fastest.

I don't know whether it is right or wrong but I read somewhere that someone asked me what the speed of the light was and he reflected 'went today and came back yesterday'. We will have to show that type of speed. One way out will be that we must have arbitral institutions. There has been some growth in our country of arbitrary institutions but those institutions need to take central space and necessary changes in law are required to be effected to make them all meaningful. This will cleanse the system of which we don't regard as wholesome because this cannot be a past time. It has to be a deep professional commitment. You have to be very passionate about an arbitration process. The arbitral bar has to be evolved, stand alone not as a collateral of the main bar. It is a very expert subject and your contribution in giving cutting edge to the growth of economy in our country and in the globe is pivotal. I am sure your deliberations will be extremely useful to come to that level.

I do not wish to speak more on the subject given the position that I was associated with the ICC Court and ICC Commission at one point of time and the position that I hold both as the Vice President of the country and the Chairman of Rajya Sabha,[3] but I will leave a thought with you. Your session one is very critical to the economy of this country; your session "Recent trends in Indian Arbitration – Leaning towards Harmony or Disorder" must not be just scratching the surface. You will have to delve deep into it. There will have to be incisive analysis. The diagnosis has to be superb and super like a Magnetic Resonance Imaging (MRI) not like an X-ray. That formulation I am waiting for and I am sure we will do something just, since the head of our Judiciary has already made reflections about it.

I conclude by saying that nothing can be more amusing than the highest court of the land will reflect in more than three dozen pages, go to each and every detail of the arbitral award and indicate that the courts must not probe in detail the arbitral award.

Thank you.'

3 The upper house of the Parliament.

13th World Chambers Congress in the Centenary Year of the ICC Court – Achieving Peace and Prosperity through Multilateralism

Geneva, 21-23 June 2023

Organised by ICC and its World Chambers Federation, the World Chambers Congress is the largest and the only international forum that enables chamber leaders and professionals to share best-practices, exchange insights, develop networks, address the latest business issues affecting their communities and learn about new areas of innovation from chambers around the world. The 13th World Chambers Congress and addressed some of the most significant global issues of our time, and particularly 'Achieving peace and prosperity through multilateralism'. Rafael Rincón, Sara Nadeau-Seguin and Daniela Walteros report on two of the panels addressing dispute resolution and ICC Dispute Resolution Services ('ICC DRS') more specifically.

Sara Nadeau-Seguin
Partner, Teynier Pic, Paris

Keeping Business Moving: The Role of Dispute Resolution Services in Preventing Disruptions and Supporting Business Operational Continuity

Moderator **Alexander Fessas** (Secretary General, ICC International Court of Arbitration – 'ICC Court') and panellists **Alison Pearsall** (Senior Group Counsel, Veolia, Paris), **Tuuli Timonen** (Director of Patenting Licensing, Nokia, Helsinki) and **Martin Hauser** (International Commercial Mediator, Munich) discussed dispute avoidance mechanisms as a means of minimising business disruption. The panellists shared their views and experience on mediation, its benefits, and its challenges in the business environment and addressed issues relating to the ideal timing of triggering a mediation proceeding.

Alexander Fessas introduced the panel, noting the increasing acknowledgment of the benefits of dispute prevention methods as a mechanism to lower business disruption, as opposed to court litigation and arbitration. Although any conflict is disruptive to business, Mr Fessas remarked that leaving a dispute unattended until it reaches a boiling point before courts or tribunals will necessarily involve a bigger expenditure of time and human resources, generating excessive costs.

When to mediate: The timing and benefits of avoiding litigation

The speakers addressed the benefits of avoiding litigation through mediation proceedings in three moments: when concluding a deal, when a conflict emerges and during arbitration or court proceedings.

First, Ms Timonen highlighted the advantages of resorting to a deal facilitator during the negotiation of contracts. As a neutral third party, a deal facilitator can help bridge the gap between different cultural backgrounds, expectations, and styles the parties might have, overcoming roadblocks more efficiently.

Mr Hauser echoed the importance of the support of a **neutral third party** during the closing of a deal in order to understand the parties' **individual interests and needs**. In this context, both Ms Timonen and Mr Hauser agreed that private sessions held between one of the parties and the mediator are extremely helpful to uncover the flexibility of each party allowing them to reach a common ground.

Second, panellists also discussed mediation as a tool when a conflict emerges. Mr Hauser set as a golden rule that parties always try to **mediate if negotiation fails**, except when the goal is to have a landmark decision. Specifically in the field of **intellectual property rights and innovation**, Mr Hauser indicated two reasons to endorse such rule:

1. Mediation allows for an interest-based negotiation, which is effective in business sectors where economic interest and market power are of the essence.
2. The emotions underlying ownership and creation can be duly addressed by a mediator, whereas courts or a tribunal typically provide parties with a purely objective analysis of the law.

Finally, the speakers were asked whether they found it beneficial to resort to mediation when an arbitration proceeding is already pending. In this regard, Mr Hauser encouraged **mediation in parallel to arbitration**, emphasising that the previous exchange of briefs during contentious proceedings make parties more prepared for mediation, allowing them to identify their interests and sensitive points with more clarity. Ms Pearsall added that mediation might be short and only comprise some of the issues within the parties' claims.

Moreover, Ms Timonen stated that an arbitrator's suggestion that parties refer to mediation is usually welcome. When the idea is brought up by a neutral party as the arbitrator, it avoids the reluctance that parties might have of taking the initiative because of the fear of showing a weak position.

The current challenges of mediation and the road to development

As well as the fear of showing a weak position, Ms Pearsall identified, in view of her experience as an in-house lawyer, other factors that might lead to a setback in regard to mediation. In this regard, she mentioned the perception of parties that mediation increases the cost of the dispute, the lack of external support of counsel, the absence of personal experience within the business and the perception of businessmen that they are capable of negotiating independently.

In order to overcome these challenges, Ms Pearsall suggested the adoption of a **series of measures within companies**, such as incorporating mediation as an internal company policy, pointing out, in each case, the costs that might be saved in avoiding arbitration or court proceedings and presenting a financial outlift to external counsel so that they are aligned with the company's goals. Ms Pearsall also encouraged internal trainings and the creation of an inhouse network of people who have mediation experience. Another idea she suggested is to present mediation as a means for the parties to **retain control over the conflict** as opposed to handing it to external counsel.

Tailoring the proceedings

When it comes to picking the right mediator, Ms Timonen shared her preference for choosing professionals that do not have an in-depth connection to the business sector of the conflict, so as to avoid preconceived ideas on the subject matter of the dispute. Ms Timonen also highlighted as desirable characteristics the willingness of the mediator to dedicate his or her time, giving the parties the feeling that they are being heard, as well as the flexibility of shifting to a more directive role when needed.

On the other hand, Ms Pearsall stated the importance of finding a mediator who knows the technical aspects of the business and underlined the challenge of reaching a common ground between the parties in the appointment of a mediator when arbitration or court proceedings are ongoing. As such, Ms Pearsall noted that the ICC International Centre for ADR ('ICC ADR Centre') is an excellent starting point to search for the right kind of professional. In addition, Ms Timonen pointed out that ICC ADR Centre is well prepared to tailor mediation proceedings according to each parties' needs, by testing claims before a dispute, modulating expedite proceedings, amongst several other formats[1].

Rafael Rincón and Daniela Walteros
Respectively Partner and Associate, Rincón Castro Abogados, Bogota

The Power of Agreed Rules: How Arbitration Promotes Peace and Prosperity

One of the sessions of the World Chambers Congress was devoted to the role of arbitration in fostering peace and prosperity through the voluntary acceptance of agreed rules. The session was moderated by **Claudia Salomon** (President, ICC Court) and the speakers who participated included **Justin D'Agostino** (CEO, Herbert Smith Freehills, Hong Kong; Member, ICC Executive Board); **Michael McIlwrath** (Founder, MD Disputes, Florence; Chair, ICC Governing Body for Dispute Resolution Services; and **Diana Akikol** (Partner, Walder Wyss, Geneva).

The panellists discussed the importance of consensual dispute resolution, the benefits of a rules-based global economy, and how arbitration can promote international business transactions, including transactions with states and state-owned entities or enterprises.

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1 For more information, visit www.iccadr.org and download the ICC Guide 'Effective Conflict Management' and Report 'Facilitating settlement in International Arbitration'

Claudia Salomon opened the session by going back to the origins of ICC and the historical importance of arbitration in a broader context. Ms Salomon emphasised that business and trade are promoted when economic agents agree on a dispute resolution method. Bearing in mind this purpose, a group of entrepreneurs – who called themselves the 'merchants of peace' – founded ICC in the aftermath of the First World War.

'Merchants of Peace'

These merchants of peace sponsored the firm belief that cross border trade promotes peace and prosperity. And they recognised and understood that a method to resolve cross border disputes was fundamental for purposes of promoting cross border trade.

Considering this background, Justin D'Agostino focused on describing the nature and scope of arbitration. Mr D'Agostino advanced the proposition that arbitration exists to facilitate trade. Arbitration is the most popular form of dispute resolution in the world for international cross border trade since it is an **efficient and fair mechanism** to resolve disputes that provides comfort to traders in the sense that the terms of their agreements will be upheld.

According to Mr D'Agostino, arbitration provides such comfort to traders for the following five reasons:

1. It is a form of private justice;
2. It provides an alternative to foreign courts that may be unexperienced regarding the specific business or may be subject to bias;
3. It provides certainty and finality with final and binding decisions;
4. Arbitrators are generally chosen by the parties;
5. Finally, and most importantly, arbitration allows to recognise and enforce the final and binding decision on multiple jurisdictions thanks to the New York Convention and other relevant treaties.

A Centenary of ICC Arbitration

Furthermore, Mr D'Agostino focused on the reasons that explain why ICC Arbitration is used by its clients for **resolving their disputes**. Mr D'Agostino highlighted the trust provided by more than 100 years of experience and expertise, and the qualified user experience granted by the Secretariat.

Afterwards, Michael McIlwrath emphasised that parties choose international arbitration to ensure that their disputes are settled **fairly and efficiently**. Mr McIlwrath advanced the proposition that specialisation and industry knowledge provided by arbitrators is essential.

In this vein, it could be more valuable for small companies to resort to arbitration since arbitrators may be more familiarised with the business and industry at issue.

Furthermore, Mr McIlwrath focused on **predictability**. In this regard, ICC Arbitration helps manage risks because its rules and regulations are friendly and accessible. For example, the wide acceptance and inclusion of an ICC Arbitration model clause in several contracts evidences that the parties are confident on the protections granted to them therein.

On another note, Diana Akikol focused on the benefits provided by ICC Arbitration. Ms Akikol outlined several reasons for choosing ICC Arbitration when drafting an arbitral agreement. Pursuant to Ms Akikol, the ICC Court is the worldwide **leading institution** as it is the only arbitral institution that is **truly international and promotes access to justice to traders on a global basis**. This is evidenced by the fact that the ICC Court can administer cases in any language.

In addition, the accessibility of the ICC Rules of Arbitration has allowed the ICC Court and Secretariat to administer 28.000 arbitrations worldwide. Hence, predictability together with **a reliable and consistent** practice promotes confidence in the institution. Furthermore, Ms Akikol emphasised the benefits of the award scrutiny process performed by the ICC Court.

Diversity inclusion

Finally, Ms Akikol concluded the session by stressing the importance of diversity inclusion in all aspects of dispute resolution because global business is diverse. Ms Akikol highlighted how ICC constantly works in increasing gender, regional, geographical, racial, and cultural diversity.

The panel agreed that a legitimate arbitration system is essential for purposes of strengthening multilateralism and global governance. Notably, diversity plays a major role in achieving such legitimacy and in ensuring that arbitration continues to be a force to promote peace and prosperity in the world.

AMERICAS

United States

Coinbase, Inc. v. Bielski – A 'Common-Sense' Approach Enhancing the U.S. as a Leading Seat for International Arbitration

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The U.S. Supreme Court in *Coinbase, Inc. v. Bielski* considered whether a party's appeal from a denial of a motion to compel arbitration should trigger an automatic stay of the underlying district court proceedings. The Supreme Court held that a district court must stay its proceedings while an interlocutory appeal on arbitrability under Section 16(a) of the Federal Arbitration Act (FAA) is ongoing.

> A right to interlocutory appeal of the arbitrability issue without an automatic stay of the district court proceedings is therefore like a lock without a key, a bat without a ball, a computer without a keyboard – in other words, not especially sensible.
>
> *Coinbase, Inc. v. Bielski*[1]

The U.S. Supreme Court in *Coinbase, Inc. v. Bielski* considered whether a party's appeal from a denial of a motion to compel arbitration should trigger an automatic stay of the underlying district court proceedings or whether the appeal of the arbitrability decision would be considered in parallel to the merits in the district court.

Adopting reasoning that relied both on 'common sense' and the policy implications for the efficiency of arbitration, the Court enhanced the appeal of the United States as a forum for arbitration. This decision minimizes unwarranted delays, risks, and costs for parties seeking to compel arbitration in U.S. federal courts.

The proceedings

Coinbase operates an online sales platform for cryptocurrencies and government-issued currencies. Coinbase's User Agreement contains an arbitration agreement. Abraham Bielski filed a putative class action on behalf of Coinbase users before the District Court alleging that Coinbase failed to replace funds fraudulently taken from the users' accounts. Because Coinbase's User Agreement provides for dispute resolution through binding arbitration, Coinbase filed a motion to compel arbitration. The District Court denied Coinbase's motion to compel arbitration. Coinbase then filed an interlocutory appeal to the U.S. Court of Appeals for the Ninth Circuit under the Federal Arbitration Act, 9 U.S.C. §16(a), which authorizes an interlocutory appeal from the denial of a motion to compel arbitration. Coinbase also moved to stay District Court proceedings pending resolution of the arbitrability issue on appeal.

The District Court declined to stay its proceedings. After receiving Coinbase's motion for a stay, the Ninth Circuit likewise declined to stay the District Court's proceedings. The Ninth Circuit followed its precedent, under which an appeal from the denial of a motion to compel arbitration does not automatically stay district court proceedings. By contrast, however, most other Courts of Appeals to address the question have held that a district court must stay its proceedings while the interlocutory appeal on the question of arbitrability is ongoing. To resolve the disagreement of the Courts of Appeals, the Supreme Court granted certiorari.

1 *Coinbase, Inc. v. Bielski,* 143 S. Ct. 1915 (23 June 2023) p. 6 para. 2, available at: https://www.supremecourt.gov/opinions/22pdf/22-105_5536.pdf.

The majority decision

The majority opinion, authored by Justice Kavanaugh, begins by noting that the FAA governs arbitration agreements. In 1988, the U.S. Congress passed, and President Reagan signed, an amendment to the Act; codified at 9 U.S.C. §16(a), which provided that a party may take an interlocutory appeal when a district court denies a party's motion to compel arbitration. Section 16(a) creates a rare statutory exception to the usual rule that parties may not appeal before final judgment. The Court further notes that Congress provided for immediate interlocutory appeals of orders denying (but not of orders granting) motions to compel arbitration. This shows a deliberate and pro-arbitration intent in the drafting.

Congress enacted §16(a) against the background of the *Griggs* principle that an appeal, including an interlocutory appeal, 'divests the district court of its control over those aspects of the case involved in the appeal'.[2] The majority opinion noted that the *Griggs* principle resolves the case because the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially 'involved in the appeal'.

The majority opinion, however, also went beyond this solid doctrinal reasoning and went so far as to highlight the policy implications of a deviation from this principle. The Supreme Court noted:

> If the district court could move forward with pre-trial and trial proceedings while the appeal on arbitrability was ongoing, then many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost – even if the court of appeals later concluded that the case actually had belonged in arbitration all along. Absent a stay, parties also could be forced to settle to avoid the district court proceedings (including discovery and trial) that they contracted to avoid through arbitration. That potential for coercion is especially pronounced in class actions, where the possibility of colossal liability can lead to what Judge Friendly called "blackmail settlements".

Beyond that, the Supreme Court noted that the decision and necessary outcome reflected 'common sense' stating that:

> The common practice in §16(a) cases, therefore, is for a district court to stay its proceedings while the interlocutory appeal on arbitrability is ongoing. That common practice reflects common sense.

Dissenting opinion

The dissenting opinion was authored by Justice Jackson and was joined by Justice Sotomayor, Justice Kagan, and, in part, by Justice Thomas. The dissent notes that when federal courts of appeals conduct interlocutory review of a trial court order, the rest of the case remains at the trial court level. Usually, the trial judge then makes a particularized determination upon request, based on the facts and circumstances of that case, as to whether the remaining part of the case should continue or be paused pending appeal. Justice Jackson notes that discretionary decision making in these cases promotes procedural fairness. Justice Jackson also dissents from and disagrees with the majority opinion on the interpretation of the FAA. She characterizes the majority opinion as an invention of a new rule that perpetually favors one class of litigants – defendants seeking arbitration. Similarly, the dissenting opinion disagrees with the broad characterization of the *Griggs* rule and implies that the issues of merits and arbitrability are both severable and distinct to preclude the application of the *Griggs* rule that two courts should not step on each other's toes in addressing the same issue.

From a policy perspective, Justice Jackson argues that the judge closest to the matter is best placed to rule on whether a stay should be granted and states that one strength of the discretionary-stay tradition is its 'suppleness of adaptation to varying conditions'. She further argues that all the benefits in favor of the pro-arbitration party ultimately come at the expense of the party seeking litigation and as such provide no net gain.

The dissent escalates to accusations that '[t]he Court today ventures down an uncharted path – and that way lies madness' and notes that if taken broadly 'the mandatory-general-stay rule the Court adopts today would upend federal litigation as we know it'. Aside from arguing that the decision creates an unfounded rule, the dissent notes that the Court is overstepping the bounds of its role in doing so.

2 *Griggs v. Provident Consumer Discount Co.*, 459 U. S. 56, 58 (1982).

Conclusion

The decision in *Coinbase, Inc. v. Bielski* that a party's appeal from the denial of a motion to compel arbitration triggers an automatic stay of the merits of the underlying district court proceedings is a step towards greater certainty for parties arbitrating their disputes in the United States. The dissenting opinion, which argues that a discretionary standard offers 'suppleness of adaptation to varying conditions', may not have fully considered the importance of stability and predictability that parties seek when choosing a seat for their arbitration.

The dissent, however, offers a fully coherent and consistent reasoning which, though less favorable to the users of arbitration, is also the norm in notable arbitration friendly jurisdictions which do not provide for an appeal as of right or an automatic stay pending that appeal. This decision of the Supreme Court sets the United States apart and in resolving the circuit split provides additional clarity and predictability for arbitrations seated in the United States. This is particularly important for jurisdictions where an automatic stay was previously unavailable, such as New York in the Second Circuit and San Francisco in the Ninth Circuit.

The decision though favorable to arbitration in the United States should still give some pause. The decision was split 5-4. The majority presented a well-reasoned set of arguments that would be appealing and understandable to any arbitration practitioner. But it also noted that the decision was in part based on 'common sense' implying that common sense may be lacking in four out of the nine justices on the Supreme Court. Such a slim margin and entrenched disagreement in the Court on procedural issues related to arbitration may make it difficult to predict how the Supreme Court may respond to future questions relating to fundamental aspects of the practice of international arbitration in the United States.

AMERICAS

United States

Supreme Court Rules that Civil Racketeering Claim Is Available in Support of Enforcement of U.S. Judgment Based on a Foreign Arbitration Award

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The U.S. Supreme Court's recent decision in *Yegiazaryan v. Smagin*, may make civil claims under the Racketeer Influenced and Corrupt Organization Act ('RICO') available to at least some foreign creditors seeking to enforce judgments based on foreign arbitration awards in the United States. In *Yegiazaryan*, the Supreme Court found that a foreign plaintiff had pleaded an injury sufficiently connected to the United States to allow a civil claim against a U.S.-based defendant accused of racketeering activity aimed at subverting a U.S. judgment enforcing a foreign arbitration award. *Yegiazaryan* leaves many questions unanswered but should factor into strategic considerations regarding U.S. enforcement of international arbitration awards.

1. Background

In 2014, Russian businessman Vitaly Smagin ('Smagin') obtained a US$ 84 million award from a London-seated tribunal against U.S. resident Ashot Yegiazaryan ('Yegiazaryan') in a dispute arising out of a Moscow real estate investment.[1] Smagin successfully enforced his award before the U.S. District Court for the Central District of California pursuant to the New York Convention (as incorporated into the U.S. Federal Arbitration Act) and obtained an order freezing Yegiazaryan's assets within the jurisdiction.[2] After Yegiazaryan failed to pay, however, Smagin brought a civil claim under the U.S. Racketeer Influenced and Corrupt Organization Act ('RICO') statute.

RICO is a U.S. statute originally enacted to combat organized crime. RICO's private right of action – allowing claims for treble damages by private plaintiffs who can successfully plead the existence of a racketeering enterprise engaged in a pattern of unlawful activity – has emerged as a powerful if complex tool for civil litigants in the United States.[3] In his RICO claim, Smagin alleged that Yegiazaryan had engaged in a complex racketeering scheme designed to evade collection of the U.S. judgment based on the London award. Smagin alleged that, as part of this scheme, Yegiazaryan had hidden funds in U.S. and offshore shell companies, engineered sham claims to encumber his assets, and engaged in multiple RICO 'predicate' crimes, including wire fraud, witness tampering and obstruction of justice.[4] Smagin sought both to collect his judgment and recover treble damages authorized under the RICO statute.

In May of 2021, the District Court dismissed Smagin's RICO claim on the ground that it did not allege a sufficiently 'domestic' injury because the alleged scheme had been aimed at evading payment of a foreign arbitral award to a foreign judgment creditor.[5] In so doing, the District Court applied the 'presumption against extraterritoriality,' a 'canon of statutory construction' applied by U.S. courts under which federal laws are 'construed to have only domestic application' within the United States, '[a]bsent clearly expressed

1 Yegiazaryan v. Smagin, 143 S.Ct. 1900 (June 22, 2023) ('*Yegiazaryan*').

2 See generally, 9 U.S.C. §§ 201-208.

3 See 18 U.S.C. § 1964(c) (authorizing a civil RICO plaintiff to 'recover threefold the damages he sustains').

4 *Yegiazaryan*, 143 S.Ct. at 1907.

5 *Smagin v. Compagnie Monegasque De Banque*, 2:20-cv-11236-RGK-PLA, 2021 U.S. Dist. Lexis 101176, *1 (C.D. Cal. May 5, 2021) (citing RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325 (2016)).

congressional intent to the contrary'.[6] The Supreme Court has explained that this presumption 'serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries' and 'reflects the … commonsense notion that Congress generally legislates with domestic concerns in mind'.[7]

The U.S. Court of Appeals for the Ninth Circuit disagreed, in a June 2022 decision which concluded that Smagin had sufficiently pleaded a domestic injury where he alleged a pattern of racketeering that 'occurred in, or was targeted at, California' and designed to 'subvert … rights … executable in California' in a California judgment against a California resident, which it characterized as a form of 'property in California'.[8]

In reversing the District Court, the Court of Appeals reasoned that 'whether a plaintiff has alleged a domestic injury' was 'a context-specific inquiry that turns largely on the facts alleged'.[9] This flexible approach diverged from that of other U.S. federal appellate courts that had applied a strict bright-line test based on a plaintiff's place of residence to determine whether an alleged injury was sufficiently 'domestic' to support a civil RICO claim.[10] The Ninth Circuit rejected a strict residency-based test, however, noting that 'it would make no sense' to conclude that subversion of a California judgment caused an injury in Russia where 'the judgment grants no rights whatsoever to Plaintiff in Russia' and 'much of the conduct underlying the alleged injury also occurred in, or was targeted at, California'.[11] Faced with these different approaches, the Supreme Court granted Yegiazaryan's petition for *certiorari* to resolve the 'Circuit split'.[12]

2. The Supreme Court found a U.S.-based defendant's subverting a U.S. judgment enforcing a foreign arbitration award to be a sufficiently domestic injury for a civil RICO claim.

In an opinion by Justice Sotomayor, a six-judge Supreme Court majority affirmed the Ninth Circuit's approach and rejected a bright-line residency test for domestic injury under RICO, thus allowing Smagin, a foreign plaintiff, to invoke the statute and its treble damages provisions in connection with efforts to enforce a U.S. judgment based on a foreign arbitration award. The Supreme Court majority's decision explained that 'in assessing whether there is a domestic injury' upon which a claim may be brought consistent with the presumption against extraterritoriality, courts should 'engage in a case-specific analysis that looks to the circumstances surrounding the injury' in order to decide whether those 'circumstances sufficiently ground the injury in the United States'.[13] The majority warned that:

> Because of the contextual nature of the inquiry, no set of factors can capture the relevant considerations for all cases.[14]

While acknowledging that Smagin's injury had 'in some sense' been felt in Russia because Smagin resided there, the Court warned that 'focusing solely on that fact would miss central features of the alleged injury'.[15] These included that 'Yegiazaryan took domestic actions to avoid collection, including allegedly creating U.S. shell companies to hide his U.S. assets, submitting a forged doctor's note to a California District Court, and intimidating a U.S.-based witness'.[16] Although some alleged activity had occurred abroad, the Court noted that 'even these' acts occurring outside of the United States had been directed from California with the purpose of frustrating enforcement of the California judgment.[17] It followed that the effects of that conduct had been 'largely manifested' in California where Smagin's rights in his California judgment existed:[18]

> Smagin's interests in his California judgment against … a California resident, were directly injured by racketeering activity either taken in California or directed from California.

6 See *RJR Nabisco*, 579 U.S. at 335 (cited in Smagin, 2021 U.S. Dist. LEXIS 101176 at *6).

7 See id. at 335-36.

8 *Smagin v. Yegiazaryan*, 37 F.4th 562, _, 2022 U.S. App. Lexis 16014, *11-13 (10 Jun. 2022).

9 *Smagin*, 37 F.4th at _, 2022 App. Lexis 16014 at *19.

10 See *Yegiazaryan*, 143 S.Ct. at 1907 (contrasting the Ninth Circuit's 'context-specific' approach with the Seventh Circuit's 'residency based test' for domestic injuries in civil RICO cases) (internal citations omitted).

11 *Smagin*, 37 F.4th at _, 2022 App. Lexis 16014 at *11-12.

12 *Yegiazaryan*, 143 S.Ct. at 1907.

13 Id. at 1910.

14 Id.

15 Id.

16 *Yegiazaryan*, 143 S.Ct. at 1910-11.

17 Id. at 1910.

18 These rights included 'the right to obtain post judgment discovery, the right to seize assets in California, and the right to seek other appropriate relief from the California District Court.' See id. at 1910.

A majority of the Court therefore found a 'domestic' injury sufficient to support a civil RICO claim ultimately rooted in the nonpayment of a foreign arbitration award.[19]

3. The dissent

In a dissent by Justice Alito (joined by Justice Thomas and Justice Gorsuch (in part)), three members of the Court complained that the majority's focus on 'context' and case-specific 'factors' offered 'virtually no guidance to lower courts'.[20] The dissenters also expressed concern that allowing foreign plaintiffs access to U.S. remedial schemes that are far more generous than those available in their home nations could raise comity concerns by allowing foreign parties access to measures of damages – a reference to RICO's treble damages provision – far greater than those available under the law of the jurisdictions where the relevant conduct or injury occurred.[21] The dissenters also objected to what they characterized as the majority decision allowing a plaintiff's residence to 'play no role *at all* in the civil RICO extraterritoriality inquiry'.[22]

While the dissenters took issue with the majority's reasoning and would have favored something closer to a bright-line test for domestic injury, they expressed no discomfort with the practical result, arguing instead that the Supreme Court should not have taken up the case and let the Ninth Circuit's decision – which had allowed Smagin to pursue his RICO claim – to stand.[23]

4. Implications for the enforcement of international awards

The Supreme Court's selection of a contextual, multi-factor approach over a bright-line rule for determining 'domestic' injury for now leaves further elaboration of the relevant RICO jurisprudence to U.S. federal district and appellate courts.

Yegiazaryan's implications for the enforcement of international arbitration awards in particular should be neither exaggerated nor minimized. The decision does not make civil RICO and its treble damages provision generally available for the enforcement of foreign arbitral awards in the United States. To state a claim for damages under RICO a plaintiff must allege 'the existence of seven constituent elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce.[24] These are difficult criteria to satisfy in any case. And nonpayment of a judgment usually falls far short of racketeering.

But *Yegiazaryan* does mean that civil RICO may *sometimes* be available to support the collection of U.S. judgments based on foreign arbitration awards in favor of foreign parties – provided that a judgment debtor can be shown to have engaged in a pattern of racketeering activity aimed at evading that judgment that is sufficiently 'ground[ed]' in the United States.[25] At the margin, therefore, *Yegiazaryan* may encourage judgment creditors in high-value cases with sufficiently egregious facts to consider whether they can allege civil RICO claims on the basis of efforts to resist payment of judgments based on foreign awards. Meanwhile, award and judgment debtors may find uncertainty over civil RICO liability to be an additional incentive for honoring their obligations.

19 Id. at 1911.

20 *Yegiazaryan*, 143 S.Ct. at 1912-15.

21 Id.

22 Id. at 1914 (emphasis in original).

23 See *Yegiazaryan*, 143 S. Ct. at 1915 (Alito, J., dissenting) ('I would dismiss the writ of certiorari as improvidently granted.').

24 See, e.g., *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). Each of these elements may be contested and is the subject of extensive jurisprudence.

25 *Yegiazaryan*, 143 S. Ct. at 1910.

AMERICAS

Venezuela-Colombia
A New BIT – Precedent or Anecdote?

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In February 2023, Venezuela and Colombia concluded a bilateral investment treaty that excludes substantive protections typically seen in investment treaties (e.g. fair and equitable treatment) and phrases other protections in an original manner that limits their substance significantly. This noteworthy development highlights the ever-changing landscape for foreign investment in Latin America. It remains to be seen whether this treaty will kick-off a new trend or if it will instead be an anomaly arising from Venezuela's and Colombia's efforts to rebuild their diplomatic relations over the last year.

Introduction

In February 2023, Venezuela and Colombia signed a new bilateral investment treaty (the **BIT**), Venezuela's first new bilateral investment treaty since 2008.[1] The BIT is noteworthy for its limited substantive protections and its restrictive approach to investor state dispute settlement (**ISDS**). The BIT has not yet been ratified, but both States have taken steps towards ratification.

Recent treaty practice reflects efforts by States to expressly safeguard their right to regulate, which is, of course, not unfettered and normally achieved by adding language that specifically acknowledges the right to enact and enforce regulations for a variety of legitimate public policy reasons. In the bill submitted to the Colombian congress to ratify the BIT, the Colombian government stated that the BIT 'represents an evolution in the negotiation model of [BITs], moving away from international standards currently considered complex to interpret and apply, or simply inconvenient'.[2]

1. Who and what does the BIT protect?

To qualify for protection, a qualifying investor from one State (the home State) has to have made a qualifying investment in the territory of the other State (the host State).

(a) Definition of qualifying investor

The treaty definition of 'investor' must be read in conjunction with the definition of 'national'.[3]

With respect to natural persons (a 'national'), the BIT excludes dual nationals from protection. This is consistent with other treaties that Venezuela and Colombia have concluded (e.g. Venezuela-Canada BIT; Colombia-Spain BIT of 2021 (not in force)), and decisions rendered in certain prior cases involving Colombia or Venezuela.[4] The definition also requires effective nationality in accordance with customary international law, which requires analysing several factors to determine the nationality of an individual for the purposes of the BIT, such as:

- the individual's habitual residence and attachment to a given country;
- the circumstances under which an additional nationality was acquired; or
- the place where the individual's centre of interest is located.

1 Agreement Between the Bolivarian Republic of Venezuela and the Republic of Colombia Concerning the Reciprocal Promotion and Protection of Investments (signed on 3 Feb. 2023, not in force). The official authoritative text of the BIT is in Spanish. Excerpted quotes from the BIT referenced herein are the authors' own translations.

2 Bill for approval of the Agreement Between the Bolivarian Republic of Venezuela and the Republic of Colombia Concerning the Reciprocal Promotion and Protection of Investment, 6 Feb. 2023, p. 6. The original text of this bill is in Spanish. Excerpted quotes from this bill herein are the authors' own translations.

3 Arts. 2(b) and 2(f).

4 Heemsen v. Venezuela, Award on Jurisdiction, 20 Oct. 2019; Carrizosa and others v. Colombia, Award, 7 May 2021.

Legal entities must have 'important commercial activities' in their home State and must not be controlled by nationals of the host State.[5] In addition, lenders, investment funds and other financial entities funding an investment are excluded from protection.[6]

Further, the definition includes additional qualifications by requiring that investors (i) acquire the relevant nationality before making the investment, (ii) continue to hold the relevant nationality after making the investment.

(b) Definition of qualifying investment

The BIT includes broad language to define the scope of protected investments ('all kinds of assets'), followed by a non-exhaustive list of assets.[7]

First, the definition is rendered more restrictive by the inclusion of language in Article 2(a) reflecting the well-known 'Salini test',[8] by requiring:

- a contribution by the investor, which requires that assets be 'directly acquired by an Investor';
- duration, because investments must be made to establish a long-lasting economic relationship in the host State;
- the assumption of risk, as the investor must commit capital or other resources and expect profit in return; and
- that the investment contributes to the economic development of the host State.

Second, to qualify for protection, an investment must also satisfy the following criteria:

- the assets must be related to productive activities;
- the funds used to make the investment cannot originate in the host State;
- the investor must be able to exert significant control or influence over the investment; and
- the investment must be made in conformity with domestic law.

Third, the BIT expressly excludes certain assets from protection, notably:

- judicial, administrative or arbitral decisions, which have previously been recognised as protected investments;[9]
- sovereign debt instruments;
- passive portfolio investments, which may exclude project financing instruments that have been recognised as protected investments in other cases;[10] and
- claims for monies or credits arising from purely commercial transactions.

2. What protections does the BIT offer?

The BIT provides certain substantive protections, but they are narrow in scope.

As mentioned above, Colombia has argued that the BIT departs from 'complex' and 'inconvenient' (also seen as malleable) standards of protection.[11] As a result, the BIT excludes some of the standards that otherwise often appear in many investment treaties (including those to which Venezuela and Colombia have previously agreed): i.e. prohibition against indirect expropriation; fair and equitable treatment; full protection and security; most favoured nation; and umbrella clause. The following sections address the protections and other relevant provisions included in the BIT.

(a) Non-discrimination and national treatment

The wording of the non-discrimination standard reflects the States' desire to protect their right to regulate (Art. 5). Rather than phrasing the obligation as prohibiting discrimination, the provision begins by listing the measures that the States can adopt that will generally not amount to discriminatory treatment. These measures include those concerning human, animal, and environmental protection (Art. 5(a)), essential security interests (Art. 5(b)), and prudential measures in the

5 Art. 2(b)(ii).

6 Art. 2(b), last paragraph.

7 Art. 2(a). This list comprises (i) enterprises, (ii) property rights and other rights *in rem*, (iii) invested returns, (iv) shares, stocks or any form of equity participation, (v) credit operations and claims to money arising out of a qualifying investment, (vi) intellectual property rights, and (vii) rights conferred pursuant to laws or contracts such as concessions or licenses.

8 As established in Salini v. Morocco, Decision on Jurisdiction, 23 July 2001, para. 52.

9 Tribunals have granted protection to these investments in e.g. Saipem v Bangladesh, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007; Frontier Petroleum v. Czech Republic, Final Award, 12 Nov. 2010.

10 Tribunals have granted protection to these investments in e.g. Portigon v. Spain, Decision on Jurisdiction, 20 Aug. 2020.

11 Bill for approval of the Agreement Between the Bolivarian Republic of Venezuela and the Republic of Colombia, supra note 2 ('El Acuerdo también representa una evolución en el modelo de negociación de acuerdos, alejándose de estándares internacionales actualmente considerados de compleja interpretación y aplicación, o simplemente inconvenientes …').

financial sector (Art. 5(c)). The provision then establishes the standard of protection by stating, at Article 5, last paragraph:

> The adoption, maintenance or enforcement of the previous measures is subject to the requirement that they are not applied in an arbitrary or unjust manner or constitute a disguised restriction on investments of investors of the other Party.

The BIT also includes a national treatment clause (Art. 6) that follows the same approach as Article 5 discussed above. Typically, national treatment clauses establish that foreign investors will be granted treatment not less favourable than that accorded to national investors. However, the BIT states, at Article 6(a):

> For greater certainty, this Agreement will not result in unjustifiably more favourable treatment of foreign investors with respect to national investors.

(b) Expropriation

While States have the power to expropriate when certain conditions are fulfilled, this is typically reflected in investment treaties in a proscribing manner (e.g. 'investments **shall not** be expropriated, unless …'). The BIT, at Article 7, however, establishes that 'investments **may be** expropriated, for necessity, grounds of public interest, or grounds of public utility or general interest'.

The BIT further states that any expropriation must be made on grounds of 'necessity', 'public interest', 'public utility' or 'general interest' (Art. 7(a)), which are several formulations of functionally the same concept. Traditional requirements to render an expropriation lawful, such as due process, non-discrimination and fair compensation, are also included.

Article 7(c) further provides:

> Non-discriminatory legal measures designed and applied to protect legitimate interests of public wellbeing, such as health, security and the environment, do not constitute an expropriation.

This provision appears to incorporate the 'police powers' doctrine, which is a principle of customary international law pursuant to which a state will not incur in wrongdoing for an expropriation conducted in the interest of public welfare.

(c) Transfers

The BIT includes a standard guarantee of 'free transfer' of funds in a convertible currency (Art. 9). It is interesting that the Parties have opted for a traditional transfer of funds guarantee, given that it has been invoked in a number of cases against Venezuela on the basis of other BITs.[12]

(d) ISDS

The BIT includes a dispute resolution clause with access to ISDS (Art. 12) by providing that '[a]ny dispute in connection with investments arising between one of the Parties and an Investor of the other Party with respect to matters governed by this Agreement' may be subject to arbitration (Art. 12(a)).

This is a notable inclusion given Venezuela's historic reluctance to comply with ISDS awards. The Parties' decision to bind each other to international arbitration confirms that States continue to see value in ISDS.

The provision includes a six-month negotiation period, after which the investor may submit its claim before domestic courts or to an *ad hoc* tribunal under the 1976 UNCITRAL Rules (Art. 12(b)). This choice is presented as a fork-in-the-road and, once a choice is made, it is final and binding (Art. 12(d)). The inclusion of the 1976 UNCITRAL Rules suggests that the Parties are not satisfied with how these Rules have evolved, which is surprising given that key changes made to the 1976 UNCITRAL Rules concern issues of procedural efficiency and transparency.

Institutional arbitration is available only before a 'Binational Arbitration Centre' (Art. 12(b)). As of September 2023, this centre does not exist and there is no publicly available information on the details or status of its creation.

Lastly, access to ISDS is only available if the investor waives its right to initiate 'any other proceeding' regarding the adverse measure before the courts of the host State (Art. 12(c)).

(e) Denial of benefits

The BIT includes a 'denial of benefits' clause (Art. 13). This clause typically allows a State to preemptively deny protection to investors that would otherwise qualify for protection (i.e. investors that formally satisfy the definitions of 'investor' and 'investment').

12 E.g. Air Canada v. Venezuela, Award, 13 Sep. 2021; Valores Mundiales and Consorcio Andino v. Venezuela, Award, 25 July 2017.

The BIT allows Article 13 to be invoked even after a dispute has arisen (Art. 13(b)). Article 13 applies to investors that:

- do not meet the requirements of the definitions of investment and investor (Art. 13(a));
- are directly or indirectly controlled by or under a 'significant degree of influence' from nationals of a third State without substantial business activities in the home State (Art. 13(b)(i));
- are nationals of the host State without substantial business activities in the home State (Art. 13(b)(ii)); or
- have engaged in corrupt actions related the investment, duly proven in domestic judicial or administrative proceedings in the host State (Art. 13(b)(iii)).

Given the significant limitations included in the definitions of investor and investment in the BIT, Article 13 does not add any additional hurdles for investors seeking protection under the BIT. All grounds to deny benefits in Article 13 are tied to pre-existing requirements to qualify for protection under the BIT. This means that an investor that satisfies any of the grounds under Article 13 would not have enjoyed the BIT's protection in the first place.

3. Takeaways

Latin American States, including Colombia and Venezuela, recurringly appear as respondents in ISDS proceedings, and have voiced concerns regarding ISDS. Their criticism has reflected, e.g. in Venezuela's, Bolivia's and Ecuador's withdrawal from ICSID (notwithstanding Ecuador rejoining in 2021);[13] Bolivia's denunciation of up to 23 bilateral investment treaties;[14] USAN's [Union of South American Nations] (now abandoned) initiative of creating a regional ISDS centre to replace ICSID;[15] Venezuela's reluctance to comply with ISDS awards;[16] or Colombia's announcement to review and potentially renegotiate its investment treaties.[17]

Against that backdrop, the BIT is a noteworthy and difficult-to-assess development. Some may say that the BIT offers little substantive protection, and therefore the Parties are not concerned about potential claims from investors, as they would have little to no prospects of success. A different view is that Colombia and Venezuela still see value in bilateral investment treaties and the ISDS system, as evidenced by the fact that the signing of the BIT coincided with a recent period in which Venezuela has undertaken other measures aimed at attracting foreign investment. In any case, the BIT may be merely reflective of Venezuela and Colombia's efforts to rebuild their relationship after years of diplomatic impasse.

13 Bolivia's Denunciation of ICSID Convention (16 May 2007); Venezuela Submits a Notice under Article 71 of the ICSID Convention (26 Jan. 2012); 'Ecuador rejoins the ICSID Convention' (7 Oct. 2021).

14 N Marigo and K Apostolova, 'Bolivia strikes investor-State arbitration again?' (Freshfields' Risk and Compliance Blog, 2 Dec. 2020).

15 D Paez-Salgado and Fernando Perez-Lozada, 'New Investment Arbitration Center in Latin America: UNASUR, A Hybrid Example of Success or Failure?' (Kluwer Arbitration Blog, 27 May 2016).

16 E. Gaillard, I. Penusliski, 'State Compliance with Investment Awards', (2020) 3 *ICSID Review – Foreign Investment Law Journal*, 540 554-559.

17 'Petro's Government is revising all treaties and free trade agreements: Minister of Commerce' (https://www.infobae.com/, 18 Aug. 2023, in Spanish).

ASIA/PACIFIC

India

Foreign Consortium Members Under the Arbitration Act: Always in it Together?

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In recent years, Indian courts have taken diverging views on the position of foreign (non-Indian) entities that are part of unincorporated consortiums with Indian entities, and whether such non-Indian entities are considered as separate foreign legal entities for the purpose of invoking arbitration and representation in proceedings. The treatment of the foreign consortium member has implications for the classification of the arbitration as an international commercial arbitration, including the scope of interference by Indian courts with the award. This article discusses the position of law, highlights the factors considered relevant by the national courts, and analyses the approach taken in these decisions.

Introduction

It is not uncommon for larger Indian projects to be awarded to consortiums composed of a mix of one or more foreign contractor(s) and Indian contractor(s). The foreign contractor brings in specialisation and proprietary technology and know-how. The Indian contractor, with its local expertise and networks, can bid and negotiate for award of projects, communicate effectively with Indian employers (often government authorities or corporations) and carry out civil works and erection more efficiently.

If the consortium incorporates a special purpose vehicle 'SPV' for executing and performing the contract, the SPV will initiate or defend any legal proceedings with the employer in its own capacity. The situation can be more complicated when the consortium remains unincorporated. Often, the contract with the employer does not provide clearly for the exact role of the consortium members vis-à-vis the employer, crucially in provisions governing dispute resolution. If the employer is an Indian government corporation or statutory authority, the legal and commercial terms are typically based on standard formats that may not accommodate specifics of the consortium arrangement.

With a lack of contractual clarity, several questions may arise affecting the consortium members' ability to manage disputes, e.g. whether one of the members can initiate arbitration against the employer independent of their partner? Can consortium members have separate representation in the arbitration? Can they execute their respective award amounts separately?

The issue of the consortium members' identities under the contract also determines the classification of the arbitration as an international commercial arbitration ('ICA') or a domestic one. An ICA under Indian law refers to an arbitration relating to disputes arising out of commercial legal relationship where at least one of the parties is foreign (either by nationality, habitual residence, or incorporation).[1] ICAs are treated differently under Indian arbitration law for some important purposes, such as court appointment of arbitrators and setting aside of awards. If the foreign contractor is regarded as an independent party to the contract (and not merely as part of the consortium), then the arbitration being an ICA will be subject to these different set of rules. Under the Indian arbitration statute, the

1 Section 2(1)(f) of the Arbitration and Conciliation Act, 1996, defines an 'international commercial arbitration' as '...an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country.'

Arbitration and Conciliation Act, 1996 (the 'Act'),[2] applications for appointment of an arbitrator will lie before the Supreme Court of India instead of the High Courts. Appointment by the apex court means that any possibility of special appeals against an appointment order are foreclosed. Another important variation is that the scope of enquiry for seeking setting aside of the award is more limited in case of an ICA, with 'patent illegality' not being available as a ground for challenge.

Issues of identity of the consortium members and consequent categorisation as an ICA can present themselves to national courts at two stages:

Pre-arbitration stage:

- Invoking arbitration and seeking appointment of an arbitrator under Section 11 of the Act; or
- Seeking pre-arbitration interim reliefs under Section 9 of the Act.

Post-award stage:

- Initiating or resisting applications seeking setting aside of the award under Section 34 of the Act; or
- Seeking enforcement of the award under Section 36 of the Act.

1. Decisions of Indian courts

L&T Scomi: Closing the door on individual identity?

The precedent holding the field is the Indian Supreme Court's judgement of 2019 in *Larsen and Toubro Limited Scomi Engineering BHD v Mumbai Metropolitan Regional Development Authority*,[3] ('*L&T Scomi*'). In this pre-arbitration case, a petition under Section 11 of the Act was filed by a consortium seeking appointment of an arbitrator. The threshold jurisdictional issue was whether the Supreme Court (instead of the High Court) was the correct forum to bring this application, which triggered the issue of whether the arbitration could be rightly characterised as an ICA.

The consortium, composed of an Indian company ('L&T') and a Malaysian company ('Scomi'), relied on characterising Scomi as a 'body corporate' incorporated in a foreign country under the definition of ICA under the Act. On the other hand, the respondent or the employer contended that the consortium was an 'association' whose central management was being exercised in India through the Indian consortium leader, L&T.

In this case, Justice Nariman examined the provisions of the contract and the consortium agreement and noted *inter alia* the following features:

- The contract was executed between the employer, of the first part, and by the **consortium**, of the second part, with the members, L&T and Scomi listed under sub-parts (a) and (b).
- The consortium members were **jointly and severally responsible** to the employer, and were collectively referred to as the 'contractor'.
- L&T was described as the **consortium leader** under the consortium agreement, and would lead all arbitration proceedings.
- A supervisory board was constituted under the consortium agreement, with equal nomination by both members. The chairperson of the board would, by consent of all, be a nominee of the consortium leader. This board was responsible for **decision making** as to the performance of the contract.
- These contract terms had been interpreted by the High Court of Bombay in a previous order[4] deciding a challenge against an interim award (on different claims under the same contract) to mean that the consortium members could not be regarded as separate entities under the contract. On this basis, the High Court had held that the challenge petition filed by one of consortium members separately was not maintainable.

In view of these factors, and in line with the previous order of the High Court which was considered as binding *inter partes*, the Supreme Court too was of the view that:

> [I]t is not open for the petitioner [the consortium] to rely upon their status as independent entities while dealing with the respondent [the employer] and they will have to deal with the respondent as a Consortium only.[5]

2 Arbitration and Conciliation Act, 1996, available at https://www.indiacode.nic.in/bitstream/123456789/1978/1/A1996-26.pdf.

3 Larsen and Toubro Limited Scomi Engineering BHD v Mumbai Metropolitan Regional Development Authority, (2019) 2 Supreme Court Cases 271; 2018 INSC922 ('L&T Scomi').

4 *Larsen and Toubro Limited v Mumbai Metropolitan Regional Development Authority*, 2016 SCC Online Bom 13348.

5 *L&T Scomi*, para 13.

Therefore, the Supreme Court held:

> [T]he unincorporated "association" referred to in Section 2(1)(f)(iii) would be attracted on the facts of this case and not Section 2(1)(f)(ii) [i.e., a body corporate which is incorporated in any other country] as the Malaysian body cannot be referred to as an independent entity following the judgement of the High Court of Bombay.[6]

Further, the Supreme Court held that this 'association' was controlled and managed from within India, as the consortium's office was in Mumbai, India and the designated lead partner, the Indian company, had the determining voice in management.[7] Therefore, the arbitration was not an ICA and the appointment could not be made by the Supreme Court.

A similar examination of control and management was done by the Supreme Court while following the decision in *L&T Scomi* in a subsequent case of *Perkins Eastman Architects DPC and Another v HSCC (India) Limited*.[8]

Unlike *L&T Scomi*, the designated consortium leader was the foreign contractor, which was specifically authorised to do all such things as necessary on behalf of the consortium to bid for the project and also to represent the consortium in dealings with employer till the completion of the contract. Thus, control and management rested with the foreign contractor based in New York, and the arbitration was classified as an ICA.

SAIL v TPL: Delhi High Court's analysis at post-award stage

More recently, in 2021, the High Court of Delhi was presented with a similar question as in *L&T Scomi in the case of Steel Authority of India v Tata Projects Limited and Another ('SAIL v TPL')*.[9] The consortium was composed of Tata Projects Limited ('Tata'), an Indian corporation, and Danieli Corus ('DC'), incorporated in the Netherlands. The High Court was required to determine whether the arbitration was an ICA in light of the petitioner's reliance on the ground of 'patent illegality' to impugn the award in favour of the consortium.

The employer (petitioner) relied on *L&T Scomi* to contend that the arbitration was not an ICA merely by virtue of the presence of the Dutch company; it was argued that the consortium was led by Tata and control and management of the consortium was exercised in India. Justice Bakhru of the High Court examined the contract and noted the following factors:

- The contract was **signed by both members** of the consortium (a factor that was not specifically noted in **L&T Scomi**).
- Notably, the **scope of works** and **contractual payments** for the consortium members were separate and distinct.
- While the consortium leader was responsible for overall execution, the **liability in damages** for each member was limited to their respective scopes.
- The arbitration clause also contemplated a different **institution** (ICC) in case of consortiums including a foreign contractor above a certain pecuniary threshold.[10]

The High Court also specifically distinguished *L&T Scomi inter alia* on the basis that, unlike the supervisory board arrangement in *L&T Scomi*, there was no common or central management of the consortium contemplated between the parties. The High Court stated:

> [I]t is evident that a foreign incorporated entity is a party to the contract as it clearly specifies the obligations to be performed by that foreign entity and creates corresponding rights in favour of the other party [i.e. the employer].[11]

Therefore, it was held that the arbitration being an ICA, the ground of 'patent illegality' was not available to assail the award.[12] Categorisation as an ICA can reduce the scope of challenge significantly as challenges under 'patent illegality' typically relate to contractual interpretation, findings based on no evidence or in ignorance of vital evidence, etc. In this case, the High Court ultimately dismissed the challenge even on the alternative ground of violation of fundamental public policy, holding that it was not possible to find that the tribunal's interpretation of the evidence conflicted with basic notions of morality and justice.

6 *L&T Scomi*, para 14.

7 *L&T Scomi*, para 18.

8 Perkins Eastman Architects DPC and Anr v HSCC (India) Limited, (2020) 20 Supreme Court Cases 706.

9 Steel Authority of India v Tata Projects Limited and Another, 2021 SCC OnLine Del 4170; 2021:DHC:2600.

10 In case of other disputes involving Indian parties and lesser amounts, arbitration would be conducted under the aegis of Indian institutions - Indian Council of Arbitration or the SCOPE Forum of Conciliation and Arbitration.

11 *SAIL v TPL*, paras 88 and 90: 'The facts in the present case are materially different [from *L&T Scomi*]. The Agreement describes TPL as –Consortium leader and Contractor– and DC as –Consortium Member and Contractor–. As noticed hereinbefore, the **rights and obligations of TPL and DC under the Agreement are separate and specific**. There is **no material to indicate that there was a common or central management** of the Consortium of TPL and DC. Thus, it is apparent from the Agreement, that TPL and DC were parties to the Agreement.' (para 88, emphasis supplied)

12 *SAIL v TPL*, para 87.

2. Distinguishing L&T Scomi – A two-pronged test?

It is important to bear in mind that the findings in L&T Scomi were based on an appreciation of the specific contractual clauses in that case and a previous determination by the High Court of Bombay (on different claims) which the Supreme Court noted was binding on the parties to the extent of their roles under the contract. Indeed, even if the Supreme Court had a differing view on this issue on merits, it would have been incongruent for a different arrangement to govern subsequent claims made under the same contract between the same parties. Therefore, it would not be correct to regard the judgment in L&T Scomi as laying down any general rule that members of an unincorporated consortium cannot be regarded as separate 'body corporates' under the Arbitration Act, or that such arbitrations cannot be classified as an ICA if the named 'leader' of the consortium is an Indian entity.[13]

In fact, the previous High Court of Bombay decision, which the Supreme Court applied in L&T Scomi, had also considered whether the contract contemplated 'different and exclusive payments' for the constituent members as a relevant factor for determining the identity of the consortium members under the contract.[14] This was one of the factors considered relevant by the High Court of Delhi in *SAIL v TPL* as well.

Following from the reasoning of the courts, the following two-prong test may be distilled for determining whether the arbitration is an ICA in cases of unincorporated consortiums with foreign members.

a) Have the parties contracted in their separate capacities or as a consortium?

For this step, contractual terms related to the description of the parties, definition of terms such as 'contractor' or 'party', scope of works of each member, divisibility and mechanism of payments, liability of the members, role/responsibility of the consortium leader, if named, and terms of the arbitration clause, etc. (as considered in *SAIL v TPL*) are relevant. If the contractual terms preponderantly recognise the parties as separate entities, and create distinct obligations and rights for them, and if one of the parties is foreign 'body corporate', then the arbitration is an ICA.

On the other hand, if the terms indicate that the identity and role of the consortium overshadows that of its individual members, especially in terms governing the rights and obligations of the consortium in relation to the employer, then the consortium, at least for the purpose of the contract, may be considered an 'association'. This means that consortium members will not be able to represent themselves individually before the tribunal or the courts. If the consortium is found to be an association, the second prong of the test is to examine the question of management and control to determine whether the arbitration is an ICA.

b) Whether central management and control of the consortium is exercised within or outside India?

Factors such as the location of the consortium's office, if any, distribution of decision-making powers between the members, composition and appointment of any board or other decision-making body, etc. (as were considered in *L&T Scomi*) are relevant. If there is no central management and control of the consortium (as was the case in *SAIL v TPL*), or if such control is not exercised from within India, then the arbitration will be classified as an 'ICA' (due to the presence of a foreign body corporate or an association managed outside India).

If, however, there is an arrangement for common management which is based in India or if the consortium leader is the Indian partner which also exercises substantial decision-making powers, then the arbitration will be treated as a domestic arbitration. This examination may become complex in cases where there the consortium is rightly characterised as an association and does have common management, but there no clear physical location to which the management can be tethered (for instance, due to virtual communication and documentation).

13 The High Court of Delhi in *SAIL v TPL* (at para 88) also distinguished *L&T Scomi* based on the Supreme Court's consideration of the Bombay High Court's previous order in that case.

14 *Larsen and Toubro Limited v Mumbai Metropolitan Regional Development Authority*, 2016, supra note 4, at para 8. While the High Court did not decide on the validity of the interim award as it dismissed the petition on maintainability, one of the findings under challenge was the tribunal's conclusion that claims could not maintained by the consortium members separately in the arbitration. The High Court discussed this finding, where the tribunal had noted other factors apart from a lack of separate payments – such as the consortium having a common address under the contract, a separate income tax registration and bank guarantees submitted by the consortium (and not its constituent members) – which further indicated that the parties were not entitled to file separate claims (para 7).

Conclusion

As seen from the reasoning of the courts, examination as to both identity and management requires the court to look closely to the terms of the contract (i.e. both the contract with the employer and the consortium agreement). By doing so, the court can translate the commercial specificities of different consortium arrangements to the legal classification of the dispute.

This close examination is also important to ensure that separate entities, who may have entered into an unincorporated consortium arrangement (as opposed to a SPV) to avoid having integrated representation and management, are not indirectly compelled to assume common identity in arbitration and related proceedings. This may have the undesirable effect of hindering the members' effective representation of their individual interests and claims and would be contrary to party autonomy.

Classification as an 'international commercial arbitration' affects critical aspects of the arbitration, from appointment of the tribunal to the scope for setting aside the award, and thus requires thorough enquiry. While we are yet to see further judicial examination of these issues, it would be salutary for national courts to continue to develop the principles applied in the above cases and articulate them as a consolidated test providing clear guidance.

ASIA/PACIFIC

Pakistan

Courts' Pro-Enforcement Stance Confirmed

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The views expressed in this article are those of the author only and are not intended to reflect those of ICC.

On 28 April 2023, the Lahore High Court allowed the enforcement of a foreign arbitral award in favour of a Spanish company against a Pakistani one. The judgment not only explicitly confirmed the courts' pro-enforcement stance, citing various recent judgments following this approach, but emphasised the importance of having a pro-enforcement approach in order to promote stability and predictability of international commerce and protect the confidence of investors.

Introduction

Pakistan is not typically a country that comes to mind when one thinks of jurisdictions that are pro-arbitration, whether in terms of legislation or the role of courts. The country's domestic arbitration act – which was introduced in the British colonial era – dates back to 1940 and the Pakistani courts have not been known for their pro-arbitration stance. However, the winds of change are blowing in Pakistan when it comes to arbitration: (i) the country is in the process of reforming its arbitration law and has prepared a draft bill that is currently open for public consultation;[1] and (ii) recent decisions by various High Courts of the country have established pro-arbitration precedents and jurisprudence.

One such judgment was passed on 28 April 2023 by the Lahore High Court ('High Court'), the largest High Court in Pakistan in terms of number of judges and caseload,[2] which reaffirmed Pakistan's pro-arbitration approach, by allowing the enforcement of a foreign arbitral award (i.e. an award made outside of Pakistan and in a state which is either a party to the New York Convention or has been notified by the Federal Government in the official Gazette) against a Pakistani company.[3]

1. Facts of the case

A dispute arose between Tradhol International SA Sociedad Unipersonal ('Tradhol' or the 'Claimant'), a Spanish company, and Shakarganj Limited ('Shakarganj' or the 'Respondent'), a Pakistani company, regarding outstanding amounts owed in connection with the supply of ethanol. The Claimant commenced arbitration proceedings to recover such outstanding amounts. The arbitration agreement was governed by English law and provided for arbitration under the rules of the London Court of International Arbitration ('LCIA'). The arbitration agreement provided for three arbitrators, however the Respondent failed to nominate an arbitrator, following which the LCIA Court appointed an arbitrator on its behalf. The seat of arbitration was London, United Kingdom.

In the arbitration, the Respondent raised jurisdictional objections on the grounds that there was no arbitration agreement between the parties. The Respondent also commenced litigation proceedings before the Civil Court in Lahore ('Civil Court') (which is a court of original jurisdiction subordinate to the High Court) seeking cancellation of the contract between the parties and an anti-arbitration injunction.[4] The Civil Court granted interim relief, restraining Claimant from taking any action on the basis of the contract. Meanwhile, Respondent had obtained an anti-suit injunction from the High Court in London.[5] Subsequently, the arbitral tribunal issued a

1 http://ljcp.gov.pk/ALRC/draft_bill.pdf

2 See 'Judicial Statistics of Pakistan 2020', Law and Justice Commission of Pakistan, pp. 3 and 31.

3 M/s Tradhol International SA Sociedad Unipersonal v M/s Shakarganj Limited, Civil Original Suit No. 80492 of 2017. The judgment has been appealed before a larger bench of the Lahore High Court, Intra-court Appeal No. 31782/2023.

4 *M/s Shakarganj Limited v /s Tradhol International SA Sociedad Unipersonal*, Civil Judge 1st Class Lahore, 25 July 2016.

5 *M/s Tradhol Internacional S.A. Sociedad Unipersonal v M/s Shakarganj Mills Limited*, Award on Jurisdiction dated 10 Nov. 2016, para. 25.

partial award in which it upheld its jurisdiction. The Civil Court ultimately vacated its anti-arbitration injunction,[6] and dismissed Respondent's application on the grounds that the Civil Court did not have jurisdiction and the correct forum was the High Court.[7]

In the final award, the arbitral tribunal awarded Claimant the amount it sought, as well as interest and costs. The final award also ordered Respondent to (i) discontinue the legal proceedings it initiated against the Claimant before the Civil Court, and (ii) refrain and be prohibited from instituting or continuing any equivalent proceedings against the Claimant in Lahore or elsewhere.

2. Enforcement of foreign arbitral awards in Pakistan

Pakistan adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the 'New York Convention') by passing the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ('2011 Act'). The 2011 Act deals with the enforcement of foreign arbitration agreements and foreign arbitral awards.[8] The 2011 Act in Section 2(e) defines a foreign arbitral award as an 'arbitral award made in a Contracting State [a state which is a party to the New York Convention] and such other State as may be notified by the Federal Government, in the official Gazette'. The 2011 Act confers exclusive jurisdiction on the High Courts of Pakistan,[9] a matter which was also addressed by the High Court in the judgment under discussion. This is in contrast to the regime under the 1940 Arbitration Act which gives jurisdiction to the civil courts.

Foreign arbitral awards

The enactment of the 2011 Act, gave rise to conflicts between the interplay of the 2011 Act and the 1940 Arbitration Act and the issue of concurrent jurisdiction of the High Courts and civil courts. This issue arose in the *Taisei* judgments which involved a contract governed by the laws of Pakistan and provided for arbitration under the ICC Rules seated in Singapore.

In *Taisei Corporation v A. M. Construction Company (Pvt) Ltd.* PLD 2012 Lahore 455 ('*Taisei I*'), the Lahore High Court in reliance of an earlier judgment of the Supreme Court of Pakistan (which was rendered prior to the enactment of the 2011 Act), held that the arbitral award could not be considered a foreign arbitral award as the governing law of the contract was that of Pakistan, and therefore the 1940 Arbitration Act applied. The Lahore High Court further held that as the 2011 Act does not repeal the 1940 Arbitration Act, the remedies provided under the latter act (as per which civil courts may have jurisdiction) remained available.

In separate proceedings before the Sindh High Court, *Taisei II*,[10] between the same parties and arising out of the same arbitral award, a different conclusion was reached. The Sindh High Court held that as the arbitral award was made outside of Pakistan and in a contracting state, it was a foreign arbitral award and came under the ambit of the 2011 Act. The appeals from the *Taisei* cases are currently pending before the Supreme Court of Pakistan.

Meanwhile, the Lahore High Court in another case,[11] which involved a contract governed by the laws of Pakistan and provided for arbitration under the LCIA Rules seated in London, held that an award made in a contracting state is a foreign award, notwithstanding the governing law of the contract.[12] The judgment noted that in *Taisei I* the High Court had incorrectly followed the reasoning of the Supreme court in the *Hitachi* case,[13] which relies upon the Arbitration (Protocol and Convention) Act, 1937, which was replaced by the 2011 Act.

6 The judgment of the High Court (para. 12) mentions that the Civil Court ultimately dismissed Shakarganj's petition on the ground that it did not have jurisdiction.

7 *M/s Shakarganj Limited v /s Tradhol International SA Sociedad Unipersonal*, Civil Judge 1st Class Lahore, 17 April 2019.

8 The New York Convention was initially adopted in domestic legislation on 14 July 2005 by way of a presidential ordinance through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005. It was re-promulgated in 2006, 2007, 2009, and 2010, and was finally enacted as an act of Parliament of 2011.

9 Section 2(d) of the 2011 Act.

10 *Taisei Corporation v A. M. Construction Company (Pvt) Ltd*, Sindh High Court, 2018 MLD 2058.

11 *Orient Power Company (Private) Limited through Authorized Officer V Sui Northern Gas Pipelines Limited through Managing Director*, Lahore High Court, PLD 2019 Lahore 607.

12 Ibid, para. 11.

13 *Hitachi Limited v Rupali Polyester,* Supreme Court of Pakistan, 1998 SCMR 1618.

3. Judgment of the High Court

Tradhol submitted an application under the 2011 Act for the recognition and enforcement of the arbitral award. Shakarganj resisted enforcement and submitted objections under Section 7 of the 2011 Act[14], invoking the following grounds:

- The arbitral tribunal disregarded the anti-arbitration interim injunction granted by the Civil Court and proceeded with the arbitration;
- The arbitration agreement was invalid as it was neither executed by a competent person nor by a person authorized to sign on behalf of Shakarganj; and
- Enforcement of the arbitral award would be in contravention to Pakistan's public policy.

The High Court dismissed Shakarganj's objections and allowed the enforcement of the award based on five key findings explained below.

(a) Competent court

The High Court found that the local High Courts have exclusive jurisdiction to deal with all matters arising out of the 2011 Act,[15] as is provided within the act itself.[16] Therefore, any other courts, such as civil courts would not have jurisdiction to adjudicate on matters arising out of the 2011 Act. For this very reason, the Civil Court had previously dismissed Shakarganj's application on the ground that it did not have jurisdiction.

(b) Documents required to be furnished

The High Court held that Tradhol satisfied the requirements prescribed in Section 5 of the 2011 Act,[17] which adopts the standard set in Article IV of the New York Convention.[18] Tradhol submitted certified copies of the award on jurisdiction, the memorandum of clarification to the award on jurisdiction, the final award, along with an affidavit of Tradhol's solicitor. In doing so, the High Court reaffirmed that no onerous requirements to furnish documents exist for parties while seeking enforcement of an award.

(c) Validity of the agreement

Shakarganj argued that the award was unenforceable as the arbitration agreement was invalid since it (i) did not execute the agreement, and (ii) did not authorise any person to sign the agreement. The High Court noted that the burden of proof to establish the invalidity of the agreement rested with Shakarganj, which was the party asserting this claim, whereas Tradhol had to only prove *prima facie* existence of the Agreement.

The High Court considered Article II of the New York Convention that defines the term 'agreement in writing', as one which includes an arbitral clause in a contract or arbitration agreement, 'signed by the parties or contained in an exchange of letters or telegrams'.[19] The High Court held that as the exchange of email communications was not disputed by Shakarganj, the existence of the agreement stood established pursuant to the 2011 Act and the New York Convention.[20] The High Court also quoted extracts from the award on jurisdiction and held that:

- the persons who executed the agreement had ostensible authority to enter into the agreement; and
- the agreement was signed and stamped by the parties.

While addressing the above issue, the High Court also held that under both English and Pakistani law, the law governing the contract (which in this matter was English law) would apply to the arbitration agreement contained within it, unless it was suggested otherwise.[21] However, despite this finding, the Court analysed this objection under Pakistani law.

(d) Public policy

Shakarganj argued that (i) the arbitral award was in violation of public policy as the arbitral tribunal proceeded with the arbitration despite the interim injunction granted by the Civil Court, and (ii) the arbitral tribunal ought to have awaited for the Civil Court's final decision.

The High Court dismissed this argument on the basis that the Civil Court was not the correct forum to decide on this issue (confirmed in due course by the Civil Court as well, following its dismissal of the case as it lacked

14 Section 7 of the 2011 Act provides: 'Unenforceable foreign arbitral awards: The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention'.

15 Civil Original Suit, supra note 3, at para. 10.

16 Section 3(1) of the 2011 Act provides: 'Notwithstanding anything contained in any other law for the time being in force, the Court shall have exclusive jurisdiction to adjudicate and settle matters related to or arising out from this Act'. Art. 2(d) of the 2011 Act defines Court as 'Court' means a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the official Gazette'.

17 Section 5 of the 2011 Act provides: '5. Furnishing of documents: (1) The party applying for recognition and enforcement of foreign arbitral award under this Act shall, at the time of application, furnish documents to the Court in accordance with Article IV of the Convention'.

18 Civil Original Suit, supra note 3, at para. 15.

19 Id. para. 20.

20 Id. para. 24.

21 Id. para. 27.

jurisdiction). While the litigation commenced before the Civil Court was not in relation to the enforcement of the arbitral award under the 2011 Act, the High Court still held that Shakarganj by filing a claim before the Civil Court, acted contrary to its obligation under the arbitration agreement to refer the matter to arbitration.[22] The High Court described the public policy argument of Shakarganj as having 'no basis' and being 'unsubstantiated and fanciful'.[23] The High Court reiterated that under the 2011 Act, only the High Courts of the country have jurisdiction to decide on such matters.

On the matter of public policy, the High Court quoted a judgment of the Supreme Court of Pakistan that held that the public policy criterion should not be given a broad scope of application, [24] and that it 'ought only to succeed where enforcement of the award would violate the forum State's most basic notions of morality and justice'.[25] This creates a positive precedent for future cases by limiting the discretion of courts with regards to the public policy defence in resisting enforcement of arbitral awards.

(e) Pro-enforcement policy

The High Court emphasized the importance of courts following a pro-enforcement policy as mandated in the New York Convention. The High Court described such an approach as being based on the principle of comity and one which promotes the finality and enforceability of arbitration awards.[26] Moreover, the High Court suggested that such a policy requires courts to limit their review to procedural matters and to refrain from examining the substance of the dispute.[27]

A recurring theme in the judgment is that a pro-enforcement policy 'contributes to the stability and predictability of international commerce' and 'protect[s] the confidence of investors'. The High Court quoted an extract from one of its previous judgments which stated:

> [I]t is the duty of the Courts in Pakistan to see the rights of the parties and to protect their interest in order to build confidence of investors in Pakistan but at the same time the interest of government functionaries has also to be examined regarding financial interest of the Government.[28]

For the High Court to make such observations and rulings, is clear evidence of the pro-arbitration approach adopted by the Pakistani courts and marks a significant departure from past decisions where the courts were at times perceived to interfere and not protect the confidence of investors. For example, the Supreme Court of Pakistan in *HUBCO v WAPDA*[29] refused to enforce an arbitration agreement providing for ICC arbitration in London as it involved matters of bribery and criminality. In *SGS v Pakistan*,[30] the Supreme Court of Pakistan issued an order restraining an ICSID arbitration on the ground that Pakistan was not bound under the bilateral investment treaty pursuant to which the arbitration had been initiated.

Conclusion

This judgment of the High Court cements Pakistan's status as a pro-arbitration jurisdiction and is in line with recent judgments issued by Pakistan's High Courts and Supreme Court. Hence, this judgment should not be seen in isolation and is part of a wider momentum in the country that is in favour of international arbitration. This is evident from the judgment itself which in multiple instances addresses the need to protect the confidence of investors and promote international trade. All of this coincides with other relevant developments in the country, such as a new arbitration law being in the works, conferences attended by local and international stakeholders, and capacity building trainings and programs being rolled out.

22 Id. para. 35.

23 Id. para. 35.

24 *Orient Power Company (Private) Limited through Authorized Officer V Sui Northern Gas Pipelines Limited through Managing Director*, Supreme Court of Pakistan, 2019 CLD 1069.

25 Id, para. 105.

26 Civil Original Suit, supra note 3, at para. 47.

27 Id. para. 47.

28 Id. para. 46

29 *HUBCO v WAPDA*, Supreme Court of Pakistan, PLD 2000 Supreme Court 841.

30 *Société Générale de Surveillance S.A. v Pakistan*, Supreme Court of Pakistan, 2002 SCMR 1694.

ASIA/PACIFIC

Singapore

Balancing Open Justice and Confidentiality in Arbitration-related Court Proceedings

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The author thanks Akshay Nair for his assistance in the preparation of this article during his time as an intern at Allen & Gledhill LLP.

It is indisputable that confidentiality is the cornerstone of arbitration proceedings. Yet, in limited circumstances, there are exceptions to this rule. The recent judgment of *The Republic of India v Deutsche Telekom AG* [2023], in which the Singapore Court of Appeal declined to make the privacy orders sought by the applicant, is instructive in this regard. The judgment, however, is to be contrasted with another recent case, *CZT v CZU* [2023], in which the Singapore International Commercial Court ('SICC') declined to order the production of records of the arbitral tribunal's deliberations, although the SICC recognised that production could be ordered in exceptional cases.

1. *The Republic of India v Deutsche Telekom AG* [2023][1]

The Republic of India ('India'), the applicant in *India v DT*, had brought an application to set aside an order granting leave to Deutsche Telekom AG ('DT') to enforce an arbitral award against India. India was unsuccessful in setting aside the enforcement order at first instance and filed an appeal with the Court of Appeal. In addition, India applied for the appeal to be heard in private, for any information or documents relating to the appeal to be concealed, for parties to not be identified in hearing lists, for the casefile to be sealed and for any published decision or judgement that may be issued to be redacted. India's application for the said privacy orders was dismissed. In its judgment, the Court of Appeal examined the legislative history of ss. 22 and 23 of the International Arbitration Act ('IAA'),[2] the principle of open justice and the court's inherent powers to grant privacy orders in arbitration proceedings.

Sections 22 and 23 of the International Arbitration Act

When first enacted, s. 22 of the IAA provided the default position that proceedings arising from arbitrations would be heard in open court but could be heard in private upon an application to the court.[3] This provision was subsequently amended in the Courts (Civil and Criminal Justice) Reform Act 2021 to provide that such proceedings would be private unless ordered otherwise by the court. Despite the difference in wording, the Court of Appeal was of the view that the purpose of the current and original iteration of s. 22 is to protect the confidentiality of arbitration proceedings. Further, the interest in keeping enforcement proceedings confidential was 'essentially a derivative interest designed ultimately to protect the confidentiality of the underlying arbitration'.[4]

In *India v DT*, the Court of Appeal declined to grant the privacy orders sought on the basis that the confidentiality of the arbitral had been substantially lost:

1 *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 4, 25 April 2023 ('*India v DT*'), available at https://www.elitigation.sg/gd/s/2023_SGCAI_4.

2 See Sections 22 and 23 of International Arbitration Act 1994. S. 22: '(1) Subject to subsection (2), proceedings under this Act in any court are to be heard in private. (2) Proceedings under this Act in any court are to be heard in open court if the court, on its own motion or upon the application of any person (including a person who is not a party to the proceedings), so orders.' S. 23: '(1) This section applies to proceedings under this Act in any court heard in private. (2) A court hearing any proceedings to which this section applies is, on the application of any party to the proceedings, to give directions as to whether any and, if so, what information relating to the proceedings may be published…".

3 Id. at [19].

4 Id. at [23]

- Several awards made in the arbitration were available on external websites.
- The Swiss Federal Supreme Court's refusal of India's application to set aside the Interim Award was accessible to the public.
- A Global Arbitration Review ('GAR') article had identified India and DT as parties to the enforcement proceedings in Singapore.[5]
- A LinkedIn post was published by India's lawyers naming India as a party to the Singapore enforcement proceedings, along with the size of the Final Award and a link to the GAR article.
- Information on enforcement proceedings in other jurisdictions (which would include the outcome of the arbitration) had entered the public domain.

The courts' inherent powers

The Court of Appeal opined that India could only invoke the court's inherent powers to grant the privacy orders based on an interest which was different from that under s. 22 of the IAA. India would only resort to using inherent powers as an alternative to the statutory stance, and this would only occur if the court determined that the default statutory position had been set aside for substantial reasons. In such situations, there would be no justification for invoking the court's inherent powers unless it was done to safeguard a distinct interest unrelated to the one protected by the statutory provision. However, this was not applicable in this instance, as India's argument was essentially based on the same grounds, specifically the confidentiality of the arbitration.[6]

The Court of Appeal also rejected India's argument that disclosing information relating to the appeal would 'provide more ammunition' to others seeking to damage India's reputation'. In this regard, India had relied on Twitter posts, website headlines, and statements made by external sources which appeared to express the view that India's conduct in relation to various arbitrations was 'repressive and wrongful'.[7] In the view of the Court of Appeal:

> … The private interest of a party not to be seen in an adverse light does not warrant a grant of privacy orders in a departure from the principle of open justice.

5 https://globalarbitrationreview.com/india-gets-more-time-challenge-enforcement-in-singapore

6 Id. at [43].

7 Id. at [44].

2. *CZT v CZU* [2023][8]

This case arose from an arbitration brought by the defendant against the plaintiff, in which the majority of a three-member arbitral tribunal had ruled in favour of the defendant. The minority, however, released a dissenting opinion in which five serious allegations were made against the majority, including: (i) falsely attributing arguments that were not supported by the record, (ii) reaching conclusions based on facts other than those argued by parties and (iii) attempting to conceal the truth behind the award.[9]

The plaintiff sought to set aside the arbitration award on the grounds that: (i) the majority acted in breach of natural justice, (ii) the arbitral procedure was not in accordance with the agreement of the parties and (iii) the award was in conflict with the public policy of Singapore. The plaintiff also requested for the production of the arbitrators' deliberations on the basis that these records were relevant to its submission that the majority had breached the fair hearing rule by deciding a key liability issue based on reasons not mentioned in the final award.[10]

The SICC stated the default position is that an arbitrator's deliberations are confidential and accordingly protected against production orders.[11] It agreed that there were four policy reasons for protecting the confidentiality of such deliberations:[12]

1. Confidentiality is a necessary pre-requisite for frank discussion between the arbitrators.
2. Arbitrators are able to reflect on the evidence without restriction, to draw conclusions untrammelled by any subsequent disclosure of their thought processes, and, where they are so inclined, to change these conclusions on further reflection without fear of subsequent criticism or of the need for subsequent explanation (to, for example, the party who appointed them).
3. The tribunal is protected from outside influence. For example, the existence of such a duty would discourage an arbitrator from leaking or publicising discussions or decisions with which he disagreed.
4. The rule helps to minimise spurious annulment or enforcement challenges based on matters raised in deliberations or differences between the deliberations and the final award.

8 *CZT v CZU* [2023] SGHC(I) 11, 28 June 2023, available at https://www.elitigation.sg/gd/sic/2023_SGHCI_11

9 Id. at [31].

10 Id. at [33].

11 Id. at [43].

12 Id. at [44].

In addition, the SICC accepted that there was a distinction between 'process issues' (for instance, where a co-arbitrator has been excluded from deliberations) and 'disagreements on substance'. It explained that the policy reasons underpinning the confidentiality of an arbitral tribunal's deliberations did not apply to 'process issues' because they 'do not involve an arbitrator's thought processes or reasons for his decision'.[13]

Leaving aside the distinction between 'process issues' and 'disagreements on substance', the court opined that there is an exception to the confidentiality of arbitration proceedings where the case was:

> … so compelling as to persuade the court that the interests of justice in ordering production of the records of deliberations outweigh the policy reasons for the protection of the confidentiality of deliberations.[14]

This would occur where (i) 'very serious' allegations were involved (such as corruption, which 'attack[ed] the integrity of arbitration at its core'), and (ii) had 'real prospects of succeeding'.[15]

On the facts, the SICC found that the exception to confidentiality was inapplicable. It was not necessary for the arbitral tribunal's deliberations to be produced as the plaintiff's allegation that there had been a breach of the fair hearing rule could be decided based on the arbitration record alone.[16]

3. Commentary

In the legal landscape of international arbitration, *The Republic of India v Deutsche Telekom AG* [2023][17] and *CZT v CZU* [2023][18] illuminate the intricate interplay between transparency and confidentiality. The judgments rendered by the Court of Appeal and the SICC offer valuable insights into the evolving dynamics of arbitration proceedings, exploring the delicate balance between openness and the imperative to protect sensitive information.

The Republic of India v Deutsche Telekom AG [2023],[19] the Court of Appeal's interpretation of legislation reinforces the enduring purpose of those sections – to protect confidentiality in arbitration. Nevertheless, the court's reluctance to grant privacy orders in the context of increased public disclosures through various channels highlights the formidable challenges posed by the digital age. The availability of arbitration awards on external websites, public disclosure of decisions from foreign courts, and media coverage significantly contributed to the court's determination that the confidentiality integral to arbitration had been substantially compromised. This recognition underscores the pressing need for a recalibration of confidentiality preservation strategies in arbitration, recognising the profound impact of modern information dissemination.

In *CZT v CZU* [2023],[20] the SICC's position on confidentiality in arbitrators' deliberations is underscored by robust policy considerations aimed at promoting open discussions, safeguarding arbitrators from external pressures, and minimising challenges to arbitration awards. The court's recognition of a nuanced distinction between 'process issues' and 'disagreements on substance' reflects a considerate approach to confidentiality concerns, adjusting considerations to the specific nature of the issues at hand. Significantly, the SICC sets a stringent standard for exceptions to confidentiality, insisting on their consideration only in cases of exceptional gravity where allegations are 'very serious' and have genuine prospects of success. The court's careful determination that the exception was inapplicable reinforces a commitment to maintaining confidentiality unless truly exceptional circumstances exist, prioritising the use of existing information over compromising established principles.

Singapore courts are fiercely protective of the confidentiality of arbitration proceedings. In the Singapore courts' perspective, the exceptions to confidentiality are extremely limited and it is not easy for a party to prove that the confidentiality of arbitration proceedings should be displaced. That said, where confidentiality has been lost, there is no purpose in preserving the privacy of the arbitration, and the interest in favour of open justice prevails. In this regard, where enforcement proceedings take place across multiple jurisdictions, parties need to liaise with different sets of counsel to ensure that court proceedings arising from the arbitration are kept private and to be careful about what information is posted online.

13 Id. at [50].
14 Id. at [53].
15 Ibid.
16 Id. at [59].
17 *The Republic of India v Deutsche Telekom AG*, supra note 1.
18 *CZT v CZU* [2023], supra note 7.
19 *The Republic of India v Deutsche Telekom AG*, supra note 1.
20 *CZT v CZU* [2023], supra note 7.

EUROPE

Albania

Reinstating the Law on Arbitration

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On 6 July 2023, the Albanian Parliament passed Law No. 52/2023 'On Arbitration in the Republic of Albania'. This law has filled the void in legislation, created by the 2013 repeal of the chapter of the Code of Civil Procedure dedicated to arbitration.

Introduction

In October 1991, Albania became member of ICSID.[1] In November 2000, the Albanian Parliament ratified the European Convention on International Commercial Arbitration of 1961,[2] and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[3]

On 29 March 1996, the Parliament passed the Code of Civil Procedure of the Republic of Albania.[4] The provisions of the arbitration chapter (Arts. 400 – 441) of the Code governed procedures of domestic or foreign commercial arbitration taking place in Albania. Said provisions of the Code were rarely tested due to the limited use of arbitration.

In October 2013, the Albanian Parliament repealed the arbitration chapter of the Code with the aim of replacing it with a comprehensive law on arbitration. This law was enacted only in July 2023 when the law on arbitration[5] (the 'Law') was passed. Hence, for ten years Albania did not have any domestic legislation dedicated to arbitration.

Due to such gap in legislation and the local business culture, used to refer to the traditional court system, arbitration has not been developed so far in Albania.

In this context, the new Law is a first step forward to foster the use and development of arbitration. The main features of the Law are summarized below.

1. Scope

The Law is based on the UNCITRAL Model Law on International Commercial Arbitration, with few local adjustments, and applies to both domestic and international arbitral proceedings where the seat of arbitration is in Albania.

According to Article 3 of the Law, the arbitration is considered international when:

- the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or
- the place of arbitration according to the arbitration agreement, or the country with which the dispute, subject to the arbitration, is most closely connected, is outside Albania; or
- a substantial part of the obligations arising out the contract, the subject to dispute, is performed outside Albania.

2. Institutional or *ad hoc* arbitration

The parties can choose in the arbitration agreement that the arbitral proceedings shall be administered by a permanent institution of arbitration, according to its procedural rules and the provisions of the law. Alternatively, the parties may agree to resolve the dispute by *ad hoc* arbitration and apply the rules defined in the arbitration agreement, or the procedures set forth by the Law.

1 Law no. 7515, 1 Oct.1991.
2 Law no. 8687, 9 Nov.2000.
3 Law no. 8688, 9 Nov. 2000.
4 Law no. 8116, 29 March 1996 'The Code of Civil Procedure of the Republic of Albania', as amended.
5 Law No. 53/2023 'On arbitration in the Republic of Albania (https://qbz.gov.al/eli/ligj/2023/07/06/52/18befe4b-3946-44fe-b232-c1d57f9437af;q=52%2F2023).

According to the definition provided by paragraph 4 of Article 3 of the Law:

> [The] 'Permanent Institution of Arbitration' is a legal entity, established by natural or legal persons, domestic or foreign, according to Albanian law, whose purpose of activity is the administration of arbitral proceedings.[6]

It is not clear how this definition will affect the arbitration proceedings where the parties have chosen a foreign arbitral institution and the seat of arbitration is in Albania.

The substantive law applicable to the merits of the dispute will be decided by the arbitral tribunal if the parties have not chosen the governing law.

3. Arbitrators' qualifications

Article 13 of the Law sets certain minimum requirements to be satisfied by the arbitrators, which are as follows:

> [T]he arbitrator must simultaneously satisfy the following requirements:
>
> a) should not have been convicted by a final and enforceable court judgment for committing a criminal offense; and
>
> b) should not have been banned from the right to exercise public functions by a final and enforceable court judgment.

According to the Law, the arbitration agreement and/or the permanent institutions of arbitration may add further requirements or qualifications which must be satisfied by the arbitrators.

4. Compétence – Compétence

Pursuant to Article 12 of the Law, the court shall, *ex officio*, declare lack of jurisdiction to resolve on a dispute brought by a party, when such dispute is subject to the arbitration agreement, unless the arbitration agreement is null and void. The arbitral tribunal will examine and decide whether it has the jurisdiction to decide on the dispute submitted by the parties and it will determine the validity of the arbitration agreement (Art. 22).

5. Arbitration agreement

The arbitration agreement can be entered between the parties in writing, by fax, telegram, telex, email, or other communication or data recording methods, which can be documented and provide written proof of the arbitration agreement. Where one of the parties is a consumer, the arbitration agreement must be entered by signing a document separate and independent from the main agreement between the parties.

The arbitration clause, when part of a contract or agreement, constitutes a separate and independent agreement from the other terms of the contract. The invalidity of the contract does not ipso jure render the arbitration agreement invalid.

Where one of the parties is the Albanian state, a state institution, governmental agency, local government or a state-owned entity, specific consent should be obtained before such party may execute an arbitration agreement. According to paragraph 4 of Article 8 of the Law:

> … A subordinate institution, autonomous governmental agency, as well as a state-owned company may enter into an arbitration agreement after obtaining the prior consent, as the case may be, of the responsible minister or the Prime Minister. Local government units may enter into an arbitration agreement after obtaining the prior consent, as the case may be, of the municipal council or the district council.

The lack of such prior consent would make any arbitration agreement executed by the parties invalid.

6. Subject-matter of the arbitration

The Law does not set any specific limit to the matters that can be resolved by arbitration. According to Article 7:

> The subject matter of an arbitration agreement can be any pecuniary claim or request deriving from a property relationship, except where a special legislation prohibits the resolution of the dispute by arbitration or when it determines that the resolution of a dispute by arbitration can be carried out only under certain conditions.

To date, there are no such laws in Albania.

6 Free translation of Art. 3(4) and of other provisions in Law No. 53/2023 as quoted below.

7. Interim relief

According to the Law, the parties may request interim relief either before or after the constitution of the arbitral tribunal.

According to Article 11, prior to the constitution of the arbitral tribunal, the parties may obtain interim relief from the competent court of law if the concerned party establishes that the relief sought is necessary to prevent a serious and irreparable harm. This provision is applicable even where the place of arbitration is not in Albania, to the extent that the interim relief sought shall be enforced in Albania. Seeking interim relief before a court of law will not prejudice the arbitration agreement.

Interim orders issued by the arbitral tribunal, in domestic arbitration proceedings or international arbitration proceedings seated in Albania, can be enforced subject to an order of the competent court of law upon request submitted by the concerned party.[7] The Law is silent about the enforceability in Albanian soil of interim orders issued by arbitral tribunals in international arbitration proceedings with the seat outside Albania.

8. Hearing sessions and written procedures

Unless the parties have agreed otherwise, the arbitral tribunal has the right to decide whether there will be oral hearings, or it will examine the case only based on documents submitted by the parties without their presence.

In addition to traditional hearings, where parties appear physically, the Law recognizes the possibility of hearings via audiovisual telecommunication means (Art. 30). The hearing are held in private, unless the parties have agreed otherwise.

9. Challenging the arbitral award

A domestic arbitral award or an international arbitral award in case of arbitral proceedings with the seat in Albania, can be challenged only by a request to set aside the award submitted by the concerned party before the competent Court of Appeal of the General Jurisdiction. Unless otherwise agreed by the parties, the request to set aside the award must be submitted within ninety days from the date of the notification of the arbitral award. In case a party has applied to make a correction, an interpretation, or an addition to the award, the term starts to run from the date of notification of acceptance or refusal of the request.

Article 44 lists the reasons to set aside the arbitral award, which are similar to UNCITRAL Model Law, consisting in the following:

> a) one of the parties to the arbitration agreement lacks the legal capacity to act in accordance with the specific law that determines the acquirement of the legal capacity to act, as well as its organization and operation;
>
> b) the arbitration agreement is not valid according to the provisions of the legislation chosen by the parties or by the arbitral tribunal, or, when the parties have not determined the applicable law, according to the provisions of the legislation of the Republic of Albania;
>
> c) the parties were not given proper notice of the appointment of an arbitrator or of the initiation of the arbitral proceedings, or any other reason that has impeded the parties from submitting their case;
>
> ç) the award deals with a dispute that was not examined by the arbitral tribunal, or the award provides resolution of a dispute that was not within the remit of the arbitration agreement, as well as, if one or several disputes resolved by the arbitral tribunal did not fall within its jurisdiction. In this case, when it is possible for the award on the disputes falling under the jurisdiction of the arbitral tribunal to be separated from that part of the award that does not fall under its jurisdiction, the court annuls only that part of the arbitral tribunal's award that does not fall under the latter's jurisdiction;
>
> d) the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of this Law or of the arbitration agreement, provided that such default entails consequences regarding the manner the dispute was resolved by the arbitral tribunal;
>
> dh) the award has resolved a dispute that is prohibited by law to be resolved by arbitration;
>
> e) the enforcement of the award would be in breach of public order.

7 Art. 23 of the Law.

The Court of Appeal must examine the request within thirty days from its filing. The filing of the request does not suspend the enforcement of the arbitral award. However, upon request of a party, the Court may exceptionally suspend the enforcement if it finds that such enforcement would risk causing great and irreparable harm to that party.

The decision of the Court of Appeal on the request to set aside the arbitral award cannot be appealed.

10. Recognition and enforcement of arbitral awards

Arbitral awards issued in domestic arbitral proceedings or international arbitral proceedings with the seat in Albania, are considered an enforceable title and are enforced subject to an order issued by the First Instance Court of the General Jurisdiction, upon request of the interested party.

The court may reject the request for the issuance of an order for enforcement of the arbitral award if, upon an *ex officio* review, it establishes the existence of one or more grounds to set aside the award as listed by Article 44 of the law and mentioned above.

As to the recognition and enforcement of arbitral awards subject to international arbitration proceedings with the seat outside Albania, Article 47 of the Law makes reference to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified by Albania in 2000. The concerned party shall submit the request for recognition and enforcement before the competent Albanian Court of Appeal of the General Jurisdiction.

Conclusion

The Law relies on the Model Law, which is widely recognized, and offers a reliable legal framework for conducting both domestic and international arbitration procedures in Albania. The Law provides a comprehensive, modern and flexible set of rules guaranteeing the effective use of arbitration in Albania as an alternative to the traditional courts for resolving disputes.

Does *Jura Novit Curia* Apply in Arbitration?

Affef Ben Mansour, Olivier Caprasse, Éamonn Conlon, Giuditta Cordero-Moss, and Alejandro Escobar

In this article based on a knowledge sharing session at the ICC International Court of Arbitration ('ICC Court') in July 2023, ICC Court Members Affef Ben Mansour (Tunisia), Olivier Caprasse (Belgium), Éamonn Conlon (Ireland), Giuditta Cordero-Moss (Norway), and Alejandro Escobar (Chile) discuss the topic of *jura novit curia* in arbitration, the boundaries of the arbitral tribunal's power in particular situations, and the interaction between *jura novit curia* and the parties' right to be heard.

1. Introductory remarks: What is *jura novit curia*

Jura novit curia is a legal maxim developed for the courts, mainly in civil law jurisdictions, expressing the principle that the court knows the laws. This implies that the court has the power to apply the law *ex officio* independently of the legal arguments put forward by the parties.

The question that concerns the arbitration community is whether *jura novit curia* applies to arbitration. The answer could appear to be based on legal tradition: in particular, it is tempting to evoke the civil law/common law divide. In general, it could be expected that in common law arbitration the parties would play a central role in the decision of the tribunal, and that therefore the maxim would not apply. As opposed to that, the civil law tradition would be expected to grant more room to the discretion of the arbitral tribunal.

This divide between legal traditions does not, however, reflect reality as most legal systems permit large discretion to the arbitral tribunal. While differences from one system to another can be observed, these differences do not stem from the classical divide between the civil law and the common law tradition.[1]

There are two competing principles underlying the use of *jura novit curia* in arbitration. On the one hand, we know that arbitration is a creature of the parties and that the will of the parties is central. Futhermore, given that in international arbitration there is no *lex fori* in the strict sense, the arbitral tribunal is not necessarily expected to know or apply the law of the seat of the arbitration to the substance of the dispute. All this suggests that the tribunal should have a passive role, merely being an umpire who chooses between the parties' legal arguments. The central role party autonomy plays in arbitration seems therefore to exclude that an arbitral tribunal can develop its own legal reasoning independently of what the parties have pleaded, and independently of what is written in the contract.

On the other hand, the opposing principle is that arbitral tribunals must comply with the *lex arbitri* and should aim to render awards that are valid and enforceable. The tribunal has the duty to apply the applicable law, considering potentially not only the law of the seat but also the laws of the possible places of enforcement in a way that will lead to a valid and enforceable award. This suggests that the arbitral tribunal should have – a degree of – discretionary power, and not limit its reasoning to what has been pleaded by the parties. By simply choosing between the parties' pleadings, the arbitral tribunal runs the risk of disregarding principles that the parties (perhaps willingly) ignored and may thus end up rendering an award that is invalid and unenforceable. For example, the dispute may regard a contract that violates competition law, or a contract that is tainted by corruption. Under many laws, such contracts would be invalid. However, if the parties are interested in preserving the contract, they will refrain from raising the issue of competition law or of corruption. If the arbitral tribunal only had to consider the parties' pleadings, the award would give effect to these contracts and would run the risk of violating public policy. The consequence would be that the award may be annulled in the country of origin and refused enforcement.

It is precisely the balance between these two opposing principles that is challenged in the maxim *jura novit curia*. The use of *jura novit curia* in arbitration relies on the need to strike a balance between the sovereign will of the parties and what would be legally acceptable in the seat of arbitration and enforceable in any relevant country.

1 For references and a more extensive analysis, see G. Cordero-Moss, 'General Report on Jura Novit Arbiter', in G. Cordero-Moss and F. Ferrari (eds.), *Iura Novit Curia in International Arbitration* (Juris 2018) pp. 463-487.

2. What are the boundaries of the arbitral tribunal's power?

Looking at arbitration rules and arbitration laws around the world, it is evident that arbitral tribunals enjoy a rather wide discretionary power. Under the ICC Arbitration Rules, for example, the arbitral tribunal may appoint experts and define their terms of reference (Article 25(3)), and it may request the parties to produce additional evidence (Article 25(4)). This means that the arbitral tribunal may independently assess the evidence, including making its own characterisation and classification of the facts and evidence that have been presented, and drawing the necessary legal consequences on the basis of its independent legal reasoning. This discretion is compatible with arbitration law in numerous countries.[2]

This discretionary power, however, has its constraints. Under the ICC Arbitration Rules, in using its discretion the arbitral tribunal must act within the scope of power that the parties have granted it (Article 22(2)). Moreover, it must remain impartial and must respect the principle of due process giving the parties the possibility to present their case (also known as the parties' right to be heard) (Article 22(4)). These constraints are reflected in most arbitration laws and in the New York Convention, and affect the award's validity and enforceability.

This means that the arbitral tribunal enjoys a considerable discretion as long as it does not exceed the scope of the power granted by the parties, it gives the parties the possibility to be heard, and it acts impartially. While these guidelines are easy to grasp in theory, their application in practice may present some grey areas. Getting the balance wrong exposes the award to the risk of annulment and non-enforcement.

In practice, there are three situations in which a tribunal may need guidelines as to whether it has powers independent of the parties' pleadings, to what extent it can exercise them, and under what conditions:

- May an arbitral tribunal develop legal arguments that have not been pleaded by the parties? (section 3);
- May an arbitral tribunal award remedies that have not been requested by the parties? (section 4);
- May an arbitral tribunal apply sources different from the law chosen by the parties in the contract or that the parties have pleaded? (section 5).

These situations will be examined below successively, along with the interaction of *jura novit curia* and the parties' right to be heard (section 6).

3. May an arbitral tribunal develop a legal reasoning different from that pleaded by the parties?

Arbitral tribunals decide disputes on the basis of the facts that have been presented by the parties, and of the remedies that have been requested by the parties. The legal reasoning is the link between these two elements – the facts and the requested remedies. The arbitral tribunal's jurisdiction exists within the boundaries of them. An award that goes beyond the parties' presentation of facts and request of remedies is likely to be an award rendered in excess of the tribunal's power, and therefore invalid and unenforceable, subject to all the nuances examined in the following sections.

But what about the third element, the legal reasoning connecting the facts and the remedies? How far can the tribunal depart from the parties' pleadings without exceeding its power or infringing due process? A pragmatic approach suggests that it is a matter of degree.

The legal reasoning is based on inferences that the tribunal draws from the facts presented by the parties and the sources of law from which the legal effects flow. In a dispute on the proper fulfilment of a contract, for example, one party may claim that the other party's conduct amounts to wilful misconduct and is a breach of contract, and the other party may deny that there was a breach at all. The tribunal may determine that there was a breach, but that it was due to negligence and not to wilful misconduct. In this example, the tribunal does not accept the parties' legal characterisation of the facts: it does not consider the breach as a consequence of wilful misconduct, and it does not deem that the contract was properly performed. It infers from the facts, on the basis of the applicable sources, that the breach was a consequence of negligence. Neither party has qualified the facts in this way; however, the tribunal has not exceeded its power.

To what extent this independent reasoning may be followed by remedies that were not requested by the parties will be dealt with in section 4; to what extent it may be based on sources that were not chosen or pleaded by the parties will be dealt with in section 5; and to what extent it may be carried out without inviting the parties to comment will be dealt with in section 6.

2 For references, see G. Cordero-Moss, 'General Report on Jura Novit Arbiter', supra note 1.

4. May an arbitral tribunal award remedies that have not been requested by the parties?

At the outset, a recent empirical analysis shows that among fifteen national reports on the issue, in a majority of countries, an arbitral tribunal awarding remedies different from those requested by the parties would be in excess of power.[3] In other countries, like Spain, Canada or Switzerland, such award might be acceptable if the parties were given the possibility to comment on the alternative remedies envisaged by the arbitral tribunal, even though these remedies have not been expressly requested by the parties.

If the arbitral tribunal is not bound by the parties' legal arguments and may draw its own legal inferences, it should follow that it can take the consequences of its legal reasoning and independently order the remedies that flow from its independent legal reasoning. However, there are limits to this. The limits can be broken down into the issues of *infra*, *ultra*, and *extra petita partium*: is it possible to decide (i) less, or (ii) more in terms of quantum, or (iii) something else entirely to that requested by the parties?

(i) Awarding less

Awarding less is the easiest option of the three. It is generally accepted that an arbitral tribunal can dismiss a claim in part or entirely. This does not mean that a tribunal may ignore a claim – all claims and counterclaims must be considered, otherwise the award will be *infra petita* – which is a ground for setting aside the award and refusing its enforcement in some jurisdictions or can lead to the possibility to request an additional award on the issues that have not been decided. However, claims can be dismissed if the tribunal finds them, for example, unfounded, inadmissible, or moot.

An arbitral tribunal can, on the basis of its independent legal reasoning, dismiss a claim in full or in part. In the above example, the tribunal accepts the claimant's argument that there was a breach of contract, but it dismisses the claimant's argument that the conduct in question constitutes wilful misconduct. It may follow that the tribunal awards damages in a lower amount than what has been requested by the claimant.

The tribunal, therefore, does not exceed its power when it remains within the scope of the parties' requests, which are the basis for the tribunal's jurisdiction. However, the principle of due process is still applicable and the tribunal should avoid taking the parties by surprise (see section 6).

(ii) Awarding more

Awarding more than requested is generally not deemed to be acceptable. In using its discretionary power, the arbitral tribunal should not exceed its power. Its power is, in principle, restricted to what the parties have requested. Ordering an amount higher than requested exceeds the parties' requests, and the award would be *ultra petita* – which is a ground for setting aside the award and refusing its enforcement.

Furthermore, if the tribunal does not give the parties the opportunity to discuss the legal reasoning upon which it will base its decision, it infringes the parties' right to be heard (see section 6) – which also constitutes a ground for setting aside the award and refusing its enforcement.

Often the parties request a specific amount and add a sentence giving the arbitral tribunal the power to award 'any other amount that the tribunal may consider appropriate', or something along these lines. This sentence may, under the law of certain jurisdictions, be a sufficient basis to give the tribunal the power to award an amount higher than the amount specified in the request for relief. However, this sentence does not affect the parties' right to be heard. Therefore, it does not dispense the tribunal from the necessity to seek the parties' comments on the basis for its decision. In other words, the arbitral tribunal's decision encompasses all the remedies requested by the parties and any other remedies discussed by the parties in the proceeding upon invitation of the arbitral tribunal.

(iii) Awarding something else entirely

The arbitral tribunal's legal reasoning may lead to a remedy completely different from what was requested by the parties. For example, a contract for the supply of goods may contain a clause providing for reimbursement of damages in case delivery is delayed, and another clause permitting early termination in case of breach of the agreed specifications regarding the volume to be delivered. Assuming that the claimant requested reimbursement of damages for delay, and assuming further that the arbitral tribunal on the basis of the proven facts concludes that the breach was not a delay, but a failure to deliver the agreed volumes: can the tribunal take the consequences of its independent re-qualification of the facts, and order termination of the contract instead of reimbursement of damages?

3 G. Cordero-Moss, F. Ferrari, *Iura Novit Curia in International Arbitration*, supra note 1.

A survey of various state laws[4] shows that under most laws an arbitral tribunal awarding remedies different from those requested by the parties would exceed its power. The award would be *extra petita* – which is a ground for setting aside the award and refusing its enforcement. Furthermore, as seen above, the parties' right to be heard, and thus to comment on the basis on which the decision is made, must be preserved (see section 6).

Similarly, the boiler-plate phrasing according to which the claims include 'any other type of relief that the arbitral tribunal might consider as appropriate' may be sufficient to grant the tribunal jurisdiction to award relief that was not explicitly requested by a party, but it would not suffice to ensure compliance with the parties' right to be heard if the tribunal did not invite the parties to comment on its reasoning.

In addition, even in the absence of such a boiler-plate clause, in some jurisdictions the arbitral tribunal can apply a contract provision different from that invoked by the parties, and consequently order remedies different from those sought by the parties, as long as some conditions such as the following are fulfilled:

1. As already pointed out, the parties should be able to discuss the alternative reasoning;
2. For another remedy to be applicable, parties should not only have been able to discuss that remedy, but it would also be necessary that one of the parties, or both, formally make new requests for the case the arbitral tribunal would follow the alternative legal reasoning envisaged.

In practice, it seems that when an arbitral tribunal asks questions to the parties as to the possible application of another provision of the contract than the one pleaded, it also asks them to explain what would be their position in case such a different provision would be applied in terms of remedies. In that situation, it could not be question of excess of power since the parties will normally express what their request would be in such a case, even on a subsidiary basis.

Another question worth considering would be whether an arbitral tribunal would have the power to decide on the amount of damages due, if the claimant had requested damages without quantifying their claims. May the arbitral tribunal award damages based on its own quantification and calculation according to the applicable law? While in theory *jura novit arbiter* allows the arbitral tribunal to decide on the amount of damages due, this power is circumscribed by the right of the parties to be heard, including on the method of calculation.

Absent the parties' clarifications on the remedies requested, an arbitral tribunal might dismiss a claim or part of a claim on the merits. In a recent investment arbitration case,[5] the tribunal refused to award damages for a specific treaty breach as the claimants had requested a global amount for the totality of their claims, composed of distinct breaches, but hadn't specifically quantified their claim for that specific breach. The tribunal found that as the claimants had not quantified that breach it would not grant an amount for said breach. It could be argued that this would be the proper approach a tribunal should have regarding issues of its discretionary power.

5. May an arbitral tribunal apply sources different from those chosen by the parties in the contract or that the parties pleaded?

The legal sources upon which the arbitral tribunal bases its legal reasoning are generally the disputed contract(s) and the applicable rules of law. The arbitral tribunal is not bound by the parties' interpretation of the contract or by their application of the law to the facts (see section 4). This independence of the arbitral tribunal may affect the tribunal's choice of sources. There are two main scenarios: (i) the tribunal may apply the same sources invoked by the parties, but base its decision on a different provision thereof; and (ii) the tribunal may consider a law different from the law chosen in the contract and invoked by the parties.

(i) Different provisions in the same sources

If a party invokes a remedy for breach of contract due to wilful misconduct, and the arbitral tribunal determines that there was a breach, but that it was the consequence of negligence, it does not exceed its power (see section 4) – even though there may still be the need to invite the parties to comment on the reasoning (see section 6).

The tribunal's re-qualification may imply the necessity to apply a source different from the source that was applicable under the parties' pleadings. In the example above (in section 4 (iii)), if the breach does not consist

4 For references, see G. Cordero-Moss, 'General Report on Jura Novit Arbiter', supra note 1. For a recent case, see C. Bao and Q. Lau, 'Hong Kong First Instance Court Clarifies Limitations to Iura Novit Arbiter', *ICC Dispute Resolution Bulletin*, 2022/2.

5 *Cervin Investissements S.A. & Rhone Investissements S.A. v. República de Costa Rica* (ICSID Case No. ARB/13/2), Award of 7 March 2017, para. 699 (the Claimants had the burden of proving not only the existence of a breach of the Costa Rica-Switzerland BIT, but also the causal nexus between the breach and the alleged damage and its quantum).

in a delay, it is not the contract provision on delay that is applicable, but that on volume specifications. There may be two scenarios: (1) the provision applicable under the new qualification may have the same effects as the provision invoked by the parties, or (2) it may have different legal effects.

In the first scenario, the arbitral tribunal does not exceed its power if it grants the same remedies that were requested by a party, but on the basis of a different provision. For example, if the amount of reimbursable damages is the same both as a consequence of wilful misconduct and as a consequence of negligence, the arbitral tribunal will not award damages in excess of the parties' requests – and the circumstance that the decision is based on a different contract provision than that invoked by the party, will not affect the tribunal's jurisdiction. Even though the scope of power was not exceeded, however, there is still the risk that the parties' right to be heard was infringed (see section 6).

In the second scenario, the provision applicable under the new qualification leads to different remedies – in the example above, the provision on delay leads to reimbursement of damages, whereas the provision on volume leads to early termination. As seen in section 4(iii), an award ordering termination instead of the requested reimbursement of damages, would likely be in excess of power and thus invalid and unenforceable in case no possibility is given to the parties to exchange views not only on the potential requalification of their reasoning, but also on the effect it could have on the consequences of such a requalification. If they have the possibility to discuss both sides of the coin and if the other remedy 'is put on the table' and discussed, with parties amending their request for the case the requalification be retained, the arbitral tribunal will then be able to grant it.

(ii) Different law

Under some circumstances, an arbitral tribunal may see the necessity to consider a rule belonging to a law that was not invoked by the parties and that was not chosen in the contract as the applicable law. This may happen in at least three scenarios: (1) The contract chose a certain law, for example Canadian law, and one party invokes as a defence that the contract is invalid under another law that is overriding – for example, under EU competition law; (2) in a contract that chose Canadian law, neither party addresses in their pleadings the issue of invalidity under EU competition law; and (3) in a contract that chose Canadian law, the parties jointly instruct the arbitral tribunal to disregard the issue of the contract's validity under EU competition law.

If the arbitral tribunal is seated in the EU, under all scenarios it may not disregard issues of EU competition law: having EU competition law been defined as a matter of EU public policy,[6] an award disregarding it may infringe public policy and thus be set aside at the seat and refused enforcement. However, EU law is not the law chosen by the parties, and the arbitral tribunal may fear to exceed its power if it disregards the parties' choice of law. The parties' agreement on the applicable law is part of the instructions given by the parties to the tribunal, and it constitutes the basis for the tribunal's jurisdiction. An award disregarding the parties' instructions may be in excess of power and thus be set aside and refused enforcement. As against this, one can argue that the choice of the seat to a certain extent constitutes a choice of law and any reference to a seat in EU countries includes EU law as part of any EU country's domestic law and public policy.

On what basis can EU law be considered? In the first scenario EU law is invoked by one of the parties, in the second scenario it is not invoked by any of the parties, in the third scenario the parties jointly instructed the tribunal not to consider EU law. How do these scenarios relate to the applicability of EU law?

Like for the issues already discussed under sections 3 and 4, the arbitral tribunal needs to ascertain that its consideration of EU law does not exceed the tribunal's power, and that it does not take the parties by surprise, thus depriving them of the right to present their case.

Regarding the scope of the tribunal's power, it is determined by the arbitration agreement, the terms of references and the parties' pleadings. Would the choice of Canadian law in the contract mean that the tribunal does not have the power to consider EU competition law – under any of the three scenarios?

In the first scenario, the issue of competition law is introduced by a party in its pleadings, and is therefore part of the dispute's scope. This means that the arbitral tribunal will not exceed its power if it considers EU competition law.

In the second scenario, the issue of competition law would be considered by the tribunal *ex officio* (or *sua sponte*). Under the ICC Arbitration Rules, Article 21(1), the arbitral tribunal may apply the rules of law it determines to be appropriate, if the parties have not made a choice.

6 See the EU Court of Justice case C-126/97 (*Eco Swiss*).

The parties' choice of Canadian law in the contract could apparently be considered as an obstacle to the tribunal's own selection of appropriate rules of law. However, the choice made by the parties concerns the contract, and not issues of competition law – for which the parties do not have the power to make a choice of law. When seen in its legal context,[7] the parties' choice of Canadian law is the exercise of their party autonomy; party autonomy is a conflict rule enshrined in the applicable private international law. Generally, the scope of this conflict rule is contract law, or, increasingly, tort law. While the parties may choose the law applicable to their respective rights and obligations towards each other, the conflict rule of party autonomy usually does not cover areas where the parties may not dispose of their rights – such as tax law, import/export regulations, currency regulations, criminal law (of particular relevance are rules on corruption and money laundering), and competition law.

This means that the parties' choice of Canadian law will extend to the contractual consequences of any breach or invalidity of the contract; however, it does not extend to the question of whether the contract infringes competition law. Therefore, considering EU competition law does not contradict the parties' instructions, as long as the contractual effects between the parties are determined under Canadian law.

The same reasoning applies to other issues that do not fall within the scope of party autonomy: the parties' choice of law does not affect the applicability of laws on taxation or corruption, for example, as well as on issues of property law, of company law, or of insolvency.

This means that, in the second scenario, the arbitral tribunal will not exceed its power if it considers EU competition law. To enhance predictability, it is advisable that the arbitral tribunal gives reasons for its decision to consider EU competition law – these reasons are often more easily convincing if they are based on the criteria for selecting the applicable law provided for in private international law. Admittedly, Article 21 of the ICC Arbitration Rules embraces the so-called *voie directe*, permitting the tribunal to skip any reasoning of conflict of laws and to determine the applicable rules of law directly.[8] However, it does not prevent the tribunal from applying a reasoning founded in private international law. For the sake of predictability and to avoid the risk of being deemed to have exceeded its power, therefore, it is advisable that the tribunal provides reasons for its determination of considering EU competition law, and these reasons are readily available in private international law.[9]

In the third scenario, the parties have jointly instructed the tribunal not to consider EU competition law. The arbitral tribunal may face a dilemma here: on the one hand, it cannot violate the parties' instructions, which have excluded competition law from the tribunal's jurisdiction. An award disregarding these instructions would exceed the power conferred by the parties on the tribunal and would thus risk to be invalid and unenforceable. On the other hand, an award giving effect to a contract that infringes public policy (and EU competition law is EU public policy) would itself infringe public policy and may thus be set aside or refused enforcement.

The arbitral tribunal may find it acceptable to follow the parties' instructions and disregard the issue of competition law, if it is seated outside of the EU and the award may be enforced outside of the EU. If the award will only be submitted to non-EU courts, it is possible that the violation of EU public policy will not affect its validity and enforceability (although, in some jurisdictions, illegality under foreign law may, under some circumstances, be deemed to violate the court's own public policy).

However, under some circumstances violation of public policy may be such that it would be considered unacceptable in most legal systems; moreover, arbitral tribunals should not lend themselves to be accomplices in such serious violations perpetuated by the parties. An example that is often discussed in these days is the issue of corruption. If the parties to a contract tainted by corruption instruct the arbitral tribunal to disregard the issue of corruption, what should the tribunal do?

On the one hand, the tribunal cannot override the parties' agreement – as opposed to the choice of law, which is a power that the parties may exercise within the limits of contract law or of tort law. Once an issue is arbitrable, the framing of an issue for submission to arbitration is completely free from constraints. If the parties decide to submit to arbitration only the issue of whether there is a liability for damages, for example, and decide not to submit the quantification of the damages to arbitration, the arbitral tribunal does not have jurisdiction on the quantification. An award

7 For a more extensive reasoning and references, see G. Cordero-Moss, *International Commercial Contracts* (Cambridge University Press, 2023, 2nd ed.), section 5.6.1.

8 Art. 21, ICC Arbitration Rules: '1) The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. 2) The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages. 3) The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.'

9 For a more extensive reasoning and references see Cordero-Moss, supra note 7, section 4.6.

determining the amount of damages would therefore be in excess of power and could be set aside or refused enforcement (at least for the part that was rendered without jurisdiction). Similarly, considering the issue of corruption notwithstanding the parties' contrary agreement would result in an award issued in excess of the tribunal's power.

On the other hand, the tribunal should not give effect to a contract tainted by corruption, if this results in a violation of the principles of corruption law – this would result in an award that infringes public policy. The only solution available to the arbitral tribunal is to resign. This is a solution that has been endorsed particularly in the context of corruption.[10]

Regarding the parties' right to be heard, of the three scenarios above, the only one in which the tribunal does not need to invite comments by the parties is the first, because the issue of competition law was introduced into the proceedings by one party. In the other two scenarios, the arbitral tribunal should seek the parties' comments on its determination that EU competition law should be considered, in order to avoid taking the parties by surprise and thus infringing their right to present their case (see section 6).

6. Ensuring the parties' right to be heard

From the above, it is evident that the parties' right to be heard is an important constraint to the arbitral tribunal's power to develop its own alternative independent legal reasoning. A party who was surprised by the award's legal reasoning or use of legal sources may challenge the validity of the award and resist its enforcement.

The importance of seeking the parties' comments is exemplified in the hypothesis set out above: the arbitral tribunal decides that the breach of contract was due not to a delay, as pleaded by the claimant, but that it was due to a violation of the provision on the volume that was to be delivered. If the respondent had known that the arbitral tribunal would re-qualify the breach and that it would consider not the contract provision on delay, but on volume, it would have produced evidence relevant to that provision – for example, it would have produced evidence that the parties had agreed to modify the quantity to be delivered and that therefore the provision on volume was not violated. As long as the arbitral tribunal did not invite the parties to comment on its reasoning, there was no reason for the respondent to produce evidence on the volume. An award ordering remedies for breach of the provision on volume, therefore, would infringe the party's right to be heard. Inviting the parties to comment on the arbitral tribunal's own alternative legal reasoning, therefore, is necessary to ensure that the award is valid and enforceable.

In some jurisdictions, for example in Switzerland, the right to be heard is analysed with more flexibility. Whereas the tribunal needs, under Swiss law, to invite the parties to comment on its alternative reasoning relating to the facts, it is expected to be capable of developing legal reasoning on its own. The assumption is that the parties' contribution to the legal reasoning is not necessary, as the legal issues are in the arbitral tribunal's domain. Conversely, the parties are expected to be capable of anticipating which legal issues the arbitral tribunal will consider – therefore, it should not be feared that the tribunal's legal reasoning takes them by surprise. The Swiss Federal Tribunal considers that a tribunal does not surprise the parties, if it merely chooses to apply the law in a different manner than the parties anticipated.[11] Therefore, not inviting the parties to comment on the legal inferences that the tribunal draws from the facts, is generally not deemed to be a violation of the principle of due process.[12]

The Swiss approach has been accepted even by the English courts in enforcement proceedings for foreign arbitral awards, although in their own procedure English courts usually do not apply the maxim *jura novit curia*, and expect that the parties are informed not only of the issues of fact, but also of the legal issues that the tribunal is considering. In a decision of the English High Court from 2020[13] on the enforcement of a Swiss award, enforcement was resisted invoking that the tribunal had applied Swiss law on corruption, although the parties had not made any reference to that law. Considering that the arbitral proceedings were subject to Swiss law, the English High Court enforced the award as the *ex officio* application by the tribunal of corruption law was in accordance with Swiss law.

10 See e.g. ICC Case No. 1110, 1963, 'Argentine engineer v British Company', in Albert Jan van den Berg (ed), *ICCA Yearbook Commercial Arbitration* 1996, Vol. XXI. See also D. Baizeau, R.H. Kreindler (eds.), *Addressing Issues of Corruption in Commercial and Investment Arbitration*, Dossiers of the ICC Institute of World Business Law (2015). For a more extensive reasoning and further references, see G. Cordero-Moss, 'Corruption and Arbitration: Arbitrability, Jurisdiction, Admissibility or Merits?', *Festschrift Piero Bernardini*, forthcoming.

11 Swiss Federal Tribunal decision 4A_56/2017 of 11 January 2018.

12 For a more extensive reasoning and references, see A. Banomi, D. Bochatay, 'Iura Novit Arbiter in Swiss Arbitration Law', in G. Cordero-Moss, F. Ferrari, supra note 1, 377-401.

13 *Alexander Brothers Ltd. v. Alstom Transport S.A. and Alstom Network UK Ltd* [2020] EWHC 1584.

An example of common law courts accepting the arbitral tribunal's decision not to seek the parties' comments is a decision from the Privy Council of the United Kingdom.[14] The Privy Council decided on an appeal against the Court of Appeal of the Cayman Islands[15] on the enforcement of a Brazilian award. In this case the arbitral tribunal applied a provision of the Brazilian Civil Code in relation to the notion of third-party malice and its impact, notwithstanding that this provision had not been mentioned by the parties in their submissions but appeared in an expert legal opinion that the respondent submitted in support of its case. The Privy Council stated that they found it a difficult issue to decide. It referred to the *ICC Secretariat's Guide* paragraph 3.770, according to which the tribunal should be cautious in applying any provision of law on which the parties didn't have the opportunity to comment.[16] The Privy Council found it surprising that the tribunal had not followed the *ICC Secretariat's Guide* on this issue, as it exposed the award to being invalid and unenforceable for having violated due process. In the end, the Privy Council approved the Court of Appeal's evaluation that the tribunal did not seriously infringe the principle of due process, and that there was no violation of English or Cayman public policy. This was because the principle of malice at issue had been discussed by the parties during the proceedings, even though the specific source of the Brazilian Civil Code had not been referred to. Considering that counsel to all parties were Brazilian, the Privy Council concluded that the parties were not taken by surprise when the Brazilian Civil Code was applied.

Notwithstanding these cases, and even in the jurisdictions where the parties' right to be heard does not extend to the legal reasoning as strictly as in others, such as Switzerland, the arbitral tribunal is well advised to seek the parties' comments on its legal reasoning.

This is because the parties' comments not only ensure the validity and enforceability of the award, but they also contribute to the award's accuracy.

The parties may have insight and material relating to the factual situation and the involved interests that are not available to the arbitral tribunal, and that permit to put the disputed issues into their proper context. Not benefiting of the parties' comments exposes the arbitral tribunal to developing a reasoning that does not properly reflect the reality of the legal relationship.

For these reasons, it is advisable that the arbitral tribunal seeks the parties' comments on elements of its legal reasoning that depart from the reasoning pleaded by the parties.

The tribunal should, however, be cautious when navigating these discussions. In order not to appear partial, the arbitral tribunal should always be cautious to remain neutral in its questioning, leaving the questions really open and, above all, giving a true and effective possibility to the parties to comment on the questions raised. Obviously, some questions not raised by the parties may lead to a solution favourable to one of them. This would not amount to being partial: it is the mere exercise of the tribunal's duties as long as it remains open to any solution until it has heard the parties on what are only questions.

On a less fundamental but related issue, that might also be important in terms of due process, it is not uncommon that a draft award submitted to the ICC Court refers to sources other than the ones submitted by the parties to corroborate the parties' pleadings. If these new sources are in the same line as what has been submitted – i.e. if they are confirming, detailing, or explaining what has been submitted – the tribunal may be tempted to refer to them in the award without informing the parties. However, during scrutiny the Court often asks the tribunal to confirm whether a source that is referenced in the award had been submitted by the parties or discussed during the proceedings. Here again, it is a question of degree. On the one hand, if it is only a question of confirming or corroborating sources, the arbitral tribunal should be able to quote them without having to come back to the parties. It is true that even though the presence of corroborating sources does not change the outcome of the decision, it is unfortunate that the award is based on sources that the parties did not have the possibility to comment on. Going back to the parties at such a late stage, however, and only for sources that are meant to corroborate the pleadings, would be disproportionate and unnecessary. On the other hand, if the source that has not been discussed is changing the interpretation of the law or brings new theories on an issue at stake, we come back to the

14 *Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) (Respondent) v Matlin Patterson Global Opportunities Partners (Cayman) II and others (Appellants)* [2022] UKPC 21.

15 *Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) (Appelant) v Matlin Patterson Global Opportunities Partners (Cayman) II and others (Respondents)* [2020] CICA (Civil) Appeal 12 of 2019.

16 Para. 3-770, ICC Secretariat's Guide to Arbitration (ICC, 2012): 'An arbitral tribunal should be very cautious about applying any provision of law on which the parties have not had an opportunity to comment or make submissions. Unlike judges in some civil law jurisdictions, arbitral tribunals that decide a case on the basis of legal concepts not raised by any of the parties will risk breaching due process requirements, rendering the award vulnerable to being set aside or difficult to enforce. If an arbitral tribunal is contemplating the application of legal concepts not argued by the parties, it should seek to uphold due process by presenting those concepts to the parties and inviting their comments. Yet even this should be done with caution, as one side may feel that it unfairly favours the opposing side by giving it ideas on how to argue its case.'

question of the duty to have them submitted to the parties to be discussed. This might even occur during the deliberation of the arbitral tribunal because it would only be then that the arbitral tribunal would discover that source or because that source – a new position from a supreme court for instance – would only appear at that time. It is then up to the arbitral tribunal to determine the better way to deal with that issue. In many cases, this could be done through asking questions about that source and receiving written comments by the parties. If need be, further instruction (as recourse to a short hearing online) could be organized.

7. Conclusion

The arbitral tribunal has a power and even a duty to develop the legal reasoning in a way ensuring that the award is valid and enforceable. When developing its legal reasoning, the tribunal shall act impartially, shall limit its decision to the facts introduced into the proceedings by the parties, and shall decide on the remedies that have been requested by the parties. The tribunal is not bound by the legal inferences presented by the parties, and may draw its own inferences, even applying sources different from those pleaded by the parties.

In order not to infringe the parties' right to be heard, arbitral tribunals should invite the parties to comment on any legal reasoning it is considering which deviates from that in parties' submissions. The invitation to comment, however, should not be made in a way that creates the appearance of partiality, and should not unnecessarily burden the efficiency of the proceedings.

Optional Provisions for the Terms of Reference and Procedural Order No. 1

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The Terms of Reference and Procedural Order n°1 tend to have a predictable minimum content comprising provisions either mandated by institutional rules or generally viewed as good practices in the international arbitration community. This article outlines provisions beyond the standard content that the arbitral tribunal may wish to discuss with the parties and include in the Terms of Reference or Procedural Order. In particular, the article addresses optional provisions regarding (1) the arbitral tribunal, (2) counsel, (3) scheduling issues, (4) evidence, and (5) other matters.

Introduction

The **Terms of Reference** ('Terms') tend to have a predictable minimum content comprising provisions either mandated by the ICC Arbitration Rules ('ICC Rules') or generally viewed as good practices in the international arbitration community. Specifically, most Terms set out:

- the parties, their representatives, and their respective contact details for notification purposes;
- the arbitral tribunal members, their method of appointment, as well as their contact details;
- a summary of the parties' claims, defenses, relief sought, and, if possible, the preliminary amount in dispute;
- a list of issues to be determined;
- the procedural history of the case;
- the arbitration agreement invoked in support of the arbitral tribunal's jurisdiction;
- the applicable version of the ICC Rules;
- the place and language of the arbitration;
- the potentially applicable substantive laws; and
- the arbitral tribunal's power to bifurcate and issue interim and partial awards.

Similarly, the **Procedural Order** establishing the timetable and particulars of procedure (Procedural Order No. 1 or for brevity here the 'Order') usually contains ground rules on the:

- calculation of time limits;
- means of communication;
- procedural, jurisdictional and merits briefs that will be allowed in the case;
- submission of evidence in general, and witness statements and expert reports in particular;
- ground rules on document production requests, replies, and comments thereto;
- translations and interpretation; and
- hearing basics, most notably provisions aimed at preventing a so-called trial 'by ambush'.

It is also standard for the Terms and the Order to address the procedure on how to amend them, as well as applicable confidentiality measures.

This article outlines additional provisions beyond the standard content that the arbitral tribunal may wish to discuss with the parties and include in the Terms or the Order. In particular, the article addresses optional provisions regarding (1) the arbitral tribunal (or 'tribunal'), (2) counsel, (3) scheduling issues, (4) evidence, and (5) other matters. Before considering each of those topics, three preliminary practical remarks are in order.

First, what and how much to codify in the Terms and the Order is ultimately a prudential decision for the tribunal to make with party input. Most of the potential provisions discussed below would be permissible in any arbitration, but they will only be necessary in a few. In evaluating whether to include an optional provision, the tribunal should consider how likely the issue addressed in the provision is to arise and whether it is desirable and even possible to introduce certainty on that issue at an early stage. It should also consider the interest shown by the parties in the adoption of the provision.

Second, the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules (the 'ICC Note') is a remarkably useful resource for identifying issues to address in the Terms or the Order. The ICC Note, however, is only 'intended to provide … with practical guidance'.[1] By incorporating some of its language and principles in the Terms or the Order, the tribunal can make them binding on the parties.

Third, in deciding whether an optional provision is a better fit for the Terms than the Order or vice versa, the tribunal should keep in mind the nature and goals of each of these two instruments. The Terms are a document central to the ICC system and usually signed both by the parties and the tribunal. The Order, by contrast, is usually signed by the tribunal (or even the chair only) and thus easier to modify. Provisions that introduce significant departures from normal ICC practice should be included in the Terms and quite often only if all parties sign them. This is the case, for instance, of provisions allowing the tribunal to mediate the dispute. Conversely, provisions on clerical issues, such as those on page limits for briefs, belong in the Order. This article generally indicates whether a certain optional provision is better suited for the Terms or the Order, but this should be taken as generic guidance, subject to the needs of the case.

1. The tribunal

Optional provisions regarding the tribunal include those to confirm (when appropriate) that there is no objection to the appointment of its members, clarify the tribunal's powers, address the use of secretaries, anticipate the use of artificial intelligence, allow for travel charges outside of an arbitrator's usual place of business, or regulate VAT or other charges the tribunal may be subject to.

i) Lack of objections to constitution

When no challenge or objection has been made to the service of any of the arbitrators, some tribunals include language like this in the Terms for the sake of certainty:

> 'Each party expressly waives any objection or challenge that it may have with respect to the constitution of the Tribunal, or the appointment of any of its members, based on any matter known or that should be known to such party as at the date of these Terms of Reference.'

ii) Powers of the tribunal

Powers of the President. Provisions clarifying that procedural orders only require chair signature are relatively common in the Terms. A possible formulation is this:

> 'The President shall have authority to sign Procedural Orders on behalf of the Arbitral Tribunal.'

A more complex question is whether the president can act for the tribunal in case of emergency. In anticipation of situations in which deliberation of procedural matters may not take place soon enough, the Terms occasionally include language such as the following:

> 'In urgent circumstances, the President, acting alone, may make and issue procedural orders, which shall be subject to revision further to consultation with the co-arbitrators [or upon request by a party or any co-arbitrator].'[2]

A more restrained alternative reads as follows:

> 'In case of urgency, the President acting alone may extend or modify a procedural time limit.'

Sometimes the parties and the co-arbitrators agree that the chair will serve as special master if one is needed. In those cases, language like this can be added to the Terms:

> 'If a dispute arises as to whether certain documents should be produced, the parties agree that the tribunal president shall review those documents and decide the dispute. This decision shall be subject to revision by the entire tribunal upon request by a party.'

Tribunal power to allocate costs. Article 38(3) of the ICC Rules already grants the tribunal the power to (at any time during the arbitral proceedings), 'make decisions on costs, other than those to be fixed by the Court, and order payment'. The Terms or alternatively the Order can flesh out this rule with language such as the following:

> 'The Tribunal may make decisions on costs pursuant to Article 38(3) on its own initiative or upon a party's request.'[3]

1 ICC Note, para. 1.

2 In this article, a bracketed text within an optional provision means a variation of or alternative language to the main text of that provision.

3 On this issue, see also ICC Note, para. 193.

Tribunal powers to apply the law: *Iura novit arbiter*. As a matter of general practice, the existence and contents of the law must be established by the parties. In other words, the tribunal is not expected to know or supply them *sua sponte*. In certain cases, however, the tribunal may be very familiar with the law being invoked or want to preserve some margin to raise legal issues. In those cases, the tribunal can include language like this in the Terms or alternatively the Order:

> 'The Tribunal expressly reserves the power to ask the parties to comment on legal authorities [and/or legal theories] that the tribunal finds of potential significance to the dispute, irrespective of whether raised by the parties.'

Powers to mediate, decide in equity, or express preliminary views. In the extraordinary event that the parties wish that the tribunal resolve the dispute *ex aequo et bono*, serve as amiable compositeur, mediate the dispute, or express preliminary views on how it may dispose of the case, the Terms should address the issue. The specific language to be included in the Terms should be agreed by the parties to reflect their needs and the tribunal approval thereof. Where appropriate, the Terms may also reference documents or instruments contemplating a more proactive conduct of the tribunal, such as the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration, which provide in Article 9 for the possibility that the tribunal assist the parties in reaching settlement.

iii) Tribunal secretaries

The ICC Note details the role secretaries can perform.[4] If a secretary is appointed, the tribunal should consider incorporating the relevant sections of the ICC Note by reference or at least distilling their key tenets. This should be done if possible in the Terms of Reference, as a preeminent resolution that is secured with party agreement, rather than in the Order. A frequently used formulation – that both distills and develops – the principles of the ICC Note goes as follows:

> 'The Tribunal Secretary will complete such tasks specifically assigned to him/her by the Tribunal or the Chair, which may include:
>
> (a) assisting the Tribunal in the review of the evidence and of the issues in dispute, including the preparation of summaries and/or memoranda, and research on specific factual or legal issues;
>
> (b) assisting the Tribunal in the preparation and communication of its decisions to the Parties on issues of procedure and substance, including by preparing drafts of procedural orders and awards, pursuant to the directions and under the strict supervision of [the Tribunal] [the Chair]; and
>
> (c) providing other support to the Tribunal or its members, especially the Chair, at any time, especially during hearings and deliberations, which the Tribunal Secretary may attend.
>
> Under no circumstances shall the Tribunal delegate any decision-making functions to the Tribunal Secretary. The Tribunal Secretary will work at all times under the specific instructions and continuous control and supervision of the Tribunal.
>
> The Tribunal Secretary's remuneration will be assumed by [the Tribunal] [the Chair], [save for reasonable expenses incurred in connection with meetings and hearings].
>
> The Tribunal Secretary shall be bound by the same ethical and confidentiality duties as the Tribunal and shall be accorded the same immunities as the Tribunal.'

iv) Use of artificial intelligence ('AI')

Not unlike the concerns sometimes expressed about the use of secretaries, the rapid increase in the availability and capabilities of AI may give rise to questions as to whether the tribunal is actually helming and deciding the case. To guarantee that no improper 'delegation' or use of AI takes place, the following text may be added to the Terms of Reference:

> 'Unless previously disclosed to and accepted by the Parties, the Tribunal members shall perform all their duties and functions – including their decision-making function – personally, without reliance on or use of any generative Artificial Intelligence tool. To the extent that with prior Party acceptance, the Tribunal relies on any generative Artificial Intelligence tool, the Tribunal shall personally supervise and correct the outputs of such tool.'

v) Ethical obligations

Certain institutions and organizations have enacted codes of ethics for arbitrators – e.g., the AAA/ABA Code of Ethics for Arbitrators, The Arbitrators' Code of Ethics by the European Court of Arbitration, the FINRA Code of Ethics for Arbitrators in Commercial Disputes, or the ICSID and UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes.

4 See the ICC Note, paras. 222 to 226.

There is some risk in adopting in an ICC case a code of ethics devised for a different context. Also, the Rules and the Notes already contain ethical protections[5] (and those in the Note can certainly be made binding through incorporation in the Terms). Anyhow, if the parties are keen to supplement the Rules or the ICC Note on ethical obligations, or if the tribunal considers that there is good cause to do so, then the Terms can include language along the following lines:

> 'In the discharge of its functions, the Tribunal agrees to be bound [alternatively: to be guided by] the provisions in [name of the code of ethics] in the understanding that nothing in those provisions will derogate from the Rules or from ethical practices in the ICC Note, which are hereby incorporated by reference.'

vi) Expenses

The ICC Note provides that the only travel expenses an arbitrator will be reimbursed for are those 'he or she incurs travelling from and returning to his or her usual place of business as indicated on the curriculum vitae filed for the relevant ICC arbitration'.[6] Arbitrators, however, occasionally spend significant time in locations other than the 'usual place of business' designated in their CVs. If they wish to be reimbursed for trips from or to a different location, it is recommended that they secure party agreement to include the following language in the Terms:

> 'The parties agree that, as an exception to paragraph 235 of the ICC Note, any arbitrator shall be reimbursed for travel to and from any such other location as the arbitrator may notify before incurring such travel costs [or in the alternative: The parties agree that, as an exception to paragraph 235 of the ICC Note, arbitrator [X] will be reimbursed for travel from and returning to location [Y].]

vii) VAT

To ensure the integrity of the tribunal's compensation and avoid uncertainty as to the allocation of taxes, some tribunals include a provision like this in the Terms:

> 'The Parties and the Arbitrators confirm that Appendix III Article 2(13) of the ICC Rules is applicable.[7]
>
> As between them and the Arbitrators, the Parties take note that Arbitrators may have to pay value-added or similar taxes or charges on their fees and expenses. To the extent that this is the case, each Arbitrator subject to such taxes or charges is entitled to claim, directly from the Parties, in addition to any entitlements received from the ICC, any such taxes or charges to be paid by them. The Parties will jointly and severally be obliged to pay such taxes or charges on demand. The Arbitrator(s), who is (are) subject to such taxes or charges may request the Parties to pay, under the same conditions, a retainer on the subject taxes or charges.'

2. Counsel

The Terms of Reference and the Order can also contain provisions regarding counsel and their conduct. Two relatively common examples include instances of withdrawal and adoption of provisions on ethics.

i) Withdrawal

Counsel's withdrawal can lead to a period during which it is not clear who is to receive notifications on behalf of the party. The following language can be included in the Terms of Reference, or alternatively the Order, to mitigate difficulties:

> 'Counsel who withdraws or resigns in the course of the case shall nonetheless continue to validly receive notifications in the proceeding until replacement counsel or party representatives are designated.'

ii) Ethical obligations

Instruments setting out obligations or guidelines for counsel conduct can be incorporated through clauses such as this:

> 'The Tribunal is empowered to enforce, and counsel agrees to be bound by, the 2013 IBA Guidelines on Party Representation.'

5 See, e.g. ICC Note, para. 66 that provides: 'Arbitrators shall discharge their duties in accordance with the Rules, be at all times independent and impartial, avoid any behaviour that may create a conflict of interest, a bias or an appearance of bias, and not allow any consideration that is extraneous to the case to influence their decisions'.

6 ICC Note, para. 235.

7 Appendix III, Art. 2(13), ICC Rules provides: 'Amounts paid to the arbitrator do not include any possible value added tax (VAT) or other taxes or charges and imposts applicable to the arbitrator's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the arbitrator and the parties'.

A 'softer' version may provide:

> 'In addressing issues involving counsel conduct, the Tribunal will be guided by the 2013 IBA Guidelines on Party Representation.'

Either language is consistent with paragraph 67 of the ICC Note, which provides that '[p]arties and arbitral tribunals are encouraged, where appropriate, to adopt or otherwise be guided by the IBA Guidelines on Party Representation in International Arbitration'.

The tribunal may also include in the Terms language borrowed from paragraph 65 of the ICC Note to the effect that '[a]rbitral tribunals, parties and their representatives are expected to abide by the highest standards of integrity and honesty, to conduct themselves with honour, courtesy and professionalism, and to encourage all other participants in the arbitral proceedings to do the same'.

3. Scheduling issues

There are multiple variants of schedule that the parties and the tribunal can adopt. Salient optional issues range from establishing hearing dates, which is useful to do even when alternative timetables are contemplated, to scheduling update communications. The following paragraphs discuss these and other possibilities.

i) Hearing dates

The ICC Note orders an expeditious and cost-efficient conduct of the arbitration.[8] This is typically best achieved when the procedural timetable already sets out specific hearing dates not too distant from the parties' last pre-hearing submissions. Orders that set out deadlines for pre-hearing submissions but do not reserve exact dates for the hearing may result in delays, as it becomes difficult to organize and ensure availability for hearings on shorter notice.

ii) Bifurcation

If the schedule contemplates a motion to bifurcate, the tribunal should consider establishing full calendars, including hearing dates, both for the case that the bifurcation request be granted and for the case it is denied. This will avoid having to develop calendars and book dates on the go based on the outcome of the motion.

iii) Tribunal list of issues of interest

Certain arbitrators favor indicating early in the case issues they find of interest and would like the parties to focus their presentations on. The following language is adapted from the schedule in one Order reflecting this approach:

> 'Statement of Claim – [Date MM/DD/YYYY]
>
> Statement of Defence – [Date MM/DD/YYYY]
>
> Tribunal to indicate to Parties specific issues or questions it suggests the Parties address in forthcoming submissions, without prejudice to other allegations the Parties wish to make in them – [Date MM/DD/YYYY]
>
> [The schedule then continues with dates for the document exchange process, second round memorials, and the evidentiary hearing.]'

Alternatively, the tribunal can provide to the parties shortly before the hearing a list of specific issues of interest.

iv) Status conferences / Submissions to update the tribunal

Mediation or settlement efforts made while the arbitration is pending may affect its schedule. Sometimes the Order contemplates this contingency. For instance, in an Order the author has recently seen, the parties undertook to report to the tribunal after their first memorials whether a mediation would be attempted and, if so, whether it would lead to a stay of the arbitration or run in parallel with it. In another case the tribunal added the following provision to the Order:

> 'If this proceeding is stayed for longer than a month for any reason, the Tribunal may order at its discretion status conference calls with the parties to discuss, without limitation, the expected further duration of the stay and its impact, if any, on the proceeding.'

4. Evidence

Optional provisions on evidence include those requiring parties to preserve evidence, detailing aspects of the document exchange process and privilege rules, and addressing certain issues that may come up with witnesses.

8 Id. para. 92.

i) Evidence preservation/hold

Tribunals can direct the preservation of evidence relevant to the dispute, including through the use of language like this in the Terms of Reference:

> 'The parties, their directors, executives, and employees are directed to preserve through the duration of this proceeding all documents, including electronically stored information, related to the dispute as defined in Section [X] of the Terms of Reference. In case of doubt as to whether a document relates to the dispute, the doubt shall be resolved in favor of preservation.'

ii) Document production

Limits on document production requests, replies, and comments. For the sake of efficiency, the Order may establish limits to the number of document production request or extension of the replies and comments, such as these:

> 'The number of document production requests per Party shall not exceed [30], including sub-requests. A Party wishing to exceed this number shall seek leave from the Tribunal two weeks before the submission of its requests to the opposing Party pursuant to Annex A, explaining in detail the reasons and need for a higher number of requests.
>
> Requests to produce and any objections to such requests shall be submitted in the form of the "Redfern Schedule" provided in Annex A. To the extent possible, the Redfern Schedules submitted to the Tribunal for disposition shall not exceed [80] pages each, using a Times New Roman 11 font.'

Obligation to meet and confer. To facilitate the resolution of document production disputes, the tribunal may also order that the parties meet and confer to narrow their differences before submitting contested requests for the tribunal to adjudicate.

Role of IBA Rules. On document production, the Order may define the role to be played by the IBA Rules on the Taking of Evidence using language such as this:

> 'In regard to matters concerning the gathering or taking of evidence, including in particular questions related to document production, if any, the Tribunal may be guided by [or apply] the IBA Rules on the Taking of Evidence in International Arbitration 2020.'

Alternatively, the Order may refer to other instruments, such as the Prague Rules.

Standards applying to document production. Additionally, the tribunal can specify or emphasize the criteria it will apply to contested document production requests with language like this:

> 'The factors considered by the Tribunal in granting or denying Requests to Produce, will include those stemming from the IBA Rules and standard international arbitration practice, with particular emphasis on the precision with which the Requests have been drafted, their relevance and materiality, and their proportionality to the amount in dispute and allegations made in the case.'

For further clarity, some tribunals define upfront terms expected to be contested. For instance:

> 'For document production purposes, a category of documents will be deemed "relevant and material" when it refers to issues actually raised in a submission from a party in the case. Categories of documents that may refer or that arguably refer to issues raised will not be deemed relevant and material.'

Power to appoint a special master. As a general matter, the tribunal has the power to appoint a special master to help dispose of document production disputes. In some circumstances, the tribunal may want to set out rules in this respect in the Terms or alternatively the Order. This language can be helpful:

> 'In its discretion, the Tribunal may appoint a special master to help resolve document production disputes. The special master shall be subject to the same independence and impartiality requirements as the arbitrators and shall have authority to convene the parties, hear disputes referred to him/her by the Tribunal, and recommend in writing to the Tribunal the resolution of such disputes.'[9]

iii) Ground rules on privilege

The Order typically contains provisions on the submission of a privilege log. As an additional precaution, the tribunal may also include ground rules on the scope of the privilege or the law governing it. These topics are contingent on several factors and there is no-one-size-fit all solution. Occasionally, the following language may be appropriate:

9 See Section 1(ii) of this Article for the possibility that the tribunal president serves as special master.

> 'In resolving disputes on the privilege or confidentiality applicable to documents, the Tribunal may consider the laws of the jurisdictions where the parties have their residence and apply consistently to both the law that contains the most protective (i.e. anti-disclosure) standard.'

With respect to experts, a solution like the following is often adopted in the Order:

> 'Drafts, working papers or any other documentation created by an expert witness for the purpose of providing expert evidence in the arbitration, and any communications between the expert and a party or its counsel in relation to that purpose, shall be privileged and shall not be subject to production in the arbitration, provided, however, that all documents relied upon by an expert in formulating his or her opinions shall be identified in the expert's report.'

iv) Witnesses

Contact with witnesses. Arbitration practice countenances meetings with witnesses in ways that may be unusual, if not outright off-limits, in certain jurisdictions. If permissible under applicable laws, the tribunal can consider the addition of this language to the Order to clarify the issue:

> 'It shall not be improper for a party, its directors, officers, employees or other representatives, or its counsel, to interview actual or potential fact or expert witnesses, or to discuss their prospective testimony with them, including for the purpose of establishing the facts relevant to the arbitration, preparing Witness Statements or Expert Reports and preparing for hearings. In all cases a party will seek to ensure that a Witness Statement or Expert Report reflects the witness's own account of relevant facts, events and circumstances, or his or her own opinion, as reflected in the Witness Statement or Expert Report.'

Prior witness statement and third-party evidence. Standard Orders contain language to the effect that:

> 'Only witnesses from whom Witness Statements have been duly submitted, or expert witnesses from whom Expert Reports have been submitted, may testify at the hearing.'

This provision, however, is rarely enough to address practical difficulties that may arise.

First, a question may exist as to who can call a witness to testify at the hearing. Typically, the party against whom that testimony was proffered can do it, but, if the tribunal expects to call witnesses or (less commonly) let the party who submitted the testimony call its own witness, it is prudent to make that clear in the Order, using language such as this:

> 'Any witness or expert from whom a Witness Statement or Expert Report has been submitted must, at the request of another party made in accordance with the Procedural Timetable, or at the request of the Tribunal [or of the party submitting the Witness Statement or Expert Report], be made available for examination at the hearing.
>
> Each party shall be responsible for summoning its own witnesses and experts to the hearing when called for examination by another party or the Tribunal, and shall advance the costs of appearance of such witnesses.'

Second, a witness who has submitted a witness statement and has been called to testify at the hearing may fail to appear, which creates the question of whether the tribunal can then consider the written testimony of the witness. The Order may address this situation in different ways. A frequently used solution reads thus:

> 'If a witness or expert is called to appear at the hearing and fails to do so without providing a reason considered valid by the Tribunal, the Tribunal may in its discretion disregard the witness' Witness Statement(s) or the expert's Expert Report(s) and/or draw such inferences as it considers appropriate in relation to the witness's failure to appear. In the event that the Tribunal decides to consider the witness's Witness Statement(s) or the expert's Expert Report(s), it may ascribe less weight to that evidence, having regard to the circumstances including the fact that the witness or expert was not subject to cross-examination.'

Third, a witness who submitted a statement or an expert who submitted a report may not be called for examination at the hearing, thus begging the question of whether the party who failed to call them has acquiesced to the contents of the statement or report. Language along the following lines can cover this situation in the Order:

> 'If a party has not called another party's fact or expert witness for cross-examination, that fact will not be deemed as an admission by the party nor will it imply that the party accepts that the substance of the witness's Witness Statement(s) or the expert's Expert Report(s) is correct or proven. The Tribunal will in its discretion, assess the weight of the written evidence of a witness or expert who is not called to testify at the hearing.'

Fourth, the tribunal may want to ensure that the party who proffered the witness's testimony makes its best efforts to bring the witness to the hearing and that, consequently, any failure of the witness to appear is not to be attributed to a strategic decision from that party. To that effect, the Order can include this language:

> 'Each Party shall use reasonable efforts to provide for the appearance for testimony at a hearing of any person whose Witness Statement the Party has previously submitted. The Tribunal retains the power to seek details and evidence of those efforts.'

Fifth, there may be times when a party wishes that the tribunal hear testimony from a third-party witness who is disinclined to voluntarily provide a witness statement. This problem will typically come up at a later stage of the case, but the Order can preliminarily address it with language to this effect:

> 'Nothing in this Order prevents a party from resorting to the Tribunal or exercising its statutory rights in court seeking to compel the testimony from a witness outside of its control. An application to the Tribunal to compel third party testimony will detail the necessity, relevance, materiality, and expected format in which that testimony is to be provided.'

The tribunal's powers to enforce an order that a third party testify will depend on the applicable laws.

5. Other matters

i) Pleading extension limits

For the sake of efficiency, the tribunal can impose in the Order limits to the extension of pleadings, witness statements, or expert reports. If that is the case, word limits may be more effective than page limits, especially in cases in which the parties are likely to use graphics in their submissions (as pictures and other visuals may take a significant part of a page).

ii) Setting out standards on bifurcation and unmeritorious claims

To save time later and facilitate the parties' submissions, the tribunal may set out in the Order the parameters it will apply to adjudicate issues that are expected to come up.

Bifurcation. If a bifurcation request is announced, the tribunal may consider it appropriate to include in the Order the standard for its disposition, which may be as follows:

> 'In order to be granted a motion for bifurcation will need to establish that a defense or allegation has been made which, if proven, would be entirely dispositive of the case and is likely to be more efficiently addressed with separation and ahead from the rest of the proceeding.'

Manifestly unmeritorious claims. As for an application for the expeditious determination of manifestly unmeritorious claims, the tribunal may set out a standard like this:

> 'For purposes of paragraphs 109 to 114 of the ICC Note, a claim or defence is 'manifestly unmeritorious' when the Tribunal is satisfied that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'

iii) Consult in good faith before making applications to the Tribunal

For the sake of efficiency (including trying to decrease the number of procedural issues that require tribunal disposition), the Order can include language like the following:

> 'Unless urgent, the parties shall attempt in good faith to address any procedural disputes before the Tribunal is involved.'

iv) Need to promptly object

Article 40 of the ICC Rules requires any party to object to infractions of the Rules or any other applicable provision, legal requirement or tribunal direction, lest the objection be waived.[10]

10 Art. 40, ICC Rules: 'A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object'.

The ICC Rules, however, do not include a deadline or timeframe to make the objection (even though some degree of promptness seems implied in Article 40). For this reason, some tribunals choose to add language similar to the following in the Terms or, in the alternative, in the Order:

> 'Except when the Rules or an otherwise applicable provision sets out a different deadline, each party agrees to provide written notice to the Tribunal [promptly since/within 15 days of] becoming aware of any complaint, protest or objection that it may have with respect to any matter affecting the conduct of the arbitration; and, if such notice is not given, the party shall be considered to have waived any such complaint, protest or objection.'

v) Extemporaneous submissions and evidence

The standard Order contains a schedule detailing the dates for briefing and submission of evidence. A party, however, may seek to make submissions or file evidence in ways or at times other than those set out in the Order. To address those requests, the tribunal may include the following provision:

> 'No submissions, Briefs, Witness Statements, Expert Reports, Exhibits or Legal Authorities may be submitted after the last date stipulated in the Procedural Timetable for each of these, unless a party demonstrates exceptional circumstances that prevented the submission or document in question from being provided earlier, and the Tribunal so orders. A request to make new submissions or to submit new Briefs, Witness Statements, Expert Reports, Exhibits or Legal Authorities shall not include the submission, Brief, Witness Statement, Expert Report, Exhibit or Legal Authority in question, which shall only be filed if and when ordered by the Tribunal. The foregoing shall not apply to applications for interim or provisional relief, provided urgent circumstances exist that prevent seeking prior leave from the Tribunal to submit them.'

vi) Applicable rules

While not a priority in most cases, some Orders incorporate the following text:

> 'Should an amendment to or a new version of the Rules be enacted in the course of the arbitration, the Tribunal will seek party input on whether to apply the amended or new Rules.'

vii) Use of artificial intelligence ('AI')

The nascent use of AI is poised to become a topic in the Terms and the Order.[11] With respect to counsel, witnesses, and experts, the Terms of Reference or alternatively the Order may contain language like the following:

> 'Each Party and its representatives shall be liable for the accuracy of their submissions in the case and will accordingly supervise and when necessary correct the output of any Artificial Intelligence tool they may have used in the preparation of those submissions. Witness and experts will be similarly liable for the accuracy of the statements and reports they submit in the case.'

Document production is an area where AI has been used extensively for years now (with digital tools often doing at least a first search for potentially responsive documents). The following language can be included in the Order to make sure any decision to produce or not ultimately rests with an individual:

> 'While each party may use digital tools to assist in the identification of responsive documents, the ultimate decision as to whether and what to produce will be made by an authorized party representative. The Tribunal may request at any point that any party identify the manner in which it searched for and identified responsive documents, and the individuals who took the decision to produce on its behalf.'

At the time of this article going to press, protocols for the use of AI in international are being developed. Most notably, on 31 August 2023, the Silicon Valley Arbitration and Mediation Center invited comments on a draft set of 'Guidelines on the Use of Artificial Intelligence in Arbitration'.[12] Tribunals should consider whether this or another protocol, once finalized, should be incorporated by reference in the Terms or the Order.

viii) Third-party funding

Article 11(7) of the ICC Rules provides that 'each party must promptly inform the Secretariat, the Arbitral Tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration'.

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11 See Section 1(iv) of this article for provisions the Terms may contain with respect to its use by the tribunal.

12 https://svamc.org/svamc-draft-guidelines-released-for-public-consultation/

In practice, this language has been supplemented in two ways at least.

- Some tribunals set out a deadline in the Terms or the Order to make the disclosure (to thus clarify the meaning of 'promptly' in the ICC Rules).
- Some tribunals add language in the Terms or the Order to the effect that 'to the extent a party is unsure as to whether its arrangement with a third-party qualifies for disclosure under Article 11(7) of the Rules, it will err on the side of disclosing'.

ix) Data protection

By now protective provisions in the Terms or the Order are standard in cases when the parties wish to avoid the dissemination of confidential or sensitive information. However, standard confidentiality provisions do not always cover the gamut of situations that can arise, especially when personal data and privacy issues are involved. For some of those situations, a provision similar to the below could be considered:

> 'The members of the Arbitral Tribunal, the Secretary, the Parties, and their representatives, acknowledge that the processing of their personal data is necessary for the purposes of these arbitration proceedings.
>
> The members of the Arbitral Tribunal, the Secretary, the Parties and their representatives, agree to comply with the provisions of [the General Data Protection Regulation (Regulation (EU) 2016/679)] and/or any other relevant data protection law, including providing appropriate notice to data subjects whose personal data will be processed in the arbitration proceedings, where necessary.
>
> Each of the Parties shall indemnify and hold harmless the Arbitral Tribunal and/or the Secretary with respect to any breach of the applicable data protection and privacy regulations by such Party and their representatives in relation to the arbitration proceedings.'

Also, it is not uncommon for the Order to require that witness statements provide the witness' picture, ID number, and address. Usually, the applicable legislation will be sufficient to protect those data, but if a party expresses concerns, the tribunal may consider adopting additional confidentiality measures, such as the redaction of personal information from the statements to be submitted to the other side.

x) Cybersecurity

In addition to the cybersecurity measures discussed below for virtual hearings, tribunals can adopt in the Order cyber-protocols to ensure the confidentiality of communications exchanged in the case. Depending on the specific circumstances of each case, this may include the use of encrypted communications, password protected files, FTP sites with certain specifications, or encrypted and password protected USB keys for the exchange of information.

xi) Sealed offers

The ICC Note encourages the tribunal to consult with the parties at an early stage about a procedure for the potential use of sealed offers.[13] If the tribunal fails to raise the issue, the parties are invited to do so. The ICC Note also provides a process for the submission of offers with the Secretariat. Accordingly, the tribunal should check with the parties whether they want to incorporate into the Order the sealed-offer process set out in the ICC Note or an alternative one.

xii) Remote hearings

The ICC Note also encourages tribunals to establish cybersecurity protocols when the hearing will take place remotely.[14] To this effect tribunals are encouraged to consider and apply the ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyberprotocols and Procedural Orders dealing with Remote Hearings.

xiii) Trade sanctions

In cases involving international trade sanctions, the tribunal should consider the ICC Note to Parties and Tribunals on ICC Compliance ('ICC Compliance Note'). Depending on the ways in which sanctions affect each arbitration, there are provisions in the ICC Compliance Note that the tribunal may want to incorporate and potentially develop in the Terms or the Order. A further provision that will often be apposite in the Terms of Reference would run along these lines:

> 'The Parties shall promptly let the Tribunal and Secretariat know about any changes to the sanctions regime with a bearing on this proceeding.'

13 ICC Note, para. 268.

14 Id. para. 101.

xiv) Execution of Terms and Award

Under the ICC Note, unless the parties otherwise provide or a law so prevents, the Terms may be signed in counterparts and communicated electronically.[15] Accordingly, the tribunal should invite the parties to indicate any disagreement with this practice.

Conversely, under the ICC Note, the execution in counterparts and electronic delivery of the award originals must be agreed by the parties.[16] Again, it is prudent for the tribunal to invite the parties to comment on whether they agree to dispense with hardcopy originals (this may be problematic in those jurisdictions in which the laws require physical hardcopies of the original, for instance to seek annulment or enforcement).

For electronically minded practitioners, the following language (which requires party agreement as it explicitly allows for awards signed in counterparts and delivered electronically) can be adopted in the Terms:

> 'Subject to mandatory requirements to the contrary, these Terms of Reference, as well as other documents (including awards) to be executed by the Tribunal in the course of the arbitration, may be signed by each party and member of the Arbitral Tribunal in counterparts, and such counterparts may be scanned and communicated to the Secretariat and the parties pursuant to Article 3 of the ICC Rules by email or any other means of telecommunication that provides a record of the sending thereof. Each executed counterpart shall be deemed an original, but all of them, taken together, shall constitute one and the same instrument. Documents, including these Terms of Reference and any awards, issued by the Tribunal may also be signed and executed by facsimile or by email transmission of a PDF format file.'

(xv) Disabilities

The ICC's Guide on Disability Inclusion in International Arbitration and ADR establishes that 'tribunals should consider making disability inclusion one of the default points on the agenda for initial case management conferences, as well as including in its first procedural order standardised provisions for the disclosure of disabilities and the requesting of accommodation by any participants in the arbitration, including members of the arbitral tribunal'.[17] The Guide and its toolkit provide guidance on how deal in the Order with disabilities at any stage of the case and any hearing format (in person or virtual)'.[18]

Concluding remarks

The foregoing is a catalogue of optional provisions and language for their adoption. Obviously, the article covers only a fraction of the provisions that can be found in practice, but tries to capture the most significant ones – or at least those the author and close colleagues have encountered more often in practice. The author welcomes correspondence on additional optional provisions and their language. As international arbitration practice continues to develop, an update of the article may become necessary in a not too distant future.

15 Id. para. 196.

16 Id. para. 199.

17 See ICC Guide to Disabilty Inclusion in International Arbitration and ADR (ICC, Oct. 2023), at p. 4.

18 Id. at p. 6. The sample language for the first CMC or PO1 provides: 'At any point during the proceedings, but ideally as soon as practicable, either party may advise the arbitral tribunal of a person who, by reason of disability, requires reasonable accommodation to facilitate their full participation in the arbitration, including site visits and oral hearings. In considering such requests, the arbitral tribunal will take account of the privacy rights of such persons against the unnecessary disclosure of their disability. For the purposes of this provision, disability means any physical or mental health condition that – without accommodation – would impair a person's ability to participate in work related to an arbitration'.

Fine Tuning: Review of the Proposed Reforms to the English Arbitration Act 1996

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The last major reform of English arbitration legislation was undertaken in 1996. At that time, the 1996 Arbitration Act (the '1996 Act') marked a significant departure from what went before, heralding a modern arbitration framework which has proved to be the bedrock of propelling London to be one of the most respected and used arbitral seats in international arbitration. By contrast, the 2023 proposed amendments to the 1996 Act are modest and might fairly be described as fine tuning. This article surveys the proposed amendments, and considers how they make express what is already implicit in English law or bring the legislation into line with other developments in international arbitration in the intervening period.

Introduction

The 1996 Act, it seems, has more than weathered its 27 years of existence. It essentially remains fit for purpose. At the time it was enacted, the 1996 Act bucked the trend of adopting the standard arbitration legislation in the form of the UNCITRAL Model Law on International Commercial Arbitration (1985). It was felt that the arbitration practice in England was well developed and those developments needed to be folded into the 1996 legislation along-side the UNCITRAL Model law.

This article is not the place for a detailed summary of the proposed changes to the 1996 Act and the reasons for them (for that one can read the recently unveiled Law Commission's[1] final report on the review of the 1996 Act[2]). Instead, this article focuses on key changes – (i) the proposed reform, and (ii) its impact – in five areas: (1) jurisdictional challenges; (2) disclosure obligations; (3) summary disposal; (4) law of the arbitration agreement; and (5) emergency arbitration, before discussing two proposals that were canvassed but did not make the final cut (6).

1. Jurisdictional challenges

(i) The proposed reform

Where a party challenges the jurisdiction of a London seated tribunal, it will usually be for the tribunal to determine whether it has jurisdiction in first instance. Thereafter, the tribunal's decision on jurisdiction can be challenged under s. 67 of the 1996 Act.

The court review under s. 67 is a *de novo* review; i.e. the court is not bound by any of the evidential or legal findings of the tribunal. This is a cause of concern for some. In part, this is due to the cost implications of and delay caused by the court being able to re-determine the jurisdictional question afresh. It was also expressed as a due process concern; i.e. a losing party before the tribunal has the opportunity of seeing where their evidence and legal submissions are found to be deficient by the tribunal and seeking to correct this on challenge before the English courts. This led the Law Commission to initially propose that, rather than a full hearing on a jurisdictional challenge, a challenge should be limited to an appeal.

1 The Law Commission is a statutory body in England which was set up for the purposes of promoting law reform.

2 https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/ [Accessed on 16 Oct. 2023].

There was healthy opposition to the Law Commission's appeal proposal. Key points made against it included:

- the fact that if the tribunal does not have jurisdiction, then there should be no deference to its decision;
- if a party takes the position that the tribunal has no jurisdiction, they should not be required to participate in the arbitration proceedings to argue the merits of the jurisdictional points so that they can challenge jurisdiction on appeal;
- without a full hearing, there may not be issue estoppel which would give rise to enforcement risk; and
- the existing court's case management powers were sufficient to tackle any party seeking to take unfair advantage.

This led to a compromise being ultimately adopted by the Law Commission in its final report. Essentially, what is now proposed is that where a jurisdictional challenge has been determined by a tribunal, and a party has participated in that challenge:

- the court will not entertain new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced, or the evidence submitted before the tribunal;
- evidence will not be re-heard unless in the interests of justice.

It has also been recommended that this change would be accommodated through reform of the court rules rather than through changes to the legislation; in order to facilitate greater flexibility for evolving procedural rules should they be necessary.

There was a broad measure of support for this compromise proposal amongst those responding to the consultation. The Law Commission concluded this reform struck the appropriate deferential balance; i.e. a challenge to the tribunal's decision on jurisdiction is permitted, but there are limits to the evidence and argument that can be presented, giving due regard to the principle of competence-competence.

(ii) Impact

The proposed reform, and manner of carrying out the reform, is clearly sensible. The reality is that while not being bound by the decision of a tribunal on jurisdiction, the English court is, in any event, likely to be alive to opportunistic challenges and show some deference to a well-reasoned determination of a tribunal. What the proposed changes therefore achieve may be a matter of emphasis, but they will empower a party seeking to uphold a jurisdictional decision in resisting new evidence before the court and will make it even more critical that parties objecting to jurisdiction before the tribunal do so on a transparent and upfront basis.

2. Disclosure obligations

(i) The proposed reform

A duty of disclosure was recognized in English law by the Supreme Court in its 2020 judgment in *Halliburton v Chubb*,[3] where it was said to be necessary in the public interest to uphold the integrity of arbitration as a system of dispute resolution.[4]

This duty is now to be codified in legislation by imposing a continuing duty on arbitrators to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. By moving the duty onto a statutory footing, it resolves certain issues which arose out of the *Halliburton* decision; namely, whether the duty arose prior to appointment and, if it arose from an implied contractual obligation, whether that obligation depends on English law applying to the arbitrator's contract of appointment.

Alongside this duty the Law Commission also proposes a duty on arbitrators to disclose what they actually know and what they ought reasonably to know. This 'state of knowledge' duty also derives from the Supreme Court in *Halliburton*, though, while it is undisputable that an arbitrator ought to make a disclosure based on what they actually know, the standard to be imposed on an arbitrator to conduct reasonable enquiries was not settled either by the Supreme Court or by consultee responses. The proposed legislative amendments will therefore clarify that.

(ii) Impact

Legislating for a disclosure obligation does not impose a dramatic change; as the duty already exists under English law, the statutory amendment merely irons out the wrinkles.

The more interesting change is the 'state of knowledge' duty, and in particular what is encompassed in a duty to disclose what an arbitrator ought reasonably to know. Does this impose a duty on an arbitrator to make reasonable enquiries, and if so, what constitutes 'reasonable' for this purpose?

3 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2021] AC 1083.

4 Ibid. at [118], [132], [136], [145], [153]

The Law Commission's view is that any duty to make enquiries is fact specific and will not always arise.[5] For this reason it considered that the 'state of knowledge' duty was more appropriate than a duty to make inquiries. The Law Commission may be right that a positive duty to make enquiries will not always be imposed, but there is still much working out to be done in terms of where the boundary lies. For example, the Law Commission draws a distinction between arbitrators in a law firm, who it says ought to search for conflict of interest, and sole practitioners, where no such search may be required. There are some valid reasons for this distinction given that a sole practitioner, unlike a partner in a law firm, does not have partners whose business he or she needs to take into account in the same way and has access to all the relevant information in his or her own files. However, there may be information which is common to both a partner in a law firm and a sole practitioner which is pertinent to disclosure and which may be checked by the law firm (even if not identified by the parties) given the firm's greater resources, but which is not the sole practitioner. Such information may be equally relevant to impartiality in both circumstances. For example, the identity of ultimate benefit owner of a party.

Arbitrators may therefore wish to ensure that they adopt procedural rules which shift some of this burden onto the parties. For example, the IBA Guidelines on Conflict of Interest (2014) impose a duty on the parties to inform an arbitrator of any relationship, direct or indirect, between the arbitrator and the party or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration.[6] Of course, this will have to be applied consistently in all arbitrations in which the arbitrator is appointed given the scope for multiple appointments giving rise to the risk of disclosures.

3. Summary disposal

(i) The proposed reform

The new legislation will introduce a power for the arbitral tribunal to make (upon application by a party) an award on a summary basis in respect of an issue where the tribunal considers that a party has no real prospect of succeeding on that issue. This is a non-mandatory provision – the parties can agree to exclude this power. It is for the tribunal to set the procedure to deal with such an application, following consultation with the parties.

5 Final Law Commission Report at [3.96].

6 See (7)(a) of the General Standards, IBA Guidelines on Conflicts of Interest (2014).

Again, this is a statutory codification of a procedural power that already existed previously, although derived from less explicit statutory powers.[7] The Law Commission thought it was helpful to put this power expressly on the statute books to give arbitrators more procedural confidence to summarily dismiss claims or issues without trial. It also brings English law in line with the major arbitral rules which provide for summary disposal, albeit with differing standards.[8]

The threshold for success is whether a party has no real prospect of succeeding on the relevant issue. This is the test which applies in English procedural law as requiring a respondent to show that they have a realistic, as opposed to a fanciful, prospect of success, with an argument that carries some degree of conviction. The only other realistic candidate was 'manifestly without merit', which is the test applied in several institutional rules, mostly notably the LCIA Arbitration Rules, ICSID Arbitration Rules and the SIAC Rules. The Law Commission ultimately concluded that the English procedural law test should apply because it is only the default position with institutional rules taking precedence, and if it is to be applied in the English courts, it is better that they apply a threshold they are familiar with.

In other words, if the arbitration agreement provides for institutional rules which apply the 'manifestly without merit' threshold, or some other threshold (the ICC Note does not stipulate a threshold *per se* but refers to 'claims or defences … manifestly devoid of merit or which fall manifestly outside the arbitral tribunal's jurisdiction'), those rules will apply rather than the default position under the revisions to the 1996 Act.

(ii) Impact

The impact of this proposal is modest. As already noted, the arbitral tribunal already had the power to summarily dispose an issue. The purpose of this change is to embolden tribunals to exercise this power. Moreover, given that there is likely to be a mismatch between the threshold applied in the major arbitral rules which apply the 'manifestly without merit' threshold (and where that is the case the institutional rules will apply) it is likely that

7 The Final Law Commission Report identifies the statutory duty to adopt procedures which avoid unnecessary delay and expense (s. 33 of the 1996 Act) and the power to decide all procedural and evidential matters (s. 34 of the 1996 Act).

8 For example, 2016 SIAC Rules, r. 29 provides for 'early dismissal'; 2018 HKIAC Administered Arbitration Rules, Art 43 provides for early determination; 2020 LCIA Arbitration Rules Art 22.1(viii) provides for early determination; 2022 ICSID Arbitration Rules, r. 41 provides for manifest lack of legal merit; ICC Note to Parties and Arbitral Tribunal on the Conduct of the Arbitration under the ICC Rules of Arbitration (2021), para 110 provides for 'expeditious determination'.

the basis for summary disposal will continue to be the power under those institutional rules rather than under the legislation.

4. Law of the arbitration agreement

(i) The proposed reform

The new legislation will make clear that the law governing the arbitration agreement will be the law of the seat, unless the parties expressly agree otherwise.

This reform does mark a departure from English law as settled by the Supreme Court in *Enka v Chubb*.[9] In *Enka*, the court determined that under the English conflict of law rules where an arbitration agreement will be the law which the parties have chosen to govern it, or in the absence of choice, the system of law with which the arbitration agreement is most closely connected. Usually, the chosen law will be the law of the matrix contract, as an implied choice. However, other factors may imply that the arbitration agreement was intended to be governed by the law of the seat, such as: (i) where the law of the seat indicates that the arbitration is subject to that law; or (ii) the existence of a serious risk that, if governed by the same law as the matrix contract, the arbitration agreement would be ineffective. If there is no implied choice, on the majority view, the court held that the law of the seat is the law with which the arbitration agreement would be most closely connected.

In short, in Enka the Supreme Court lent heavily in favour of the law of the matrix contract governing the arbitration agreement, whereas the proposed amendment reverts to the law of the seat as the default choice.

The Law Commission concluded that a new default rule would have the virtues of simplicity and certainty. The reasons for this switch include that it avoids, or minimises, the following problems:

- application of foreign law derived from the matrix contract, which may be less supportive to arbitration as English law;
- the disapplication of the non-mandatory provisions of the 1996 Act as a consequence of foreign law applying to the arbitration agreement; and
- a complex and unpredictable outcome which may come from following the conflict of laws analysis in *Enka*.

There was some push back on this proposal; predominantly, because some consultees argued that by agreeing to the matrix contract, parties had an expectation that this law would govern all clauses in their contract, including the arbitration agreement. In addition, points were also raised (and rejected by the Law Commission) as to whether the proposed reform limited party autonomy or would give rise to complications where there is no choice of seat. The answer in part to the former issue was that the proposal preserves the party's right to expressly agree to a different law to govern their arbitration agreement should they wish. As to the second, the Law Commission rather doubted this would arise in practice.

(ii) Impact

This represents one of the biggest changes introduced by the legislation. Ultimately, it represents a policy decision – that, by default, the law of the seat should apply to the arbitration agreement rather than the law of the matrix contract because this will be simpler and provide greater certainty. However, the impact may not be dramatic. First, it is not unusual for standard form arbitration agreements to specify the law applicable to them. Second, while English law is robust in facilitating the construction of an arbitration agreement to be valid, most sophisticated legal systems will adopt an equally robust approach.

5. Emergency arbitration

(i) The proposed reform

Provision in institutional rules for an emergency arbitrator is a relatively new phenomenon which post-dates the 1996 Act. The legislative reform focuses on facilitating this (and not adopting a rival emergency arbitrator scheme in the legislation). It does this in two ways.

First, it will empower an emergency arbitrator, whose order has been ignored, to issue a peremptory order, which, if still ignored, might result in the court ordering compliance. A peremptory order is an order available to a tribunal under the 1996 Act,[10] which sets a final deadline for the defaulting party to comply with an original direction. If the defaulting party fails to comply, the 1996 Act imposes certain sanctions.[11] A peremptory

9 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

10 S. 41(5) of the 1996 Act.

11 These include dismissing the claim where the order is for security of costs (s. 41(6) of the Act). Or where it is any other kind of peremptory order, the tribunal can direct that a party is not entitled to rely on upon any allegation or material subject of the order, draw such adverse inferences from the act of non-compliance as the

order can also be enforced by court order, while preserving safeguards in relation to the arbitral process; i.e. the court must be satisfied that the applicant has exhausted any available arbitral process in respect of a failure to comply with the order.[12]

Second, it will expressly recognise that an application may be permitted not only by a tribunal, but now also an emergency arbitrator, to apply to the court for relief in support of the arbitration under s. 44 of the 1996 Act.[13] Tribunal permission is only required where the case is not one of urgency. If the matter was urgent, no permission is required for an application for an order necessary for the purpose of preserving evidence or assets. The proposed amendment to s. 44 is to avoid the situation where the matter is not urgent, but as the emergency arbitrator is seized of the matter rather than the tribunal, no application can be made to the English court for s. 44 relief.

(ii) Impact

Again, one can expect these amendments to have limited impact. If the parties agree to an emergency arbitrator procedure, the chances are that they will comply with orders of an emergency arbitrator which means that the successful party will not have to go to court to enforce the order. Further still, given the context in which the emergency arbitrator is appointed (i.e. one of urgency), one would expect that applications via s. 44 are likely to be rarer than the enforcement of peremptory route via s. 42 route.[14]

6. Reforms ruled out

Finally, there are two interesting proposals which ultimately the Law Commission decided did not merit legislative amendments.

(i) Confidentiality

First, a duty of confidentiality. An arbitration is broadly speaking likely to be confidential under English law, at least as a default position. However, under English law there are numerous exceptions to the duty of confidentiality, and it has long been recognized that it would be difficult to codify the exact list of exceptions. The Law Commission felt (similarly to the drafters of the 1996 Act) that it would create more problems than it would solve to codify the duty in legislation. In addition, the Law Commission recognised that in certain fields, there has been a move away from confidentiality, such as investor-state arbitration, and in other fields where a greater need for confidentiality would be required, such as family arbitration. Simply put, the inclusion of a statutory duty of confidentiality would not be flexible enough.

(ii) Anti-discrimination provisions

Second, a proposal to include anti-discrimination provisions in the legislation. The Law Commission suggested a rule that arbitration agreements should not require an arbitrator to have protected characteristic (age, gender, race etc) unless this could be justified. This proposal was subsequently adapted to make it clear that in the interests of neutrality it would be deemed to be justified to require an arbitrator to have a nationality different from that of the arbitral parties. This position is of course consistent with the nationality neutrality requirement in most major arbitral rules,[15] and the UNCITRAL Model Law.[16]

The aim of this proposed amendment was laudable. There have been recent important initiatives in international arbitration to address apparent discrimination in the appointment of arbitrators such as the Equal Representation in Arbitration Pledge and Racial Equality for Arbitration Lawyers. While it is harder to monitor other protected characteristics, the Law Commission noted that some statistics tended to show that women are up to three times less likely to be appointed as arbitrators than men.

circumstances justify, proceed to an award on the basis of such materials as have been properly provided to it or make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance (s. 41(7) of the Act).

12 S. 42 of the 1996 Act:'(1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal. (...) (3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order. (4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time. (...)'

13 Typically, this would be the case where a party needs an injunctive order backed by the contempt jurisdiction of the English court in order to enforce compliance, but the powers of the English court under s. 44 are broader than that. S. 44 empowers the court to make any order available in court proceedings relating to the taking of evidence of witnesses, preservation of evidence, orders relating to property the subject of proceedings or as to which any question arises in the proceedings, the sale of any goods the subject of the proceedings and the appointment of a receiver. A further amendment to the 1996 Act will make clear that such orders are available not only against the parties to the arbitration but also third parties.

14 See s. 42, as quoted supra, note 12.

15 Arts 13(5) and 13(6), 2021 ICC Arbitration Rules; Art 6.1, 2020 LCIA Arbitration Rules; Arts 38, 39, ICSID Convention.

16 Art 11, UNCITRAL Model law.

Ultimately, it proved too difficult to incorporate an anti-discrimination amendment. It was simply too difficult to legislate in a short-hand way to meet the complexity of the issues arising. For example, if one were to include a neutrality exception, should there be a further neutrality exception for a faith-based tribunal? Or where an all-male tribunal was appointed, a potential female arbitrator who wished to challenge this as discriminatory would encounter certain practical difficulties making a challenge very difficult (i.e. she is unlikely to know of this, whether it is justifiable or whether she would have otherwise been included in the short list or should have been appointed). Even if these difficulties could be overcome, concern was expressed that this may give rise to unmeritorious challenges to arbitrator appointments. The net effect may have been that a well-meaning amendment would do more harm than good.

Next steps

Now that the Law Commission has issued its final report, its work is complete and the draft Bill is ready to be tabled in Parliament. The modest changes to the 1996 Act will shore up the existing strong foundations for arbitrations seated in England and Wales.

On 7 November 2023, it was confirmed in the King's speech that Parliament will consider the Law Commission's recommendations to review the 1996 Act in the current legislative session, and on 21 November 2023 it was introduced into the House of Lords in Parliament. This means that we are likely to see the amendments enacted in 2024.

Given that the proposed amendments tweak rather than reform the legal arbitration framework, there is a case to be made that this is essentially jurisdictional marketing through legislative reform. Just the fact of refreshed legislation is a response to competition from other leading arbitration jurisdictions which have recently modernised their own arbitration frameworks (Singapore, Hong Kong, Sweden and Dubai). Nevertheless, that in 2023 we are only looking at modest changes to legislation enacted over 27 years ago, also serves to underscore the enduring success of the 1996 Act and the role it played in establishing London as one of the world's most popular arbitral seats.

Dissuasive and Abusive Arbitration Clauses on the Digital Consumer Market

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As the economy makes inroads into the digital industry, questions arise regarding the validity and effects of arbitration clauses contained in the terms and conditions of digital platforms, apps, and online services that may restrict the consumers' right to access to justice. This article analyses unnoticed and questionable practices that have been introduced in the drafting of these arbitration clauses in the digital consumer market, further limiting consumer rights that do not always find support in judicial precedents.

Introduction

Companies in the digital sector most often draft dissuasive and abusive arbitration clauses, restricting the rights of several digital users. The digital economy has permeated virtually all dispute resolution mechanisms and international arbitration is no exception. The interaction of arbitration with the digital economy has presented situations where companies tend to abuse their position against consumers in arbitration proceedings. The situation is exacerbated due to new digital dispute resolution systems, which may restrict the rights of the parties. As Gerhard Wagner and Horst Eidenmueller recall:

> Online platforms such as eBay, which broker contracts between parties or otherwise intermediate between them, offer dispute resolution tools that exclusively rely on the internet.[1]

These online dispute resolution provisions might impact on consumer's rights. Despite this, little has been studied in this regard as academia has only proposed solutions for particular contexts, such as categorically rejecting the forceful application of dispute resolution clauses in online agreements.[2]

The digital economy revolves around consumers. Thus, arbitrations in the consumer sector arising from digital economic activity have an impact on economic competition and consumer's rights – those which usually require the state to act proactively–,[3] freedom of trade, and data protection of users of digital platforms.[4] In this industry, the scope of services provided by digital companies is no longer limited to a territorial constituency.[5] This continually impacts international arbitration in the consumer sector. In particular, there has been an increase in dissuasive and abusive arbitration clauses.

A **dissuasive clause** can be understood as an arbitration clause that imposes an excessive procedural, economic or intellectual burden on one of the parties.[6] An **abusive**

1 See G. Wagner,H. Eidenmueller, 'Digital Dispute Resolution' (22 June 2021), p. 6.

2 For example, see J. Foxx, 'Take-it-or-leave-it Arbitration, Banning Consumers from the Court' (Lenders Compliance Group, 2017) National Mortgage Professional Magazine. J. Foxx notes that in the context of financial products, companies prefer to offer products with arbitration clauses, but that this is not replicated in commercial contracts with non-consumer parties. Therefore, the assertion that arbitration is a means of dispute resolution does not seem, at first glance, to be supported by the preference of companies in the financial sector in the US. See also, ICC Report 'Financial Institutions and International Arbitrations' (ICC Commission on Arbitration and ADR, 2016).

3 As recalled by X. Contiandes, 'The answer to the question "what social rights are" is not obvious. According to a traditional approach, social rights require from the state to act positively (status positivus), imposing on the state duties to provide goods or services such as work, housing, health care, education, welfare, and social security. Nevertheless, the debate on the constitutionalization of social rights and their judicial enforceability reveals differences in the ways in which they can be understood'. See X. Contiandes. 'Social rights in the age of proportionality: Global economic crisis and constitutional litigation'. *International Journal of Constitutional Law*, Oxford University Press, Vol. 10, Issue 3, July 2012, p. 660.

4 For an analysis of consumer perceptions of the impact of online platforms on their rights, see 'Platform Perceptions: Consumer Attitudes on Competition and Fairness in Online Platforms' (https://advocacy.consumerreports.org/, 2020),

5 Ibid. p. 3.

6 This kind of clauses are common in day-to-day transactions, such as credit card payments, cheque cards, prepaid cards, etc.

clause, on the other hand, can be defined as an arbitration clause that, in its execution, places one of the parties at an advantage over the other, which is usually a procedural advantage given the economic power of the benefiting party over the other. While all abusive clauses constitute *de facto* dissuasive clauses, not all dissuasive clauses amount to an abusive clause. This is because dissuasive clauses can have a deterrent effect on both parties, constituting a two-way or two-sided deterrent effect, or it can produce a one-way deterrent effect, impacting and disincentivizing only one party - i.e. producing a one-way effect.

- A **one-way dissuasive arbitration clause** that *de facto* impose a procedural advantage in favour of one party constitutes an abusive clause.
- A **two-way dissuasive clause** cannot result in an abusive clause since the deterrent effect is on both parties and neither of them would be faced with a procedural advantage.[7]

Unilateral arbitration clauses grant a procedural benefit to only one of the parties and have mainly been adopted in labour arbitrations in the United States.[8] As such an advantage usually consists of the possibility for one party to recourse to arbitration and not the other, such clauses have been categorised as unfair and abusive.

Despite the procedural benefits they may have, unilateral arbitration clauses are not as widely adopted in the standard terms and conditions of digital marketplaces as class action waiver clauses are. This is possibly because the interest of companies lies in having their disputes effectively resolved by arbitration. Therefore, it would not be beneficial to them to have disputes raised by consumers to be resolved before local courts. In the digital consumer sector, the application of such clauses and the decision as to their validity must take into account the social aspects of consumer rights.[9]

The competing rights in the face of a unilateral arbitration clause comprise of, on the one hand, the freedom of contract or the intention of the parties and, on the other hand, the fairness for the parties to the proceedings. Parties' intention and autonomy lies at the heart of arbitration. However, it has justifiable limitations. One of them is procedural abuses, which may result in procedural inequities that may even lead to the nullity of an award, as provided for in Article 34 of the UNCITRAL Model Law.

An abusive practice might for instance be when an arbitration clause allows only one of the parties to claim through arbitration, or allows a party to attract a case already brought by the other party before local courts so that it can be referred to arbitration. In such a case, the other party would always be subject to the counter party's decision to arbitrate.

If it is left to the choice of one of the parties to commence arbitration, this would constitute an abusive arbitration clause. This may also allow the party with the procedural advantage to choose to arbitrate issues that its opponent might not otherwise have chosen to arbitrate. This might vitiate the arbitral award in some jurisdiction and may result in its subsequent annulment.[10] A nullified or unenforceable award would be extremely burdensome for a consumer litigating against a digital industry giant.

Of the companies analysed, Zoom's arbitration clause poses a dilemma by limiting the dispute claim to the consumer filing a request for arbitration '[w]ithin one (1) year after such claim or cause of action arose, or else that claim or cause of action will be permanently barred' (see Table in Annex). In this scenario, it must first be determined according to each jurisdiction, whether consumers can bring *ex ante* or *ex post* claims for anti-competitive conduct. It may be the situation that an arbitral tribunal may confirm certain jurisdictions to make determinations on anti-competitive conduct independent of the determination made by the administrative authority in due course. Thus, the statute of limitations for filing for arbitration is subject to the temporal nature of the damages that consumers may claim.

J. Valenti, 'The Case Against Mandatory Consumer Arbitration Clauses' (https://www.americanprogress.org, 2 Aug. 2016).

7 With regard to a two-way dissuasive clause that does not constitute an abusive clause, the JAMS Clause Workbook provides for the possibility of implementing a 'prevailing party' arbitration clause, wherein the arbitrators must award the non-prevailing party the legal costs reasonably incurred by the prevailing party in the arbitration. While these types of clauses are a common practice across the field, JAMS notes that this type of clause would 'deter frivolous claims, counterclaims, and defences', see JAMS Clause Workbook. A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts (JAMS, 2018).

8 B. Van Zelst. 'Unilateral Option Arbitration clauses. An unequivocal choice for arbitration under the ECHR?' (2018) *Maastricht Journal of European and Comparative Law* 2018, Vol. 25(1), p. 81.

9 As the United Nations Conference on Trade and Development (UNCTAD) has noted, consumer protection is premised on the right to participate in social and economic decisions. Manual on Consumer Protection (2018) UNCTAD/DITC/CPLP/2017/1/Corr.1, p. 5.

10 For cases where these clauses have been declared invalid, see *Phox v. Atriums Management Co., Inc.*, 230 F.Supp.2d 1279 (D. Kan. 2002); *Stanich v. Hissong Group, Inc.*, 2010 WL 373 2129 (S.D. Ohio 2010); *Caire v. Conifer Value Based Care, LLC*, 2013 WL 5973151 (D. Md. 2013); *Williams v. TCF Nat'l Bank*, 2013 WL 708123 (N.D. Ill. 2013); *Lizalde v. Vista Quality Markets*, 746 F.3d 222 (5th Cir. 2014); *Peleg v. Neiman Marcus Group, Inc.*, 140 Cal. Rptr. 3d 38 (Cal. App. 2012). All of the prior cases are cited in R. Papadima, 'Asymmetrical Arbitration Clauses: Global Overview', in C. E. Alexe (ed), *Revista Română de Arbitraj*, (Wolters Kluwer România 2019, Vol. 13, Issue 4), p. 41.

The above clause seems unfair and to amount to a dissuasive arbitration clause. Such a clause forces consumers to file a claim without the certainty that their claim has merit. In contrast, applying a theory where claims can only be brought *ex post* to the administrative determination of the anti-competitive or unfair practice, provides certainty in consumer arbitrations.[11] In the latter case, consumers' interest in arbitration may outweigh the deterrent aspects of arbitration clauses and procedural costs.[12]

1. Panorama on digital regulation and arbitration clauses

The digital economy has encouraged 'big tech'[13] companies' creativity with respect to dispute resolution clauses included in the terms and conditions of their services.[14] These clauses encompass a variety of legal fields, such as consumer, commercial, banking and fintech law. While companies attempt to resolve their disputes out of the public eye, public authorities regulating digital transactions may appear powerless, although the importance of these authorities is ever growing in strong economies such as the United States, China, the United Kingdom, and Singapore. Some of these developments have resulted in arbitration clauses that are dissuasive and abusive to consumers.

To analyse such contractual clauses that many consumers interacting with digital platforms may face on a daily basis across different jurisdictions, this article reviews the arbitration clauses in the terms and conditions of some of the 10 most frequently used digital service delivery platforms: *Facebook*, *Amazon*, *Tinder*, *Uber*, *Airbnb*, *eBay*, *Bitcoin*, *Zoom*, *Snapchat*, *Bumble* (see Table in Annex). Some of them, such as Facebook and Amazon, are under review by competent authorities due to their suspected antitrust practices.[15] Others, such as Tinder and Uber, remain a point of contention over the liability of such platforms for the damage, injury and even death of their users.[16] Finally, the most recent twist in the digital economy has been cryptocurrencies,[17] as platforms for their acquisition have not yet taken a firm stance on the use of arbitration for the resolution of disputes arising from their services. This includes services of open-source blockchain systems such as the 'Q Protocol' that has incorporated the ICC Rules of Arbitration to resolve disputes concerning the governance of decentralized organizations.[18]

From the Table in Annex, a diversity of options through which arbitration is adopted for disputes arising out of the use of digital platforms is discernible. Giant technology-related companies are increasingly employing such clauses in their standard terms and conditions, and their inclusion, in part, depends on their innovativeness. For example, the top 8 United States firms by market capitalization during the initial months of 2022 (*Apple*, *Microsoft*, *Alphabet*, *Amazon*, *Nvidia*, *Tesla*, *Meta [Facebook]*, *Berkshire*) are technology-related companies which employ arbitration clauses in their standard terms and conditions.[19] The territorial

11 It has been considered that, given the nature of anti-competitive damages, those arising from non-contractual relationships will take a secondary importance in favour of contractual ones. This, by virtue of the difficulty of imposing a determination on an anticompetitive practice without the applicable administrative authority issuing a prior ruling. Marcos and Sanchez. Damages for breach of the EC antitrust rules: harmonising Tort Law through the back door? *Revista para el análisis del derecho* (2008), p. 4.

12 See also Chapter 2: The Arbitration Agreement and the Jurisdiction of the Arbitral Tribunal', in D. Girsberger, N. Voser, *International Arbitration: Comparative and Swiss Perspectives* (Fourth Ed.) (Schulthess Juristische Medien AG 2021), pp. 73 – 172, para. 293 (footnotes omitted): 'The validity of asymmetrical jurisdiction clauses is unclear. A 2015 decision of the French Court of Cassation found such a clause in which a French company was restricted to bringing a claim in the courts in Zurich while the other party, a Swiss bank, could choose any other competent court, to be invalid because it was "not sufficiently precise and predictable." Other national courts have held asymmetrical arbitration clauses in the specific context of standard form contracts to be invalid on the grounds of a violation of the equal rights of the parties. However, the more recent decisions of the courts in the United Kingdom and the United States have upheld such clauses out of respect for party autonomy to choose how to resolve disputes and because of the lack of an unconscionable level of unfairness or asymmetry. Similar decisions upholding non-mutual clauses in commercial settings have been made in France, Italy and Germany. Most legal commentators consider asymmetrical clauses in a commercial context unproblematic and valid, although some express reservations with regard to such clauses in consumer contracts.'

13 'Big tech' companies have been defined by the Bank of International Settlements as emerging companies with vast technological capabilities. J. Crisanto, J. Ehrentraud et al., 'Big tech regulation: what is going on?' (Bank for International Settlements. FSI Insights on policy implementation No. 36, p. 3, 2021).

14 V. Oksanen and J. Laine mention that while guidelines have been created to prevent such practices, such as Directive 93/13/ECC of 5 April 1993, these efforts have remained limited to matters such as the sale and purchase of software. V. Okasen and J. Laine, 'Digital consumer and user rights in EU policy' (Proceedings of the 10th International Conference on Electronic Commerce, 2008).

15 The US Federal Trade Commission alleges that Facebook has applied a buy-or-bust mechanism to break up competition after failed attempts to innovate. It even cited Facebook's CEO and a major shareholder who, in 2010, expressed concern about being eclipsed by another network. To see the discussion, visit: https://www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush.

16 R. Burnson, 'Judge Rejects Uber Denial of Liability in Student's Death on Freeway'. (www.insurancejournal.com, 2021).

17 The increase in crypto trading has come with risks. Information asymmetry in investment is constant given the need to implement high-level technology for market research. This, in addition to the complexity in the use of blockchain as a means of security in crypto transactions. In this regard, see, L. Lin, D. Nestarcova 'Venture Capital in the Rise of Crypto Economy: Problems and Prospects', *Berkeley Business Law Journal*, Vol. 16, No. 2, 2019, p. 26.

18 Information retrieved from https://q.org/files/Q_Whitepaper_v1.0.pdf , 'Q Whitepaper', Section 4.6, p. 14.

19 Information retrieved from disfold.com, 'Top 1000 largest US Companies by Market Cap in 2023'.

capacity of these companies is usually not limited by their state's geographical frontiers; a frontier which is usually also trespassed in international arbitrations.[20]

Positions followed by companies on multiple aspects do not follow a common trajectory. However, they all adopt innovative arbitration clauses. A Table in Annex shows the characteristics the arbitration clauses may have with regard to the arbitral institution, the seat of the arbitration, a rule to fix the cost of the arbitration, a waiver of class action, and additional specific characteristics ranging from specialized powers of the arbitral tribunal to fixing the place for the arbitration hearings.[21] As a result:

- Only two companies, *Uber* and *Amazon*, consider it useful to determine the seat of the arbitration from the start. In the case of *Uber*, as explained below, the seat of the arbitration may be used to dissuade a party from commencing arbitration.
- There are also certain characteristics common among all 10 companies, such as including a waiver of class action and referring to institutional arbitration, except for *Bitcoin*. Data shows what companies are more interested in including a well-rounded arbitration clause that may fit all the reviewed characteristics of an arbitration clause. Such is the case of *Amazon*, which employs an arbitration clause in its standard terms and conditions, which also coincides with the most common characteristics for arbitration clauses by these companies.[22]
- There is also an evident distinction between clauses on the contractual allocation of costs, the seat of arbitration, the arbitral institution, and on the powers granted to the arbitral tribunal.[23] Some of these practices will be analysed in later sections.

Prior to their analysis, however, it is relevant to define what constitutes a dissuasive and abusive arbitration clause.

2. Fallback options and arbitrator's authority to modify 'unfair terms'

Most jurisdictions[24] have succeeded in regulating Fintech, which until recently was itself an unexplored area of law. The growing use of Special Purpose Acquisition Companies (SPACs),[25] blockchain, decentralised justice systems, cryptocurrency trading platforms, and 'unicorn companies'[26] that tend to use digital platforms, leaves consumers in an economy of constant change and innovation,[27] where given the competition in the industry, public policy is failing to regulate the digital economy fast enough.[28]

In this regard, innovative technology industries have also come up with innovative arbitration clauses that are complex in their application.[29] Through these clauses, there is a tendency to maintain the arbitration ongoing even if the arbitration clause is declared void and ineffective on the agreed terms. To prevent a local court from declaring an arbitration clause void given its dissuasive or abusive characteristics, *Tinder* and *Airbnb*

20 J. Kleinheisterkamp. 'The Myth of Transnational Public Policy in International Arbitration' (2023), *The American Journal of Comparative Law*, Vol. 71, Issue 1, Spring 2023, p. 119 ("Gaillard makes transnational public policy one of the cornerstones of his theory of a truly autonomous arbitration. This theory is based on Eisemann's postulate, which was rephrased and given full normative force (for France only) in 2007 by the French Cour de Cassation in the *Putrabali* case: '[A]rbitral awards, which are not attached to any legal order, are decisions of international justice').

21 To illustrate the relationships among these arbitration clauses, a data analysis is employed to produce a neural network. Neural networks illustrate how social factors relate and are interlinked to one another. (See https://www.ibm.com/topics/neural-networks). To produce a neural network, a pack of information with each of the arbitration clauses in the Table in Annex was uploaded into a software program named *Gephi*. This program employs an artificial intelligence algorithm to produce a diagram reflecting the relations in the data provided.

22 These characteristics include *inter alia* a waiver for class action, defining the seat for the arbitration, and providing for a specialized rule to fix the cost of the arbitration.

23 This creativity has been conveyed in a 'free pass' for companies to deny rights that consumers could claim before the courts. Thus, opening a side door in law that may prove detrimental to consumers. C. Nace, 'Arbitration Clauses in Consumer Contracts May soon be Banned' (www.paulsonandnace.com, 24 Nov. 2015).

24 For example, the World Bank notes that out of a survey of 200 countries, 167 have data protection regulations, 103 regulate virtual tangibles, 128 regulate digital identification in transactions, and 44 regulate open digital finance. See 'Global Fintech-enabling regulations database' (World Bank, 2021).

25 A SPAC is an entity organised to raise capital in an initial public offering (IPO) for the purpose of identifying and acquiring one or more operating companies in the market. For a discussion of the characteristics of a SPAC, see C. Krus, V. Bulkin, 'Knowledge sharing: What is a SPAC?' (Eversheds Sutherland, 2019).

26 The term 'unicorn companies' refers to start-ups worth more than one billion dollars. G. Morrilla, 'The "unicorn companies" park' (2018) *eXtoikos*, N°21. 2018, p. 79.

27 According to the EY report, current market projections foresee an increase of US$1b+ for initial public offerings, which include technology companies such as unicorns, SPACs, e-commerce, and in general a considerable range of companies in the technology sector. See EY Report, 'How can the opportunities to go public be seized, not lost?', p. 8.

28 This characteristic aspect of public policy on competition and free competition in the digital sector is considered a laggard given the idea in places like Silicon Valley of 'moving fast and breaking things'. See, T. Wheeler, Ph. Verveer, et al. *The need for regulation of big tech beyond antitrust* (2020, Brookings).

29 There is a divergence in the doctrine on what constitutes a complex arbitration clause. While Bernard Honotiau understands by complex a clause involving multiple parties or contracts, Tevendale and Ambrose assimilate it to a tiered clause with multiple sequential means of dispute resolution. Tevendale, Ambrose et al. 'Multi-Tier Dispute Resolution Clauses and Arbitration', *Turkish Commercial Law Review*, Vol.1, No. 1 (2015), p. 31.

state that the arbitrator must modify unfair terms in the interest of ensuring the continuity of the arbitration, stating the following:

> The arbitration shall be governed by the JAMS Streamlined Arbitration Rules and Procedures ... as modified by these Arbitration Procedures. If there is any discrepancy between the JAMS Rules and these Arbitration Procedures, the Arbitration Procedures shall prevail. However, if the Arbitrator determines that strict application of any term of the Arbitration Procedures would result in a fundamentally unfair arbitration (the 'Unfair Term'), the Arbitrator shall have the authority to modify the Unfair Term to the extent necessary to ensure a fundamentally fair arbitration consistent with these Arbitration Procedures (the 'Modified Term').[30]

In their application, the above and similar clauses raise many questions. The arbitration clause expands the powers of an arbitrator to an unexplored extent. While arbitrators have the power to determine their own competence (*Kompetenz-Kompetenz* principle),[31] the arbitration clause in *Tinder* and *Airbnb* standard contracts gives the arbitrator the opportunity to modify the arbitration clause even if it is inoperative or ineffective as a matter of 'fairness', so as to render the arbitration clause effective.

While an arbitrator cannot, regardless of how he or she modifies the clause, make something that is not arbitrable, arbitrable,[32] the *Tinder* and *Airbnb* clauses give the arbitrator broad powers to the arbitrator with no perceived limitation on changing the place of arbitration assuming if he or she considers it 'fair'. Consider a country where class actions are not arbitrable and where, for instance, there are reports of possible corruption between a powerful Tech company and the judiciary. The arbitrator could, for example, consider modifying the seat of arbitration in the arbitration clause to the United States,[33] [34] where class actions are arbitrable in order to evade the courts in the home country.

The aforementioned clauses in *Tinder* and *Airbnb* impose two limitations: (i) the modification must be subject to a notion of obtaining or restoring 'justice'; (ii) such power is limited to achieving 'permanence' in the arbitration.[35] This implies that an abusive arbitration clause, despite granting an advantage to one of the parties, could not be modified, since the purpose of such modification would not be with the objective of keeping the parties in the arbitration. Another aspect of relevance is the nature of such a clause. If the arbitrator decides to modify the arbitration clause, such a decision entails a kind of *ex aquo et bono* decision by the arbitrator.[36] This could establish a favourable clause for consumers. The arbitrator can modify terms of costs, place of arbitration, and excessive document production periods so as not to impose an undue burden on the user.

30 The reproduced arbitration clause is from *Tinder*'s terms and conditions. The terms and conditions are available at: https://policies.tinder.com/arbitration/intl/en/.

31 The *kompetenz-kompetenz* principle allows arbitrators the freedom to determine their own substantive jurisdiction under the arbitration agreement itself, including the validity of the arbitration agreement itself. For a discussion of the scope of this principle, see, B. Salifu, The Doctrine of *Kompetenz-Kompetez*: An Instrument of Fraud or Justice? The Case of *Dallah Real Estate and Tourism Holding Company (Appellant) (Dallah) v. the Ministry of Religious Affairs* (2019). *Open Journal of Social Sciences*, DOI:10.436/jss.2019.76014, p. 172.

32 This would probably constitute an excess of the arbitrator's powers. An arbitrator must make an enforceable award. Therefore, assigning a different jurisdiction by making the dispute arbitrable would jeopardise the possible enforcement of the award in case a court in another jurisdiction considers itself competent. This would open up the possibility for multiple courts to declare themselves competent to hear the nullity of the award. While the courts do not constitute an appellate stage, the change in jurisdiction is a procedural aspect that is difficult to overlook.

33 Recently, in *Henry Schein Inc. v. Archer and White Sales Inc*, the U.S. Supreme Court confirmed that class actions are arbitrable, although such a determination must be made by a court, not an arbitrator, in cases where there is no 'clear and unambiguous' decision that such a decision is for the arbitrator to make (Tomasich & Firestone). In other matters of a social nature, US courts have also analysed the intersection between freely available rights, the application of a forum outside of state intervention and the difficulty of reconciling labour rights with the right to assemble and start a union, and have also placed great stress on this type of arbitration. J. Getman, 'Labor Arbitration and Dispute Resolution', 88 *Yale Law Journal*, 916, pp. 1978-1979.

34 The possibility of an arbitral tribunal modifying an arbitration clause is still subject to much debate. See, for example, a decision by the United Kingdom Supreme Court that where it refused to recognize the arbitral tribunal's interpretation that the arbitration agreement could be orally modified. *Rock Advertising Limited (Respondent) v MWB Business Exchange Centres Limited (Appellant),* [2018] UKSC 24, Case ID UKSC 2016/0152. Also see, the sole arbitrator's decision to 'replace' the seat of the arbitration from Madrid to Paris. Final Award (2022), in *Nurhima Kiram Fornan, Fuad A Kiram, Sheramar T Kiram, Permaisuli Kiram-Guerzon, Taj-Mahal Kiram-Tarsum Nuqui, Ahmad Narzad Kiram Sampang, Jenny KA Sampang and Widz-Raunda Kiram Sampang v. Malaysia*, Ad Hoc Arbitration.

35 The arbitration clause at Tinder may be found at: https://policies.tinder.com/arbitration/intl/en/: 'However, if the Arbitrator determines that strict enforcement of any provision of the Arbitration Procedures would result in an arbitration that is essentially unfair (the 'Unfair Clause'), the Arbitrator has the authority to modify the Unfair Clause to the extent necessary to ensure an essentially fair arbitration consistent with these Arbitration Procedures (the 'Modified Clause'). In determining the content of a modified Clause, the Arbitrator shall select terms that best express the intent of the Unfair Clause.' For Airbnb's clause, see: www.airbnb.com/help/article/2908.

36 *Ex aequo et bono* arbitrations can be seen as mechanisms that foster unpredictability, excessive discretion and abuse of power. While these characteristics may seem inherently reprehensible, in consumer disputes, the arbitrator's powers can assist in balancing the economic imbalance between the parties. See M. Lazic, G. Palermo, et al. '*Ex Aequo et Bono* in International Arbitration' (*Revija Kopaoničke Škole Prirodnog Prava*, 2020), p. 49.

The arbitration clause in *Tinder* and *Airbnb* does not constitute per se arbitration *ex aquo et bono*. By contrast, *eBay* does provide that the arbitration must be resolved in 'law or equity'. The difference between the *Tinder* and *Airbnb* clauses and the *eBay* clause is that the former does not allow the merits of the dispute to be resolved on notions of fairness and equity, whereas the *eBay* clause does. For a consumer, the former is arguably more favourable than the latter, in the sense that the former allows the arbitrator to avoid leaving the user or consumer in a procedurally disadvantageous position.

Snapchat and *Bumble* take a similar position,[37] In the sense that former provides that, if the AAA is unavailable – without specifying what is meant by 'unavailable' – the parties must choose an 'alternative arbitral forum'.[38] Whereas *Bumble* provides that if JAMS is not available, the parties shall choose another arbitral institution. Such clauses, in the author's view, are likely to undermine the principle of consensual arbitration, as it is not possible for the parties to foresee the implications of the eventual arbitral forum to which they will submit. As for the *Snapchat* clause, it is not discernible what an 'alternative arbitral forum' entails. This could allow the parties to proceed both in institutional arbitration and *ad hoc* arbitration. On the contrary, it is arguable that the *Snapchat* clause equates a 'forum' with the AAA, and that therefore only an arbitral institution and not *ad hoc* arbitration could be chosen. This is why the *Bumble* clause expressly demands that the alternative be another arbitral institution.

The lack of clarity as to the 'alternative arbitration forum' in such clauses is detrimental to their effective enforcement. To illustrate, if one of the parties refuses to agree to arbitrate in another arbitral institution, a local court could encounter multiple difficulties in choosing the arbitral institution, as it could consider that by imposing an arbitral institution, it would be violating the consent of the party refusing to arbitrate. Although in adhesion contracts the user does not have the capacity to negotiate them, the *Snapchat* clause expressly states that in the event of the 'unavailability' of the arbitral institution, 'the parties' will choose another arbitral forum, thus allowing the user to participate in the negotiation of the arbitration clause. Thus, if the consumer refuses to agree to another arbitration institution, it is questionable whether this could render the arbitration agreement ineffective, or even render the arbitration award null and void if the company unilaterally chooses the forum or if the forum is chosen by a judge. In the author's opinion, such reasoning could lead to an increase in the difficulty for a user or consumer to exercise the dispute resolution mechanisms in the contracts provided in digital platforms and applications. The complexity of a clause is in itself a hindrance to its enforcement, thereby discouraging users from using it.

3. Arbitration clauses prohibitive of class actions

Another common denominator of the clauses in the Table in Annex is the waiver of the right to sue collectively.[39] The present study does not intend to make an analysis of the arbitrability of this waiver, as the scope is limited to the detection of a dissuasive or abusive arbitration clause.

The class action waiver is the exercise of free disposal of consumer rights.[40] As Jean R. Sternlight and Elizabeth J. Jensen note, 'the attempt by companies to avoid exposure to class actions through arbitration raises both legal and [public] policy questions'.[41] This waiver, in principle, satisfies the basic conditions for a valid waiver of the right to submit a dispute to ordinary jurisdiction. Therefore, jurisdictions that accept a class action waiver should allow for the arbitrability of disputes between consumers and businesses in the digital sector.

37 The *Bumble* arbitration clause may be found at: https://bumble.com/en-us/terms: 'If the applicable arbitration provider is not available to arbitrate, including because it is not capable of administering the arbitration or arbitrations in accordance with the rules, procedures and terms of this Arbitration Agreement, including those described in Section 13(8) (Mass Filings), the parties will select an alternative arbitral forum.'; The Snapchat arbitration clause may be found at: https://snap.com/en-US/terms. This clause has been updated through 2023: 'Arbitration Rules. The Federal Arbitration Act, including its procedural provisions, governs the interpretation and enforcement of this dispute-resolution provision, and not state law. If, after completing the informal dispute resolution process described above, you or Snap wishes to initiate arbitration, the arbitration will be conducted by ADR Services, Inc. ('ADR Services') (https://www.adrservices.com/). If ADR Services is not available to arbitrate, the arbitration will be conducted by National Arbitration and Mediation ('NAM') (https://www.namadr.com/). The rules of the arbitral forum will govern all aspects of this arbitration, except to the extent those rules conflict with these Terms.'

38 See, *Bumble* arbitration clause supra note 37, Section 13(4).

39 Class actions generally provide the most economically viable means of pursuing claims arising from violations of consumer rights. Potential damages may be too small to litigate individually. Thus, a class action may be the ideal mechanism to overcome the obstacles that an arbitration clause may pose. See S. Smith, 'Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System', *DePaul Law Review*, Issue 4, p. 1217.

40 The waiver of a class action, if allowed by the jurisdiction, is generally considered to derive from the contractual will of consumers. Consequently, the main argument against such clauses is that consumers cannot "aggregate" their claims, which is considered essential to protect consumer rights. For a discussion, see M. Glover, 'Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements' (2006). 59 *Vand. L. Rev.*, p. 1747.

41 J.R. Sternlight, E.J Jensen, 'Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?' (2004). Scholarly Works. 277.

All the terms and conditions reviewed, with the exception of *Uber* and *Bitcoin*, provide in some way that users must waive their right to bring class actions against the companies. In some of the clauses, it is emphasised that the parties expressly agree to arbitrate claims between them and the company, and not between any other users. Subject to the wording of the clause, the waiver to bring a class action can be understood in two ways – the first, in the sense of waiving the right to bring a class action in both a judicial and arbitral forum, and the second, waiving the right to bring a class action exclusively in an arbitral forum. The latter may arise due to an unintended wording of the clause, where a strict interpretation would imply that the user could indeed bring a class action, but not through arbitration.

The purpose of a class action, which is to allow multiple claimants to bring a claim on behalf of similarly affected parties, would level the playing field in a situation where an abusive clause is implemented. This is because if an unfair term benefits the party with the higher economic power, the collective of claimants would counter that power. Therefore, in innovative jurisdictions in the digital sector such as South Korea, the use of class actions in arbitration has been debated at the doctrinal level.[42] However, most jurisdictions require a minimum number of plaintiffs to certify a class action. For example, the new initiative law in France proposes a minimum of 100 consumers to certify, having met other conditions, a class action.[43] Thus, considering the deterring factors, this could result in a dissuasive clause. Regardless of whether the waiver should be arbitrable or not, the waiver of the right to bring a class action is likely to be a deterrent to the consumer. Therefore, it will be up to the legislature – in the case of regulation – or courts dealing with the recognition, enforcement, and annulment of an arbitral award, to assess in a holistic perspective whether the implementation of such practices should be accepted.

4. Allocation of costs

From the table in the annex, it can also be discerned that one of the trends in arbitration clauses in digital contracts and standard terms and conditions is the allocation of costs of the arbitration. Arbitration has been fervently attacked for the high costs of its use. These costs become even more relevant in the digital economy, where users are generally private individuals who would not be able to afford the administrative costs of a dispute. Therefore, we see that *Facebook*, *Amazon*, *eBay*, *Snapchat* and *Bumble* will bear the costs and expenses of arbitration, up to a certain amount, as long as the dispute resolution mechanism remains arbitration.[44] Some of the clause, e.g. *Snapchat*, provides that the company will bear all the costs if it initiates the arbitration against the application user/consumer.

Even when some clauses might consider that the company would bear the costs of the arbitration, or a part of it, none of the arbitration clauses that were reviewed provides an overview of the actual administrative costs of a potential arbitration.[45] This might contribute to the uncertainty of the administrative costs in cases where there is no clear rule from the arbitration clause as to the party that would bear the administrative costs.

For its part, *Bumble* also bears the costs if the arbitrator considers that the user is unable to pay them. In such a scenario, however, it is not clear as to when such a decision would be made by the arbitrator. To start the arbitration, the user would have to make an initial financial contribution to JAMS. This initial financial contribution would happen before an arbitration is initiated and subsequently, before any decision by the arbitrator can be made. However, it is also possible that the arbitration clause provides for such a decision to be determined *only after* the award on the merits is rendered, thereby forcing the user to bear the costs of the arbitration until such time. Therefore, subject to the manner of enforcement of the *Bumble* arbitration clause, it may or may not be a dissuasive or abusive arbitration clause.

42 R. Kim, H. Jun Jung, 'Time for Class Action Arbitrations in Korea?' (Kluwer Arbitration Blog, 2021).

43 On 17 Oct. 2018, several members of parliament in France proposed a bill to regulate class actions which, as of April 2021, had yet to be passed. See A. Valencon, N. Boucaert, 'The Class Actions Law Review: France' (2021) (https://thelawreviews.co.uk, 2021).

44 The allocation of costs agreed to in advance is common practice. See ICC Report, 'Decisions on costs in international arbitration' (ICC Commission on Arbitration and ADR, 2015), p. 6.

45 J. Kabya, et al. 'Use of Arbitration Clauses by Social Media Websites: A Critique' (2023). *Pepperdine Dispute Resolution Law Journal*, Vol. 23, Issue 2, p. 312 ('Most websites fail to disclose the arbitral rules that govern proceedings, or the estimated costs of arbitration. They also fail to explain the rights that users are waiving or provide additional information related to the process').

5. Third-party funding

Third-party funding (TPF) arrived in the market to stay, although its use has now deviated from its original purpose.[46] Initially, TPF was self-proclaimed as the means to obtain more *David v. Goliath*, where the TPF funds David against his opponent. In practice, however, TPF has been used as a 'credit' for companies that have the financial resources to finance arbitration, but nevertheless *choose* to use those resources for business expenses rather than arbitration. Although most jurisdictions may allow TPF, mainly those with a civil law background, courts and legislative bodies are yet to regulate the relationship between TPF and its service acquirers. In jurisdictions such as Mexico, Saudi Arabia, Qatar and the United Arab Emirates, even when TPF is allowed, there is no public record of its use neither in the digital market nor as an access-to-justice mechanism.

Faced with this new and unexplored market, the possibility for TPF to function as an alternative that provides a balance to dissuasive and abusive arbitration clauses is questionable. In *Uber v. Heller*, the Supreme Court of Canada (SCC) opened the possibility for the first time to this market. Heller brought a class action before the local courts in Canada. For its part, Uber applied for a stay of the trial and referral to arbitration. In its reasoning, the SCC determined that:

> Applying the doctrine of unconscionability in this case, there was a clear inequality of bargaining power between Uber and [Heller]. The arbitration agreement was part of a standard contract and a person in [Heller's] position could not be expected to understand the arbitration clause to impose a $14,500 hurdle for relief. The impropriety of the arbitration clause is also clear because these fees are close to [Heller's] annual income and are disproportionate to the size of an arbitration award that could reasonably have been anticipated when the contract was entered into.
>
> Respect for arbitration is based on the fact that it is a cost-effective and efficient method of resolving disputes. When arbitration is truly unattainable, it is tantamount to having no dispute resolution mechanism at all. In this case, the arbitration clause is the only way [Heller] is allowed to vindicate his rights under the contract, but arbitration is out of reach for him and other drivers in his situation. His contractual rights are therefore illusory.[47]

It is notable that the clause in issue in *Uber v. Heller* is the same arbitration clause that subsists as of 2022 in the standard terms and conditions of *Uber*'s apps. In its analysis, the SCC considered that two conditions are required to attract the theory of unconscionability: (i) inequity in bargaining power between the parties; and (ii) unforeseen costs of arbitration.[48]

As noted by the 'ICCA-Queen Mary Working Group on Third Party Funding', TPF has developed gradually but steadily in international arbitration.[49] While the application of the doctrine of unconscionability is based on the premise that an arbitration clause might be frivolous, TPF may compensate this as it has been endorsed for its ability to promote access to arbitration. TPF does not promote frivolous lawsuits. On the contrary, its modern conception is that '[a]ny claimant can attract the resources and expertise necessary to litigate or arbitrate the claim'.[50]

In *Uber v. Heller*, the arbitration clause called for arbitration under the ICC Arbitration Rules, based in Amsterdam, and entailed an administrative fee to initiate the proceedings of $14,500. Heller's annual income was close to this amount, excluding travel expenses to Amsterdam and the attorney fees. Despite this, Heller's case could have been an attractive investment for a third-party funder, as he was claiming $400 million in damages. By way of comparison, *DeepNines*, a Texas-based security company obtained an $8 million loan from a third-party funder, which resulted in a $25 million settlement.[51] The third-party funder of *DeepNines* received more than $10 million in return. Although third-party funders do not typically invest in litigation with little potential for damages, the Heller case, because of the amount claimed, could have been attractive because it represented a potential high return on investment.

46 R. Howie, G. Moysa. 'Financing Disputes: Third-party funding in litigation and Arbitration' (2019), *Alberta Law Review*, 57:2, p. 472.

47 See *Uber Technologies Inc. v. Heller*, 2020 SCC 16, available at https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do.

48 I. Tlaculio Fuentes, 'Legal recognition of the digital trade in personal data', *Mexican Law Review* (Vol. 12 n°2, 2020).

49 'The ICCA-Queen Mary Working Group on Third Party Funding', ICCA Report No. 4, 2018. The ICCA Task Force was led by S. Brekoulakis, W. Park and C. Rogers.

50 H. Van Boom. 'Third Party Funding in International Investment Arbitration', Dec. 2011, p. 3,

51 L. Rickard, 'Why are Hedge Funds Allowed to Invest in Litigation?' *The Atlantic* (3 July 2012).

In *Heller*, the SCC opined that it is unreasonable to impose high costs as a condition of arbitration on a party that is unable to fund the proceedings.[52] However, how would this analysis change if the claimant were able to obtain third-party funding? Would the clause still be disproportionate? The relevant factor in releasing the claimant from an improper arbitration clause is whether the claimant could not have recognized the implications of such an agreement. In this regard, the SCC determined that this is appropriate where:

> [A] person in Heller's position could not have been expected to appreciate the financial and legal implications of the arbitration clause.[53]

Therefore, there must be a lack of knowledge of the consequences of the arbitration agreement by one of the parties before it is declared invalid. In addition, some drafting modifications,[54] such as a more conspicuous arbitration clause in a standard agreement, might have saved the arbitration clause from being declared invalid.

Contracting parties or companies in the digital industry may consider how TPF may impact or benefit the validity of an arbitration clause. In certain cases, a consumer's access to multiple funders of international litigation might reduce the likelihood of the arbitration clause being classified as improper.[55]

Thus, the inclusion of TPF before determining its legitimacy in an arbitration clause would develop the doctrine of unconscionability into a more concrete concept, have pro-arbitration effects, and avoid delaying tactics. TPF could clarify the role of 'bargaining power' in unfair clauses. To assume that all arbitration clauses that are not negotiable are unfair would conclude that all adhesion contracts and most concession contracts are not arbitrable.[56]

In conclusion, for an arbitration agreement to be excessive – under the theory of unconscionability – it must be (i) too onerous to exercise, (ii) the party must not have recognized the implications of the clause, and (iii) if there was a possibility to negotiate, there must have been unequal bargaining power. While the relationship between TPF and the doctrine of unconscionability can be mutually beneficial, there is a fine line between the use of TPF to outweigh disbalanced arbitration clauses and contractual arbitral agreements that are openly abusive and dissuasive. The eventual rise of digital sector claims could displace TPF to give the appearance of being only a tool for large claims. In the digital industry, TPF could be included in the context of class actions, where punitive damages could provide attractive returns for the funder. While TPF will not automatically prevent deprotection, it could help rebalance the scales of justice by serving as an empowerment tool that facilitates access to arbitration (and thus justice) for all arbitration users.

Conclusion

The increasing complexities in the digital economy sector may lead to an increase in consumer claims. While the discussion with regard to the arbitrability of the subject matter and the validity of the arbitration clause constantly evolve, depending on the nature of the claim, the dispute may or may not be arbitrable, and an arbitrator may not ensure the enforcement of its arbitral award.[57]

The legal framework arising from the confluence of digital economy, arbitration, and consumer rights, although recent, is bound to increase given the globalisation of digital transactions. At the enforcement stage of arbitral awards, the discussion around abusive and dissuasive arbitration clauses will be a constant. While the diversity and creativity that companies have adopted in arbitration clauses is remarkable, the effectiveness of these remains unknown and will have to be litigated in courts, where different outcomes may be arrived at.

52 *Uber Technologies Inc. v. Heller*, 2020 SCC 16, para. 47.

53 Ibid. para. 3.

54 Similarly, in the 2011 case *AT&T Mobility v. Concepcion*, the U.S. Supreme Court declared an arbitration agreement partially invalid, to the extent that certain features were held to be improper. In that case, the arbitration agreement provided that any party bringing a claim against AT&T would have to pay AT&T its attorney fees, regardless of the outcome of the arbitration. The Supreme Court noted the unfairness of that condition and determined that it was inoperative, while upholding arbitration as the proper proceeding on the merits. Gary Born noted that it might not have been declared inoperative at all if AT&T had been more careful in drafting its arbitration clause.

55 For example, Suppose the arbitration clause had required that any party unable to pay for the arbitration had to first attempt to obtain financing. In that case, the arbitration clause could have been upheld as valid, regardless of whether Amsterdam was the seat of arbitration. As Judge Coté said in a dissenting opinion in the case, the seat of arbitration is not synonymous with the place of hearings.

56 In the author's view, the bargaining power concept might have been developed through the following questions should be considered: What if (i) the arbitration clause in *Uber v. Heller*'s dispute had reflected the costs of administrative and filing fees; (ii) the arbitration clause required that parties unable to initiate arbitration should first seek third-party funding before going to the local courts? Consequently, would Heller have been forced to seek funding for its claim? Could Heller still argue a lack of knowledge of the implications of such an arbitration agreement?

57 Art. V, New York Convention provides: '2. Recognition and enforcement of an arbitral award may also be refused if the competent authority of the country in which recognition and enforcement is sought finds: ... (b) That recognition or enforcement of the award would be contrary to the public policy of that country'. See O. Sendetska, 'Arbitrating Antitrust Damages Claims: Access to Arbitration', in Maxi Scherer (ed), *Journal of International Arbitration*, 2018, Vol. 35 Issue 3, p. 357.

The reaction that will emerge from each jurisdiction may raise further questions, which will revolve around some of the issues addressed in this article, e.g. valid arbitration clauses, class actions, third party funding. Increasingly, it will be up to the arbitral tribunals and national courts to assess the line between freely available social rights that may be waived by users of digital services and those of a contractual nature, with no determination yet as to who will decide on the legitimacy of the use of dissuasive and abusive arbitration clauses, keeping alive the doctrinal dispute around their application. In this sense, it will be relevant to determine whether courts choose to categorize a one-way dissuasive arbitration clause as invalid or also make such a determination for two-way arbitration clauses when dealing with the new complexities of the digital economy, since this might allow the parties to claim that a general deterrent effect in a clause is abusive.

Company *	Arbitral Institution	Seat	Costs	Waiver of class action	Other characteristics
Facebook	AAA	X	Facebook assumes costs if claims are less than USD 75,000.	✓	N/A
Amazon	Different on each jurisdiction (e.g. CANACO in Mexico)	Mexico City	Amazon assumes costs when they are less than USD 145,000.	✓	Arbitration is optional.
Tinder	JAMS	X	Costs assumed by each party, but respondent may transfer theirs t o claimant.	✓	Arbitrator may modify unjust and unfair arbitration clauses so as to maintain arbitration as the applicable procedure.
Uber	ICC	Amsterdam	N/A	X	Does not allow for expeditious proceedings.
Airbnb	JAMS (for EU users); CIETAC y SIAC (for Chinese users); tribunals applicable (for the rest of users)	X	Each party may request the arbitrator to condemn the other user for the costs.	✓	The arbitrator must modify unjust and unfair clauses so as to maintain arbitration as the applicable procedure.
eBay	AAA/ICDR	Users outside of EUA to perform the hearing at Salt Lake City, Utah.	eBay shall pay costs for claims smaller than USD 10,000.	✓	The arbitration clause allows the tribunal to act *ex aquo et bono*. Further, the Arbitration clause may be refused in the first 30 days of using the service.
Bitcoin	X	X	N/A	X	X
Zoom	AAA	X	If Zoom obtains a favourable award, the consumer shall pay costs.	✓	N/A
Snapchat	AAA	X	Snapchat assumes costs with respect of the arbitral institution fees. If Snapchat commences the arbitration it shall assume all costs.	✓	If the AAA is not available, the parties shall select an alternative forum, The party who commences the arbitration may select the type of arbitration.
Bumble	JAMS	X	Bumble shall pay the costs if the arbitrator considers that the user is not able to afford it.	✓	If JAMS is not available, the parties shall choose another arbitral institution.

* The clause may differ depending on each jurisdiction.

ICC International Court of Arbitration

The Suitability of Arbitration and ADR to Resolve Financial Disputes: Islamic Finance and the Emerging Disputes in the Digitalised Financial Sector

26 May 2023, Paris

In the context of the cooperation and Memorandum of Understanding between the International Chamber of Commerce ('ICC') and the Union of Arab Banks ('UAB'), the ICC-UAB joint conference addressed, inter alia, the use of arbitration as a means of resolving disputes that may arise in the context of Islamic finance and the suitability of arbitration for resolving issues arising in the digitalised financial sector, such as smart contracts, automated trading, artificial intelligence, cyber security, and blockchain technology. Dr. Aline Tanielian Fadel and Christophe Dugué report.

Suitability of arbitration and ADR to resolve disputes arising from Islamic finance

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Taking stock of the increased offering of Islamic finance products, this panel discussed (i) to what extent arbitration, as an alternative mode of dispute resolution, can provide an adapted and effective resolution for disputes arising in Islamic finance; and (ii) the role of arbitration and ADR in preserving the integrity of the Islamic financial system.

The conference offered an introduction to Islamic finance and to the core principles to follow in order to ensure compliance with Sharia law such as the prohibition of *riba* (interest), *gharar* (excessive risk) and *maysir* (speculation). The panel also described the dominant modes of financing used by Islamic banks, including *murabaha* (cost-plus sale contract, involving an immediate delivery with deferred payment), *bay' al-inah* (a double sale used to avoid lending with interest), *tawarruq* (a sale with deferred payment followed by a repurchase of the same item in cash for a lower price through a third-party intermediary) and *ijarah* (leasing).

The discussions raised the need for Sharia-compliant arbitration,[1] whether in the choice of arbitration rules, the replacement of interest by compensation for late payment and penalty, or the use of third-party funding through an agreed-upon profit sharing formula, particularly with the rise of Islamic FinTech and cryptocurrency disputes.

The advantages of semi-secular arbitration to resolve Islamic finance disputes were examined, particularly when managing the Sharia risk (i.e. the uncertainty of compliance of the financial product with Sharia law) to ensure the compliance of Islamic financial products with Sharia law over their entire life cycle. The panel shared examples of the failure of court litigation to properly address the Sharia risk causing enforcement issues in Sharia-compliant jurisdictions. Arbitration offers a better alternative, particularly if it combines conventional arbitration rules with a regional seat of arbitration, and a secular governing law with precise references to principles of the Sharia.

The panel then explored whether Islamic dispute resolution ('IDR') called for specific proceedings in comparison with alternative dispute resolution ('ADR'). While traditional IDR is essentially similar to ADR, Islamic arbitration centers are not widely used. The panel mentioned that IDR and ADR should consequently coexist to cater for different targeted markets, pointing out that the real issue was the Sharia risk that encouraged the major Islamic institutions to opt exclusively for secular governing laws for the disputes related to their Islamic financial product, leaving the compliance with the Sharia to the determination of a Sharia board (sometimes the Islamic institutions' very own Sharia board, putting into question its objectivity) certifying the Islamic product's compliance with the Sharia within the documentation offered to the investors to subscribe to such product.

The panel drew attention to the fact that disputes in the context of Islamic banking and finance should not be resolved, as is often the case, without verifying the compliance of the decision resolving the dispute with Sharia law. Instead of excluding the application of Sharia law as the governing law because of its uncertainty that may jeopardize the enforcement of the decision in many jurisdictions, the panel shared many

1 See also the ICC Report on Financial Institutions and International Arbitration (2016), Section X 'Islamic Finance'. The Report of the ICC Commission on Arbitration and ADR was prepared by a Task Force co-chaired by Georges Affaki and Claudia Salomon.

examples where specific provisions of Sharia law could be adopted to govern the dispute, such as a specific Islamic Fiqh school,[2] or the standards of Bahrain based Accounting and Auditing Organization for Islamic Finance Institutions ('AAOIFI').[3] In conclusion, the parties agreed that arbitration is more suitable to cater for Islamic finance disputes than litigation because of the flexibility it offers in the choice of the provisions of Sharia law, while ensuring the integrity of the Islamic financial system through an objective verification of compliance with Sharia law.

The panel comprised Amel Makhlouf (Independent Counsel, Amel Makhlouf Avocat; Research Associate, Centre of Islamic and Middle Eastern Law, SOAS University of London; Lecturer in Law, Sorbonne Law School, Paris), Gordon Blanke (Founding Principal, Blanke Arbitration); Aline Tanielian Fadel (Partner- Arbitrator, Lecturer, Faculty of Law, Saint-Joseph University, Beirut) and was moderated by Ahmad Ouerfelli (Attorney at law, Ouerfelli Attorneys and Counsels, Tunis; Member of the Supreme Council of Arbitration, Mediation and Arbitration Center, UAB).

2 Such as *Hanafi*, *Shafi'i*, *Maliki*, *Hanbali*, *Ja'fari*, and *Isma'ili* schools.

3 See https://aaoifi.com/newly-issued-standards/, e.g. Financial Accounting Standard 33 'Investment in Sukuk, Shares and Similar Instruments'.

An increasingly digitalised financial sector: The suitability of arbitration and ADR to resolve emerging disputes

Christophe Dugué
Independent Arbitrator and Counsel, Christophe Dugué-Avocat-International Arbitration, Paris

This panel offered the opportunity to discuss (i) how the increased digitalisation in the financial sector is leading to the emergence of new types of disputes in various sectors (data usage, IP ownership, self–executing smart contracts, automated trading, blockchain technology etc.); and (ii) how the inherent features of arbitration and ADRs are particularly suitable for resolving digitalised finance-related disputes.

The panel provided an overview of the blockchain-based technologies (i.e. a technology for storing and transmitting information, without a central control body), which were identified by one panellist as a profound paradigmatic shift in the collection, sharing and processing of data and to trigger related revisions in socio-economic and political arrangements. These technologies include (i) smart contracts (i.e., self-executing contracts) that are neither smart nor a contract but an irrevocable protocol, deployed on the blockchain, programmed to perform automatically predefined actions when predefined conditions are met, (ii) cryptos (tokens, NFTs and cryptocurrencies), and (iii) metaverse.

Disputes arising from the digitalised financial sector include the following characteristics:

- involve investors, users of blockchain/ metaverse/ crypto exchange platforms located in any part of the world;[4]
- relate to the underlying transaction and performance of contractual undertakings or to the functioning of the platform itself (hacks, errors of code …);
- can be categorized according to their complexity and stakes (i.e. ranging from very simple questions involving a small amount at stake that call for a yes or no answer to highly technical or complex issues that can raise both procedural legal and technical issues and relate to multi-million USD or EUR disputes); and
- while the technologies and uses are new, the complexity of the related disputes can be significantly increased by procedural and legal issues.

While judicial courts are not the best option for international and complex disputes, alternatives are either 'on-chain' modes (available on the blockchain) for very small claims and yes or no questions,[5] and 'off-chain' modes (available outside the blockchain) amongst which international arbitration is the perfect fit for complex blockchain/crypto disputes. International arbitration is already a fact in this industry and many platforms provide for institutional international arbitration in their terms of use,[6] and several arbitral

4 E.g. https://bitcoin.org/; https://ethereum.org/; https://corda.net/ (blockchain platforms); https://www.binance.com/ (cryptocurrencies exchange); https://decentraland.org/ (Metaverse).

5 Such as the protocol offered by https://kleros.io/.

6 See e.g. G. Vannieuwenhuyse, W. Maxwell, 'Robots Replacing Arbitrators: Smart Contract Arbitration', *ICC Dispute Resolution Bulletin,* issue 2018-1*; D.* Itzel Santana Galindo, The Role of the Seat in Smart Contract Disputes, *ICC Dispute Resolution Bulletin,* issue

awards have already been rendered. Features that make arbitration attractive include: arbitration is not related to a specific jurisdiction, an award can be enforced in any jurisdiction, arbitrators are used to deal with complex issues both legally and technically, in any language and applicable law.

Legal issues raised in crypto disputes, i.e. relating to crypto assets (NFTs or cryptocurrencies) or involving a crypto exchange platform, include:

- **The question of the applicable substantive law**: if not provided for by the parties, the law is to be decided by using conflict of law rules, with the possibility that the applicable law deems crypto transactions illegal.
- **The determination of the seat of the arbitration**: if not specified in the arbitration agreement or fixed according to the arbitration rules or by the arbitral institution, the seat needs to be decided by the arbitral tribunal (preferably in a pro-arbitration and 'crypto-friendly' jurisdiction).
- **The enforcement of the award**: with the risk to be denied enforcement for public policy reasons when enforcement is sought in a jurisdiction that deems cryptos illegal or has declared a ban on cryptos (or their use).

On the notion of 'crypto friendly jurisdictions', the panel stressed that there was no uniform, easy, and definitive answer as the question is a moving target. In some regions, notably Europe and Singapore, cryptos are not illegal and their use have been regulated. Other regions, however, are still struggling with the characterization of crypto assets as commodities and/or securities (USA) or have declared cryptos illegal (e.g. Algeria, Egypt, Morocco, Afghanistan, Bolivia, China, Bangladesh, Nepal).

While it becomes manifest that the interplay between technology and arbitration is not the future but is happening now,[7] artificial intelligence and blockchain must be implemented with full human control and professionalism to preserve the existence of human decision processes. The panel mentioned the use of an 'open sandbox',[8] which consists in gathering professional knowledge from the field, methodically bringing in context and deciding with maximum possible scrutiny and noted that the promise of a dispute-free environment governed by infallible technology has proved to be utopian, since even the pioneers of blockchain technology did not contemplate a litigation-free environment.

The panel concluded that as surprisingly as this might appear new technologies raise issues that are not uncommon questions for international arbitration practitioners. It is thus preferable to select arbitrators on their legal rather than technical skills.

The panel comprised Prof. Hadi Slim (Professor of Law; Member, French Branch of the International Law Association, the French Committee of Arbitration, the Comparative Law Society, Executive Board of the Lebanese Review of Arab and International Arbitration), Christophe Dugué (Independent Arbitrator and Counsel, International Arbitration, Christophe Dugué-Avocat-International Arbitration, Paris), Sabine Van Haecke-Lepic (Independent Advocate, Mediator, Barreau de Paris) and was moderated by Dania Fahs, Former Director, Arbitration and ADR, Middle-East, ICC Dispute Resolution Services, Abu Dhabi).

The full programme and list of speakers are available at https://2go.iccwbo.org/the-use-of-arbitration-and-adr-in-international-banking-and-trade-sectors.html.

2021-1; G. M. Márquez Ruiz, 'Dissuasive and Abusive Arbitration Clauses in the Digital Consumer Market', *ICC Dispute Resolution Bulletin*, issue 2023-3.

7 One example being the impact of the disruption introduced by blockchain and the tokenization of illiquid real-world assets, which is estimated at US$ 16 trillion by 2030.

8 https://www.techtarget.com/searchsecurity/definition/sandbox

ICC DRS Regional Conferences

8th ICC Asia-Pacific Conference on International Arbitration: Rethinking Dispute Prevention and Resolution When the Dawn Returns

Hong Kong, 27 June 2023

Diane Peng
Partner, Fangda Partners, Beijing

Yvonne Mak
Associate, Withers KhattarWong LLP, Singapore

After a three-year hiatus due to the COVID-19 pandemic, the 8th ICC Asia-Pacific Conference ('Conference') finally brought together 280 international arbitration experts from 20 countries in Hong Kong. Topics discussed ranged from artificial intelligence to renewable energy and ESG arbitrations. The Conference ended with a mock court demonstration showcasing the ICC International Court of Arbitration ('ICC Court') scrutiny process of draft awards. The Conference was followed by a cocktail reception in celebration of the centenary of the ICC Court and the 15-year anniversary of the Hong Kong case management team. The 9th ICC Asia-Pacific Conference on International Arbitration will take place on 27-28 June 2024 in Singapore.

Opening remarks

Opening the conference, **Dr. Donna Huang** (Director, ICC Arbitration and ADR, North Asia, ICC Dispute Resolution Services) highlighted that Hong Kong remains the preferred hub for international arbitration, and that through its presence in Hong Kong, ICC continues to support global trade and investment in Asia.

ICC Court 100 meets ICC Court 1: Rules, values and spirits

In the first session, moderated by **Alexander G. Fessas** (Secretary General, ICC Court),the three Vice-Presidents of the ICC Court from Asia – **Chiann Bao** (Independent Arbitrator, Arbitration Chambers, Hong Kong), **VK Rajah SC** (Independent Arbitrator, Duxton Hill Chambers, Singapore), and **Helen Shi** (Partner, Fangda Partners, Beijing) – engaged in a discussion on the evolution and key milestones of the ICC with focus on Asia as well as the blueprint for the next century.

Mr Fessas invited the Vice-Presidents to put forward their views on anticipated changes in international arbitration over the next 10 years, through the people, processes and product. Mr Rajah SC opined that the biggest change in the future would relate to demographics, through greater representation from ethnic arbitrators and local law firms. Ms Bao agreed that there would be greater diversity in international arbitration, including a generational shift. Ms Shi opined that with China offering more training and universities with a focus on international arbitration, it is expected that more Chinese practitioners will be seen in the international arena.

On the legitimacy of arbitration, Mr Rajah SC opined that trust is the essence of the arbitration process. He pointed out that there is a lack of common ethical standards to adhere to in arbitration. He suggested combining the self-regulation of ethical standards with globally accepted objective standards, such as guidance or rulings for unacceptable conduct. Ms Bao noted that the publishing of ICC awards with the consent of parties has been a big factor in increasing trust and transparency. Ms Shi added that institutions are in a better position to be the guardians of the arbitration procedure. To this end, the ICC does well in engaging with arbitrators to assess how the case is progressing, and the scrutiny of awards ensures better quality awards.

In terms of whether the arbitration process can be more user-friendly and innovative, the panel highlighted that:

- arbitrators should be more conscious to fit processes to the problems before them, such as using better methods to address complex disputes, and more cost-friendly approaches to low value arbitrations;
- parties are usually concerned about speed, cost and enforceability; and

- the instruments of soft law need to evolve and move with the times, and that they may now need to be harmonised.

Fireside chat: How to lead business in the time of artificial intelligence

The second session was a fireside chat featuring **Justin D'Agostino** MH (CEO, Herbert Smith Freehills; ICC Executive Board Member) and **Harshika Patel** (CEO and Head of Firmwide Strategy Asia Pacific, JP Morgan Hong Kong), along with a third 'speaker', ChatGPT. The session was moderated by Claudia Salomon (President, ICC International Court of Arbitration), who invited the speakers to share techniques they have adopted to lead in a 'multi-crisis'.

Mr D'Agostino shared that as CEO of Herbert Smith Freehills, his job was to communicate simply, as people looked to him for direction. In the pandemic, he found that it was important to take care of oneself, to react and interact with clients in a different way, and to go back to basics on financial discipline. Ms Patel shared anecdotes about her journey stepping into the role of CEO of JP Morgan in Hong Kong, including learning to better understand people from different cultures that she interacted with.

Both speakers agreed that beyond mastery, leadership also requires authenticity and empathy. Ms Patel highlighted that unconscious bias still exists in the workplace, and people have higher expectations of female leaders. She shared anecdotes on situations where she had to lead with empathy as a female leader. Turning the question to the AI speaker, ChatGPT agreed that 'a leader can be tough and kind simultaneously', and that effective leaders strike a balance by being firm when needed, while also displaying kindness and understanding. Mr D'Agostino noted that while it is important to be decisive as a leader, a leader is appreciated for caring about the impact of a decision on the people around them. On the use of AI for writing letters that required empathy, ChatGPT was tasked with writing a condolence letter. Ms Patel and Mr D'Agostino agreed that AI could be used as a first draft template or precedent, but it was still important for humans to spend time making it their own and applying their own style or voice.

To conclude, Ms Patel noted that in a post-Covid world, we are almost given a blank slate about what we can do with organisations and talent, given the speed of the development of technology. Mr D'Agostino shared that the issues that concerned him as a leader of a law firm related to the war around talent and the reputation of the firm, as well as technology and the disruptions happening in the legal industry.

The day after tomorrow: Asia-Pacific's desires and approaches to prevent and resolve disputes in the current energy transition

The third session moderated by **David MacArthur** (Co-head of International Arbitration, Anderson Mori & Tomotsune PLC, Japan) opened with statistics on a pre-panel poll on several energy dispute-related questions. A majority of those polled were of the view that the construction of energy infrastructure and the provision of equipment (including supply chain) caused the most international energy disputes in the past five years, and will cause the most international energy disputes in the next five years.

Sam Boyling (Partner and Joint Head of China Practice, Pinsent Masons, Singapore) opined that the causes of disputes come from change and scale: namely, the scale of work that is being done in relation to decommissioning and net zero goals. With new technologies, new markets and new entrants, disputes arise when significant risks are taken by new or inexperienced entrants, or when repeat players deal with new market entrants without the maturity of relationships. Further, new regulations impact long-standing markets that are set up with agreements and arrangements as to who bears certain costs.

Lei Shi (Partner, Clifford Chance LLP, China) noted that there have been more than twice as many new renewable energy arbitrations in China compared to the traditional arbitration sector. **Friven Yeoh** (Partner & Global Co-Head of International Arbitration & Trade, Sidley, Hong Kong) added that China has been a net importer of energy sources, as there has been a movement towards diversification of energy sources. In terms of the energy transition, disputes could arise from decommissioning, joint-venture disputes as a result of foreign investments, intellectual property disputes arising from the use of new technologies, property disputes due to land charge uses, environmental disputes, or supply chain disputes.

In respect of disputes relating to technology, **Jo Delaney** (Partner, HFW, Australia) highlighted that energy transition projects require new forms of technology where disputes could arise as a result of:

- major defects in the new technology;
- issues with existing technology applied in new environments, and
- delays (e.g. in the supply chain, the construction of infrastructure, during the installation or pre-commissioning …).

This may also lead to problems in commercial relationships, especially when relationships are not mature or when dealing with new investors. Mr Boyling added that due diligence should be undertaken into new technologies and their risks. Otherwise, a party dealing with a supplier who is unable to perform may face significant liquidated damages for delays. Mr Shi opined that parties should have alternative suppliers to manage their risks in relation to supply chain disruptions.

In terms of the suitability of international arbitration in resolving energy disputes, the survey results showed that over 50% of users and counsel still saw international arbitration as the most suitable means for resolving energy disputes. The panel highlighted that:

- mediation and expert determinations are helpful in resolving energy disputes;
- disputes boards can help to resolve disputes during the implementation of projects; and
- expert determinations are commonly used as a first step to resolve renewables disputes.
- there could be a specialized panel for arbitrators with technical expertise in energy-related arbitrations.
- end-users are increasingly opting for expedited procedures and tailor-made arbitration procedures for energy disputes.

Moving towards a healthy business model: The rise of ESG disputes, prevention, and resolution

This session chaired by **John Choong** (Partner of Freshfields Bruckhaus Deringer LLP, Hong Kong) addressed key ESG trends and developments in the Asia Pacific region and the role of arbitration in resolving ESG disputes. The panel acknowledged the changing global risk environment and the increasing pressure on businesses to incorporate environmental, social, and governance (ESG) considerations into their core business strategy.

During the discussion, **Seung Wha Chang** (Professor, Seoul National University, Korea) gave a brief introduction of the ESG principles, emphasizing that it is an umbrella term that all corporations must balance based on their specific circumstances to achieve sustainable development. **Jiaxing (Joe) Zhou** (Chief Compliance Officer, Global Head of Legal and Compliance of China International Capital Corporation Limited, Hong Kong) provided insights into how ESG-related obligations impact business models, highlighting China's carbon goal and related policies, as well as the newly published ISSB Sustainability Standard. Meanwhile, **Sylvia Tee** (Counsel, Ashurst LLP, Hong Kong) noted an increasing trend of ESG-related disputes in Asia, which is a result of the increasing inclusion of ESG clauses in commercial contracts rather than a lower threshold for ESG violation.

When it comes to resolving ESG disputes, Mr Zhou opined that arbitration is a better venue than litigation because climate challenges cannot and will not be isolated to a particular region. He called for more proactive work to be carried out to change the way people conduct themselves and suggested the feasibility of mandatory arbitration for ESG claims. However, Professor Chang expressed concern about the lack of incentives for parties to resort to arbitration when they face an ESG dispute. Unlike treaties such as the Hague Rules on Business and Human Rights Arbitration (2019),[1] which may have meticulously provided for third-party rights, private commercial parties may not insert ESG clauses into their contracts.

1 https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/

Mock court demonstration: Scrutiny of draft awards

The scrutiny of draft awards is a unique feature of the dispute resolution services provided by ICC Court under Article 34 of its Rules. In accordance with the Rules, the arbitral tribunal must seek the Court's approval before rendering an award. The Court may lay down modifications as to the form of the award and draw the tribunal's attentional to points of substance without affecting tribunal's liberty of decision.

An interactive mock ICC Court session was held to allow the audience to witness first-hand how the scrutiny is conducted. **Claudia Salomon** (President, ICC Court) and **Alexander G. Fessas** (Secretary General, ICC Court), **Hazel Tang** (Counsel, ICC Court) and **Xin Zhang** (Counsel, ICC Court) acted as the ICC Court Secretariat – which reviews the draft award and prepares a memo for the ICC Court's review. Mock Court members comprised **Sanjeev Kapoor** (Partner, Khaitan & Co, India), **Anna Kirk** (Arbitrator/ Barrister; Member, Bankside Chambers, New Zealand), **Louie Ogsimer** (Partner; Member, Romulo, Philippines), **Kim Rooney** (Independent Arbitrator and Barrister; Member, ICC Court, Hong Kong). The audience was also invited to act as mock Court members and provide comments and questions to the draft award. During the Court session, the Court then ensures that all the claims and defences have been considered and that the reasoning is clear. At the end of the Court session, members make a decision about whether to approve the award, and subject to which comment(s).

It is important to note that the purpose of scrutiny is to ensure that the award rendered and notified to the parties is enforceable before local courts.[2] This ICC scrutiny mechanism showcases ICC's commitment to providing quality, effective and efficient dispute resolution services to the parties.

Keynote address by the Hong Kong Secretary for Justice

Paul Lam (Secretary for Justice of Hong Kong) expressed his confidence in Hong Kong continued excellence as an international arbitration hub. He highlighted the groundbreaking mutual legal assistance arrangement with mainland China on interim measures, which allows parties to apply to mainland courts for interim measures such as property preservation, evidence preservation, and conduct preservation before obtaining the final award. This, along with the legalization of third-party funding and outcome-related fee structures, solidifies Hong Kong's position as a top arbitration destination. Mr Lam also presented the pilot scheme launched in June 2020, allowing eligible foreign nationals to participate in arbitral proceedings in Hong Kong without needing an employment visa.[3] With its strong legal infrastructure, Hong Kong remains an attractive destination for arbitration.

Closing remarks: The sun never sets

Tejus Chauhan (Director, ICC Arbitration & ADR, South Asia, ICC Dispute Resolution Services) delivered the closing remarks, expressing gratitude towards the speakers, organizers, sponsors, and attendees of the Conference. He highlighted ICC's global reach, with case management teams situated in Brazil, Hong Kong, New York, Sao Paulo, Paris, and Singapore working tirelessly towards excellence. Mr Chauhan acknowledged that there is always a case management team of the ICC working around the clock to provide top-notch services to their parties – concluding with the phrase used to describe mighty empires 'the sun never sets'.

2 See 'Ten Tips on How to Make an Arbitration Award Work: Lessons from the ICC Scrutiny Process', *ICC Dispute Resolution Library*, 2022, issue 2.

3 The Pilot Scheme on Facilitation for Persons Participating in Arbitral Proceedings in Hong Kong (https://www.doj.gov.hk/).

ICC Dispute Resolution Services/ ICC Singapore Arbitration Group

'Tech Disputes and Arbitration'

Singapore, 25 August 2023

Suraj Sajnani
Senior Associate, King & Wood Mallesons, Singapore and Hong Kong

In the bustling technological hub of South-East Asia, Singapore, the intersection between law and technology has become increasingly vital. In an event co-organised by ICC Dispute Resolution Services and the ICC Singapore Arbitration Group, panellists addressed (i) technology in arbitration, and (ii) arbitration of technology disputes.

Technology plays a significant role in modern arbitration, particularly in the nascent fields of cybersecurity, blockchain and artificial intelligence ('AI'). As a flexible and effective method of alternative dispute resolution, the increased use of technology in arbitration has been a necessary progression. Technology disputes often require subject matter experts, confidentiality and flexibility. In this regard, arbitration is the natural and bespoke solution for such disputes.

As technology continues to evolve, the advancements available in the market have revolutionized the arbitration process, enhancing efficiency, security, and decision-making. However, concerns remain over issues of maintaining confidentiality and privacy. Stakeholders should stay abreast of emerging trends, regulations, and best practices to harness the full potential of technology while maintaining the integrity of the arbitral process.

Moderators **Rakesh Kirpalani** (Director and Chief Technology Officer, Drew & Napier, Singapore) and **Nelson Goh** (Partner, Pallas Partners, London), together with fellow panellists **Lee Jane Tan** (Legal Counsel, PropertyGuru, Singapore) and **Benjamin Mui** (Senior Legal Counsel and Data Protection Officer, Capgemini, Singapore) took us on a journey through how technology is reshaping arbitration, one dispute at a time.

In a swift Friday afternoon hour, the panel dealt with two key issues:

- The transformative potential of technology in the conduct of arbitration; and
- The arbitration of cutting-edge technology disputes.

1 – Technology in arbitration

In this first part of the seminar, the panel went over 'the ABCs': **A**rtificial Intelligence, **B**lockchain, and **C**ybersecurity.

The panel kicked off by discussing the technology on everyone's lips that is slowly but surely revolutionizing the way we work: ChatGPT. Mr Kirpalani started by explaining that ChatGPT is a 'Generative AI' model. In lay-terms, it is auto-complete on steroids. What ChatGPT does is study what you are typing and plug in as an output what the most statistically probable next text is. The other buzzword to note about ChatGPT: it is an 'LLM'. Given the likely audience reading this article, it is worth clarifying that LLM here is not a Master of Law qualification (although, ChatGPT could probably attain one of those!); instead, it means 'Large Language Model'. This means that ChatGPT is an AI model built on words, and its specialty is determining how words fit together (as compared to other types of AI models which have a different purpose).[1] To that end, it has been trained on words from a vast portion of the internet, and it is therefore the internet that has taught ChatGPT how words fit together.

Armed with that knowledge of how the technology works, the panel discussed how such technology could change the practice of arbitration. The most direct impact would be if a large language model – or LLM – could be trained not only on the internet, but on the information of a case and on law. It could then produce documents to be submitted in an arbitration with a high degree of accuracy, e.g. a notice of arbitration or a statement of claim. It could also then be trained on the responsive documents provided by the other side and produce replies. With training on a sufficient body of legal knowledge, it could also then produce research memos which are used to support arguments

1 https://help.openai.com/en/articles/7842364-how-chatgpt-and-our-language-models-are-developed

put forward in an arbitration. While we are not there yet, the panel agreed that we are heading in such a direction, and if we reach a world where research can be done with a high degree of accuracy and reliable information could be produced in statements, then that would change the practice of arbitration, and indeed the practice of law in its entirety.

Cybersecurity and secure platforms

The panel then dealt with the issue of cybersecurity and its relationship with arbitration. Fundamentally, one of the key reasons that people opt for arbitration is a significant degree of confidentiality, often beyond what is guaranteed in national courts. Once that confidentiality is lost, arbitration loses a lot of its allure for commercial parties.

An arbitration itself is a prime target for hacking, whether the goal is to ransom, embarrass, or politicize. Often, a significant number of people involved in an arbitration has access to confidential information. To a hacker, this means that there are several entry points to steal information, the biggest targets being counsel, clients, and the tribunal, and the targets could expand to include institutions, ancillary service providers (e.g. transcribers, interpreters or e-discovery providers), or witnesses. And in the increasingly always-on world of legal practice, these groups of people are accessing confidential information from a number of entry points – mobile devices, office computers, and laptops at homes, coffee shops and airports – giving even more 'surface area' for a hacker to attack.

Another key point is that today's hackers are no longer the historically thought of whiz-kid adolescent in a dimly lit room typing away on a single computer. Instead, they are sophisticated criminal organizations. Like any mainstream large enterprise, they have CEOs, operations managers, and workers. Even hackers have remuneration packages, bonuses, and tiers, based on the value of the organizations they infiltrate. Users of confidential information ought to bear in mind this level of sophistication when dealing with confidential information. While firewalls remain very useful technologically, one of the most common ways to infiltrate a secure system nowadays is phishing attacks which allow an entry through a firewall.

Multi-factor authentication

'Multi-factor authentication' is another tool that is under-used in the arbitration industry but overweight in terms of its effectiveness. The panel discussed the virtues of using multi-factor authentication in every arbitration communication, whether through email or through a document exchange and storage platform. In that vein, the panel discussed the benefits of having a secure platform deployed for arbitration, such as what ICC has done with ICC Case Connect.[2] Both in-house panellists, Ms Tan and Mr Mui confirmed that as end-users of ICC's arbitration services, it is welcoming to see cybersecurity being taken seriously.[3] The panel agreed that it is high-time that all users involved in the arbitration process transition to using means of exchange of information which mandate multi-factor authentication. A hack never feels real until it happens, but the reality is that it does happen, and so parties should be prepared and take steps to prevent it.

Blockchain

The final section of the first segment of the seminar dealt briefly with blockchain. The panel prophesized into how blockchain as a technology could be used for dispute resolution, including through the following three ideas:

- Service of papers by token.
- Decentralised dispute resolution, where facts, arguments and information are submitted to a decentralized autonomous organization, which then reaches a consensus about which party should win.
- Holding of claim amounts on-chain as security in a multi-signatory wallet with the keys held by the tribunal. Upon a win, the tribunal would release the amount directly to the winner.[4]

Currently, prototypes of each of these ideas exist in their infancy in other contexts. For example, when it comes to decentralised dispute resolution, *Kleros*[5] has a platform that essentially involves a community of jurors determining dispute outcomes and who are incentivised to pick the most likely majority outcome (what is thus believed to be the 'right' outcome) by being

2 'ICC launches ICC Case Connect: Secure online case management made easy' (www.iccwbo.org, 12 Oct. 2022.

3 See also 'ICC Policy Primer on Cybersecurity' (ICC, Dec. 2021) and ICC Arbitration and ADR Commission Report 'Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings' (ICC, Feb. 2022) at '3.4 Cybersecurity, data privacy, and confidentiality' and '4.2 Methods of electronic exchange'.

4 See e.g. G. Vannieuwenhuyse, W. Maxwell 'Robots Replacing Arbitrators: Smart Contract Arbitration', *ICC Dispute Resolution Bulletin*, issue 2018-1.

5 https://kleros.io/

awarded tokens to vote as the majority would. What would be exciting is when these ideas find themselves in institutional rules or specific arbitration references, and develop to a level of sophistication sufficient to be deployed in arbitration.

2 – Arbitration of technology disputes

In the second segment, the panel discussed the advantages of arbitration for technology disputes; and particularly those in relation to technology service contracts and M&As.

The advantages of arbitration for technology disputes

The panel posited that the advantages of arbitration are more pronounced in technology disputes. Starting with the **choice of arbitrators** themselves, as arbitration allows a panel who has subject matter expertise. While arbitrators without subject matter expertise can nevertheless expertly determine a matter with the aid of able counsel, there remains utility in having an arbitrator who is familiar with the subject matter of a technology dispute. The panellists considered that even when drafting technology contracts, subject matter expertise is useful, so it should follow that when unravelling disputes that came out of those contracts, a subject matter expert is involved.

The second arbitration advantage that is particularly fitting for technology disputes: **confidentiality**. Often, a technology dispute will require parties to deal with sensitive information about their products and services, which they want to keep confidential. Both in-house panellists, Mr Mui and Ms Tan, agreed wholeheartedly. Taking the example of PropertyGuru, Ms Tan confirmed that as a technology company, it holds a tremendous amount of data, it owns such data and goes to great lengths to protect it. Being required to air information during a dispute in an open forum would be less than ideal, which is why arbitration is an immediately attractive option.

Service contracts/M&A disputes in the technology sector

For arbitration of both technology service contracts and technology M&A disputes, the panellists were in unanimous agreement that the virtues extolled above apply directly to the resolution of such dispute.

As an example, in service contracts, there are often several cross-dependencies with other technologies or providers, which would require both subject matter experts as well as confidential treatment.

M&A contracts also require confidentiality, but for slightly different reasons. Mr Goh highlighted that several technology sub-sectors are currently in the season of consolidation. And the key drivers for M&As are usually to acquire either people or intellectual property. For both drivers, it is crucial that disputes arising from such M&As are kept confidential. The further benefit of arbitration is that while the subject matter is kept confidential, court assistance by way of injunctions against individuals involved in businesses being sold is a frequently used tool to give effect to the underlying transactions and arbitration. With that positive note about the effectiveness and attractiveness of arbitration for technology disputes, the panel drew the curtains on a thought-provoking event.

While the technologies we deal with and their impact will keep evolving, it is certain that, as arbitration practitioners, we cannot see ourselves as immune from the impact of technology on our world. Whether it is in the practice of arbitration, or the type of matters that go to arbitration, technology will reshape the arbitration scene in the Lion City and beyond.

ICC Institute of World Business Law

ICC Institute Training on Complex Arbitrations

New York, 21 September 2023

Priscilla Villa Nova
Foreign Associate, Chaffetz Lindsey, New York

The ICC Institute of World Business Law ('ICC Institute') provided a one-day course developed by ICC Institute Council Members Carmen Nuñez-Lagos and Matthias Scherer on complex arbitrations. The ICC Institute training on complex arbitrations was designed to provide participants with both theory and practical skills. The highly interactive sessions and workshops covered (1) jurisdiction, and (2) multiple parties, multiple contracts, multiple claims, and consolidation.

1. Jurisdiction *ratione personae* and *ratione materiae*

Prof. Anne Marie Whitesell (Professor, LLM Program and Faculty Director Program on International Arbitration and Dispute Resolution, Georgetown Law, Washington D.C.; Former Secretary General, ICC International Court of Arbitration ('ICC Court')) provided an overview on personal jurisdiction (*ratione personae*) and subject matter jurisdiction (*ratione materiae*). She clarified such concepts comprise respectively who and what can be subject to arbitration and lead us to questions on the parties' consent, which is the base of the arbitration system.

Jurisdiction *ratione personae*

Regarding personal jurisdiction, Prof. Whitesell stressed that the arbitral tribunal must always have jurisdiction before the parties in front of them. In other words, the parties must have consented to the arbitral tribunal jurisdiction. Under the New York Convention and most national laws, the absence of consent constitutes grounds for voiding or denying enforcement of an arbitral award. When analyzing personal jurisdiction, one must examine the entities that have signed the arbitration agreement. However, the difficult question is whether non-signatories can be subject to it. Luckily, there are many theories discussing it.

Prof. Whitesell urged the participants to reflect on why the parties or the tribunal should consider the joinder of non-signatories to the arbitration. The audience responded by commenting on topics such as efficiency, consistency of the outcome, and enforceability. Prof. Whitesell flagged that parties often realize that the real party of interest is not the party who signed the arbitration agreement but a related company, i.e. the principal in an agency contractual relation, the government, etc. The participants added that a fraudulent situation could also lead to a third-party joinder. Prof. Whitesell added that there are situations where a party wants a non-signatory to join, and other times outside non-signatories want to be included in the case.

Continuing the discussion on personal jurisdiction, Prof. Whitesell addressed some of the theories for non-signatories to be included in an arbitration and made short comments on each:

- **Alter ego**: Usually invoked when there is fraud or misconduct
- **Succession or assignment**: One party takes over rights and liabilities. Depending on the jurisdiction, it may be necessary to assign specifically the arbitration agreement to make it valid.
- **Group of companies**: It is not enough to be in the same group, companies need to share the same economic interest, and the non-signatory company must have actively participated in the negotiation, the termination, or the performance of the agreement. It traces back to the *Dow Chemical Group v. Isover Saint-Gobain* case.[1]
- **Estoppel**: If one takes advantage of the agreement, one will be bound by it; if one acts like a party, one will be a party to it.
- **Agency**: If somebody acts as an agent to an entity, it can be bound by the initial arbitration agreement executed by such entity as well.

Prof. Whitesell provided further context on how those theories apply and explained they are based on national contract law, national agency law, or national corporate law ideas. The discussion moved on to the lack of uniformity in court cases. Prof. Whitesell then questioned whether the arbitral community wants more uniformity

1 *Dow Chemical Group v. Isover Saint-Gobain*, Paris Court of Appeal, 21.10.1983, in Revue de l'Arbitrage, 1984(1), pp. 98-114.

among different jurisdictions with third-party issues and how autonomous the international arbitration system should be. She also pointed out this is one of the reasons why reflecting on the seat of the arbitration is of utmost importance.

Yasmine Lahlou (Partner, Chaffetz Lindsey, New York) commented that having a uniform solution is wanted. However, the reality is that we have different national systems, and that, unfortunately, needs to be addressed. The safest way to deal with it is within the contract and by choosing institutional rules that deal with those issues, such as the 2021 ICC Arbitration Rules (the 'ICC Rules'). Prof. Whitesell agreed and referred to two cases where the different jurisdictions and the non-uniformity issue became relevant, one being the *Dallah* case,[2] in which an arbitral award rendered with the inclusion of a non-signatory was discussed both in England and in France. While English courts denied the enforcement of the arbitral award on the basis that the non-signatory was not subject to the arbitral jurisdiction as it had no intention to be part of the arbitration agreement, French Courts refused to set aside the arbitral award considering the non-signatory party had participated fully and behaved as it was a party to the arbitration agreement. Both courts supposedly applied French law.

Prof. Whitesell emphasized that the law that should be applied to the arbitral agreement is also relevant because some jurisdictions will look at it to see if a third party can join. There are indeed different approaches around the world that must be considered.

She asked who should decide this question: the arbitral institution, the arbitral tribunal, or the national court? She explained that the ICC approach is enshrined in Article 6 of the ICC Rules but may differ from other institutions, so the institutional rules must also be considered. When analyzing Articles 6(3), 6(4), and 6(9), Prof. Whitesell explained that under the ICC Rules, if an objection is raised, the Secretary General will review and decide whether to send to the ICC Court or directly to the arbitral tribunal. The ICC Court shall then decide whether and to what extent the arbitration shall proceed if and to the extent the Court is satisfied with a *prima facie* analysis of the underlying matter of the jurisdictional objection raised. She emphasized that it is a screening process, and the arbitration tribunal must then take its own decision. In addition, if the ICC Court decides that the arbitration shall not proceed, the parties may refer to the national courts to discuss. Ms Lahlou added that in this screening process, the ICC Court will give a chance to the parties to comment and address their arguments on the raised objection.

Prof. Whitesell cited Article 6(9) as an ICC statement of the international approach of *kompetenz-kompetenz*, stressing that when one is in an ICC arbitration, one has the security of a proper jurisdiction screening process, which is not the case with every institution, so one must pay attention.

She concluded that the question of who should decide jurisdiction is a matter of context as some national courts may have different approaches and that every approach has advantages and disadvantages. The advantage of going to court is to get a fast decision instead of having an award set aside later on; on the other hand, when one chooses to arbitrate, the idea is to stay out of court.

Ms Lahlou brought for discussion recent cases heard in U.S. Courts. She concluded that U.S. courts' standard is to see clear and unmistakable evidence that the parties want the arbitral tribunal to decide the jurisdiction. Ms Lahlou also brought to the discussion a case seated in Geneva in which the Arbitral Tribunal was deciding on jurisdiction on a competence-competence basis, and one of the parties went to a court in Michigan (where such party was from) and the Michigan court decided the arbitration agreement did not bind such party. However, the court in Michigan had no connection to the case – besides being a potential enforcement venue – so the arbitral tribunal had nothing to do with it. In summary, that party tried to fabricate an issue on the jurisdiction, and one must analyze whether it is strategic to spend money doing so since it is not cheap and is not necessarily binding.

The discussion ended with general comments and notes on the bifurcation of proceedings and the cost-benefit of it, considering that in many cases, the questions that will be analyzed to assess jurisdiction may be deeply connected with the merits of the case and that, when one goes to court, the bifurcation will be mandatory. The working groups were then requested to discuss jurisdiction *ratione personae* provided in questions connected with the mock case.

2 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*

Jurisdiction *ratione materiae*

Ms Lahlou started the discussion addressing the concept of jurisdiction *ratione materiae*. She stated it is solely on the tribunal to decide whether it has jurisdiction over, for instance, tort claims or disputes arising out of separate agreements. She explained that under Article V(2) of the New York Convention, the competent authority in the country where recognition and enforcement is sought can deny them if it finds that:

- the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- the recognition or enforcement of the award would be contrary to the public policy of that country.

In other words, national courts can deny recognition and enforceability if they see that the award addresses matters not susceptible to arbitration. This inquiry must comprise the arbitration agreement, the law that governs it (seat or law of the agreement), and the institutional rules behind it. For instance, antitrust issues in Europe cannot be decided on arbitration.

Ms Lahlou then provided greater context on caselaw that reflected her remarks, particularly on cases that reaffirm the common sense that if there is a broad arbitration agreement, this agreement should encompass all disputes captured therein. The Second Circuit of the U.S. says that the existence of a broad arbitration agreement allows the presumption that it covers all disputes related to such agreement, and it will also cover disputes under collateral agreements that touch the issue of the arbitration agreement (for instance, in case of an assignment). She also provided context on the *Ribadaneira v New Balance Athletics Inc* case, with an underlying discussion on wrongful termination of a distribution agreement and damages and an ICC arbitration clause that encompassed 'any and all disputes (whether in contract or any other theories of recovery) related to or arising out of' the distribution agreement, or that are related to or arise out of 'the relationship' between the parties to that agreement. In that case, the First Circuit determined the arbitration agreement was broad enough to cover 'any and all' disputes 'whether in contract or any other theories of recovery', embracing not only contract-based claims but also tort claims such as a tortious interference claim. Ms Lahlou advised that the UK courts have the same approach to the arbitrability analysis.

Ms Lahlou ended her conclusions by stating that in the past 20 years, there was no rejection by a U.S. Court to the enforcement of an award based on jurisdiction reasons. The working groups were then requested to discuss jurisdiction *ratione materiae* provided in a set of questions connected with the mock case.

2. Multiple parties

Paul Di Pietro (Counsel, ICC Court, New York) inaugurated the second panel by introducing the ICC Rules on multiple parties and complex cases. He highlighted that the ICC noted a change in the number and demography of ICC Arbitration, an increase of multi-party arbitrations (now representing one-third of the ICC cases), and a need to adapt the rules to international business needs. In that context, he mentioned that the ICC identified and implemented solutions throughout the revision of the rules in 2012 and, later, in 2021 to evolve, adapt, and deal with complex procedural issues.

He stressed that such revisions are always necessary as the ICC Court is ultimately trying to strengthen the integrity of the procedures to avoid the set-aside or restrictions to the enforcement of the ICC Arbitration Awards rendered in complex cases. However, practice always brings new cases and new problems to be resolved.

The discussion then moved to the wording of Articles 6(3) and 6(4) of the 2021 ICC Arbitration Rules and the *prima facie* analysis made by the ICC Court in cases where jurisdiction objections are raised by the parties and referred to the Court by the Secretary General. In summary, in all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if the Court is *prima facie* satisfied that an arbitration agreement may exist and, as per Article 6(4), In particular:

- where there are **more than two parties** to the arbitration, the arbitration shall proceed between those of the parties with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the ICC Rules that binds them all may exist; and
- where claims pursuant to Article 9 are made under **more than one arbitration agreement**, the arbitration shall proceed as to those claims with respect to which the Court is *prima facie* satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

Mr Di Pietro clarified that the Court's decision under Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas and that it does not bind the tribunal as the standards of the Court are lower since it is a *prima facie* analysis. He also clarified that, in practice, the case management team prepares a memorandum containing details of the arbitration agreement(s), the signatories, and, if there are non-signatories, whether jurisdiction's objections were raised, with the related evidence and a summary of the case. This memorandum goes to the Secretary General's review, who, if it deems to be the case, refers the matter to the Court so it can then render the *prima facie* analysis. Often, there is little input from the Claimant or evidence to explain why a non-signatory was brought to the proceeding, making the proper jurisdiction assessment more complex. This process aims to help the Court to make a sound decision.

Mr Di Pietro drew attention to the fact that some non-relevant parties may try to sneak into the proceeding by consolidation. However, there is a similar analysis for consolidation too, so it often does not work. Ms Lahlou added that this is a mechanism to protect the party who has nothing to do with the case and could be obliged to be there throughout the complete process. Mr Di Pietro wrapped the session by giving examples of the application of Article 6 where:

- The claims are filed on the basis of a law or treaty that refers disputes to arbitration.
- The non-signatory appears to have been involved in the negotiation, execution, performance or termination of the contract; documentary evidence exists to that effect and expressly refers to the non-signatory.
- The non-signatory is the successor, assignee, or has been subrogated into the rights of a signatory party.
- The non-signatory is a member of a consortium or joint venture that has signed the contract.
- The non-signatory is a beneficiary or trustee of a signatory party.
- The non-signatory is a guarantor and (i) the contract obliges the guarantor, (ii) the purported arbitration agreement refers to or incorporates the guarantee, or (iii) there are allegations that the applicable law binds guarantor.
- The non-signatory is an affiliate of a signatory and there is an indication in the arbitration agreement or contract that such affiliate is bound.

Joinder, cross-claims and counterclaims

Ms Lahlou explained the concept of joinder as the addition of one or more parties in a pending arbitration. In practice, a party files a request for a joinder, which must follow the same requirements than a request for arbitration. Joinder is automatic (i.e. it does not require a Court decision) prior to the confirmation or appointment of an arbitrator. Any objections would be treated as a jurisdiction objection pursuant to Articles 6(3)/6(4) as with the original parties.

She flagged that ICC adopted explicit joinder provisions in 2012, and that prior to 2012, the ICC Court allowed joinder of parties based on practice. Leading institutions now have joinder procedures and rules, but they may vary. One crucial question is if the party requesting the joinder must file a claim for the joinder to be admissible. However, ICC would allow under very limited exceptions for a joinder to go on without a claim.

Ms Lahlou then discussed the limits of a joinder. It is not possible after the appointment or confirmation of any arbitrator unless Article 7(5) requirements are met, which include the additional party accepting to the constitution of the arbitral tribunal and agreeing to the terms of reference, where applicable. The aim is to avoid any attempts to set aside an ICC award rendered in a joinder case.

She Illustrated the topic with interesting practical issues, such as what could happen when a party learns about an arbitration and wants to enter it. Usually, the standard answer is that arbitrations are confidential, but there may be cases of exception, e.g. state-owned entities' cases may raise the public interest and there may be more attempts to intervene.

Ms Lahlou focused on the provisions of Article 8 of the ICC Rules, the definitions inserted therein, and the idea of cross-claims, which allows the parties in multi-party arbitrations to advance claims against each other (i.e. inter-claimant or inter-respondent claims made by one or more claimants against another claimant or by one or more respondents against another respondent), and may even include an additional party joined under Article 7 of the ICC Rules, which is not on Claimant's nor Respondent's side .

She explained the new provisions are consistent with the framework of the Rules, particularly Article 2(iv), which provides for the definition of 'claim'/'claims' to 'include any claim by any party against any other party'. Those claims must be addressed against an existing party to the arbitration (and not one that has not yet been joined, in which case the joinder procedure under Article 7 of the Rules needs to be followed first) and must be

introduced before execution of the terms of reference ('temporal limitation'), unless autorisation is given by the arbitral tribunal (Art. 23(4), ICC Rules).

She also highlighted that Article 8(2) sets out the procedure for filing claims, and Article 8(3) rules the procedure for responding to claims. The process must be as fluid as possible. It is a matter of efficiency and the safeguard to the validity and enforcement of the award. In summary, claims introduced under Article 8 of the Rules are subject to the following:

- the ICC Court's *prima facie* assessment of jurisdiction (Arts. 6(3) – 6(7));
- the application of the provisions involving multiple arbitration agreements (Arts. 9 and 6(4)(ii));
- payment of an ICC advance on costs pursuant to Article 37(4), failing which claims will be considered withdrawn (without prejudice to them being re-introduced at a later stage in the same arbitral process or in another arbitration) – no additional filing fee hen introducing new claims (including counterclaims / additional party claims) once the arbitration has been initiated by Claimant. pursuant to Article 4(4)(a). The claims are added to the total amount in dispute to calculate the advance on costs. [3]

How to constitute an arbitral tribunal: nomination/ appointment of arbitrators; conflicting interests

On the constitution of an arbitral tribunal in a case with multiple parties, **Fabien Gélinas** (Full Professor and Sir William C. Macdonald Chair, Faculty of Law, McGill University, Montreal, Canada; Member, ICC Institute) conveyed the key takeaway message, which is to ensure that equality was served for all the parties involved.

He clarified Articles 12(6) and 12(7) of the Rules provide that where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation. Mr Gélinas drew attention to the Dutco principle,[4] which has established that an arbitration clause must respect the principle of 'égalité' (equality) and stressed that the ICC Rules, since its 1998 version, provide that where multiple parties fail to appoint an arbitrator jointly, the court will do so. Furthermore, according to Article 12(9), introduced in the 2021 ICC Arbitration Rules, the ICC Court can appoint each member if it would lead to a manifest risk of inequality between the parties.

Prof. Gelinas mentioned that when considering a tribunal in a multi-party arbitration, the most critical factor to the multi-party group is to preserve their diverse interest. Parties are invited to comment, and their comments are submitted to the Court to preserve that diversity of interest. He tackled a case with a sole arbitrator to be appointed by the Claimant as per the arbitration agreement: there were two respondents, one not participating and the other agreeing with the appointment by the Claimant. The case was referred to the ICC Court, which decided to confirm the sole arbitrator jointly nominee by the participating parties, considering the other respondent had shared interest with the non-participating party.

Prof. Gelinas then discussed cases based on the following matrix of Article 12(8):

3 There is a joinder fee if a party is joining a new party to make claims against them.

4 *BKMI Industrienlagen GmbH et Siemens AG v Dutco Construction Bull.* Civ. 1 No 2, Chambre Civile 1, Cour de Cassation, 7 Jan. 1992 (no. 89-18.708, 89-18.726).

	Application matrix of Article 12(8) of the 2021 ICC Rules
Purpose	• Allows to sidestep the standard procedure for appointment of the tribunal in a multi-party context pursuant to Arts. 12(2) and (4). • Applies if one side is unable to make a joint nomination and allows the ICC Court to appoint all three arbitrators of a three-member tribunal by default, with one acting as chair. • As a result, all parties to the arbitration will 'lose' their right of nomination to safeguard parties' equality of treatment in the formation of the tribunal.
ICC Court practice	• Confirm the co-arbitrator nominated by the participating parties on the multi-party side upon the non-objection of any non-participant on that side, and confirm the co-arbitrator nominated by the other side. • Appoint a co-arbitrator on behalf of the side that failed to make a joint nomination and confirm the co-arbitrator nominated by the other side (Art. 13(3)). • Appoint all three members of the arbitral tribunal (Art. 12(8)). • Will be hesitant to apply Art. 12(8) if multiple respondents fail to participate in the arbitration or fail to agree for apparent tactical considerations. • When the Court decides to appoint all three arbitrators it often proceeds to directly appoint all arbitrators (exception to Art. 13(3)).
Party autonomy	• Parties to the arbitration remain free to agree an alternative method for constituting the tribunal. • Parties remain free to agree on suitable criteria for arbitrators to be default-appointed by the ICC Court (Art. 11(6))

3. Multiple arbitration agreements and/or claims

Ank Santens (Partner, White & Case, New York) led the discussion, focusing on two main questions.

> Whether parties can bring claims under multiple contracts in one arbitration; and

> Whether two or more proceedings involving the same or overlapping parties, contracts and/or issues in dispute, can be consolidated into one arbitration.

Ms Santens emphasized that arbitration rules may vary in the availability of multi-contract arbitration and consolidation. She invited the audience to reflect on whether arbitral tribunals, institutions, or even national courts would order consolidation in the absence of express provisions.[5]

Jurisdiction over claims under different contracts

Alexander Fessas (Secretary General, ICC Court, Paris), together with **Ms Santens**, took a deep dive into Article 9 of the ICC Rules, which provides for claims arising out of or in connection with more than one contract brought in single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules. They provided a greater context of Articles 6(6)-6(7) and 23(4), considering they establish direct conditions to the application of Article 9 and may require the involvement of the Court. He highlighted that discussions about an arbitration with multiple contracts may not discuss multiple claims.

5 Ms Santens explained that court-ordered consolidation is available in very few countries (i.e. Hong Kong, the Netherlands). U.S. courts have held that arbitrations may be consolidated only where all parties agree, or the arbitrations agreement(s) demonstrate consent to consolidation. She also suggested U.S. Courts have overwhelmingly found that incorporation of arbitration rules providing for consolidation demonstrates necessary consent. She added that, in general, in the absence of provisions, they tend to delegate to the arbitral tribunal or institution to decide. Some U.S. state laws (i.e. California) permit court intervention to consolidate arbitration beyond that, but likely inapplicable to international arbitrations seated in the U.S. The U.S. Federal Arbitration Act (FAA) does not address consolidation.

Mr Fessas pointed out the wording in Article 10(b) as to the plural added on 'agreement or agreements' covering the situation of having more than one arbitration agreement within the same agreements. It does not necessarily means having the same exact wording but having the same identical context and features.

Consolidation

The discussion then moved to Article 10 of the Rules, which determines that the Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration. **Ms Santens** pointed out that there are different approaches to consolidation in different institutional rules. For the 2021 ICC Rules, these are the gateway conditions in which the Court may order consolidation:

- The parties have agreed to consolidation;
- All the claims in the arbitration are made under the same arbitration agreement or agreements; or
- The claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

She compared the consolidation provisions of the 2021 ICC Rules and the 2020 LCIA Rules, stressing that paying attention to the criteria set therein is essential. She addressed that under the ICC Rules, there is no formal requirement to the request for consolidation, so it can be done in the request for arbitration, in a separate letter, or even by email, but must contain the relevant and necessary information to allow a sound decision by the Court, such as how and why the different disputes fit into one of the situations allowing for consolidations (as provided for in Arts. 10(a)-10(c)) and a brief explanation as to why the requesting party considers consolidations appropriate under the circumstances, making the appropriate references to facts and evidence.

She provided greater detail on Article 10(c) and explained that, under such provision, arbitrations to be consolidated are between the same disputing parties but not bound by the same arbitration agreements. All contracts or disputes must relate to the same legal relationship, interpreted as the same economic transaction (e.g. a single project, cross-references, dates, and other similarities and links between the contracts), or different economic transactions. In addition, the arbitration agreement must be compatible, which means they must not be identical but substantively compatible on main procedural features. If the case, a subsequent agreement can rectify incompatibilities.

Consolidation	
Art. 10(b)	Art. 10(c)
Same arbitration agreement	**Different arbitration agreements**
same or different parties	same parties + same legal relationship + compatible arbitration agreements

Once the request for consolidation is made, the Secretariat will notify the other side, or the arbitral tribunal will invite the other side for comments; the ICC Court will decide and may communicate reasons if requested. When arbitrations are consolidated, they are consolidated into the arbitration that started first unless parties agree otherwise.

After giving more practical tips and inputs on the wording of Article 10 of the Rules, Ms Santens invited the audience to discuss hypothetical scenarios and if those would allow for consolidation and under which grounds. Many comments were made, particularly discussion if the consolidation would result in efficiency on those given cases since that is the goal of the consolidation provisions.

She gave practical consideration for parties entering complex contracts, such as selecting updated arbitration rules for multi-contract arbitration and consolidations (such as the ICC Rules) and coordinating arbitration clauses or stand-alone umbrella agreements. On that note, she warned the audience to include compatible arbitration clauses in each contract, referencing the related contracts and providing for multi-contract arbitration and consolidation. She asserted that one stand-alone arbitration clause must be referenced in all related contracts, also providing for multi-contract arbitration and consolidation. She advised that arbitration is usually the preferred avenue in complex cases, considering the avoidance of national courts, but the clauses must also follow the complexity of the case; one must do the proper due diligence to avoid the loss of legal fees and costs. The effort and the extra hours are worth it. She ended her notes by giving examples of multi-contract arbitration and the working groups then addressed a new set of questions on joinder and consolidation connected with the mock case for the afternoon session.

The Fidic Red Book: Clause-by-Clause Application and Recent Developments

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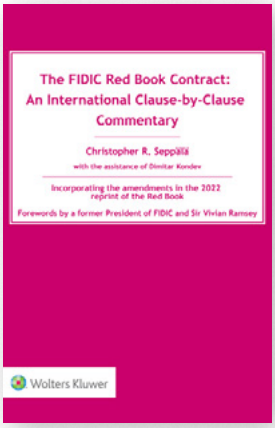

The Fidic Red Book Contract: An International Clause-By-Clause Commentary

Chris Seppälä
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1,414 pages
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The International Federation of Consulting Engineers (FIDIC) is the leading organization in the construction industry probably best known for its international standard forms of contract. The 'Red Book', officially known as the 'Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer', is one of the most widely used standard forms of contract. As such, the Red Book plays a crucial role in the construction industry by providing a recognized and widely used contractual framework.

Christopher Seppälä's new book 'The FIDIC Red Book Contract: An International Clause-By-Clause Commentary' offers an in-depth examination of the Red Book. It provides a comprehensive analysis of the 2017 edition of the Red Book, as amended in 2022.[1] This aspect is considered a key highlight of the Red Book's widespread international adoption as a model contractual framework. Mr Seppälä's work examines the details, offering readers a thorough understanding of the Red Book's application and its relevance in the global construction industry.

The book is divided into five chapters accompanied by five appendices.

The **first chapter** (pp. 1-44) provides an **overview of the purpose and structure** of the book. It introduces the International Federation of Consulting Engineers (FIDIC) as an organization and highlights FIDIC's involvement in creating standard forms of contract for the construction industry, including the Red Book.

This chapter emphasizes that FIDIC, although engaging in various activities, is most renowned for its international standard forms of contract and clarifies that these contract forms are primarily developed by engineers rather than lawyers, which can be surprising given their length and complexity. The Red Book, being a standard form of contract for international use, is examined not only from the perspective of common law countries but also from other legal systems. The book dedicates section 3.1 of the first chapter to describe the origins of the Red Book and notes that its earliest versions were closely drafted following English contract forms. One of the reasons for modelling the Red Book after British forms was that shortly after the Second World War many of the reconstruction projects led by international institutions, such as the World Bank, were already using the fourth edition of the Conditions of Contract of the United Kingdom's Institution of Civil Engineers. Therefore, FIDIC built upon the experience of these contemporaneous international construction contracts for the first edition of the Red Book in 1957. With every edition, however, English – and common law – specific terms were substituted with neutral language that can be applied in civil law jurisdictions and other legal traditions. This introductory chapter outlines the distinctive features of the Red Book, including its language usage, provision for an

1 https://fidic.org/books/construction-contract-2nd-ed-2017-red-book-reprinted-2022-amendments

independent engineer, contingency clauses, balanced risk sharing, and the common contract structure it follows.

In the **second chapter** of the book (pp. 45-157), the topic of **applicable law** is discussed. The chapter highlights certain legal principles that are common to all legal systems. It underscores the common legal principles of freedom of contract, the sanctity of contracts, and the critical role of default rules in contract law. This chapter emphasizes the practical importance of the parties' agreement on terms and their interpretation in resolving disputes and determining their rights and obligations. Therefore, regardless of the governing law in a dispute, **the terms of the parties' agreement and how they are interpreted** hold significant practical importance in determining their respective rights and obligations. The author makes the point that the Red Book is based on English contract forms derived from common law, but is also frequently used in certain civil law jurisdictions. He examines how certain topics, such as the duty of good faith, disclosure of information, defense of non-performance (i.e. when the party fails to perform certain substantial obligations), force majeure, hardship, or liquidated damages, are addressed under certain civil law and common law jurisdictions, recognizing at the same time that there are many different legal traditions, within common law and civil law. The chapter also focuses on two significant concerns in international construction contracts:

- the mandatory laws applicable at the project site or in the host country, and
- the challenges involved in choosing and applying the governing law, particularly when it involves a less developed country – this being a frequent issue in international construction contracts.

Mr Seppälä makes the point that international arbitral tribunals are often willing and qualified to engage in a comparative law analysis in these types of circumstances, and he shares examples of international arbitration awards setting forth such analyses. The chapter concludes by examining the UNIDROIT Principles 2016 and trade usages, and their significance in relation to a FIDIC contract. The author identified four main ways in which the UNIDROIT Principles may have a role in a contract using the Red Book, namely (i) through the agreement of the parties to apply these Principles as 'the "governing law" for a FIDIC contract'; (ii) as a source of interpretation of the governing law; (iii) as guidelines where these Principles were used as a model for the applicable local legislation; or, (iv) as codification of trade usages.

The **third chapter** (pp. 159-208) discusses the issue of **contract interpretation**. The chapter delves into the intricacies of interpreting FIDIC contracts, contrasting approaches in civil law and common law jurisdictions, and the relevance of the UNIDROIT principles in contract interpretation. This chapter also discusses the nuances of interpreting FIDIC contracts, in particular the Red Book. The author highlights the approach used to create the Red Book and, thus, proposes a practical interpretation of a construction contract drawn upon the FIDIC forms. We are reminded that the drafters of the Red Book are mainly engineers that have the day-to-day execution and management of a construction contract in mind. Therefore, according to the author, the Red Book is purposefully drafted to be understood by an engineer without the need to consult with a lawyer. Further, this chapter addresses certain issues related to interpreting a FIDIC contract, including the form's own interpretation provisions, translations, the possibility of interpretation *contra proferentem*, and the impact of other interpretative sources. This chapter also covers topics such as the impact of international arbitration clauses, and it presents an approach to contract interpretation by engineers and dispute adjudication boards.

The **fourth chapter** (pp. 209-1,282) includes the author's main commentary on the **General Conditions of the Red Book** form itself. The chapter emphasizes the context in which Red Book based contracts are entered into and provides a detailed analysis of each of the **168 sub-clauses**, considering the changes from previous editions and relevant related clauses. The commentary on each of the sub-clauses is approached through five categories.

1. '**Main Changes from RB/99**' describing the changes that have been made to the 1999 Red Book.
2. '**Related Clauses/Sub-Clauses**' identifying cross-references to related clauses or sub-clauses.
3. '**Analysis**' of the wording used in the 2022 Reprint of the Red Book, with examples provided of any issues that have arisen, lessons to be learned or issues that may arise.
4. '**Related Law**' analysing how courts in certain common law and civil law jurisdictions have addressed topics often by comparison of recent English or Common Law case law against the UNIDROIT principles and other national legislation of civil law countries.
5. '**Improvements**' exploring possible future modifications of the Red Book or individual contracts.

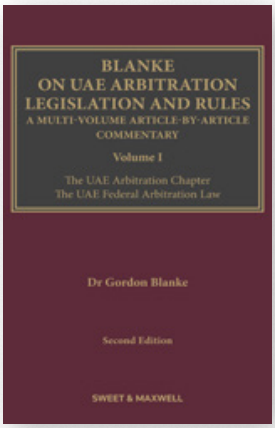
The author further explores the more than 100 defined terms and suggests that FIDIC should strongly recommend that parties using a FIDIC form of contract communicate with each other using the defined terms from the contract. This would establish a common language between the parties. The author also addresses various clauses related to time, exceptional events, claims, and arbitration conditions.

In the **fifth chapter** (pp. 1,283-1,314), the author comments on **other documents ancillary to FIDIC's General Conditions**. Notably the documents making up the 'DAAB Agreement'. Further a series of charts created by the author are a helpful guide for new users to visualize the roadmap of the procedures for dispute avoidance and resolution.

Undoubtedly the book is an essential resource for all users involved in international construction projects, both new and experienced. Christopher Seppälä's work is far more than a clause-by-clause review but provides new users a strong introduction to, and the author's perspective on, the discussion of applicable law in relation to FIDIC contracts. It further provides the author's detailed insight and analysis of many topics that a broad base of experienced users will find extremely valuable, including users of the FIDIC Yellow and Silver Books, which share many provisions with the Red Book, and users of the earlier versions of the Red Book who will find detailed comments on recent changes.

Arbitration in the UAE Demystified

Prof. Georges Affaki
Partner, AFFAKI, Paris



Blanke on UAE Arbitration Legislation and Rules – A Multi-Volume Article-by-Article Commentary, Vol. I (second ed.)

Dr Gordon Blanke
December 2021, Sweet & Maxwell
788 pages
ISBN: 9789672919766

Published four years after its first edition,[1] 'Blanke on UAE Arbitration Legislation and Rules' is destined to the same success. It can be seen as a tribute to the continued evolution of the arbitration regime in the Middle East, in general, and in the UAE specifically. The publication dedicated exclusively to arbitration in the UAE is, by itself, the best proof of the fact that the UAE is, with increasing importance, one of the leading arbitration hubs in the Middle East. Anyone involved in arbitration in the UAE must read, and re-read, this detailed article-by-article commentary on UAE arbitration.

As of 16 June 2018,[2] the UAE Federal Arbitration Law No. 6/2018 (the 'Federal Arbitration Law') repealed and replaced the former arbitration chapter in the Federal Law of Civil Procedure No. 11/1992 (the 'CPC's Former Arbitration Chapter'). As a result, a modern UNCITRAL Model Law-based arbitration law, replaced the former anachronistic and obscure UAE arbitration legislation. It is this change in the law on arbitration, occurring one year after the publication of the first edition that prompted the author to update the commentary on the UAE Arbitration Chapter with the second edition.

'Blanke on UAE Arbitration Legislation and Rules' covers both the CPC's Former Arbitration Chapter (in **Part II**) and the newly adopted UAE Federal Arbitration Law (in **Part III**) so that readers know precisely where they stand whichever of the two statutes applies temporally to their proceedings. Numerous cross-references between both parts are particularly useful given that a significant part of the case law developed by the UAE courts under the CPC's Former Arbitration Chapter remains relevant in the construction of the new UAE Federal Arbitration Law, some provisions of which codify existing case law. So are the references in Part III to the relevant provisions of the UNCITRAL Model Law, on which the new arbitration law is based.

The new edition preserves the style and format of the first one. The practical article-by-article commentary, rather than a conceptual textbook approach, is particularly easy to access when looking for the interpretation and relevant case law under one or more specific statutory provisions. Overall, the second edition of 'Blanke on UAE Arbitration Legislation & Rules' is meant as a comprehensive go-to authority on UAE arbitration. Clear references on the relevant arbitration legislation, court jurisprudence, and about enforcement in the UAE for both domestic and foreign arbitral awards will save considerable hours of research on UAE arbitration law in other sources. This is all the more reason to add this second edition to a library for anyone interested in the subject.

But first things first; **Part I** 'Introduction' is a helpful overview of the UAE arbitration eco-system. While any international arbitration practitioner worth her/his salt has heard of DIAC, the odds are that fewer eyes will spark when hearing about the AjCCCA, the SICAV or the RAKCRCA (the arbitral institutions respectively set up by Ajman, Sharjah, and Ras Al Khaimah, the other emirates in the Federation that strived to compete with Dubai's trailblazing institutions). Part I provides an overview of all of them and offers a summary of the arbitration laws both onshore and in the offshore zones. A checklist of the main legal questions besieging counsel and arbitrator follows, including the questions of validity of arbitration agreements, multiparty proceedings, challenges to arbitrators, compétence-compétence, liability of the arbitrators, including an account of the short-lived, now defunct, amendment

1 G. Blanke, *Commentary on the UAE Arbitration Chapter*, Vol. 1 (Sweet & Maxwell, 2nd ed., 2017).

2 Federal Law No. 6 issued on 03 May 2018, corresponding to 17 Shaaban 1439 H. On Arbitration

to Article 257 of the Penal Code that caused concern in international circles by holding arbitrators criminally liable if convicted of bias, and a comprehensive review of the conduct of arbitration proceedings seated in the UAE, which is a reminder that the author is also an experienced arbitrator.[3] Each paragraph is supported by comprehensive footnotes often prolonging the author's reflections and citing to the relevant authorities and other scholarly works.

To his credit, the author does not shy away from addressing difficult subjects like the conflicts of jurisdiction between the onshore Dubai and the offshore DIFC Courts. Such conflicts, which have left many foreign observers puzzled, typically occur where an award debtor initiates an action for nullification before the onshore Dubai Courts pending enforcement proceedings before the DIFC Courts, or the opposite. This will invariably be the case where an award creditor wishes to rely upon the DIFC Courts as a conduit for enforcement of a domestic award for execution on the debtor's assets in onshore Dubai. Parallel proceedings and conflicting judgments ensued. The Ruler of Dubai set up the 'Dubai-DIFC Joint Judicial Tribunal' on 9 June 2016, composed of judges of the two curial systems, to deal finally with any conflicts of jurisdiction. The author disagrees with a policy decision taken by the Joint Tribunal, by a majority, holding that the onshore Dubai Courts have general jurisdiction, the jurisdiction of the DIFC Courts being an exception.[4] More recently, however, the DIFC Courts were held to be competent to hear an action for nullification of an award rendered under the DIFC Arbitration law. As of today, it is rather uncertain whether the DIFC Courts will continue to act as a conduit jurisdiction for the enforcement and recognition of awards rendered in an onshore Dubai seat.[5] Comprehensive as it is, this introduction is a stepping-stone towards broader research into the applicable UAE laws as relevant in the situation at hand.

Part II reviews article-by-article the CPC's Former Arbitration Chapter, essentially Articles 203 through 238 that used to govern arbitration in the UAE until the enactment of the Federal Arbitration Law. The main developments in this part are essentially from the first edition, although the author has updated the bibliographical references in the footnotes to refer to more recent scholarly works, including the author's own prolific work on the subject.[6]

Part III – the essential contribution in this second edition – covers the Federal Arbitration Law that was enacted on 3 May 2018, shortly after the first edition was published. Part III is drafted as a stand-alone section, which permits a reader directly to consult the relevant analysis under the applicable provision without the need to go through the previous parts. The author seizes every opportunity – including recitals to the Federal Arbitration Law – to share his deep knowledge of arbitration in the UAE through excellent developments walking the reader through historical considerations, a discussion of each of the 61 sections of the Federal Arbitration Law and relevant case law, and a constant cross reference to other relevant UAE laws and bibliographical references. The commentary for each provision follows the same outline: after the text of the provision, follows a bibliography of relevant scholarly works, an introductory paragraph, and a section-by-section commentary of that provision. The footnotes – there are 2701 of them – offer complete references to the relevant case law.

Part III also introduces the new regime for the recognition and enforcement of foreign arbitral awards in the UAE, enacted by Cabinet Decision No. 57/2018 (the 'Cabinet Decision'), which has (i) clarified the position regarding enforcement of foreign awards, and (ii) significantly improved the onshore regime for enforcement by expediting the process to obtain an order for enforcement by the competent enforcement (or execution) judge. Most importantly, under the new regime, an application for enforcement is heard by the competent execution judge, who, in turn, will dispose of the application within three days from service.

Overall, the second edition of 'Blanke on UAE Arbitration Legislation & Rules', which states the law as at 31 March 2021, comes as a handy reference both to the foreigners and to the locals, whether novices or seasoned, dealing with arbitration in the UAE. And a third edition is already looming as, shortly after the second edition went to press, the UAE enacted Decree No. 34 of 21 September 2021 that overhauled arbitration in the emirates with immediate effect on all pending cases. Two previously existing arbitral institutions – the DIFC-LCIA and the Emirates Maritime Arbitration Centre (EMAC) – were entirely devolved to DIAC, which was itself reorganised in its structure and arbitration rules, as referred to in Part I. The attractiveness of Dubai as the preferred seat in the UAE requires without delay a new Part IV in the next edition that would address recent amendments to the arbitration law and court decisions recently handed down in relation to the signing of UAE-seated awards, competence-competence, the authority of signatories, and the severability of arbitration agreements.

3 See para. I-138.

4 See para. I-219.

5 See para. I-220.

6 See, among others, G. Blanke *et al.*, *A Guide to Arbitration in the UAE* (ICC, 2020)

L'Exécution des Mesures Provisoires Arbitrales à l'Etranger : Pour une Solution Urgente

Lucas de Medeiros Diniz
Collaborateur, Rodrigo Mendes Advogados, São Paulo

L'exécution des mesures à titre provisoire rendues par un tribunal arbitral situé à l'étranger

Aécio Filipe Coelho Fraga de Oliveira
L'Harmattan, Novembre 2022
221 pages
ISBN 978-2-14-020688-7

Dans un contexte de globalisation, où les frontières s'effacent, la question de l'exécution des sentences rendues par des tribunaux situés à l'étranger, le débat sur l'exécution de jugements internationaux revêt une importance cruciale.

Le débat est d'une complexité considérable et pose d'énormes défis. Alors qu'il convient de noter que la majorité des litiges commerciaux transnationaux sont désormais résolus par l'arbitrage, il est peut-être davantage pertinent de discuter de la réglementation juridique de l'exécution des décisions rendues par des arbitres internationaux dans le contexte du commerce international que de se concentrer sur l'exécution de jugements étrangers.

Bien que la Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères (1958) ait déjà résolu la plupart des problèmes liés à la reconnaissance et à l'exécution des sentences arbitrales étrangères, la question de l'exécution d'une mesure d'urgence ou un titre provisoire délivré par un tribunal arbitral international est, elle, loin d'être tranchée.

Il s'agit bien entendu d'une question importante, car ces mesures nécessitent naturellement une réponse rapide, sans quoi la préservation du résultat de la procédure arbitrale serait compromise.

C'est précisément dans ce contexte que l'auteur, Aécio Filipe Coelho Fraga de Oliveira, propose sa réflexion dans le livre « L'exécution des mesures à titre provisoire rendues par un tribunal arbitral situé à l'étranger ».

> Nonobstant et à défaut d'accomplissement volontaire, existe-t-il des mécanismes de coopération entre la justice arbitrale et la justice étatique capables d'assurer l'exécution des mesures provisoires et conservatoires rendues par un tribunal arbitral situé à l'étranger ? Si tel est le cas, ceux-ci peuvent-ils répondre effectivement aux attentes des parties ? [1]

Face à la nature résolument internationale de l'arbitrage, il examine l'efficacité des mécanismes disponibles pour exécuter des mesures provisoires ou conservatoires dans un état autre que celui du siège de l'arbitrage. L'auteur se penche sur leur classification, en affirmant qu'il existe:

> [D]eux types de mécanismes mis en place par certaines juridictions, capables d'assurer l'exécution des mesures arbitrales provisoires ou conservatoires dans un pays autre que celui du siège de l'arbitrage. À cet égard, ces mécanismes peuvent être divisés en deux catégories : d'une part, ceux qui adoptent un système d'exécution essentiellement identique à celui qui s'applique aux décisions sur le fond et, d'autre part, ceux qui considèrent les mesures à titre provisoire comme étant des ordonnances … qui prévoit une procédure adaptée à la nature de la décision en question [nommé système d'assistance au juge].[2]

1 A. Oliveira, *L'exécution des mesures à titre provisoire rendues par un tribunal arbitral situé à l'étranger*, p. 42.

2 Ibid. p. 42 et 107.

L'ouvrage révèle que, s'il est vrai que la plupart des mesures provisoires sont volontairement exécutées par les parties, il existe des situations où leur exécution forcée est nécessaire. Selon l'auteur, dans de tels cas, les parties sont confrontées à divers défis, notamment :

- l'absence de mécanismes standardisés garantissant l'exécution effective de ces mesures provisoires « étrangères » ;
- le manque de dispositions légales spécifiques applicables à chaque situation ; et
- les restrictions imposées par le droit national qui limitent cette forme d'assistance aux seuls arbitrages menés dans leur juridiction.

Dans ce contexte, l'auteur explore avec finesse et profondeur les défis juridiques et les enjeux entourant l'exécution des mesures provisoires ou conservatoires délivrées par des tribunaux arbitraux situés dans un état différent de celui où se déroule l'arbitrage.

Après avoir procédé à une analyse historique du pouvoir des arbitres et démontré l'existence d'un système de sanctions qui encourage l'observance spontanée des décisions arbitrales,[3] l'auteur présente les différentes approches pour exécuter les mesures provisoires rendues par un tribunal arbitral situé à l'étranger qu'il classe en deux catégories :

1. L'approche des juridictions qui suivent un système d'exécution similaire à celui des sentences arbitrales, appelé le système d'assimilation (États-Unis, en Égypte, à Malte, aux Pays-Bas, en Écosse et aux Bermudes).[4]
2. L'approche des juridictions qui considèrent les mesures provisoires comme des ordonnances,[5] qui constitue le système qualifié d'assistance au juge (Hong Kong, Suisse, et plus récemment Italie,[6] ainsi autorisé en Allemagne et au Brésil grâce à une interprétation libérale de la doctrine (toutefois, ces deux juridictions n'ont pas encore une réponse définitive sur cette matière).[7]

C'est précisément ainsi que l'ouvrage est divisé.

La **première section** présente **la notion de l'assimilation**, selon laquelle les mesures provisoires et conservatoires ordonnées par les tribunaux arbitraux étrangers sont traitées comme des sentences arbitrales étrangères, dont l'exécution peut être entravée par divers obstacles, notamment la nécessité pour le tribunal étatique de déterminer si la mesure répond à la définition d'une sentence arbitrale, ainsi que le respect de plusieurs exigences lors de son élaboration. La procédure d'exequatur et les exigences formelles lors de l'élaboration d'une sentence ne semblent pas, selon l'auteur, compatibles avec la nature de la mesure à titre provisoire. Des questions complexes – comme celles de l'incohérence des voies de recours contre une décision qui elle-même n'est pas définitive, ou de l'étendue de contrôle du juge de l'exequatur qui peut porter atteinte au principe de compétence-compétence de l'arbitre – démontreraient que le système d'assimilation n'est pas compatible avec la nature d'une mesure provisoire.

Une **seconde section** présente le système d'assistance au juge, qui en opposition au système d'assimilation, est adaptée à la nature spécifique des décisions provisoires basé sur le droit commun des États. En considérant la mesure à titre provisoire comme une « ordonnance », la demande d'assistance est envoyée directement par le tribunal arbitral au juge compétent pour l'exécution de la mesure, en évitant qu'elle soit soumise à une procédure d'exequatur.

Dans ce contexte, l'auteur souligne le mécanisme de la lettre arbitrale brésilienne (« *carta arbitral* »), un instrument juridique qui permet l'exécution des mesures provisoires rendues par un tribunal arbitral étranger de manière efficace. Tandis que l'exécution de la « *carta arbitral* » est subordonnée à l'appui des tribunaux brésiliens, elle fait l'objet d'un contrôle limité et est soumise à des critères tels que la compétence du tribunal arbitral, le respect des droits de la défense et l'ordre public brésilien.[8]

Face à de nombreuses incertitudes concernant la compatibilité des mesures provisoires avec la définition et les caractéristiques d'une sentence arbitrale, l'auteur préconise l'ouverture des systèmes juridiques nationaux à un mécanisme d'assistance au juge visant à renforcer l'efficacité de l'arbitrage international en matière de mesures provisoires et conservatoires et éviter ainsi les obstacles rencontrés précédemment.

3 Ibid. p. 25-40.

4 Ibid. p. 45-106.

5 Ibid. p. 107-145.

6 L'Italie, jusqu'en 2022, n'autorisait pas les arbitres à rendre des mesures à titre provisoire (voir par exemple, M. Sabatini, 'The Time Has Finally Come to Say Goodbye to the Prohibition for Arbitrators to Issue Interim Measures', *ICC Dispute Resolution Bulletin*, 2022, Issue 1. Cependant, la récente réforme du Code italien de procédure civile a écarté cette disposition et a mis en place le système d'assimilation mentionné ci-dessus (Code italien de procédure civile, Art. 818-ter).

7 A. Oliveira, *L'exécution des mesures à titre provisoire rendues par un tribunal arbitral situé à l'étranger*, p. 121 et 129-145.

8 Ibid. p. 144.

A. de Oliveira explore avec une compréhension minutieuse les défis juridiques et les enjeux entourant l'exécution des mesures provisoires émises par des tribunaux arbitraux internationaux. Ce livre, qui se situe à la croisée du droit international privée et du droit de l'arbitrage, offre une analyse détaillée des questions complexes liées à l'application et à la mise en œuvre de ces mesures dans un contexte transnational. L'auteur nous guide à travers un voyage intellectuel stimulant qui met en lumière les problématiques juridiques contemporaines pertinentes en arbitrage international. Une lecture essentielle pour les praticiens du droit, les universitaires et tous ceux qui s'intéressent au fonctionnement de l'exécution des mesures à titre provisoire rendues par un tribunal arbitral situé à l'étranger :

> [Il] existe bien deux mécanismes de coopération entre la justice arbitrale et la justice étatique capables d'assurer l'exécution des mesures provisoires et conservatoires rendues par un tribunal arbitral situé à l'étranger. Néanmoins, seul le système d'assistance au juge peut répondre effectivement aux attentes des parties. Si ce système était adopté par d'autres juridictions nationales, il éviterait que la matière des mesures provisoires et conservatoires ne mette en échec l'efficacité de l'arbitrage international comme moyen de règlement des litiges commerciaux.

Comme Renato Grion et Ana Gerdau de Borja l'ont écrit en préface,[9] Aécio Filipe Coelho Fraga de Oliveira est indéniablement l'un des représentants de la nouvelle génération des spécialistes en arbitrage et une étoile montante ('*rising star*') de l'arbitrage, et son livre reflète parfaitement son expertise et son dévouement au domaine de l'arbitrage international.

9 Ibid. p. 8 et 9.

International Law in Action: The 1001 Lives of the Honorable Charles Brower

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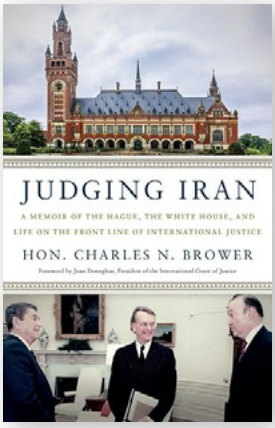

Judging Iran: A Memoir of The Hague, the White House, and Life on the Front Line of International Justice

The Hon. Charles B. Brower
Disruption Books, April 2023
102 pages
ISBN: 9781633310704

Few people are unfamiliar with the multi-faceted Charles Brower. A renowned attorney and a top-tier arbitrator, Brower served the U.S. Department of State, the White House, and the Iran-United States Claims Tribunal for 40 years. Brower also sat as judge *ad hoc* on the Inter-American Court of Human Rights and became the most-appointed American judge *ad hoc* of the International Court of Justice.

His memoirs take the reader on a tour of his extraordinary career path, at the crossroads of international arbitration, politics, diplomacy, and public service. Brower's narrative gifts make this summary of a six-decade career at the forefront of international justice a gripping page-turner. Far from a self-centered narrative, 'Judging Iran: A Memoir of The Hague, the White House, and Life on the Front Line of International Justice' ('Judging Iran') is a precious insider account of the role of international dispute resolution mechanisms in preserving global peace.

1. The attorney

Brower began his career with White & Case in 1961. He explains, not without humor, that his early cases had no connection to international law.

> I somehow became the go-to lawyer for defending claims that involved exploding beer bottles.[1]

Brower also emphasizes the significance of 'all the tricks of a brass-knuckle trial attorney' he learned in the New York criminal courts.[2]

To general surprise, Brower left White & Case in 1969 shortly after the firm made him partner to serve the US State Department as legal adviser. During the negotiation of a US-USSR trade deal, international arbitration caught his eye as:

> [I]nternational arbitration combined [his] passion for litigation with [his] interest in foreign affairs.[3]

Brower later resigned to set up White & Case's Washington, DC office, where he ended up suing the federal government he previously served. Brower ably explains this was still public service.

> When you sue the government for doing something stupid, you are doing a public service.[4]

States and private investors started engaging him for their international dealings. With landmark cases under his belt, Brower decided to characterize himself as an expert in the field, go on the speaking circuit, and build his reputation accordingly:

> I decided I was an expert, which, given how limited international arbitration was at the time, I probably was.[5]

1 C. N. Brower, *Judging Iran: A Memoir of The Hague, the White House, and Life on the Front Line of International Justice* (Disruption Books, 2023), at p. 13.

2 Id. at p. 16.
3 Id. at p. 42.
4 Id. at p. 52.
5 Id. at p. 78.

Brower resigned from White & Case in 1983 following his first appointment at the Iran-United States Claims Tribunal. When he rejoined the firm in 1988, the end of the Cold War triggered an explosion in BITs and a resulting boom in international arbitration. Brower's practice became a pioneer in investor-state work. The first ICSID case against a Latin American state (*Santa Elena v. Costa Rica*), one of the largest ICSID awards on record (*CSOB v. Slovakia*), and one of the first NAFTA cases (*Mondev v. United States*) are just three examples of Brower's impressive track record. 'Judging Iran' provides juicy anecdotes of hearing moments, including with the late Professor Gaillard ('a true international law heavyweight').

Brower's practice went well beyond investment arbitration and embraced the entire spectrum of international law. He notably addressed the International Court of Justice (ICJ) as counsel on behalf of the United States and Costa Rica, drafted an expert opinion upon Yves Fortier's request on the challenges that an independent Quebec would face in establishing relations with the US, and argued numerous cases before the United Nations Compensation Commission (UNCC) established by the Security Council following Iraq's unlawful invasion of Kuwait ('a milestone in the development of international justice').

2. The legal adviser

Brower served the U.S. State Department from 1969 to 1973 as assistant legal adviser for European affairs, deputy legal adviser, and acting legal adviser. Through these positions of increasing responsibility, Brower gained valuable experience in international negotiations – he headed the U.S. delegation to the conference that produced the Montreal Sabotage Convention – and policymaking. Brower also acquired a deep knowledge of how states behave. His developments on why the presence of a state as a party to an arbitration makes such a big difference are remarkably insightful.

In 1987, Brower served the White House as deputy special counsellor to President Reagan during the Iran-Contra scandal, which involved US officials facilitating the sale of weapons to Iran, apparently in return for the release of US hostages held in Lebanon. It later turned out that the price of the arms shipments had been artificially raised and the profits redirected to the Contras, while Congress had banned the administration from further funding the Nicaraguan rebel group. Brower enjoyed significant face time with President Regan and Vice-President Bush during prep sessions for the President's interviews with the Tower Commission, which investigated the matter. Regan was eventually exonerated for funding the Contras, based on culpable ignorance.

3. The judge

Brower's activity as a judge mainly relates to the Iran-United States Claims Tribunal (IUSCT). As Brower recalls, some forty-five thousand Americans lived in Iran in 1978. Claims for compensation thus flourished following the Iranian Revolution and the ensuing expropriations against US businesses and individuals. The IUSCT was created by the Algiers Accords, which aimed at terminating all litigation between each party's government and the other's nationals through binding arbitration. Brower was offered a seat in 1983, which he saw as:

> [A] tremendous opportunity to shape the future of international law.[6]

The IUSCT indeed emerged as a forum that proved to be important for the development of international law and dispute settlement, as ICJ President Donoghue notes in her forewords.

Brower's account of his activity as a judge at the IUSCT is a rare, if not unique, testimony of the inner workings of the tribunal. Topics covered are profuse and equally engaging: dominant and effective nationality, guerrilla arbitration, good and bad relationships between fellow judges, political influence and policy consideration during deliberations, Brower's famous concurring opinion in *Amoco*, and many more. Brower's description of Iranian Judges Shafeiei and Kashina's assault on Judge Mangard from Sweden in 1984 is a striking example of the ongoing political – and even physical – tension within the IUSCT.

Despite all this, the tribunal has always endured. The novelty at the time of a standing institution specifically designed to allow the nationals of one state to sue the government of another state under international law proved successful: between 1981 and 1993, the IUSCT rendered more than 800 reasoned decisions.

> [The Decisions] developed the law of international commerce, giving investors and sates a stronger foundation upon which to build their relationships.[7]

6 Id. at p. 99.
7 Id. at p. 134.

In Brower's view, successive Iranian governments stuck with the tribunal in order to:

> [B]e viewed as legitimate in the eyes of the world [which is] good news for international law in general and for international arbitration in particular.[8]

Brower concludes that the IUSCT is strong evidence that arbitration can peacefully resolve disputes even in the most difficult of circumstances.

Brower also dwells on his appointments as a judge *ad hoc* in three ICJ cases. Brower emphasizes the significance of states peacefully settling their disputes, notably their territorial claims:

> The more international disputes can be reduced to matters of law, the better.[9]

He concludes by aptly quoting Albert Einstein: 'No worthy problem is ever solved on the plane of its original conception'.

4. The international arbitrator

Brower has served as arbitrator in numerous proceedings in commercial arbitration and in investor-state cases. His work as an arbitrator exploded after he left White & Case. In 2013, a famous US law magazine labelled him 'the reigning king of international arbitrators'. *ADC v. Hungary*, *Dow Chemical v. PIC*, *Siemens v. Argentina*, *Perenco v. Ecuador*, and *Vantage Deepwater v. Petrobras* are just a few examples of major cases where Brower sat as an arbitrator.

Brower also dwells on various topics related to his extensive arbitrator practice. Three deserve to be mentioned. First, dissenting opinions, for which Brower is particularly famous for. Brower ardently advocate for arbitrators – in particular civil law-trained arbitrators – to dissent when the majority gets the law wrong or applies it incorrectly to the facts.

> Albert Jan [van den Berg] may call this 'intellectual exhibitionism'. I call it principled.[10]

Brower's view is grounded on two reasons: publicity of the award and the need to help domestic courts to understand any annulment challenge.

Second, the criticisms addressed to investor-state dispute settlement (ISDS). Brower recalls that states agreed to abide by their treaties under the *pacta sunt servanda* rule, which include BITs. He goes on to affirm that ISDS is demonstrably not business-biased, while recalling that the system that existed before the rise of investment treaties 'was massively biased in favor of states'.[11] Nevertheless, Brower concedes that the current international arbitration system is not perfect for four reasons: excessive confidentiality, the need for stronger precedent, the impossibility for states to initiate arbitration against foreign investors under most BITs, and the lack of gender and geographic diversity among arbitrators.

Last but not least, Brower truthfully tackles his alleged pro-investor bias:

> It is true that I have been appointed largely by investor; but this is largely an artifact of having spent much of my early career working for a big law firm. … But I have worked for, and been appointed by, states, too. … Nor do I consider myself a captive of the party that appointed me; a review of my CV indicates that I voted against the party that appointed me 30 percent of the time – a figure in line with the above statistics on prevailing parties. In other words, I am not pro-investor. I am not pro-state. I am pro-investment.[12]

As a reader, Judging Iran made a lasting impact, evoking how quickly the international legal field evolved to extend the empire of law – and thus peace – through the creation of dispute resolution mechanisms.

> Just a generation earlier, [my] career trajectory would have been next to impossible.
>
> […]
>
> Law gives order to life. And in the international arena, order means peace.[13]

Brower concludes by identifying the next frontier for the younger generation: the harmonization of international investment law with human rights and the climate emergency. Words to live by.

8 Id. at p.133.
9 Id. at p. 199.
10 Id. at p. 218.
11 Id. at p. 227.
12 Id. at p. 227-228.
13 Id. at p. 8, 253.