GLOBAL PERSPECTIVES ON COMMERCIAL ARBITRATION[1]

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CONTENTS

[1] General Report for the Heidelberg XIV Conference of the International Association of Procedural Law, 2011.

I
INTRODUCTION[2]

Popularity of Arbitration, Especially in Commercial Matters: Commercial arbitration has become popular among companies and other organisations, both globally[3] and within many national jurisdictions.[4] For example, a survey

[2] I received national reports from the following (alphabetical by surname of first-named contributors) in response to a questionnaire: Tony ALLEN (Centre for Effective Dispute Resolution, `CEDR', London); Francisco CAHALI and Paulo Osternack AMARAL and Teresa WAMBIER (Brazil); Constantin CALAVROS and Dimitris BABINIOTIS (Greece); Andrew CANNON (Australia); Laura ERVO (Finland, Denmark and Norway); Carlos Esplugues (Spain); BART GROEN (The Netherlands); Ulrich HAAS (Switzerland); Viktória HARSÁGI (Hungary); Yoshihisa HAYAKAWA and Masayuki TAMARUYA (Japan); HERBERT SMITH (London); Art HINSHAW (USA); Carsten KERN (Germany); Roman KHODYKIN (Russia); SIR Elihu LAUTERPACHT QC (England); LINKLATERS (London); Michele Angelo LUPOI and Caterina ARRIGONI (Italy); Christian KOLLER (Austria); Natalie MOORE (London); Renato NAZZINI (England and Italy); William W PARK (USA); Luca PASSANANTE (Italy); Nicholas PENGELLEY (Canada); Cesar A Guimarães PEREIRA and Eduardo TALAMINI (Brazil); Claudia PERRI (Brazil); Luca RADICATI DI BROZOLO (Italy); Alan RYCROFT (South Africa); SLAUGHTER AND MAY (London); David STEWARD (Ince & Co, London, but also Singapore and Hong Kong); Rolf STÜRNER (Germany); Hiroshi TEGA (Japan); Alan UZELAC (Croatia); Françoise VIDTS and Didier MATRAY (Belgium); Shukun ZHAO (China); Elena ZUCCONI (Italy).

[3] G Born, *International Commercial Arbitration* (2 vols: Kluwer, 2009); Buhring-Uhle, *Arbitration and Mediation in International Business* (Kluwer, The Hague, 1996); WL Craig, WW Park, J Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000, Oceana/ICC Publishing); Fouchard, Gaillard, Goldman's *International Commercial Arbitration* (ed's Gaillard and Savage 1999) (1999) (Kluwer); E Gaillard's *Legal Theory of International Arbitration* (2010, Boston USA, and Leiden); JDM Lew (ed), *Contemporary Problems in International Arbitration* (Kluwer, The Hague, 1987); Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (2003); LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Juris Publishers, Bern, Switzerland, 2004); WW Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (Oxford University Press, 2006); Redfern and Hunter, *International Arbitration* (eds, Blackaby and Partasides) (5th edn, Oxford University Press, 2009); Poudret and Besson's *Comparative Law of International Arbitration* 2nd ed (London, 2007); Schreuer, *The ICSID Convention: A Commentary* (2nd ed 2009); see also the Montreal 2006 conference papers in *International Arbitration 2006: Back to Basics* (Kluwer, 2007) (International Council for Commercial Arbitration Congress No 13).

[4] eg, England: *Russell on Arbitration* (23rd edn, London, 2007); Mustill and Boyd, *Commercial Arbitration* (2001 Companion Volume, London, 2001); R Merkin, *Arbitration Law* (2006, Lloyd's of London); J Tackaberry and A Marriott (eds), *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4th edn, London, 2003); JG Collier and V Lowe, *The Settlement of Disputes in International Law* (Oxford University Press, 1999); *The Freshfields Guide to Arbitration and ADR* (2nd edn, Kluwer, 1999); D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd edn, London, 2010); R Merkin, Arbitration Law (Informa Business Publishing, 2006); A Tweeddale and K Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press, 2005); also important is *Dicey, Morris, and Collins on the Conflict of Laws* (14th edn, London, 2006), ch 16 (and

of in-house counsel indicates a very high level of preference for arbitration, rather than court litigation.[5]

> *The English report of 2006 on the Arbitration Act 1996 suggests tentatively that between 5,000 and 10,000 arbitration references are made under that legislation each year.[6] Statistics concerning cases administered by arbitral institutions[7] show a clear and general upward trend: (i) the LCIA[8] (the London Court of International Arbitration) had 37 cases in 1996 and over 120 in 2006; (ii) cases organised by other institutions, probably raise the total number to around 300 cases per annum in London;[9] (iii) as for Paris, the case-load of the ICC (International Court of Arbitration)[10] has risen from under 300 in 1980 to nearly 600 in 2006.*

The burgeoning traffic in arbitration is part of the general rise in privatised forms of dispute resolution.[11] An arbitration tribunal's power to reach a

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referring to other literature).

[5] Hogan Lovells (London) report: `a 2006 International Arbitration Survey conducted by Pricewaterhouse Coopers LLP and The School of International Arbitration, Queen Mary, University of London (the "2006 IA Survey") asked in-house counsel of leading corporations around the world for their perceptions of international arbitration - 73% of the respondents said they prefer to use international arbitration, or in combination with ADR, in fact, 95% of the corporations responding expected to continue using international arbitration and foresee an increase in cases.' Hogan Lovells' report contains a lucid and balanced analysis of arbitration's benefits and occasional; shortcomings.

[6] 'Report (2006) on the Arbitration Act 1996', at [19]; report prepared for the Commercial Court Users' Committee, the British Maritime Law Association, the London Shipping Law Centre, and other bodies (the authors were various barristers, solicitors, and other arbitration specialists—see Appendix A of report for details); for the text, see:
www.idrc.co.uk/aa96survey/Report_on_Arbitration_Act_1996.pdf.

[7] A summary table can be found in the statistics page of the HKIAC website: *http://www.hkiac.org/HKIAC/HKIAC_English/main.html*.

[8] *http://www.lcia-arbitration.com*.

[9] A recent report by IFSL quotes that number based on research among law firms in 2002: *http://www.ifsl.org.uk/uploads/PB_Dispute_Resolution_2006.pdf*. The main centre used by international parties in London (the IDRC in Fleet Street) reports that it holds between 250-300 arbitrations each year which take 5 days on average, and a similar number of mediations.

[10] *http://www.iccwbo.org/court/* (the ICC ICA was established in Paris in 1923 and the most popular nationalities of arbitrators appointed by the ICC are still French and Swiss). See also statistics collected in G Born, *International Commercial Arbitration* (2 vols: Kluwer, 2009), 68-71 referring to `robust growth'.

binding decision on the merits is to be contrasted with mediation (or conciliation). A mediator, although neutral, is not empowered to give a binding decision, but instead to facilitate a consensual resolution of the parties' dispute. Thus arbitration is a distinct technique. Most national reporters showed no enthusiasm for a confusion of the adjudicative function of arbitrators with the conciliatory role of mediators (IX(3) below). At best, mediation might occur separately from arbitration: it might be used, and exhausted, before arbitration is begun; or mediation might run concurrently with arbitration, without necessarily interrupting the arbitral process (on these permutations, IX(1) and (2) below). Arbitrators might also make suggestions that there are opportunities for settlement. But the majority of reporters regarded the prospect of arbitrators foisting settlement proposals on the parties as mischievous and liable to back-fire.

`*Between Law and Equity'*: This is the stimulating title suggested for this topic by the Praesidium of the International Association for the Heidelberg conference.

If arbitration were a procedural facsimile of court litigation, adjudicated outside of court by state judges in their spare time, and open to public view, few (other than free-market zealots) would choose it. In such circumstances, arbitration would be economically a `mug's game': for the parties would be paying at full cost not only the fees of the arbitration tribunal, but the expense of the accommodation for the hearing. By contrast, court services are provided more cheaply. Court fees (which have tended to increase in England) are subsidised. This subsidy is borne by the tax system.

Of course, arbitration, in most jurisdictions a long-standing `alternative' form of dispute-resolution, is chosen because it is distinctive. It offers something superior. It might sometimes be compared to the choice between travelling to the airport by limousine, and getting there by bus or train, or between having a hip operation in a private hospital or (where state medicine is available) relying on the public system of medical care.

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[11] eg Peter L Murray (Harvard), `The Privatization of Civil Justice' (2007) 12 ZZP Int 283-303 (*Zeitschrift Für Zivilprozess International*: Germany); A Cannon, `A Pluralism of Private Courts' (2004) 23 *Civil Justice Quarterly* 309-23; Elizabeth Thornburg, `Reaping What we Sow: Anti-Litigation Rhetoric, Limited Budgets, and Declining Support for Civil Courts' (2010) 30 *Civil Justice Quarterly* 74-92.

Parties stipulate for arbitration because they hope to gain various advantages: confidentiality (it is eccentric, even perverse, to wash one's dirty linen in public); private selection of the decision-maker(s); and parties wish to escape from dilatory court processes. There might be other expectations: lower costs, finality, procedural stream-lining, substantial insulation from the court system, and easier enforcement. Even if arbitration cannot consistently deliver these advantages, its potential to secure these advantages renders it a highly attractive alternative to court litigation. It is similar to the enthusiasm to populate the New World, and to flee the Old World. Of course, in the New World old problems recur, and new problems emerge.

Why suggest a middle-ground `between law and equity'? The contrast between strict and regular adjudication by courts (`law') and flexible and liberal adjudication by arbitrators ('equity') remains a convenient starting-point. But it is only that. The gap between courts and commercial arbitration has been closing. This means that the `strict law-fixed procedure'/`open-texture law-fluid procedure' contrast has diminished, even disappeared for the most part.

The reality is that the main point of difference between court litigation and commercial arbitration is simply between public and private justice. Thus arbitrators are expected to display the judicial virtues of equal respect for each party and patient assessment of each side's case; and in general their decisions are reasoned. Admittedly, appeal on the merits is not permitted in most systems of arbitration. Predominantly, arbitrators apply the substantive norms of a chosen national system. Occasionally, arbitrators might be empowered by the parties to apply more fluid norms, or even to make up the rules as they proceed.

Although there are strong elements of arbitral autonomy (notably the *kompetenz-kompetenz* principle, allowing arbitrators to have the `first crack' at determining whether there is a valid arbitration reference, and who, are what, are covered by it), in many other respects the arbitration system relies heavily on the supplementary assistance of the courts. The modern trend is for state courts to be regarded as benevolent supporters of arbitration, rather than

hostile interferers or obstructers[12] (for example, this has become a central feature of Spanish practice, for example, as Carlos Esplugues shows).[13]

In England this enlightened attitude is strengthened by the fact that many commercial judges have practised as barristers. During their pre-judicial stage, they will have acted as advocates before arbitration tribunals and will have sat as members of such tribunals.[14] When they become state judges, they will often have an economic expectation that they will sit as arbitrators after they retire from the High Court or from the appellate court bench. There are strong ties of comity, therefore, between the arbitral community and the commercial judiciary. A good illustration of this career path is Lord Mustill: commercial barrister, High Court judge, culminating in his position as a member of the House of Lords (now the UK Supreme Court), and then for fifteen years enjoying a final career as a member of the global arbitral community at the highest echelon.[15]

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[12] Neil Andrews, `The Modern Civil Process in England: Links between Private and Public Forms of Dispute Resolution' (2009) 14 ZZP Int (*Zeitschrift für Zivilprozess International*: Germany) 3-32; translated as `La "Doppia Elica" della Giustizia Civile: I Legami tra Metodi Privati e Pubblici di Risoluzione delle Controversie' in (2010) *Rivista Trimetrale di Diritto e Procedura Civile* 529-48.

[13] Esplugues (Spain): ` The Spanish Arbitration Act 2003 envisages certain areas for cooperation between courts and arbitrators. The rationale is clear: it is not a question of control by the courts of the work undergone by arbitrators but it is an issue of cooperation on similar grounds among themselves. Article 7 clearly states that "*In matters governed by this Act, no court shall intervene except where so provided in this Act*". This rule is interpreted in a very rigid manner by Spanish legal doctrine and even parties to the arbitration are not allowed to broaden those areas of cooperation between courts and arbitrators envisaged by the Arbitration Act. In accordance with Article 8 AA, these areas of cooperation are: judicial appointment of arbitrators, taking of evidence, interim measures, award enforcement, setting aside of the award rendered and, of course, enforcement of foreign awards.'

[14] It is common for at least one member of a three arbitrator panel in a commercial matter to be chaired by a barrister who is a QC (senior counsel); often the panel will include, or consist wholly of, senior lawyers (whether barristers, solicitors, or retired judges.

[15] Lord Mustill: educated (Natural Sciences and Law), St John's College, Cambridge (Hon Fellow, 1992); LLD, Cantab, 1992; Gray's Inn. Called to the Bar, 1955; practised in commercial law; QC, 1968; appointed to the High Court, 1978; to the Court of Appeal, 1975; to the House of Lords, 1992, retiring from appeals in 1997. Goodhart Professor of Legal Science, University of Cambridge, 2003-4. With Stewart Boyd, QC, Mustill is author of *The Law and Practice of Commercial Arbitration in England* (1982; 2nd edn, London, 1989; companion volume, 2001); friend and chambers colleague of Sir Michael Kerr; Lord Mustill was influential (with Lord Saville, as he now is) in the preparation of the Arbitration Act 1996 (England and Wales). Since judicial retirement, he has enjoyed a career as a commercial arbitrator.

Scope of the Reports: The richness and versatility of this technique are obvious. Predominantly the national reports composed for this conference addressed commercial disputes. Arbitration can concern `domestic' matters, that is, disputes where both parties are situated in the jurisdiction where the process has its `seat'. It is also common for arbitration to govern disputes where only one party, or even neither party, is situated in the jurisdiction where the arbitration is to take place. However, arbitration might also be used to resolve matters one or more parties is not engaged in trade or business. Furthermore, public entities, or sovereign states, can also be party to arbitration.

This report does not concern analogous forms of neutral determination: for example, expert determination,[16] or decision-making by ombudsmen,[17] or stream-lined adjudication of building disputes (in that context, so-called `adjudication' has transformed the practice governing construction disputes in England; statute allows experts to make swift decisions if disputes arise during the course of a building project; these decisions are initially provisional; they become binding if, within a short period, neither party seeks to re-open the determination, by litigation or arbitration).[18] Finally, this report does not concern arbitration conducted by court judges, although that possibility exists in certain jurisdictions.

II
THEMES

[16] Steward (Ince & Co, England): ` An arbitration clause may be coupled with a provision for expert determination. In the shipbuilding industry, it is comment to provide that technical disputes (eg, as to conformity of the ship to the technical specification) will be decided by a neutral third party , such as the Classification Society, but it is usually expressly stated that it will do so as an expert and not an arbitrator. Similarly, a contract for the international supply of oil cargo may provide for expert determination of quality disputes.'

[17] As early as the early 1990s in England (see Neil Andrews, *Principles of Civil Procedure* (London, 1994), para 19-019), it was apparent that quasi-arbitral scheme were being used to process large numbers of disputes between service providers and consumers (including businesses), within certain fields of commerce: pensions, financial services, insurance, building societies, etc; these relatively cheap and accessible `industry-wide' processes produce binding decisions

[18] *Pegram Shopfitters Ltd v Tally Weijl* [2003] EWCA Civ 1750; [2004] 1 WLR 2082, CA, especially at [1] to [10], on accelerated resolution of construction disputes (so-called 'adjudication') under Part II, Housing Grants, Construction and Regeneration Act 1996, and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649); generally on mediation and experts, L Blom-Cooper (ed), *Experts in Civil Courts* (Oxford University Press, 2006) ch 10.

(1) PRIVATISED JUSTICE

There has been some anxiety that the pendulum has swung too far in favour of private dispute-resolution.[19] For example, Rolf Stürner says:[20]

> *`In many fields of economic and social significance the development of law lies in the hands of private arbitration tribunals. Arbitrators decide in secret and are responsible to the parties only and not to the society as a whole. They develop case law without any democratic legitimacy, although their decisions may have significant direct or indirect influence on the life of all citizens.'*

And he concludes his report by suggesting that state courts might even be said to be in crisis:

> *`The growth of arbitration and mediation in modern societies is the consequence of globalization and the decline of state power and significance. It will be interesting to observe whether private institutions will be efficient enough to replace state institutions and to avoid social collapse. After the recent USA and European financial crisis this seems to be more questionable than before. Reorganization and improvement of state institutions could be an attractive alternative.'*

Some complain that one factor stimulating the increase in ADR is under-funding of civil courts. For example, Hazel Genn, responding to the tendency for Government to promote mediation, rather than to improve court systems, said in her 2008 Hamlyn Lectures:[21]

> *`We need modern, efficient civil courts with appropriate procedures that offer affordable processes for those who would choose judicial determination. This is*

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[19] eg Peter L Murray (Harvard), `The Privatization of Civil Justice' (2007) 12 ZZP Int 283-303 (*Zeitschrift Für Zivilprozess International*: Germany); Elizabeth Thornburg, `Reaping What we Sow: Anti-Litigation Rhetoric, Limited Budgets, and Declining Support for Civil Courts' (2010) 30 *Civil Justice Quarterly* 74-92; A Cannon, `A Pluralism of Private Courts' (2004) 23 *Civil Justice Quarterly* 309-23.

[20] Stürner, (Germany).

[21] Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010), ch 3, at p 119 (considered in Elizabeth Thornburg, `Reaping What we Sow: Anti-Litigation Rhetoric, Limited Budgets, and Declining Support for Civil Courts' (2010) 30 *Civil Justice Quarterly* 74-92).

not impossible. But it requires recognition of the social and economic value of civil justice, an acknowledgement that some cases need to be adjudicated, and a vision for reform that addresses perceived shortcomings rather than simply driving cases away.'

(2) NATIONAL MAGNETS

Some national arbitration centres have developed a reputation for neutrality, efficiency, and professionalism. And so there has been a concentration of international arbitration in certain countries, as Alan Uzelac (Croatia) notes:[22]

`...arbitration is ever more becoming a process dominated by certain countries, certain centres and certain institutions. In the context of foreign trade and investment,...arbitration is in very many cases exported to a small number of countries, such as Switzerland (which became a seat of the arbitration industry), or institutions (such as the ICC--International Chamber of Commerce)--and LCIA—the London Court of International Arbitration)...This development is also fostered by the practice of multi-national law firms that have developed practices about "good" arbitrators, arbitration rules and arbitration jurisdictions.'

As the German[23] and Japanese[24] commentators note, transnational commercial arbitration is also associated with the rise of `business English', which has (increasingly) become the commercial *lingua franca*. They also note the global influence of the `mega-law firm', whose tentacles reach into many jurisdictions, even if the relevant octopus' main body is situated in New York or London.

(3) LATE EMERGENCE OF ARBITRATION IN SOME JURISDICTIONS

In many jurisdictions there has been an unbroken tradition of arbitration, stretching back over centuries (for example, in England), or at least several

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[22] Uzelac, (Croatia).

[23] Stürner, (Germany).

[24] Hayakawa and Tamaruya, (Japan): ` Shortage of professionals who can deal with cases in English, or insufficient trust on the institution with a few practical accomplishments etc. are supposed to make the parties choose other countries [within which to arbitrate their disputes].'

decades, as reported by Nicholas Pengelley (Canada).[25]But elsewhere there has been no long tradition, or at least there have been interruptions. In Brazil (as Francisco Cahali, Paulo Osternack Amaral, and Teresa Wambier show),[26] arbitration has only fairly recently been recognised as a valid form of resolving disputes. Viktória Harsági notes that in Hungary arbitration became dormant after the Second World War, until the re-emergence of the market economy following the end of Communism.[27] Carlos Esplugues also notes the slow emergence of a settlement or arbitration culture in Spain.[28]

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[25] Pengelley (Canada): `Canada is an "arbitration friendly" country, and alternative dispute resolution is widespread, particularly mediation (which is now mandated in many Canadian jurisdictions, before a civil matter can proceed to trial). Arbitration as a means of resolving disputes is continuing to grow rapidly. There are arbitration centres in three provinces: Ontario - the ADR Institute of Canada (Ottawa) (www.adrcanada.ca) and ADR Chambers (Toronto) (www.adrchambers.com); Quebec - the Quebec National and International Arbitration Centre (Montreal) (www.cacniq.org); British Columbia - the British Columbia International Commercial Arbitration Centre (Vancouver) (www.bcicac.com).

For more information and background on international commercial arbitration in Canada, H Alvarez, `Recent Trends in International Commercial Dispute Resolution' (1999) 57 Advocate 691; B Barin, *Carswell's Handbook of International Dispute Resolutions Rules*, (Scarborough, Ontario: Carswell, 1999); *Canadian Encyclopaedic Digest* (Ontario), vol 1A (3rd edn, Scarborough, Ontario: Carswell, 2001), 'Arbitration'; JB Casey and J Mills, *Arbitration Law of Canada: Practice and Procedure* (New York: Juris, 2004); EC Chiasson, `A Precipice Avoided: Judicial Stays and Party Autonomy in International Arbitration' (1996) 54 Advocate (Vanvouver) 63; LY Fortier, `Delimiting the Spheres of Judicial and Arbitral Power: "Beware, My Lord of Jealousy"' (2001) 80 Can Bar Rev 143; GW Ghikas, `The Independence and Impartiality of Arbitrators: A Perspective from British Columbia' (1999) 57 Advocate 9 (Vancouver) 677; DR Haigh, AK Kunetzki and CM Antony, `International Commercial Arbitration and the Canadian Experience' (1995) 34 Alta LRev 137; R Pepper, `Why Arbitrate?: Ontario's Recent Experience with Commercial Arbitration' (1998) 36 Osgoode Hall LJ, 807; JC Thomas, `Investor-State Arbitration under NAFTA' (1999) 37 Can YB Int'l L 99; T Weiler, `NAFTA Investment Arbitration and Growth of International Economic Law' [2002] BKI 158.'

[26] Cahali, Amaral, and T Wambier (Brazil): `only in recent years (virtually the last decade) has arbitration established itself in our legal system, having gained strength only after the Supreme Court (STF – Supremo Tribunal Federal) declared it constitutional, by means of the Ratification of the Foreign Award SE 5,206, on 12 December 2001, stating that access to justice, guaranteed by the Federal Constitution, is not being denied by arbitration' and `In 1996 Arbitration Act 9307 was enacted. Since then, we have had a modern system, which renders arbitration awards independent of Judiciary ratification. Before that, the Brazilian system was conceived in such a way as to hinder the development of this kind of ADR.

[27] Uzelac, (Hungary), citing extensive literature: Kengyel, Miklós, `Arbitration and State Courts in Hungarian Law', in R Stürner and M Kawano (eds), *International Contract Litigation, Arbitration and Judicial Responsibility in Transnational Disputes* (Mohr Siebeck, Tübingen, 2010), M Kengyel, Miklós, *Magyar polgári eljárásjog* (Osiris Kiadó, Budapest, 2008), 676–7; Éva Horváth and G Kálmán, *Nemzetközi*

(4) THE RANGE OF ARBITRATION

The modern stereo-type has become sophisticated corporate arbitration, supported by teams of lawyers, applying institutional rules. The author remembers one (not atypical) large arbitration conducted in Switzerland but involving a Middle Eastern company and a British manufacturer, where the proceedings lasted over ten years. During that decade this was the only work conducted by one distinguished partner in a London firm. Little wonder that the costs can become massive.

Big-players are prepared to pay big sums to finance such a process, as Alan Uzelac observes, the attractions of arbitration:

> *`are most appealing in complex, international commercial cases where the idea of neutrality, availability of significant funds for dispute resolution, and the existence of a good infrastructure (eg (Paris) ICC Court of Arbitration, (London) LCIA or the arbitration courts of national chambers of commerce) make possible a proper and fast dispute resolution process which is acceptable for both parties.'*

But there is a range. Renato Nazzini (England and Italy) emphasises that arbitration can concern very large commercial disputes or, at the other end of the spectrum, rather small-value claims. If court fees are low, arbitration will make little economic sense for these smaller claims (although a powerful party might wish to maintain secrecy—on this problem see VII(7) below). Very efficient court litigation, as in Austria, will tend to attract such claims to the court system, as Christian Koller has observed.[29] Similar comments are made in Japan.[30]

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eljárások joga – A kereskedelmi választottbíráskodás (Osiris Kiadó, Budapest, 1999), 81–3; A Boóc, *A Brief Introduction to Hungarian Arbitration Law* (Acta Juridica Hungarica, 2008), 351–8.

[28] Esplugues (Spain): `Only since the enactment of the Arbitration Act in 1988 (overruled by the currently in force 2003 Arbitration Act) a real trend in favour of arbitration may be ascertained... but it is still incipient and the number of arbitration procedures before arbitration institutions in Spain is still remarkably low in comparison with other EU countries.'

[29] Koller (Austria): `Arbitration practitioners report that arbitration is mostly used as a dispute resolution mechanism in international commercial contracts. The majority of domestic disputes are still resolved by courts considering the effectiveness and efficiency of the Austrian judiciary; the majority of cases, at least in contentious proceedings, is resolved within a year or even a shorter period of time (see P Mayr, `Neue Rechtstatsachen aus der Zivilgerichtsbarkeit' (2009) AnwBl 62 [No 2]).'

Another variation concerns the size of arbitral panels. Many commentators assume that a panel of three is the norm. But single arbitrators are quite common in some systems, including England.

(5) THE ARBITRATION PANEL LACKS *IMPERIUM*

Arbitrators might issue orders, but they lack the power to issue coercive sanctions. This difference between arbitrators and judges is obvious within the Common Law court system, where judges have contempt of court powers against parties[31] and even non-parties[32] whose conduct violates or undermines their injunctions. Many commentators emphasised the fact that arbitrators lack credible sanctions, and so must seek `back-up' from the courts. This is the problem of lack of arbitral *imperium:*[33] see also discussion of provisional remedies at VI(3), evidence at VI(4), and enforcement at X(2). However, Herbert Smith (London) note that arbitration tribunals have some quite strong powers, such as the drawing of adverse inferences, and possible stays or dismissals of the proceedings, to the prejudice of a non-conforming party.[34]

III
ADVANTAGES

As Rolf Stürner says, parties come to arbitration hoping for numerous practical advantages:[35]

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[30] Hayakawa and Tamaruya, (Japan): `Relatively high costs of arbitration have also prevented it from being an alternative to court proceedings that are readily available for those who have modest claims.'

[31] Neil Andrews, *The Modern Civil Process* (Mohr & Siebeck, Tübingen, Germany, 2008), 8.33 ff; and 4.17.

[32] ibid, 4.18.

[33] Cahali, Amaral, Wambier (Brazil), Calavros and Babiniotis (Greece), Nazzini (England and Italy), Passanante (Italy), Uzelac (Croatia).

[34] Herbert Smith (London): `Although arbitral tribunals are often said to lack the teeth necessary to enforce interim measures (e.g freezing bank accounts), in addition to the possibility of enlisting the court's support in enforcing such measures (see section 42 of the Arbitration Act, discussed above), if a party does not comply with tribunal ordered measures, the tribunal can take that into account in the award. The LCIA rules provide that where a claiming party does not comply with an order to provide security, the tribunal may stay the non-complying party's claims or dismiss them in the award (LCIA Rules 25(2)).'

> *`They hope to obtain resolution of their disputes in a specialized forum and procedure: not observed by the public and mass media, without the availability of a second or even third instance, under the responsibility of experienced arbitrators, in due time without unnecessary delay, on the basis of a flexible legal framework, and with a result which may produce an amicable settlement or a voluntarily executed arbitral award.'*

Will these wishes come true? Unfortunately not, for Rolf Stürner adds:

> *`The reality does not always meet the expectation of the parties. Sometimes arbitral procedures are lengthy and not really cheaper than court proceedings, especially if the losing party applies for judicial revocation or refuses voluntary execution thereby forcing the winner to apply to a state court for a declaration of enforceability.'*

We will now consider nine advantages (although the eighth, `low cost', turns out to be a chimera).

(1) SPEEDINESS

Some commentators candidly admitted that the very slow pace of court litigation in their jurisdictions renders arbitration an obvious and attractive competitor (Italian, Brazilian, Greek, and South African reports).[36]

However, arbitration is not as consistently speedy as it should be.[37] David Steward (Ince & Co, London) comments on his experience of delay in English arbitrations.[38] To this problem some legal systems have responded by

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[35] Stürner, (Germany).

[36] Cahali, Amaral, Wambier (Brazil); Calavros and Babiniotis (Greece); Lupoi and Arrigoni (Italy); Passanante (Italy); Pereira and Talamini (Brazil); Radicati di Brozolo (Italy); Zucconi (Italy); Rycroft (South Africa).

[37] eg, Uzelac (Croatia).

[38] Steward (Ince & Co, London, but also Singapore and Hong Kong): `Generally, the progress of a large arbitration can be slow. Arbitrators are mindful of their duty to act *"fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent"* (Section 33 of the Arbitration Act 1996). They may be reluctant to impose stringent time limits on the parties. Also, if there is a tribunal of barristers or professional arbitrators, there can be delay in fixing hearings on dates when they are available. In our experience, proceedings in the Commercial Court or Technology and Construction Court can generally be completed more quickly than large arbitrations.

stipulating that arbitration must be conducted within a specified period, at least for some categories of dispute (including some jurisdictions enjoying quite speedy court systems).[39] The problem of lack of expedition overlaps with the question of complexity (IV(3) below) and it also overlaps with the failure by arbitrators to exercise managerial control of the dispute (IV(5) below).

Many commentators, for example Carlos Esplugues (Spain), noted that arbitration avoids successive appeals, a source of delay which can bedevil the ordinary court process.[40] A particular source of expedition is that arbitration can avoid the delay generated by disputes concerning allocation of court jurisdiction in transnational matters.[41]

However, in jurisdictions where court proceedings are relatively speedy, arbitration is not chosen for reasons of expedition. This point is made, for example, by Roman Khodykin, who notes that court proceedings in Russia are impressively quick. He explains, therefore, that the choice of arbitration by Russian parties is driven by a multiplicity of other considerations, including the `absence of corruption' and the high reputation of certain arbitration institutions.[42]

The judges take cases firmly in hand at an early stage and are often willing to hold the parties to tight timetables.'

[39] Passanante (Italy); Steward (Singapore); Cahali, Amaral, Wambier (Brazil); Perri (Brazil); Groen (The Netherlands); Hayakawa and Tamaruya (Japan).

[40] Esplugues (Spain): commenting that speediness in arbitration `is due more to the absence of an appeal against the arbitration award than to the duration of "normal" first instance civil procedures in Spain (averaged less than one year of duration).'

[41] Hayakawa and Tamaruya (Japan).

[42] Khodykin (Russia): ` In Russia litigation is rather fast. Judgement in commercial disputes is usually delivered by the first instance court within 3-4 months of filing. Therefore, speed is not an advantage of arbitration in Russia. However, among factors which make the arbitration a viable option are:

(i) Enforceability of awards (Russia is a party to NY Convention while the number of treaties allowing enforcement of court judgements is rather limited – apart from Soviet-friendly countries like Cuba – only Spain and Italy. No treaty with UK, USA, Germany, France).
(ii) Qualification of arbitrators;
(iii) Confidentiality (all court proceedings are public, even if the proceedings are confidential, the judgement will be published on the court's website);

(2) EXPERTISE

Arbitrators can be selected for their expertise in technical areas, such as engineering,[43] economics,[44] science, the `customs of the sea',[45] or commercial law (state judges might lack consistent expertise within this branch of law, a problem noted by the South African report, Alan Rycroft, where the post-apartheid Bench was rapidly assembled). Françoise Vidts and Didier Matray (Belgium) note that arbitrators acquire special expertise in cases having an international dimension, whereas most national courts tend not to be exposed to such a range of matters. However, it is reported in Brazil and Japan that it is sometimes difficult to find arbitrators of sufficient commercial and legal experience.[46]

(3) PARTY CHOICE AND CONTROL

This is a central benefit, the ramifications of which are listed at VII below.

(4) NEUTRALITY AND AVOIDANCE OF THE UNFAMILIAR

As Art Hinshaw (USA) says: `The legal systems of certain countries can be perceived to be biased towards their nationals, whether they are or not may or may not be the case, and so contracting parties can contract in ways to make themselves feel protected from such a perceived threat.' Roman Khodykin (Russia) states that arbitration in reputable foreign centres is regarded as attractive because of `the absence of corruption'.

(iv) Absence of corruption;

(v) Limited ability to appeal the award;

(vi) High reputation of Russian arbitration institutions in business community (Maritime Arbitration Commission ("MAC") and the International Commercial Arbitration Court (hereinafter - ICAC)(aka MKAS) were established in 1930 and 1932 respectively. Both under the aegis of the Russian Federation Chamber of Commerce and Industry).'

[43] Ervo (Finland, Denmark and Norway).

[44] Harsági (Hungary).

[45] Moore (England), specialising in shipping law.

[46] Cahali, Amaral, Wambier (Brazil); Hayakawa and Tamaruya (Japan).

As for the question of alien legal techniques, Hiroshi Tega (Japan) comments that arbitration can avoid `unfamiliar and unpredictable foreign justice systems (systems which are, conversely, familiar and predictable to the other party – like discovery, jury decisions, punitive damages, etc).'

A stumbling-block, currently besetting England, is a Court of Appeal decision precluding selection of arbitrators by reference to their religious or national affiliation: but it is hoped (at the time of writing, January 2011) that the UK Supreme Court might soon straighten out this problem—it has given permission for this matter to be heard on final appeal (the appeal is scheduled for 6 and 7 April 2011, and judgments are expected before the Court's summer vacation).[47]

(5) CONFIDENTIALITY

Commentators unite in naming this as one of the leading attractions.

English law[48] (in line with many other systems) has developed quite a mature appreciation of the need for confidentiality and of the competing need for

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[47] Hogan Lovells (London), noting *Jivraj v Hashwani* [2010] EWCA Civ 712: `this decision has raised some new questions regarding whether parties may restrict the appointment of arbitrators based on their religious qualifications or affiliations, or their nationality. The Court of Appeal held that arbitrators' work falls within The Employment Equality (Religion or Belief) Regulations 2003 (the "Regulations") definition of "employment". The requirement under the arbitration agreement in question that the arbitrator not be appointed, or "employed", based on religious qualifications, contravened the Regulations. Since this requirement was an integral part of the agreement to arbitrate, it could not be severed from the rest of the agreement, and therefore the entire arbitration agreement was void. In light of *Jivraj*, a party resisting arbitration may seek to argue that an arbitration agreement containing a requirement (whether on the face of the arbitration agreement or by incorporating institutional rules which contain such a requirement) that the sole or presiding arbitrator be of a nationality other than that of any of the arbitrating parties contravenes the Race Relations Act 1976 or the Equality Act 2010; that the requirement cannot be severed from the rest of the arbitration agreement; and that the entire arbitration agreement is therefore invalid. This argument could be raised during the course of the arbitration, and/or at the enforcement stage.'

[48] Redfern and Hunter, *International Commercial Arbitration* (5th edn, Oxford University Press, 2009), 2.145 ff, noting *Esso Australia Resources Ltd v Plowman* (1995) 193 CLR 10, H Ct Aust (criticised P Neill, `Confidentiality in Arbitration' (1996) 12 Arb Int 287); *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662; on US decisions, Redfern & Hunter, ibid at 2.155; on Swedish law, ibid, 2.162; French law, ibid, 2.164; ICSID decisions, ibid, 2.167 ff; World Intellectual Property Organization decisions, ibid, 2.172 to 2.174; Spanish legislation, ibid, 2.175. Lawrence Collins LJ, in *Michael Wilson & Partners Ltd v Emmott* [2008] EWCA Civ 184; [2008] Bus LR 1361, at [74], cited these foreign cases: `In *United States v Panhandle Eastern Corpn* 1988 US Dist Lexiz 1177 it was held, in a civil action by the US

measured and controlled exceptions, for example, where foreign courts might otherwise be misled into reaching inconsistent decisions in parallel and related litigation (see the discussion by Lawrence Collins LJ (now Lord Collins) in 2008;[49] see also discussion by Nicholas Pengelley, Canada).[50]

Some fear that arbitral awards of note, made by distinguished panels and concerning interesting aspects of commercial law, might perpetually escape public attention[51] (but for a response to this see IV(1) below). On one occasion

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Federal Maritime Administration, that the defendant was not entitled to withhold from discovery documents generated in a Swiss ICC arbitration. One of the grounds of the decision was that the defendant had not shown that the effect of the ICC Rules was to impose an obligation of confidentiality: see also *Caringal v Karteria Shipping Ltd* 2001 US Dist Lexis 1312; *Contship Containerlines Ltd v PPG Industries, Inc* 2003 US Dist Lexis 6857 and *Lawrence E Jaffe Pension Plan v Household International, Inc* 2004 US Dist Lexis 16174.' *ICC Commission on Arbitration, Forum on ICC Rules /Court: Report on Confidentiality as a Purported Obligation of the Parties in Arbitration* (2002); Fouchard, Gaillard, Goldman, *International Commercial Arbitration* (1999), para 1412; Lew, Mistelis & Kröll, *Comparative International Commercial Arbitration* (2003), paras 24–99 ff; for other references, Redfern and Hunter, *International Commercial Arbitration* (5th edn, Oxford University Press, 2009), 2.147, 2.148. In *Michael Wilson & Partners Ltd v Emmott* [2008] EWCA Civ 184; [2008] Bus LR 1361; [2008] 1 Lloyd's Rep 616, Lawrence Collins LJ at [64], states: `The privacy of arbitration is almost universally recognised by institutional rules. Thus the privacy of the hearings is provided for in article 19(4) of the Rules of London Court of International Arbitration ("LCIA"); article 21(3) of the Rules of the Court of Arbitration of the International Chamber of Commerce (" ICC"); article 53(c) of the arbitration rules of the World Intellectual Property Organisation (" WIPO"); and article 25(4) of the UNCITRAL Rules.'

[49] In *Michael Wilson & Partners Ltd v Emmott* [2008] EWCA Civ 184; [2008] Bus LR 1361; [2008] 1 Lloyd's Rep 616, at [107]: `the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.' Adding, at [111]: `The interests of justice are not confined to the interests of justice in England. The international dimension of the present case demands a broader view.' And at [101]: `disclosure' is `permissible when, and to the extent to which, it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by that third party. It would be this exception which would apply where insurers have to be informed about the details of arbitral proceedings…'

[50] Pengelley (Canada): `One decision, of a lower level Ontario court, affirmed that, while confidentiality and privacy are hallmarks of alternative dispute resolution generally, they will likely to give way to Canadian principles of openness in court proceedings if parties move into litigation, and seek the support of the courts with respect to interim orders of protection, or challenge an award. Although, in certain circumstances, Canadian courts will grant "sealing orders", and one was sought in this case, Farley J declined to grant it.'

an arbitration award concerning a controversial development in English contract law was reported without the names of the parties. It was then possible for this award to be absorbed into the scholarly literature.[52]

(6) FINALITY

Commentators emphasised the perceived advantage of finality, and in civil law systems the considerable benefit of avoiding a slow progression through the various tiers of appeal. The general approach is that awards cannot be judicially annulled on the merits, whether by reference to findings of fact or points of law.

In England (and Australia, see below), however, there is some, but in fact highly limited, scope to obtain the High Court's permission to hear an appeal on a point of *English* law contained within the award.[53] But the High Court is slow to grant such permission.[54] Slaughter and May (London) comment:

> *`The Arbitration Act 1996 provides limited bases for an appeal against an arbitral award. England is slightly unusual in allowing a substantive appeal on a point of law, although such appeals are subject to a leave requirement and then allowed only in very limited circumstances. The majority of such appeals involve maritime disputes and fewer than 10% succeed. In addition, this right*

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[51] Moore (England), in field of commercial law, notably shipping.

[52] eg, Goff and Jones, *The Law of Restitution* (7th edn, London, 2007), considering *Ab Corpn v CD Corpn (The `Sine Nomine')* award of 19 November 2001; also noted J Beatson (2006) 118 *Law Quarterly Review* 377.

[53] s 69(2)(3) Arbitration Act 1996 (England and Wales); *`Leave to appeal shall be given only if the court is satisfied—(a) that the determination of the question will substantially affect the rights of one or more of the parties, (b) that the question is one which the tribunal was asked to determine, (c) that, on the basis of the findings of fact in the award—(i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.'* There are many cases on this provision, for example, Flaux J in *ASM Shipping Ltd of India v TTMI Ltd of England, (`The Amer Energy')* [2009] 1 Lloyd's Rep 293, at [17], [18] to [19].

[54] Report by VV Veeder and A Sander (2009) notes that the Commercial Court, in London, considered 36 applications in 2006, and granted leave in 9; in 2007, 58, leave granted in 13; in 2008, 57, leave granted in 14; disclosing an average of 50 a year, with leave granted in 12 (noted M O'Reilly, `Provisions on Costs and Appeals: An Assessment from an International Perspective', paper delivered at the British Institute of International and Comparative Law conference, London, February 2010).

of appeal can be excluded by the parties and the default position under the LCIA Rules is that it is excluded.'

Andrew Cannon (Australia) reports that the New South Wales legislation has adopted the same approach.[55] In England a 2006 report states that a majority of respondents considered that appeals on points of English law should be retained.[56] The same report also rejected the proposition that the restrictive criteria for permission to appeal might be 'starving English Contract Law of nourishment' and 'hindering its development.'[57] It is possible for parties to English arbitration, by very precise wording,[58] to stipulate that there will not be any recourse to such an appeal.

(7) ENFORCEABILITY

The main point, examined in detail at X(1) below, is that over 140 nations

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[55] Cannon (Australia), noting s 34A(2) Commercial Arbitration Act 2010 (NSW).

[56] 'Report (2006) on the Arbitration Act 1996', at [66] to [69]. The report is accessible at www.idrc.co.uk/aa96survey/Report_on_Arbitration_Act_1996.pdf.

[57] 'Report (2006) on the Arbitration Act 1996', ibid, at [70] to [75].

[58] Gloster J in *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm) held that the formula `final, conclusive and binding', contained in the arbitration clause, although clearly intended to bestow some form of finality on an award, did not render an arbitration award secure from appeal to the High Court on a point of law. Instead the words `final, conclusive and binding' merely indicated that the award would be final and binding as a matter of *res judicata*: that is, findings of fact are binding, with the result that there should be no further litigation on the same factual matters between the same parties. This still leaves the door open to the award being subject to appeal to the High Court on a point of law (if permission to appeal to the High Court can be obtained from a judge under section 69(2)(3), Arbitration Act 1996). To exclude this possibility of appeal on a point of English law, it would be necessary explicitly to state that the award would not be subject to appeal or other recourse. Thus the rules of the London Court of International Arbitration (LCIA), Article 26.9, provide: `All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27 [which concerns correction of awards by the arbitral tribunal on request by a party or on the initiative of the tribunal]; and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.' Similarly, the ICC (1998) rules (International Chamber of Commerce), Article 28.6, provide: `Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their rights to any form of recourse insofar as such waiver can validly be made.

are party to the New York Convention (1958), which facilitates relatively quick and straightforward enforcement of foreign awards. Indeed sometimes arbitration awards are the only mechanism for achieving foreign enforcement, as Japanese commentators (Hayakawa and Tamaruya) have noted:

> *`Foreign arbitral awards can be more readily recognised and enforced than court judgments issued in the same country. For example, while a judgment by the court in China cannot be recognised or enforced in Japan (and vice versa) because there is no bilateral treaty for judgment enforcement between China and Japan, an arbitral award issued in China (by the China International Economic and Trade Arbitration Commission (CIETAC), for example) can be recognised and enforced in Japan (and vice versa) because both countries are signatory to the New York Convention.'*

There is a general perception that arbitration awards are more readily enforced in foreign systems than court judgments.

But this is not invariably so, as is evident from the recent refusal in London to enforce a Paris award: *Dallah Real Estate & Tourism Holding Co v Pakistan* (2010).[59] In that case the UK Supreme Court held that a Paris award could not be recognized in England, under the New York Convention (1958). In its view, the French arbitration tribunal had incorrectly determined that the Pakistan Government was a party to the relevant arbitration agreement. All three levels of the English court in this litigation (Commercial Court, Court of Appeal, and UK Supreme Court) approached this matter *de novo*. They held that the Paris tribunal had failed to apply French law to determine whether the Pakistan Government was a party to the arbitration agreement (French law being the applicable law to the construction of the arbitration agreement, in default of party choice of another system).

It is right that there should be opportunity for such a `final check' before the relevant enforcing court authorizes enforcement against the award-debtor's assets. But it is somewhat embarrassing that a French court (Paris Cour d'appel, 2011) has recently reached the opposite conclusion: that this award

[59] [2010] UKSC 46; [2010] 3 WLR 1472.

was satisfactory, according to French arbitration principles.[60]

This French judicial decision (Paris Cour d'appel, 2011) was made pursuant to Article 1502(1) of the French Code of Civil Procedure, enabling the court to refuse to enforce an award *`if the arbitrator has ruled upon the matter without an arbitration agreement or based on a void and lapsed agreement'*. It has also been suggested that the French court's perspective involved posing different criteria (independent of French national law) compared with the criteria adopted by the English courts when purporting to apply French law to the relevant arbitration agreement.[61] The Paris Cour d'appel decision in the *Dallah* case (2011) follows the *Dalico* doctrine[62] which involves a loosening of conflicts rules in the case of international arbitration. The French court then focused on the parties' dealings between the parties. It noted that the Pakistan Government negotiated the contract, and that the Trust created by the Government was merely a signatory. The Paris Court also noted that the Government was involved in the performance of the contract, and that it effectively controlled the same transaction's termination. It concluded that the Trust was `purely formal' and that the Government was the true Pakistani party to the transaction.

By contrast the English courts had given very considerable weight to the legal separateness of the Trust. The English courts emphasised that the arbitration

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[60] *Gouvernement du Pakistan v. Société Dallah Real Estate & Tourism Holding Co, Cour d'appel de Paris, Pôle 1 – Ch. 1, n° 09/28533 (17 February 2011) (www.practicallaw.com/8-505-0043).*

On which see both the next note and the comment by White & Case: http://www.whitecase.com/insight-03022011/

[61] James Clark, http://www.practicallaw.com/4-504-9971?q=&qp=&qo=&qe=: `By contrast, the French court did not focus on French law principles and proceeded to a factual enquiry to determine whether the parties had actually consented to go to arbitration. This very practical approach is consistent with French case law. This solution is inspired by the recognised desire of French courts to develop substantive rules for international arbitration that ensure that the outcome of a dispute does not depend on the particularities of a national law. This solution is also consistent with French case law on the extension of arbitration agreements to parties that are non-signatories but have participated in its negotiation and performance.'

[62] Cour de Cassation, First Civil Chamber, *Municipalité de Khoms El Mergeb v. Dalico*, 20 December 1993, JDI 1994, 432, note E. Gaillard.

agreement had not merely been signed by the Trust, that it made no mention of the Government as an additional party, and that there was no true consensus between the members of this triangle that the Government should be treated as a party to the arbitration agreement.

How does this difference of analysis and result leave the relevant award? If a third jurisdiction were to be asked to enforce the Dallah award (made by the arbitration tribunal in Paris), it seems highly likely that it would defer to the French court's decision, rather than be guided by the UK Supreme Court's conflicting decision. This is because (a) the French court is situated in the seat of the relevant arbitration and (b) it seems likely that the French court's flexible and transnationally orientated reasoning in this matter would be regarded as more attractive.

At any rate, the *Dallah* saga reveals that the New York Convention (1958) is not always the fast-route to cross-border enforcement that enthusiasts for international commercial arbitration had expected.

(8) LOW COST

Arbitration is not necessarily cheap. It might even be fallacious to see this as an advantage (for this reason, see IV (2) below). As Herbert Smith (London) explain, although commercial arbitration can be cheaper in some respects, the increasing sophistication of many types of arbitration can lead to quite an expensive style of arbitral proceedings.[63]

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[63] Herbert Smith (London): `Traditionally, arbitration has been viewed as a cheaper and faster dispute resolution process as compared to court litigation. Whilst this will often still be the case (particularly if appeals against first instance judgments are taken into account), with the increasing sophistication of the process and the parties and lawyers (and experts) involved, cost and time savings vary. Moreover, the types of disputes submitted to arbitration are becoming increasingly complex, and as such, a more thorough (and therefore costly) investigation of the issues and law involved is often necessary. Of particular relevance in considering cost / time issues: (i) the process of appointment of the tribunal can cause a delay at the start of the arbitration process, which does not apply in litigation; (ii) the length of hearings in arbitration proceedings are usually much shorter (in like cases) than hearings in civil litigation; the normal length of a hearing for an arbitration proceeding (in a fairly complex dispute) will be 1 to 2 weeks; (iii) the document production phase of arbitration is usually less demanding (in terms of both time and cost) than the disclosure process in most common law jurisdictions, but conversely may be more onerous than that in some civil law jurisdictions; and (iv) in arbitration, the parties pay the arbitrator's fees and any institutional costs (the arbitral costs), whereas in court proceedings the majority

(9) LESS AGGRESSIVE NATURE OF DISPUTE RESOLUTION

Viktória Harsági (Hungary) and Laura Ervo comment that arbitration is relatively less formal in atmosphere than court obligation. Parties sense that they will feel less `exposed' and `intimidated'.

IV
PROBLEMS

(1) SECRECY

Some fear that legal decisions of note might be lost from public view.[64] But, as Carsten Kern (Germany) suggests, there is scope to report these decisions in redacted form so as to preclude identification of the parties and their specific circumstances.

> *`A disadvantage of confidentiality is of course the lack of precedents which can be problematic if disputes in certain areas of law are mainly decided by arbitral tribunals. A possible solution with specific regard to German civil practice: court judgments are as a matter of practice published without disclosing the identity of the parties to the underlying dispute. Law reports therefore do not disclose the names and addresses of the parties or other material which would tend to enable them to be identified – could be a solution for arbitration which strikes a balance between confidentiality and the need for precedents***.'**

As noted above, anonymous reporting of one English arbitration award, concerning a controversial development in English contract law, enabled leading textbooks to incorporate the reasoning into their account of the relevant topic.[65]

Elena Zucconi (Italy) notes that enforcement proceedings might later `lift the lid' on confidentiality, because such judicial proceedings occur in public. Within Common Law jurisdictions it might be possible for the court to retain

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of the cost is met out of public funds. The arbitral costs however often form a relatively small proportion of the overall cost of a matter.'

[64] Moore (England), in field of commercial law, notably shipping.

[65] eg Goff and Jones, *The Law of Restitution* (7th edn, 2007), considering *Ab Corpn v CD Corpn (The `Sine Nomine')* award of 19 November 2001; also noted J Beatson (2006) 118 *Law Quarterly Review* 377.

confidentiality by making a special protective order, as has been suggested in Canada (Nicholas Pengelley).[66]

(2) HIGH COST

Arbitration normally concludes without further proceedings, and thus does not normally require the duplication of judicial examination, or even triplication, caused by successive appeals through the court system. In principle, `one-stop' arbitration should produce a significant economy. However, the overall impression is that arbitration is not perceived as cheaper than court litigation, except perhaps in very big cases (as suggested by Hogan Lovells, London).

In general, David Steward (Ince & Co, England) notes:

> *`Arbitrators must be paid fees. In addition, costs may be incurred in hiring a venue, providing food and drink for hearings, and in the fees of an institution that administers the arbitration. These can combine to make a large arbitration significantly more costly than court proceedings***.'**

Laura Ervo (Finland) describes arbitration expenses as `huge'. Luca Radicati di Brozolo (Italy) and Calavros and Babiniotis (Greece) also note the high cost of hiring both arbitrators and counsel. Cahali, Amaral, Wambier (Brazil) and Hayakawa and Tamaruya (Japan) state that arbitration costs are higher than the costs of ordinary court litigation. Luca Passanante (Italy) concludes that arbitration is not attractive to litigants unless they are rich.

Carsten Kern (Germany) notes that the efficient and cost-effective nature of German litigation renders arbitration unattractive for lower value claims. On the other hand, Calavros and Babiniotis (Greece) suggest that arbitration is superior to court adjudication, because the Greek courts are run on restricted

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[66] Pengelley (Canada): `a lower level Ontario court, affirmed that, while confidentiality and privacy are hallmarks of alternative dispute resolution generally, they will likely to give way to Canadian principles of openness in court proceedings if parties move into litigation, and seek the support of the courts with respect to interim orders of protection, or challenge an award. Although, in certain circumstances, Canadian courts will grant "sealing orders", and one was sought in this case, Farley J declined to grant it: *887574 Ontario Inc v Pizza Pizza* [1994] OJ No 3112. Further to this, George M Vlavianos, `Seeking Interim Measures from a Canadian Court in International Commercial Arbitration: Putting Confidentiality at Risk' Bennett Jones LLP, International Commercial Arbitration Update (http://bennettjones.com/Images/Guides/external8969.pdf)

budgets and are under great pressure. The parallel of the choice between private medical care and a public health service comes to mind. People are prepared to pay for extras (the `trimmings'), for privacy, and for personal service.

(3) COMPLEXITY

Many commentators noted[67] a tendency for arbitration proceedings to `mimic' court procedure, whether as a result of the tribunal's influence or the parties' representatives, or both. One reason is simply procedural habit (shared by counsel and local arbitrators). Another is that the arbitral tribunal might fear that deviation from the procedural norms of the local court process might expose them to criticism, or even that their award might become vulnerable to annulment by supervisory courts. A further factor is that arbitrators might be anxious that bold procedural experimentation might reduce their chances of being hired again by those arbitrating parties (and in practice by the law firms advising those parties). These factors can, of course, combine, as Carlos Esplugues (Spain) notes.[68]

Elena Zucconi (Italy) notes the great potential for procedural streamlining offered by arbitration, notably concentration of hearings, and use of electronic communications for short matters. Linklaters (London) suggest that `where parties can agree to a truncated procedure such as reduced disclosure and a cap on the number of experts', this can lead to `reduced time and costs', compared with High Court litigation. Conversely, Françoise Vidts and Didier

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[67] Harsági (Hungary); Hayakawa and Tamaruya (Japan); Hinshaw (USA); Radicati di Brozolo (Italy); Rycroft (South Africa); Steward (Ince & Co, London, but also Singapore and Hong Kong); Uzelac (Croatia); Zucconi (Italy).

[68] Esplugues (Spain): `Despite the understanding of arbitration as a legal reality, different from the judicial one, parties seem to be in many cases not fully aware of that fact, and they tend to project in arbitration many court's trends. For instance, references to the Civil Procedure Code instead of to the Arbitration Act ("AA") or the Regulation of the particular arbitration institution in charge of the arbitration are regularly made by the parties and their lawyers during the arbitration proceeding. Besides, a more negative attitude in favour of reproducing some obstructive court's practices in the arbitration realm is broadening very fast. The aim of this blocking attitude (mainly undertaken by the party expecting to lose the case!) is to lengthen the duration of the proceeding as much as possible thus preventing the arbitrators from rendering an award within the compulsory period of 6 months since the commencement of the arbitration procedure. The overcoming by the arbitrator of this term of 6 months set forth by Article 37(2) AA implies that no valid arbitration award exists.'

Matray (Belgium) lament that arbitrators are reluctant to appoint independent experts and that instead they too often acquiesce in the proposed system of party-appointed rival experts. Vidts and Matray suggest that the latter style of receiving expert opinion can cause delay.

Natalie Moore (England) says that `document-only' arbitration, although not unknown, is problematic, at least from counsel's perspective:

> *`unless my client has a very good case on the merits, I would be reluctant to recommend a documents only arbitration if the case is of any value. In my experience, it is often much better to have a short hearing so that you can gauge the Tribunal's reaction to the evidence and your submissions and tailor them accordingly.'*

Hogan Lovells (London) also addressed the complaint `that the extensive and complicated document production and discovery procedures of many common law jurisdictions are said to be creeping in and complicating the arbitral procedure.' On this they remarked:

> *`Whether or not this is the case will mostly depend on the legal background of the arbitrations and counsel involved, but is not as pervasive as may be believed. In practice most international arbitrations incorporate or make use of the "IBA Rules on the Taking of Evidence in International Arbitration", which does not typically result in extensive discovery and is considered limiting as compared to litigation.'*

Claudia Perri (Brazil) reports that Brazilian arbitration can induce parties and lawyers to act in a more co-operative manner than traditionally hostile court litigation, and that arbitration might thus be a more promising arena within which to explore opportunities for settlement.[69]

(4) VARIABLE QUALITY

[69] Perri (Brazil): `Experience has shown another advantage of arbitration: more interaction between the parties, the attorneys and the arbitrators involved in the case, which almost all the time helps prevent the well-known postponing maneuvers available under traditional litigation (and which are common in Brazil).
In addition, such interaction is positive in that it generates, most of the times, more chances of reaching amicable solutions upon agreement between the parties (settlement) which may meet their needs in a more expeditious manner.'

Even a talented arbitrator can have an `off' day or two when he or she is `below par'. The author has received anecdotal evidence of patchy performance even in some of the prestigious centres. One particular hazard is that an arbitrator becomes very popular within the market and then over-extends himself by taking on too many appointments. This can lead to delays or even to erratic conduct.

More generally, Slaughter and May (London) state: `we consider there to be a greater degree of uncertainty in the result of an arbitration than would be the case in the Commercial Court.'

Quality control is hard to maintain if the national arbitration market is large and relatively young. Institutional support might then be weak or inconsistent, as Cahali, Amaral, Wambier (Brazil) report:

> *`At present, the main concern regarding the system of [Brazilian] arbitration for dispute resolution is the uncontrolled proliferation of arbitration institutions whose integrity is, at times, questionable, both due to their structure and to the arbitrators on their staff. This could lead to dubious proceedings. Thus, the erroneous choice of an arbitration institution could pose a problem for a party, or even for the reputation of the institute of arbitration, which will be blemished by the misconduct of unethical tribunals.'*

(5) PROCEDURAL SHORTCOMINGS

Linklaters (London) and Slaughter and May (London) lamented the absence of summary or default procedures in arbitration. Natalie Moore (London) comments on the regrettable lack of case management, and on the rather chaotic processing of interim applications. Slaughter and May (London) also comment on the reluctance of arbitration tribunals to award security for costs.[70]

[70] Slaughter and May (London): ` Arbitration is also likely to put a defendant in a worse position in relation to costs. Whilst we have succeeded in obtaining a security for costs in arbitration, our experience is that, partly by virtue of the fact that a party being from another jurisdiction may not be the basis for the award of security for costs and partly due to the fact that tribunals will frequently be composed of individuals from jurisdictions where security for costs is not a feature of litigation, awards tend to be significantly smaller than we might have expected in litigation.'

However, in Japan, the arbitration legislation has incorporated case management, in the interest of expedition and economy, as Hayakawa and Tamaruya explain:

> *`Since the late 1990s, significant changes have taken place in the arbitral practices to emphasise the expedition of arbitral proceedings. The change has been attributed to an increasing number of experienced international arbitrators being appointed from outside Japan and the growing receptivity to such ideas on the part of Japanese arbitrators and counsels. The explicit authorisation of case management in the current Arbitration Law (introduced in 2004) is in line with such reform. Strong emphasis on case management has replaced the traditional feature of Japanese arbitration proceeding, i.e., slow definition of issues and protracted scheduling.'*

It is interesting that Haroshi Tega (Japan) comments that some Japanese lawyers resent the increased `strength' of arbitrators, and that they prefer the opportunity for greater party influence within ordinary court proceedings. Françoise Vidts and Didier Matray (Belgium) recommend selection of a chairman who is `pro-active' and likely to prevent abuse of the process by the parties.

As for multi-party disputes, many commentators accepted that this is a weak link in the arbitral system, because arbitral tribunals lack the power to require a non-party to accede and become privy to the process (`compulsory joinder'). However, Françoise Vidts and Didier Matray (Belgium) note that compulsory joinder is possible under Belgian rules if the CEPANI[71] body's rules have been chosen, and if the relevant disputes are closely related or indivisible. Furthermore, Alan Rycroft reports an exception in labour arbitration within South Africa.[72] And Hogan Lovells (London) commented positively on the scope for procedural flexibility when dealing with the problem of multi-party disputes.[73]

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[71] CEPANI (le Centre belge d'arbitrage et de médiation).

[72] Rycroft (South Africa): `In domestic labour arbitration a norm of joinder of parties with a direct and substantial interest in the outcome has taken root to ensure that such third parties are bound by the arbitration award.'

[73] Hogan Lovells (London): `use of an arbitral institution or appointing authority to decide the selection and appointment of the tribunal members is one way to address the procedural difficulties of multi-party disputes and equitable formation of the tribunal. Additionally, the tribunal itself must take

Finally, Françoise Vidts and Didier Matray (Belgium) note that the topic of costs is a grey area. They caution against mechanical application of the `winner takes all' approach, and recommend a more nuanced assessment of the overall level of victory achieved by the `winner' (on the latter approach in English civil proceedings, see the author's treatment elsewhere).[74]

V
AUTONOMY OF THE ARBITRAL TRIBUNAL

(1) *KOMPETENZ-KOMPETENZ* PRINCIPLE

The principle that arbitrators are competent to decide whether they have jurisdiction (and, if so, to what extent) appears to be accepted widely in modern systems (see, notably, UNCITRAL Model Law, Article 16(1)).

Hogan Lovells (England) supply details of the English and ICC approach.[75] As Calavros and Babiniotis (Greece) note, this combines with the

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advantage of the flexibility of arbitration and work with the parties themselves to tailor the arbitral proceedings to allow each party to have an equal say in the dispute. Creating the arbitral procedure to address the distinct role and associated claims of each party should offset any of the issues created by the multi-party imbalance. Another method to deal with multi-party and multiple disputes is to have arbitrations run concurrently. This allows the parties to employ the arbitration agreement as they have set out between each other in their contract while also taking into consideration the other related disputes that may have arisen with related parties and contacts. Where the arbitrations run concurrently it is typical to have arbitral tribunals composed of the same members and have the parties agree to similar or parallel procedural timetables. The parties may also enter into confidentiality and disclosure agreements that allow the parties to disclose to submissions and evidence from one arbitration to those taking part in the "other" concurrent arbitration.'

[74] Neil Andrews, *The Modern Civil Process* (Mohr & Siebeck, Tübingen, Germany, 2008),9.09, noting the issue-by-issue approach adopted by Lord Woolf MR in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, 1522-3, CA, who said: 'too robust an application of the "follow the event principle" encourages litigants to increase the costs of litigation'; and he suggested 'if you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.'

[75] `In the English Arbitration Act 1996 (hereafter the "1996 Act") the competence of an arbitral tribunal to rule on its own jurisdiction is expressly established in Section 30: (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction that is, as to – (a) Whether there is a valid arbitration agreement; (b) Whether the tribunal is properly constituted; and (c) What matters have been submitted to arbitration in accordance with the arbitration agreement.' In terms of institutional rules, the Rules of the London Court of International Arbitration (hereinafter the "LCIA") provide: `Article 23 Jurisdiction of the Arbitral Tribunal 23.1 The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or

`separability' principle (see V(2) below). These points are juxtaposed in German law, as noted by Carsten Kern,[76] reflecting the presentation in the UNCITRAL Model Law, Article 16(1).

The *kompetenz-kompetenz* and `separability' ideas enable arbitrators to proceed without the delay, vexation, and frustration of applications (whether or not made in good faith and on objectively reasonable grounds) to state courts, with the possibility of further delay consequent on appeal(s).

However, determining whether the arbitral tribunal possesses jurisdiction over the substantive matter is often itself quite a `meaty' issue, which might well consume significant time and expense. It might, of course, result in a negative answer from one or more prospective arbitral tribunals, and large costs might be incurred when petitioning successive arbitral tribunals in different jurisdictions. In Croatia, Alan Uzelac reports that an arbitral `decision' that the tribunal lacks jurisdiction is not subject to court review, both because it is not regarded as a species of an `award', and because it is considered that the arbitrators should have a right to refuse to arbitrateIn Croatia

In one instance, reported as *C v RHL* (2005), a London Commercial Court judge recommended that the parties to a disputed and ostensible arbitration clause should resort to mediation, so that they might end extensive jurisdictional squabbling, already laboriously played out before the Russian courts[77] (see also Section XI (2), below). Whether this was successful is not

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effectiveness of the Arbitration Agreement.' The Rules of the International Chamber of Commerce (hereinafter the "ICC Rules") provide authority not only for the tribunal to rule on its own jurisdiction but also for the ICC Court to first satisfy itself of the prima facie existence of such an agreement as to jurisdiction (see Article 6.2 of the ICC Rules). While this express administrative review is unique to the ICC Rules, other arbitral institutions, such as the LCIA, employ a similar prima facie administrative review process when it first receives a request for arbitration.'

[76] `Kompetenz-Kompetenz': The arbitral tribunal has the competence to rule on its own jurisdiction (§ 1040 (1) ZPO: "The arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement.(…)"). If a party objects against the tribunal's decision on jurisdiction, the court finally decides the issue (cf. § 1040 (3) ZPO). 'Separability of the arbitration agreement': Cf. § 1040(1) ZPO providing that "(...) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract."

[77] *C v RHL* [2005] EWHC 873 (Comm), Colman J.

reported. The case is unusual because the Russian litigation had involved extensive jurisdictional wrangling between the parties. It is doubtful whether the High Court will generally order ADR in a straightforward case where the parties are pursuing English arbitration.

Recourse to national courts is possible to challenge such a jurisdictional decision, the arbitration tribunal's assertion of jurisdiction being seldom, if ever, final. The relevant determination can concern these matters: that the arbitration clause is valid; that the same clause nominates them to occupy the relevant `seat'; that the tribunal has been properly constituted; that the matter is appropriate for arbitration; and that the ostensible parties are valid parties within the terms of the arbitration clause, etc). As Bart Groen (Netherlands) neatly observes: `The question of jurisdiction...has to be answered according to the law, even if arbitrators have to decide the [substantive dispute] on the merits as *amiable compositeurs*.'

Furthermore, as a recent English decision illustrates, such an arbitral determination concerning jurisdiction can be re-opened in a foreign court when that court is petitioned, under the New York Convention (1958), to enforce the relevant award (the UK Supreme Court in *Dallah Real Estate & Tourism Holding Co v Pakistan* (2010)[78] held that a Paris award could not be recognized in England, under the New York Convention (1958), because the French arbitration tribunal had incorrectly determined that the Pakistan Government was a party to the relevant arbitration agreement). The foreign court does not purport to annul the relevant award, but it can refuse to accede to the petition to recognize or enforce the relevant award. In the *Dallah* case the negative response of the English courts caused the enforcing party to commence enforcement proceedings in France.

Art Hinshaw (USA) injects a welcome note of cynicism into this issue: `Just like courts, arbitrators have incentives to expand their jurisdiction. Unlike courts, arbitrators have a financial incentive to expand their jurisdiction.'

Similarly, David Steward (Ince & Co, England, and Singapore and Hong Kong) has some interesting observations:

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[78] [2010] UKSC 46; [2010] 3 WLR 1472.

> *`Our recent experience is that some clients and overseas lawyers are sceptical about the power of an arbitrator to determine his own jurisdiction, even though this is subject to review by the courts. To put it neutrally, some feel that, however properly the arbitrator may conduct himself, he may find it hard to resist the natural temptation to incline towards accepting jurisdiction, and that a court will be inclined to defer to his view. In Singapore, the SIAC Rules usefully provide for a separate committee to determine whether a valid arbitration agreement granting SIAC jurisdiction exists prior to the constitution of the tribunal if a challenge is made.'*

(2) `SEPARABILITY' OF THE ARBITRATION AGREEMENT

This involves rejection of the contention that the arbitration clause must be declared still-born because of the earlier demise of the mother (the main transaction). Instead, the arbitration clause (although physically often contained within the larger and principal transaction) has an independent and separate life, enabling the arbitral tribunal to pronounce on whether the main contract is non-existent, invalid, or unenforceable. The present principle is reflected in the UNCITRAL Model Law, Article 16.

Christian Koller notes[79] that this development occurred in Austria by virtue of judicial development. In England the change occurred by case law development,[80] and was ratified by statute (section 7, Arbitration Act 1996, England and Wales). The House of Lords has more recently embraced the idea with enthusiasm in *Fiona Trust and Holding Corporation v Privalov* (2007).[81]

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[79] `The Austrian legislator adopted Article 16 Model Law except for its formulation of the separability doctrine. It was argued that the separability presumption has already been acknowledged in legal literature and case law. The Austrian Supreme Court (hereinafter "OGH") held that challenges to the validity of the main contract, even based on a claim that it is void *ab initio*, do not as such affect the arbitration agreement (OGH 7 August 2007, 4 Ob 142/07x, RdW 2007/757). It was held that according to the parties' intention that the arbitration agreement remains valid in such cases. The same applies to cases of unilateral rescission, termination, and abrogation of a contract containing an arbitration agreement. However, in cases where the parties had terminated the main contract by mutual consent the OGH decided that the parties had (usually) intended to also terminate the arbitration agreement (OGH 5 February 2008, 10 Ob 120/07f, ecolex 2008/152).'

[80] Mustill and Boyd, *Commercial Arbitration: Companion Volume* (London, 2001), 266-7, noting especially *Harbour Assurance v Kansa* [1993] QB 701, CA; and The Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, 1996, at paras 43 ff (reprinted in Mustill & Boyd, ibid, Appendix 1).

In Japan Hiroshi Tega suggests that fraud or misrepresentation might render both the main contract and the arbitration clause invalid.

(3) NO APPEAL ON FACTUAL OR LEGAL MERITS OF THE SUBSTANTIVE DISPUTE

One of the advantages sought by potential arbitrating parties is that the tribunal's decision *on the substance of the dispute* will not be open to review on the factual or legal merits by a national court. The arbitral tribunal's sovereignty when making factual findings and applying the substantive law (or other norms) appears to be accepted in the systems surveyed, except that on matters of English law the High Court retains a `gate-house' power to grant permission to hear an appeal on an aspect of English law: see III(6) above for details.

Questions concerning the substance of the dispute are distinct from jurisdictional issues concerning the arbitrators' title to deal with this dispute, where judicial supervision is possible, either by annulment of the award or refusal to enforce an award. Review or annulment by national courts on narrow grounds (such as lack of jurisdiction, etc) is examined at IX(1), and the question of enforcement at X.

(4) ARBITRAL AUTONOMY IN GENERAL

The report by Hogan Lovells (London) contains a lucid analysis of this topic:[82]

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[81] [2007] UKHL 40; [2007] 4 All ER 951: notably Lord Hoffmann's speech at [17] to [19]; otherwise known as *Premium Nafta Products Ltd v Fili Shipping Co Ltd*. In this case Lord Hoffmann said: `Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged;' or ` if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement;' but not: `if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement;' nor, again as in the present case, if it can be shown that the main contract was procured by bribery and so is void or voidable: `that does not show that he was bribed to enter into the arbitration agreement' because `it would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been.'

[82] Hogan Lovells (London) continues: `The UNCITRAL Model Law on International Commercial Arbitration (hereinafter the "Model Law"), which forms the basis for many national arbitration laws, expressly recognises this balance in Article 5, which states: "In matters governed by this law, no court

> *`It is impossible for arbitration to distance itself completely from national courts because national courts alone have the police-power to enforce interim orders and awards. Nevertheless, the consensual nature of arbitration should result in national courts only playing a supportive role when an order or award needs to be enforced on a third-party to the arbitration or where a tribunal is in need of special power such as freezing assets. The interplay between the independence of arbitration and the supportive role of the courts should, ideally, achieve a balance which reinforces the attributes of arbitration. Achieving such a balance is however highly dependent on the sophistication and arbitration-friendly nature of the curial law at the seat of the arbitration (e.g. where the arbitration is said to take place, also known as the lex arbitri).'*

Arbitral autonomy might well be expressed as a presumption, and no more than this. This is because there are significant opportunities for courts to challenge arbitral conduct, or to support the conduct of arbitration. For this reason Hogan Lovells (London) rightly refer to the notion of an expedient

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shall intervene except so provided in this Law". Additionally, a significant part of the Model Law provides for a supportive role by the national courts:

(a) Article 11 provides a competent court may constitute an arbitral tribunal;

(b) Article 13 provides that a competent court may decide a challenge to an arbitration; and

(c) Article 16 provides that a party may appeal to the competent court against the decision of an arbitral tribunal on jurisdiction.

Hogan Lovells (London) continues: `The (English) Arbitration Act 1996 expresses the balance from the very beginning of the Act at Section 1(c):

1. The provisions of this Part are founded on the following principles, and
shall be construed accordingly -. . .(c) in matters governed by this Part the court should not intervene except as provided by this Part.

Section 44 of the 1996 Act further supports the arbitration-court balance, and provides:

(1) Unless otherwise agreed by the parties, the Court has for the purposes of and in relation to arbitral proceedings the same power of making orders about matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) These matters are:-

(a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

…

(e) the granting of an interim injunction or the appointment of a receiver.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively

. . . .

The balance between the tribunal and the national courts is particularly reflected in sub-section (5), where the court can only take action if and to the extent the tribunal or the arbitral institution cannot.'

balance between arbitral autonomy and judicial involvement and support. Canada also strongly recognises arbitral autonomy, as Nicholas Pengelley notes.[83]

VI
RELIANCE ON SUPPORT OF COURT SYSTEM
(1) APPOINTMENT OF ARBITRATORS

In the event of the parties not achieving a complete constitution of the tribunal (with or without the assistance of an arbitration chamber or institution), national courts are often empowered to cut the Gordian knot and make such an appointment themselves. Pereira and Talamini (Brazil), for example, provide details of the Brazilian statute relevant to this;[84] and Michele Lupoi and Caterina Arrigoni,[85] as well as Elena Zucconi explain the Italian regime.[86]

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[83] Pengelley (Canada): `The principle of non-interference by courts in arbitration is the norm in Canada and the decisions of arbitrators are accorded great deference. Challenges to arbitral awards are rarely successful in Canadian courts, and foreign arbitral awards are routinely enforced.'

[84] Pereira and Talamini (Brazil): `The Arbitration Act (Brazil) provides for a variety of situations in which a state court will be called upon to give support to the arbitration procedure: Article 7 – This provision creates a specific procedure for the definition of arbitration rules when the parties have agreed to arbitrate but have not established a submission agreement or referred to institutional rules to govern the arbitration. The state court will ultimately set the applicable rules in lieu of the parties. Article 11, sole paragraph – The state court may be requested to set the arbitrator's fees, if that is not provided for in the submission agreement or in the applicable institutional fees. Article 13, § 2 – When the party-appointed arbitrators, appointed in an even number, cannot reach an agreement on the appointment of an additional arbitrator, any of the parties may request that the state court makes such appointment. Evidently, this procedure is not applicable in institutional arbitrations in which the rules of the arbitration center already provide for a solution. Article 16, § 2 – If an arbitrator needs to be replaced for any reason and no solution is reached, any of the parties may resort to the state court, unless the parties have expressly agreed in the submission agreement or arbitration clause that no substitution of arbitrators would be admitted.'

[85] Lupoi and Arrigoni (Italy): `Article 810: the president of the Tribunale may appoint an arbitrator when the parties or the arbitrators fail to do so; Article 811: at certain conditions, the court may substitute an arbitrator; Article 814: the courts determines the arbitrators' compensation when the parties do not agree with the arbitrators request; Article 815: the court decides on a challenge against an arbitrator.

[86] Zucconi (Brazil): `The choice is generally left to the parties, but it is possible to ask for judicial support when: the parties have provided for an even number of arbitrators; the parties have not established or have not agreed upon the appointment procedures; or a party does not appoint her arbitrator in an established time-limit. Judicial support is also established when it is necessary to replace an arbitrator, only if the parties, or the third appointing party, have not provided; or if the arbitral agreement does not rule the case. '

(2) ANTI-SUIT REMEDIES

It must be admitted that on the topic of anti-suit relief the Common Law and civilian traditions are at odds.

Thus English law has employed anti-suit injunctions for many years, to the satisfaction of aggrieved parties to arbitration clauses. Canadian courts also grant anti-suit relief, as Nicholas Pengelley notes.[87]

In the House of Lords' reference to the European Court of Justice, in *Turner v Grovit* (2001),[88] Lord Hobhouse trenchantly analysed the English courts' power

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[87] Pengelley (Canada): `Two cases in the arbitration context where an anti-suit injunction was granted were both at what might be considered the extreme end of the scale. In *Dent Wizard International Corp v Brazeu*, an anti-suit injunction was granted to halt a Missouri arbitration, which had not commenced, where court proceedings were well underway in Ontario. And in *Lac D'Amiante du Canada Itee c. Lac du Amiante du Quebec Itee*, the Quebec court granted an anti-suit injunction to prevent a New York arbitration in circumstances where the parties had already been involved in a lengthy legal battle in Quebec and in fact had both renounced arbitration.

[88] [2001] UKHL 65; [2002] 1 WLR 107.

[23] The present type of restraining order is commonly referred to as an "anti-suit" injunction. This terminology is misleading since it fosters the impression that the order is addressed to and intended to bind another court. It suggests that the jurisdiction of the foreign court is in question and that the injunction is an order that the foreign court desist from exercising the jurisdiction given to it by its own domestic law. None of this is correct. When an English court makes a restraining order, it is making an order which is addressed only to a party which is before it. The order is not directed against the foreign court... The order binds only that party, in personam, and is effective only in so far as that party is amenable to the jurisdiction of the English courts so that the order can be enforced against him: "an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy"

[24]...since such an order indirectly affects the foreign court, the jurisdiction must be exercised with caution and only if the ends of justice so require...

[25] ...Under English law, a person has no right not to be sued in a particular forum, domestic or foreign, unless there is some specific factor which gives him that right. A contractual arbitration or exclusive jurisdiction clause will provide such a ground for seeking to invoke the right to enforce the clause. The applicant does not have to show that the contractual forum is more appropriate than any other; the parties' contractual agreement does that for him.

[26] The making of a restraining order does not depend upon denying, or pre-empting, the jurisdiction of the foreign court. ... Restraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. English law makes these distinctions. Indeed, the typical situation in which a restraining order is made is one where the foreign court has or is willing to assume jurisdiction; if this were not so, no restraining order would be necessary and none should be granted.

to grant an anti-suit injunction. Hogan Lovells (London) have encapsulated[89] the English practice. They also note the *West Tankers* case, namely *Allianz SpA etc v West Tankers, `The Front Comor'* (2009),[90] in which the European Court of Justice held that an order requiring a party to desist from bringing or pursuing civil proceedings in another Member State's court (within the European Union) runs counter to the principle of `mutual trust'. According to that principle, the EU Member State court seised with the substantive matter (in a civil or commercial matter falling within the Jurisdiction Regulation) must itself decide whether there is a valid arbitration clause covering the relevant dispute. If so, that court will decline jurisdiction (the case itself involves commencement of litigation in Italy, on which Luca Passanante's summary of Italian practice is helpful).[91] The matter can then proceed by

[89] Hogan Lovells (London): `Where international arbitration is chosen as the exclusive dispute resolution mechanism there is the expectation that this mechanism will be adhered to by the parties if and when a dispute arises. In the situation where a party has ignored this agreement and commences court proceedings, in breach of its negative obligation not to litigate the dispute, two remedies are typically available: (a) An application for a stay or dismissal of the proceedings in the court in which the proceedings have been commenced. (b) An application for an "anti-suit injunction" typically from the courts at the seat of the arbitration to restrain the breaching party continuing or commencing the court proceedings....Recently, however, the ability of EU Member States to issue "anti-suit injunctions" has been almost completely restricted by the Brussels Regulation, and in particular the ECJ's 2009 decision in *Allianz SpA v West Tankers Inc* (Case C-185/07). The Brussels Regulation is however only applicable to the EU Member States, and therefore anti-suit injunctions issued by the courts of EU Member States are still applicable in court proceedings that have been initiated outside the EU but have an effect within the EU.'

[90] *Allianz SpA etc v West Tankers, `The Front Comor'* (C-185/07) [2009] 1 AC 1138; [2009] 1 All ER (Comm) 435; [2009] 1 Lloyd's Rep. 413; [2009] 1 CLC 96; [2009] ILPr 20; *The Times*, 13 February, 2009; noted E Peel (2009) 125 LQR 365; For a stimulating and constructive analysis of this problem, Claudio Consolo, `Arbitration and EC Law: an Italian reaction to the Heidelberg Colloquium' (2009) *Lis Int'l* 102-108; H Seriki, `Declaratory relief and arbitration: the aftermath of *The Front Comor* ' (2010) 7 JBL 541-55 H Seriki, `Anti-Suit Injunctions, Arbitration and the ECJ: An Approach Too Far?' (2010) 7 JBL 24; Peter Schlosser, `Europe -- Is it Time to Reconsider the Arbitration Exception from the Brussels Regulation?' [2009] Int ALR 45; Alexis Mourre and Alexandre Vagenheim, `The Arbitration Exclusion in Regulation 44/2001 after West Tankers' [2009] Int ALR 75; Philip Clifford and Oliver Browne, `Lost at Sea or a Storm in a Tea Cup? Anti-suit Injunctions after West Tankers' [2009] Int ALR 19; Andrew Pullen, `The Future of International Arbitration in Europe: West Tankers and the EU Green Paper' [2009] Int ALR 56.

[91] Luca Passanante (Italy): `A party bound by an arbitration agreement cannot commence a Court proceeding to enforce the rights deferred to arbitrators. If the party does so, notwithstanding the arbitration clause, the defendant must raise the issue (*exceptio compromissi*) in the first pleading; if the defendant does not do that, the Court's jurisdiction cannot be challenged anymore. If the issue is raised promptly, the judge will investigate the validity of the arbitration agreement, and, if he thinks that the agreement is valid, will decline his jurisdiction and will normally order the losing party to pay the costs to the other party. This is the only sanction for the party that starts an illegitimate court proceeding

arbitration. At the time of writing (January, 2011), the European legislature's response[92] to this problem has yet to be finalised (and is subject to national consultation). The proposed change is as follows (draft Article 29, section 4, of the Jurisdiction Regulation):[93]

> *Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration or the arbitral tribunal is located have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement. This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes. Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.*

As Linklaters (London) notes, this relief remains available if the `offending' foreign proceedings are outside the EU judicial area.[94] Indeed the English Commercial Court in *Shashoua v Sharma* (2009)[95] and the English Court of Appeal in *Midgulf International Ltd v Groupe Chimiche Tunisien* (2010)[96] have confirmed that the European Court of Justice's decision in the *West Tankers*

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brought in violation of an agreement to conduct only an arbitration process. Anyway it should be pointed out that, according to the Italian law, the fact that the same suit is pending before a public Court does not deprive the arbitrators of jurisdiction, either on the basis of an arbitration clause already existent or on the basis of an arbitration agreement entered into by the parties after the birth of the dispute.'

[92] The position arising from the *West Tankers* case is currently under review by the European Commission: The EU Commission's *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* Brussels 14/12/2010 COM (2010) 748 Final 2010/0383 (COD).

[93] ibid.

[94] Linklaters (London): `In our experience the English court, and in particular the Commercial Court, is extremely responsive to applications for assistance in respect of arbitration. We have recently acted on two arbitrations which have involved applications for anti-suit injunctions (against non-EU domiciled counterparties) and have found the English court to be reasonable and measured in its approach to the issue.'

[95] [2009] EWHC 957, at [39].

[96] [2010] EWCA Civ 66; [2010] 1 CLC 113.

case (*Allianz SpA etc v West Tankers, `The Front Comor'* 2009)[97] does not preclude use of anti-suit injunctions against parties contemplating bringing, or already actively pursuing, proceedings in the courts of a country which is not a Member State of the European Community or of the Lugano system.

The English Court of Appeal's decision in *C v D* (2007) is an example of an injunction to prevent foreign proceedings and in support of a `London arbitration' clause.[98] The court held that an English anti-suit injunction was appropriate to restrain a party from bringing proceedings in New York designed to `second guess' the London arbitration award's application of New York insurance law (contained in a `partial award'). The English Court of Appeal held that it would be improper, and a `recipe for chaos', to allow this award to be challenged in New York proceedings. Instead the English arbitral award could only be challenged in accordance with the judicial remedies prescribed and regulated under the (restrictive) scheme contained in the English Arbitration Act 1996. In short, *`a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award'*.[99] In fact appeals from arbitration awards concerning questions of law contained in the award and concerning the substance of the dispute can only be brought in respect of suggested errors of *English* law (questions of foreign law, therefore, are not covered).[100]

However, there is an especially categorical rejection of anti-suit relief expressed by the Greek commentators:[101] Françoise Vidts and Didier Matray

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[97] *Allianz SpA etc v West Tankers* (C-185/07) [2009] 1 AC 1138; [2009] 1 All ER (Comm) 435; [2009] 1 Lloyd's Rep. 413; [2009] 1 CLC 96; [2009] ILPr 20; *The Times*, 13 February, 2009; noted E Peel (2009) 125 LQR 365.

[98] *C v D* [2007] EWCA Civ 1282; [2008] 1 Lloyd's Rep 239.

[99] ibid, at [17], *per* Longmore LJ.

[100] This is the result of the definition of `question of law' in s 82(1) Arbitration Act 1996; affecting scope of s 69, Arbitration Act 1996 (appeal to court on a `question of law arising out of an award made in the [arbitration] proceedings'; choice of substantive law covered by s 46(1), 1996 Act.

[101] Calavros and Babiniotis (Greece): `The procedural device of anti-suit injunction runs contrary to several fundamental public order rules of the Greek state. This has been the traditional view in literature and jurisprudence given the civil law origins of Greek legal order. The same holds true for any other functional equivalent to an anti-suit injunction, that is, any other order seeking to prevent any kind of court proceedings because they run afoul of an existing arbitration clause. The core justification behind this well established doctrine is that anti-suit injunctions violate the fundamental constitutional

(Belgium) and Roman Khodykin (Russia)[102] also report the absence of such relief.

In Austria, Christian Koller reports that there is no clear authority whether anti-suit relief is available.[103]

(3) PROTECTIVE RELIEF

Protective relief is examined in the literature on both commercial arbitration[104] and comparative procedure.[105] Such measures (sometimes described as

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right of access to justice. The defendant in a complaint brought in clear violation of an arbitration agreement must raise the relevant defence before the state court which in turn will refer the dispute to arbitration.'

[102] Khodykin (Russia): `Russian law does not impose any specific sanctions for commencement of court proceedings in apparent breach of an arbitration agreement.'

[103] Koller (Austria): `Under sec 584(1) ACCP a court seized with an action in a matter which is subject to arbitration shall dismiss the action, unless it establishes that "the arbitration agreement does not exist or is incapable of being performed". The Austrian Supreme Court has not yet decided whether Austrian courts may issue anti-suit injunctions in support of arbitration.'

[104] International commercial arbitration, A Redfern, 'Interim Measures' in LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Bern, 2004), at 217 ff and F Knoepfler 'Les Mésures Provisoires et l'Arbitrage' in L Cadiet, E Jeuland, T Clay (eds), *Médiation et Arbitrage: Alternative Dispute Resolution-Alternative a la justice ou justice alternative? Perspectives comparatives* (Lexis Nexis: Litec, Paris, 2005); for the position in international commercial arbitration, A Redfern, 'Interim Measures' in LW Newman and RD Hill (eds), op cit, 217-43; H van Houtte, 'Ten Reasons Against a Proposal for *Ex Parte* Interim Measures of Protection in Arbitration' (2004) 20 Arbitration International 85; A Baykitch and J Truong, 'Innovations in International Commercial Arbitration: Interim Measures a Way Forward or Back to the Future' (2005) 25 The Arbitrator and Mediator 95; and on the same context, M Mustill and S Boyd, *Commercial Arbitration: Companion Volume* (London, 2001), 314-6, 323-4, considering, respectively, ss 39, 44, Arbitration Act 1996; see also on those provisions the Departmental Advisory Committee (on the Arbitration legislation), on clauses 39, 44 (the report is reproduced in M Mustill and S Boyd, op cit); the arbitral tribunal has power under s 39, 1996 Act, but only if the parties consent, to make a 'provisional' decision on the substance of the case, for example for an interim payment; the High Court has power under s 44, 1996 Act, to award (*ex parte*) freezing relief or a search order in support of pending or contemplated arbitration proceedings, if the matter is 'urgent'; therefore, the arbitral tribunal itself lacks power to award *ex parte* freezing relief or search orders.

[105] Neil Andrews, 'Provisional and Protective Measures: Towards an Uniform Provisional Order' (2001) Uniform L Rev (Rev dr unif) vol VI 931; Stephen Goldstein, 'Revisiting Preliminary Relief in Light of the American Law Institute/UNIDROIT Principles and the New Israeli Rules' in Studia in honorem: Pelayia Yessiou-Faltsi (Athens, 2007) 273-96; N Trocker, `Provisional Remedies in Transnational Litigation: the Issue of Jurisdiction: a Comparative Outline' (2009) Int'l Lis 48-56; and 93-101.

`provisional measures', and sometimes as `interim' orders) are recognised within the American Law Institute/UNIDROIT's canon of 'transnational' principles of civil litigation.[106] Here we are primarily concerned with freezing orders for the preservation of assets (but another common type concerns preliminary steps to preserve important evidence).

In general, the arbitral tribunal's lack of *imperium* (coercive power) creates a gap which only the court's full panoply of powers can fill.

Of course, as Françoise Vidts and Didier Matray (Belgium) note, only the courts are available to provide protective relief if the arbitration has yet to commence.

In both Italian[107] and Finnish law only the courts enjoy authority to grant protective relief. As Laura Ervo (Finland) explains:

> *`The general court of law is the only forum competent to make a decision on provisional measures. The arbitration tribunal court cannot even decide the cancellation of the precautionary measures.[108] The arbitration court does not have jurisdiction even in the situations of a cancellation of a precautionary measure. If the main case is pending in the arbitration court, the same court has to make the decision on the cancellation, which decided the petition on the precautionary measure.'*[109]

Alan Uzelac (Croatia) suggests that even where arbitrators and courts have overlapping powers to issue preliminary forms of relief, the courts' possession of coercive authority is likely to be the telling point when making

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[106] American Law Institute/*UNIDROIT: Principles of Transnational Civil Procedure* (Cambridge University Press, 2006), principle 8; on which Stephen Goldstein, 'Revisiting Preliminary Relief in Light of the ALI/UNIDROIT Principles and the New Israeli Rules' in *Studia in honorem: Pelayia Yessiou-Faltsi* (Athens, 2007) 273.

[107] Article 818 of the Italian Code of Civil Procedure, as reported by Luca Radicati di Brozolo.

[108] E Havansi, *Uusi turvaamistoimilainsäädäntö selityksineen* (Lakimiesliiton Kustannus, Helsinki, 1993), 82, 84 and J Lappalainen, *Alioikeusuudistus* (1987 – 1993; 3rd ed, Lakimiesliiton Kustannus, Helsinki, 1994), 279.

[109] E Havansi, *Uusi turvaamistoimilainsäädäntö selityksineen* (Lakimiesliiton Kustannus, Helsinki, 1993), 156.

such an application.[110] Rolf Stürner (Germany) offers some interesting remarks on the interplay of court authority and arbitral competence in this regard.[111]

Amendments to the UNCITRAL Model Law (Chapter IVA added in 2006) are designed to enable arbitral tribunals to issue orders in this regard, including *ex parte* orders, known as `preliminary orders'. But it is unclear how effective this can be, for here the ultimate *imperium* of a court sanction is the only potent weapon. The Model Law contemplates that `interim measures' issued by arbitration tribunals,[112] which include measures designed to preserve assets,[113] will be enforced by `the competent court'[114] (although court-issued interim orders are also possible).[115] However, *ex parte* or `surprise' forms of protective relief, known as `preliminary orders' within the UNCITRAL system,[116] have a shelf-life of 20 days.[117] Thereafter, they can be adopted[118] or

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[110] Uzelac (Croatia) : `The request for preliminary measures at the competent court is not regarded to be incompatible with the arbitration agreement, and the right to turn to a court is not affected by the eventual possibility to ask the same preliminary measure from the arbitrators. Since courts have jurisdiction both regarding the issuance of the preliminary measures of all kinds (including orders for freezing assets), and have to be engaged for the enforcement in such matters, it is mostly the better option for the parties.'

[111] Stürner (Germany): `The arbitration panel is authorized to adopt provisional measures to secure the subject matter of controversy or to preserve the status quo. If enforcement of this arbitral order is required, a party may apply to the state appeals court for an appropriate court order (see §§ 1041, 1062(1)(3) ZPO). But, nevertheless, before and after commencement of the arbitral proceedings, parties may also apply to state courts for provisional measures under national procedural law (§ 1033 ZPO), which are per se enforceable without a special application for executability. It is seriously disputed whether the arbitration agreement can validly exclude protective measures by state courts to be rendered before commencement of arbitral proceedings. Protective measures by state courts before commencement of arbitral proceedings are an essential element of the human right to a fair and efficient court procedure. Therefore, such anticipatory waivers should be considered void. '

[112] UNCITRAL Model Law, Article 17(1).

[113] ibid, Article 17(2)(c).

[114] ibid, Article 17 H and Article17 I.

[115] ibid, Article 17 J.

[116] ibid, Chapter IV, section 2, Articles 17 B and 17 C.

[117] ibid, Article 17 C(4).

modified[119] or terminated[120] by the arbitration tribunal. If adopted, they will be clothed as an `interim measure',[121] although before such ratification occurs the respondent will have had an opportunity to challenge this.[122] But the rules specifically state[123] that `a preliminary order shall be binding on the parties but shall not be subject to enforcement by a court...Such a preliminary order does not constitute an award.' It follows that, under the UNCITRAL Model Law scheme, as just explained, there is no obvious source of coercive support for `preliminary orders' issued by arbitration tribunals before such orders are adopted by the arbitration tribunal as `interim measures' and then enforced by a `competent court'. As mentioned at the beginning of this sub-section, the arbitral tribunal's lack of *imperium* creates a gap which only the courts can fill.

Spanish arbitrators are responsive to the demand for protective relief, as Carlos Esplugues notes.[124] Roman Khodykin (Russia) also notes the willingness of Russian arbitral tribunals to issue protective relief.[125]

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[118] ibid Articles C(4), 17 D.

[119] ibid Articles C(4),.17 D.

[120] ibid, Article 17 D.

[121] ibid, Article 17 C(4).

[122] ibid, Article 17 C(2).

[123] ibid, Article 17 C(5).

[124] Esplugues (Spain): `Spanish arbitration practice shows a growing demand of provisional measures requested by the parties and a positive attitude of the arbitrator towards this demand.'

[125] Khodykin (Russia): `Under Article 17 of the ICAA (International Commercial Arbitration Court), arbitrators and arbitral tribunals are permitted to award preliminary relief in respect of the subject matter of a dispute in such form as they deem necessary. This means that arbitrators and arbitral tribunals may order, inter alia, that a party be prohibited from disposing of its assets or require a party to provide a bank guarantee. The ICAC can grant interim relief in the form of interim awards (§36 of the ICAC Rules). An arbitrator does not have to seek the assistance of a court to do so. Under the previous ICAC Rules not only the arbitral tribunal but also the President of the ICAC could order injunctive relief, meaning that measures of protection could be ordered before the arbitral tribunal was constituted. This is no longer the case.'

Common Law courts (with the exception of the USA, see next paragraph) are experienced in awarding freezing relief, in particular, on an *ex parte* basis, and even before the main proceedings (here contemplated arbitral proceedings) have begun. For reasons of space, reference is made to the mature English principles governing this matter.[126] Under English principles, the relief takes the form of an *in personam* order (i) primarily addressed to the respondent, but also (ii) indirectly constraining non-parties (notably the respondent's banks, once notified) who must henceforth refrain from acting inconsistently with the order. In either situation (i) or (ii), failure to comply might place the culprit in `contempt of court', and he might then be subject to punitive measures controlled by the (civil) court which issued the relevant order. However, under the Common Law model of freezing relief, the relevant assets remain unsecured, and are not (unlike the approach adopted by some non-Common Law systems) subject to prioritising attachment for the purpose of insolvency rules. By contrast, in Japan Hayakawa and Tamaruya note that protective relief in support of arbitration will operate *in rem* in accordance with the Germanic style of protection.[127]

In a London decision, *Mobil Cerro Negro Ltd v Petroleos De Venezuela SA* (2008),[128] Walker J emphasised that English worldwide freezing orders[129]

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[126] Neil Andrews, *English Civil Procedure* (Oxford University Press, 2003), ch 17; *Zuckerman on Civil Procedure* (2nd edn, London, 2006) ch 9; IS Goldrein (ed*), Commercial Litigation: Pre-emptive Remedies* (regularly updated, London).

[127] Hayakawa and Tamaruya (Japan): `The party can request from a court an interim measure of protection, and the court can grant such measures to support the arbitration process (Arbitration Law, art 15: *'It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure in respect of any civil dispute which is the subject of the arbitration agreement'*). This essentially follows the Model Law, art 9. The measures include an order for freezing assets, though it takes the form of *in rem* order attaching specific assets that belong to the respondent. Such court support is available whether the place of arbitration is in or outside the territory of Japan (Arbitration Law, art 3(2)). For example, a district court issued an order in favour of a South Korean creditor to attach a ship belonging to the Russian debtor, where there were a contract designating the High Court of Busan, South Korea as having an exclusive jurisdiction, and an additional contract involving an arbitrating clause where they agreed to resolve any disputes by an arbitration conducted by a tribunal in Sakhalin Oblast, Russia. Neither party was domiciliary of Japan nor had any branch or office in Japan, but the debtor's ship, its only assets, was anchored in a port in Japan. *Namsung Shipyard Co Ltd v Barracuda Co Ltd* (9 February 1996) 1610 Hanrei-Jihou 106 (District Court for Asahikawa).'

should be made `only sparingly'. He also held that where such a far-reaching injunction is sought in support of arbitration, where the seat is outside England, relief will usually be confined to cases where there is `compelling evidence of serious international fraud.'[130]

However, the USA has refrained from adopting the *ex parte* freezing order in general commercial matters,[131] except claims based upon equitable proprietary principles, such as a constructive trust, or even unjust enrichment[132] (although state law might assist).[133] Steve Burbank (USA) has commented on this.[134]

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[128] [2008] EWHC 532 (Comm); [2008] 2 All ER (Comm) 1034; [2008] 1 Lloyd's Rep 684; [2008] 1 CLC 542; noted Adam Johnson (2008) CJQ 433-44. In January 2008, the English court had granted Mobil Cerro Negro (Mobil) a temporary worldwide freezing order covering assets of up to $12 billion against the Venezuelan national oil company, Petroleos de Venezuela SA (PDVSA). This order was in support of an International Chamber of Commerce arbitration between Mobil and PDVSA, the seat being New York, and the parties being Bahamian and Venezuelan. The governing law of the main contract was Venezuelan. PDVSA successfully applied to set aside the freezing order. Walker J found that there was no evidence that the respondent was likely to dissipate its assets. That was sufficient to resolve the matter. But he gave three *additional* reasons for setting aside the freezing injunction:[128] (1)*`Mobil cannot surmount the…hurdle [in section 44(3) of the Arbitration Act 1996 and] show that the case is one of "urgency"'*; (2) *`in the absence of any exceptional feature such as fraud, [Mobil] would have had to demonstrate a link with this jurisdiction in the form of substantial assets of PDV located here' but `Mobil cannot demonstrate such a link'*; (3) *in the absence of any exceptional feature such as fraud, and in the absence of substantial assets of PDV located here, the fact that the seat of the arbitration is not here makes it inappropriate to grant an order under section 2(3) of the Arbitration Act 1996….'*

[129] Neil Andrews, *The Modern Civil Process* (Mohr & Siebeck, Tübingen, Germany, 2008), 4.03 ff.

[130] ibid, at [5].

[131] *Grupo Mexicano de Desarrolo SA v Alliance Bond Fund Inc.* 527 US 308; 119 S Ct 1961; 144 L Ed 2d 319 (1999) (a bare majority 5–4), followed and considered in, *Crédit Agricole Indosuez v Rossyskiy Kredit Bank* 92 NY 2d 541; 729 NE 2d 683, New York Ct of Appeals (2000).

[132] *USA ex rel Rahman v Oncology Associates* 198 F 3d 489 (4th Cir 1999) (US Ct of Appeals): preliminary injunction granted to freeze assets; injunction justified both on general equitable grounds and under Fed Rules of Civ Proc, r 64 (see *Rahman* case, at 499); allegation of fraudulent billing by medical entities and doctors; claim for recovery, in equity and unjust enrichment, of $US 12 million; freezing injunction available, if ordinary debt claim inadequate, where claim sounds in equity (all unjust enrichment claims so characterized, para 6), especially for remedies of constructive trust or equitable lien; *Decker v Independence Shares Corp* 311 US 282; 61 S Ct 229; 85 L Ed 189 (1940) applied (*Rahman* case, paras 1 ff, at 436 ff 9); freezing injunction especially justified if—as here— public interest strongly involved (*Rahman* case, para 3); *Grupo Mexicano* case distinguished as denying freezing injunction only where claim for debt, LA Collins, (1999) 115 LQR 601–4, has criticized the majority's reasoning in the *Grupo Mexicano* case and its discussion of English freezing injunctions as superficial and outmoded; for a sophisticated critique of the *Grupo Mexicano* case, Stephen B Burbank, 'The Bitter with the Sweet: Tradition, History

Finally, an interesting variation on the question of protective relief is the interim injunction, or conservatory measure, sought (but not granted) in the `Channel Tunnel' construction dispute, *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (1993).[135] In that case, the parties' dispute-resolution clause included a prior stage of expert determination,[136] and a second stage of arbitration. The salient portion of the dispute resolution clause (clause 67) provided: *`...If any dispute or difference shall arise between the employer and the contractor during the progress of the works..., [it] shall at the instance of either the employer or the contractor in the first place be referred ...to be settled by a panel of three persons (acting as independent experts but not as arbitrators)... [If] either the employer or the contractor be dissatisfied with any unanimous decision of the [expert] panel... [that party] may ... notify the other party ... that the dispute or difference is to be referred to arbitration.'* The House of Lords held that it should grant a stay of the London High Court proceedings brought by the employer to seek an interim injunction to prevent the contractor from stopping work on the tunnel project. That stay was available both under the court's inherent jurisdiction, and under a statutory power.[137] Although the House of Lords held that the court's general power to issue an injunction, including an interim injunction, was available in principle to support a foreign arbitration (the seat of the

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and Limitations on Federal Judicial Power—A Case Study' (2000) 75 Notre Dame L Rev 1291–1346 (at 1297–1306, summarizing the facts and judgments). (I am grateful to Linda Silberman, New York University, Law School, for references.)

[133] On the legitimacy of state law in this context, see discussion in *Rahman* case, *op cit*, at 499, explaining scope of Fed Rules of Civ Proc, r 64 (in *Rahman* case, as the second ground of decision, it was held that the Maryland state freezing jurisdiction applied).

[134] Stephen B Burbank, 'The Bitter with the Sweet: Tradition, History and Limitations on Federal Judicial Power—A Case Study' (2000) 75 Notre Dame L Rev 1291, at 1345: `the study of the experience of the English courts in developing and refining *Mareva* injunctions would be helpful to the creation of US federal law on the subject'. To this he adds the qualification that:`it would be important to mark the differences in the broader legal and political contexts before borrowing wholesale from that experience.'

[135] [1993] AC 334, 345-6, HL (clause 67).

[136] *Pegram Shopfitters Ltd v Tally Weijl* [2003] EWCA Civ 1750; [2004] 1 WLR 2082, CA, especially at [1] to [10], on accelerated resolution of construction disputes (so-called 'adjudication') under Part II, Housing Grants, Construction and Regeneration Act 1996, and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649); J Kendall, C Freedman, J Farrell, *Expert Determination* (4th edn, Sweet & Maxwell, 2008); on mediation and experts, L Blom-Cooper (ed), *Experts in Civil Courts* (Oxford University Press, 2006), ch 10.

[137] See now the even clearer statutory power to grant a stay in this context under s 9(1)(2), Arbitration Act 1996, on which Mustill and Boyd, *Commercial Arbitration; Companion Volume* (London, 2001), 268 ff.

channel tunnel arbitration would be Brussels, Belgium), and although the consortium of contractors in this transaction were subject to the personal jurisdiction of the English court, Lord Mustill, giving the House of Lords' main judgment, considered that the relief sought would trench upon the intended arbitral tribunal's central question: whether there had been a breach of the construction contract and , if so, what remedy should be granted:[138] `*The [English courts have] stayed the action so that the [expert] panel and the arbitrators can decide whether to order a final mandatory injunction. If the [English] court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide.'* Furthermore, if there were to be a judicial grant of interim relief, the more obviously suitable court to issue that relief would be Belgian, because the seat of the arbitration was Brussels:[139]

> `*A Belgian court must surely be the natural court for the source of interim relief. If the appellants wish the English court to prefer itself to this natural forum it is for them to show the reason why, in the same way as a plaintiff who wishes to pursue a substantive claim otherwise than in a more convenient foreign court...They have not done so. Apparently no application for interim relief has been made to the court in Brussels... [and] most remarkably, no evidence of Belgian law is before the court. If the appellants had wished to say that the Belgian court would have been unable or unwilling to grant relief, and that the English court is the only avenue of recourse, it was for them to prove it, and they have not done so.'*

However, Lord Mustill did acknowledge that the privatised dispute mechanism in this case did not appear likely to provide a swift and effective remedy for a short-term and urgent dispute. Even so, in the House of Lords' opinion, as expressed by Lord Mustill, it would be wrong for the English courts in this case to override the parties' choice of dispute-resolution:[140]

> `*This conspicuously neutral, "anational" and extra-judicial structure may well have been the right choice for the special needs of the Channel Tunnel venture. But whether it was right or wrong, it is the choice which the parties have made. The [employer] now regrets that choice. To push their claim for mandatory relief through the mechanisms of*

[138] [1993] AC 334, 368, HL, *per* Lord Mustill.
[139] ibid.
[140] ibid.

> *clause 67 is too slow and cumbersome to suit their purpose, and they now wish to obtain far reaching relief through the judicial means which they have been so scrupulous to exclude. Notwithstanding that the [English] court can and should in the right case provide reinforcement for the arbitral process by granting interim relief I am quite satisfied that this is not such a case, and that to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration.'*

(4) EVIDENCE

A system of enlightened judicial support seems to prevail in most jurisdictions. For example, Bart Groen comments on the position in the Netherlands:

> *`If a witness refuses to appear before the arbitral tribunal, arbitrators can grant the party concerned the right to ask the district court to hear the unwilling witness. Any party can ask the President of the district court to order the other party to produce documents...Whether any such request is granted by the President is another matter.'*

Viktória Harsági (Hungary) makes similar observations concerning practice in Hungary.[141] Luca Passanante (Italy) notes that the courts lack coercive powers in this respect.[142] In the case of recalcitrant arbitral parties who fail to comply with a court order to give or produce evidence for use in arbitration, In the case of a person who fails to comply with a court order to give or produce evidence for use in arbitration, Rolf Stürner (Germany) draws

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[141] Harsági (Hungary): `If conducting the taking of evidence before the arbitral tribunal is likely to entail considerable difficulties or disproportionately high additional costs, upon the request of the arbitral tribunal the local court shall give legal assistance by conducting the taking of evidence as well as by the application of the coercive means necessary for the taking of evidence conducted by the arbitral tribunal..'

[142] Passanante (Italy): `This is a relatively new rule: before the 2006 the arbitrators were not entitled to obtain by the Courts the necessary support for the effectiveness of the evidence process. Now things have changed on a formal point of view, but not in the substance: it's true that the Court can order the witness to appear before the arbitrators, but as a matter of fact the Court can neither physically force the witness, nor punish her/him for disregarding the Court order.'

attention to the possibility of the arbitral tribunal drawing adverse inferences, provided he is party to the relevant arbitration.[143]

(5) ENFORCEMENT

The arbitral tribunal is not capable of administering coercive or physical assistance in securing enforcement of its awards. At that point the successful party will need to invoke the enforcement powers of the relevant judicial system, whether this be within the jurisdiction where the arbitration had its `seat' or a foreign jurisdiction. These possibilities are discussed at section X of this report.

VII
PARTY CHOICE

(1) SELECTION OF ARBITRATORS

As Viktória Harsági (Hungary) states:

> *`Parties' greater confidence in arbitral tribunals stems partly from the fact that they themselves usually appoint the arbitrator. Arbitration proceedings are also preferred by parties because they can ensure special expertise. Judges of state courts are (or can be) highly qualified legal experts; however, they cannot be expected to have detailed knowledge of international trade practices.'*

In those jurisdictions where specialist commercial courts regularly sit in `big ticket' disputes concerning one or more foreign parties (for example, the London Commercial Court, and courts in large mercantile centres elsewhere in Europe, or the court in Delaware, etc), the decision to prefer an arbitration, rather than the court process, will be motivated by factors other than legal

[143] Stürner (Germany): 'an arbitral tribunal does not have the power to summon and compel the attendance of witnesses or parties or to enforce the production of documents or tangibles or the access to land. However, if an arbitral tribunal or a party to an arbitration proceeding wishes access to proof which is not voluntarily granted by witnesses or third persons, the tribunal or the party with the consent of the tribunal may apply to a state court for assistance in the taking of proof. The court is authorized to grant the assistance requested and to conduct, e.g., a hearing for the reception of proof at which the parties to the arbitration and the arbitrators may also participate and ask questions in the same manner as in a civil case. It should be noted, however, that the German Civil Procedure Code provides direct compulsion (fines, imprisonment) against third persons only, not against parties to litigation. A party's refusal to cooperate is sanctioned by negative inferences according to which the not produced means of evidence or the party examination may have documented the facts as asserted by the evidence giving party. As a consequence, applications to state courts for compulsory measures against parties make no sense because the arbitral tribunal could draw negative inferences without the state court's assistance.'

expertise: notably, neutrality; considerations of timing and cost; confidentiality; and the matter of enforceability. It should also be noted that an English Commercial Court judge sits alone (although in a very long trial he might receive a glorified `PA', known as a judicial assistant, to help him tabulate the data and evidence), whereas an arbitration panel can be arranged to ensure that there is opportunity for discussion by adjudicators, rather than solo cogitation. Moreover, there is less likelihood that one of a panel will remain asleep during a hearing, because fellow adjudicators can discreetly wake the somnambulant colleague(s). If this happens at first instance in England, and the parties' counsel find themselves addressing a conspicuously dormant judge, sitting alone without either fellow judges or a jury, there is a danger that the process might start to unravel.

(2) SUBSTANTIVE NORMS

Many commentators reported that the arbitration agreement might specify a national system of rules to govern the substance of the dispute (say, English or French Law) other than the national law of the `seat' (for example, New York, or Japanese law).

This is in fact quite common even in London arbitrations. For example, in *C v D* (2007) a `London arbitration' clause provided that the arbitration should apply New York substantive law, its law concerning insurance.[144] The English arbitrators were engaged, therefore, in hearing expert evidence on points of foreign law. Points of foreign law are classified as matters of fact within English practice. Therefore, there was no possibility of taking the award to the High Court in London to re-consider the findings of New York law. One of the arbitration parties attempted to second-guess the London award on a point of NY insurance law (contained in a `partial award') by referring the relevant point to the New York courts. But this was precluded by the opponent obtaining an anti-suit injunction in London against the New York court petitioner. (At the stage of enforcement—even if this occurred outside England, the decision on points of New York law would not be capable of being re-opened, because of the narrow criteria of the New York Convention, 1958).

[144] *C v D* [2007] EWCA Civ 1282; [2008] 1 Lloyd's Rep 239.

But some systems also permit parties validly to stipulate that the relevant substantive norms might be rules taken from a `soft law' code, such as UNIDROIT's *Principles of International Commercial Contracts* (2nd edition), or religious law, or even principles of equity and fair dealing. However, care must be taken to specify which edition of a `soft law' code is intended to apply. Linklaters (London) report that they are engaged in a dispute where one side has contended that UNIDROIT's *Principles of International Commercial Contracts* (2nd edition) apply, and the other party contends that the first edition is applicable. And it should also be noted that soft law rules can be presented in more than one language, including `official' versions in more than one language (Anglo-French texts are standard within UNIDROIT).

Modern arbitration systems[145] display a tendency to unshackle parties from substantive norms adopted within national legal systems, if that is the parties' considered preference (but there are variations, such as Japan,[146] Austria,[147]

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[145] eg Cahali, Amaral, Wambier (Brazil) `According to the Arbitration Act, "*Article 2 ...§ 2º The parties can also agree that the arbitration be based on general principles of law, on mores and customs, and on international laws of commerce*".'

Perri (Brazil): `The arbitrator may, upon authorization, disregard the criteria of strict legality and judge based on the general principles of law (equivalent to judgment by equity), and also on usage and custom, especially the usage and custom of international trade. If established by the parties, the arbitrator may also hear commercial cases without submitting to a specific legal system, but applying what has been commonly known as *lex mercatoria* (art. 2, Par. 2, of the 'LAB'). Notwithstanding such great freedom, evidently there are limits to the choice of rules, as such rules must be compatible with good practices, public policy and the principles of the arbitration proceeding. Such limits become narrower when one of the parties to the arbitration is a Government entity (e.g., the arbitrator may not decide the case based on equity).'

Calavros and Babiniotis (Greece): ` Under article 28 par. 3 of Law 2735/1999 `the arbitral tribunal shall decide as *amiable compositeur* only if the parties have expressly authorized the arbitral tribunal to do so and par. 4 provides that in all cases....'

Esplugues (Spain): `the drafters of the AA of 2003 did not refer to "rules of law" (*normas de Derecho*) –as Article 28(1) of the UNCITRAL Model Law does- but decided to use a different term: "legal norms" (*normas jurídicas*). By this way, they wanted both to stress that the Spanish AA separates from the Model Law in relation to this issue and that "*legal norms*" is a much broader notion than "*rules of law*" and is able to include any sort of legal rules: even religious ones. (Article 34(2): "*Subject to the previous paragraph, where the arbitration is international, the arbitrtators shall decide the dispute in accordance with such legal rules as are chosen by the parties. Any designation of the law or legal system of a given State shall be construed, unless otherwise stated, as referring to the substantive rule of that State and not to its conflict of laws rules. Failing any designation by the parties of the applicable legal rules, the arbitrators shall apply those they consider appropriate.*"'Harsági (Hungary): ` The arbitral tribunal may only decide ex aequo et bono, instead of the application of a law, if it was expressly authorized do so by the parties.' [Arbitration Act, §§ 49–50].'

Lupoi and Arrigoni (Italy): `according to Article 822 c. p. c., an equitable decision is admitted only if the parties have agreed on the application of equity rather than the law'; Laura Lupoi (Finland), Finnish Arbitration Act (from the year 1992), Section (3) The arbitral tribunal shall decide ex aequo et bono only if the parties have expressly authorized it to do so.'

[146] eg Hayakawa and Tamaruya (Japan): `Article 36 of the Arbitration Law provides as follows: *'(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are agreed by the parties as applicable to the substance of the dispute.'* This essentially follows the Model Law. Thus there is no doubt that the arbitral tribunal can apply foreign law in accordance with party agreement. The language 'such rules of law as are agreed by the parties' has been drafted broadly to include both non-national law and religious law, though there has been no decided case that interpreted this language. In the absence of such agreement, the arbitral tribunal will apply *'the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected'* (Arbitration Law, art 36(2)). This is a modification of the Model Law, art 28(2), which provides for the application of *'the law determined by the conflict of laws rules which [the arbitral tribunal] considers applicable'*. The reference in the Arbitration Law

and South Africa,[148] so that care must be taken to ensure that the relevant national arbitral system has the desired flexibility in this regard). As Hogan Lovells (London) note, there are liberal rules within the English Arbitration Act 1996.[149] Nevertheless, Linklaters (London) report:

> *`On the whole the arbitration agreements that clients use in Linklaters transactional documents, and the arbitration agreements that underpin the disputes referred to us, state that English law is the substantive law to be applied.'*

It must be obvious, furthermore, that loose references in the arbitration clause empowering the tribunal to apply `equity' or the elusive *lex mercatoria* will ensure that arbitrators enjoy an unfettered capacity to apply their subjective

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to 'substantive law of the State' will preclude application of non-state law or religious law under this heading. Principles of equity can be applied only upon the parties' express authorisation (Arbitration Law, art 36(3): '*…the arbitral tribunal shall decide ex aequo et bono only if the parties have expressly authorized it to do so'*). This essentially follows the Model Law, art 28(3).'

[147] Koller (Austria): `According to sec 603(1) ACCP the arbitral tribunal shall decide the dispute in accordance with such statutory provisions or rules of law as agreed upon by the parties. Consequently, the parties may agree on the application of internationally accepted principles of commercial transactions which have been "codified" by private international organizations, such as the UNIDROIT Principles on International Commercial Contracts or the Principles of European Contract Law. Unlike the parties, the arbitral tribunal may only choose a national law (as opposed to rules of law; see sec 603[2] ACCP).'

[148] Rycroft (South Africa) :`Parties to an arbitration are for the most part free to contract on whatever terms they wish and may confer on the arbitrator the power to apply substantive norms of foreign or non-national law. This is however unusual and most commercial arbitration will be resolved in terms of domestic law. Outside of labour arbitration there is no system of equitable principles which are normatively applied. As a confidential process, arbitration in South Africa is largely isolated from public law scrutiny. Courts will not however enforce an award which is illegal or contrary to public policy.'

[149] Hogan Lovells (London): `Section 46, Arbitration Act 1996 (England and Wales) provides:

> (1) The arbitral tribunal shall decide the dispute –(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with *such other considerations* as are agreed by them or determined by the tribunal.
>
> ....
>
> (3) If or to the extent there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. (emphasis added)

The meaning of "*such other considerations*" in section 46(1)(b) remains a source of debate within the English legal system. The English Courts have however interpreted this to permit parties to require an *ayatollah* arbitrator to apply Shari'ah law as the applicable law (see *Musawi v R E International (UK) Ltd &Others* [2007] EWHC 2981).'

value-judgements to a dispute. Such clauses will also ensure that awards, even if reasoned, will provide little intellectual sustenance. In essence, such clauses permit arbitration panels to respond to their intuitive sense of fairness. It might be less expensive to agree to toss a coin.

Once it is clear which body of laws will apply to the substance of the case, the tendency, as reported by Françoise Vidts and Didier Matray (Belgium), is for the arbitration tribunal to rely upon the parties to research the law, rather than the tribunal conducting its own researches. However, Vidts and Matray suggest that if counsel `did a poor job', the tribunal might take a `pro-active' approach and research the legal topic. If so, Vidts and Matray further suggest that the tribunal must then ensure that the parties enjoy an equal opportunity for comment. Finally, Vidts and Matray comment that if points of public policy are overlooked by counsel, the tribunal will take the initiative.

Related to the question of fixing the applicable substantive norms is the question of what David Steward (Ince & Co, London, Singapore, and Hong Kong) calls `commerciality':

> *`There is a common perception that an arbitration tribunal's decision will be more grounded in commercial considerations than that of a judge. In practice, this varies from one industry to another. In some commodity trade arbitrations, the tribunal may decide not to apply the law strictly and to make an award that reflects its view of what the trade would regard as fair. This is generally recognised and accepted by the parties, who submit to the judgment of others who know how the market works. In other fields, such as shipbuilding or offshore oil and gas disputes, the parties often appoint as their arbitrators QCs or other practising lawyers, whose approach is likely to be essentially similar to that of a judge.'*

A good example is the treatment of shipping disputes, on which Natalie Moore (England) comments:

> *`In the field of shipping, clients often prefer their dispute to be referred to "three commercial men sitting in London" (as the arbitration clause is often worded) who are familiar with shipping matters, rather than hand it over to the courts. The decision making is likely to be more rough and ready, but my underlying clients (charterers, ship-owners, insurers etc) seem to accept that this is the traditional way of litigating shipping disputes.'*

(3) PROCEDURE

Many commentators emphasise the potential for flexible procedural arrangements.

Thus Cahali, Amaral, Wambier (Brazil) report that procedural flexibility is the *reality* and that this contrasts with the over-prescribed and rigid forms of ordinary court procedure:

> `Flexibility is the rule in the Arbitration. This is effectively one of the appeals of arbitration. Conversely, when it comes to judicial proceedings, rigidity is the rule, for statutory law is very detailed and normally unbending.' (Commentators' emphasis).

A variation on this theme is the position in Greece where Calavros and Babiniotis report that parties opt to have their arbitration governed by a flexible and speedy type of procedure (`provisional order proceedings') drawn from court practice, which has evolved in contrast to the exceedingly slow and cumbersome procedure of full court litigation.[150] The same commentators add that this simplified procedure, supported by the principle of finality (no appeal on the merits, and only restricted grounds for judicial annulment `limited by law only to grave errors which contravene fundamental procedural principles or public policy'), conduces to much speedier resolution. They note that in court proceedings a final decision might require six or seven years.

The presence of arbitrators from both Common Law and civilian backgrounds, and the cosmopolitan atmosphere of commercial arbitration, can result in a flexible blending of procedural techniques. For example, Christian Koller (Austria) favourably remarks:

> *`Procedural flexibility enables the parties to combine the best of common and civil law litigation practices. It is not uncommon that in arbitral proceedings in Austria the parties agree on the application of procedures foreign to their legal background, such as the exchange of witness statements or the cross examination of witnesses.'*

[150] Calavros and Babiniotis (Greece): `Parties regularly agree on an uncomplicated and flexible set of procedural rules to govern the arbitration proceedings. In particular, they usually adopt the same procedural rules which apply to provisional order proceedings before the state courts. These model rules are informed by considerations of efficiency and speed.'

Carsten Kern (Germany) has also commented at length on the potential mixture of procedural techniques within a single arbitral panel, different members enabling the tribunal to achieve a bridge between Common Law and civilian approaches.[151] He also notes:

> `international arbitration has developed some techniques which are acceptable for practitioners on both sides of the 'Civil Law-Common Law divide'. The IBA Rules on Taking Evidence are one example (or result) of this development.'

Françoise Vidts and Didier Matray (Belgium) also report a regular mixing of procedural techniques, reflecting the various juristic traditions of tribunal members.

Linklaters (London) report willingness on the part of arbitration tribunals to adopt truncated procedure, where appropriate, involving restrictions upon, on experts, and witness statements, in the interest of focus, economy, and expedition.[152]

Natalie Moore (England) suggests that sometimes there is excessive procedural flexibility, in the sense that the arbitration tribunal does not engage in efficient case management, with the result that the case can meander at the whim of the parties' lawyers. But at least Françoise Vidts and

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[151] Kern (Germany): `Procedural flexibility can be an advantage, esp. in international arbitrations in order to bridge the civil law-common law divide.' C Kern, `Internationale Schiedsverfahren zwischen Civil Law und Common Law' [International Arbitration between Civil Law and Common Law Traditions], ZVglRWiss/German Journal of Comparative Law 2010, 78 ff.'

[152] Linklaters (London): `[arbitrators] are willing to dispense with court techniques and patterns and are amenable to the likes of truncated disclosure and a reduced number of experts reports, witness statements and alike.'

Lupoi and Arrigoni (Italy): `According to Article 816 bis cpc, before the start of the proceedings, the parties may agree on the procedural rules which the arbitrators are then bound to apply. In practice, these agreements are not very common. When no specific agreement exists, the arbitrators are free to regulate the proceedings in the most convenient way, as long as the right of the defence of the parties is granted. This allows a lot of procedural flexibility. In practice, however, arbitrators tend to reproduce court habits (e.g.: by granting the parties the possibility to file the same written briefs provided for in court in court proceedings), sometimes making express reference to articles of the code of civil procedure. A "proceduralization" of arbitration is discernible.'

Didier Matray (Belgium) report that it is usual for the tribunal to take the initiative in composing a schedule of issues.

However, Michele Lupoi and Caterina Arrigoni (Italy) say that there is little party-initiative in agreeing flexible forms of procedure, and that arbitrators fall back upon customary methods borrowed from court practice.[153] Luca Passanante (Italy) supports this, noting that even where parties agree on procedural matters their instructions to arbitrators are loose and general.[154] Carlos Esplugues (Spain) also reports that there is little party initiative in shaping matters of procedure.[155]

(4) SEAT AND GEOGRAPHICAL SITE AND LEGAL REPRESENTATION

The question of selecting a `seat' has already been examined when addressing `neutrality'. As Cahali, Amaral, Wambier (Brazil) note, in large jurisdictions it is helpful that arbitrators can be asked to sit in a nominated city, province, or region which is convenient to the parties (consider, for example, the geographical enormity of Russia or Brazil).

In fact arbitration hearings need not take place within the borders of the relevant selected jurisdiction. For example, it is not unknown for a Swedish or

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[153] Lupoi and Arrigoni (Italy): `According to Article 816 bis cpc, before the start of the proceedings, the parties may agree on the procedural rules which the arbitrators are then bound to apply. In practice, these agreements are not very common. When no specific agreement exists, the arbitrators are free to regulate the proceedings in the most convenient way, as long as the right of the defence of the parties is granted. This allows a lot of procedural flexibility. In practice, however, arbitrators tend to reproduce court habits (e.g.: by granting the parties the possibility to file the same written briefs provided for in court in court proceedings), sometimes making express reference to articles of the code of civil procedure. A "proceduralization" of arbitration is discernible.'

[154] Passanante (Italy): `In the real world the parties are unlikely to take advantage of this opportunity and quite often the arbitration agreements do not embody specific procedural rules. Sometimes the parties give sober and broad proceeding directions, without providing for detailed rules.'

[155] Esplugues (Spain): ` Although the parties are granted a great deal of power as regards the designation of the Arbitration procedure, practice shows that it is usually for the arbitrator and the arbitration institution to design and implement it in practice. In this task, they tend to be rather flexible. Many arbitrators in Spain are fully aware of the fact that arbitration is something different from judicial proceedings and that it must be approached and performed in a fully different manner: more flexible and adapted to the specific circumstances of the dispute at stake.'

Swiss arbitration to be heard in London, for the convenience of the parties, even though the `seat' of the arbitration remains Sweden or Switzerland.

Andrew Cannon (Australia) reports that the New South Wales legislation explicitly permits parties to be represented by counsel other than those competent to practise within that jurisdiction.[156] However, Françoise Vidts and Didier Matray (Belgium) note that lawyers from different systems are subject to different codes of professional ethics and that this can cause difficulties.

(5) LANGUAGE

Courts tend to insist on court business being conducted in the national language (or applicable national language, where there is a choice: for example, in England this is English, but in Wales it can be English or Welsh). By contrast, commentators noted the great practical advantage that arbitration enables the parties to agree flexibly on written and spoken languages, which need not be the national language(s) of the `seat'.

Furthermore, many business transactions are now written in English (or the American variant).

Christian Koller (Austria) notes that arbitrators can also be selected for their linguistic skills (for example, their capacity to understand more than one language). In some arbitration references, there can be a conflict between the different languages in which transactions (including the text of the arbitration clause itself) are presented (for example, where the parties have purported to agree contractual texts or an arbitration clause in more than one language, but it turns out that there is difficulty in reconciling these versions).

(6) FINALITY

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[156] Cannon (Australia), noting s 24A(2) Commercial Arbitration Act 2010 (NSW): `A person who is not admitted to practise as a legal practitioner in New South Wales does not commit an offence under or breach the provisions of the Legal Profession Act 2004 or any other Act merely by representing a party in arbitral proceedings in this State.' He also notes that there is no equivalent of this section in the UNCITRAL Model Law.

Mention is made elsewhere of the restricted scope for challenging an award within the relevant national court system (IX(2)). Appeals on the substantive merits of the dispute (factual or legal) are not possible (although English practice permits controlled access to appeal for allegedly erroneous applications of English law: III(6) above).

Emphasising the advantage of a `one stop' and final arbitral decision, David Steward (London) says:

> *`The limited scope for appeal and the courts' reluctance to permit appeals can be seen as an advantage. The parties may prefer this to the prospect of the cost and delay attendant on appeals. It is important that the parties recognise that, to a greater degree than in court, they are entrusting the outcome to the tribunal, so that they are not aggrieved if they believe the award wrong but find it is unappealable.'*

(7) PROTECTION OF CONSUMERS AND OTHER VULNERABLE PERSONS

There is the obvious danger that powerful entities, enjoying control of the small-print of contractual terms, and possessing large economic power, will abuse the opportunity to agree private forms of dispute resolution. Not only might this become a cynical technique for `burying' embarrassing events, but such inequality of bargaining power and experience as an arbitral `repeat-player' offers scope for powerful entities to manipulate the arbitral process. For this reason, many systems are alert to the need either to prohibit, or at least to control and restrict, resort to arbitration by vulnerable parties (consumers and employees, notably): see discussion of this issue by Yoshihisa Hayakawa and Masayuki Tamaruya (Japan),[157] Hiroshi Tega (Japan),[158] Cesar

[157] Hayakawa and Tamaruya (Japan): `Consumers and individual employees are protected from being drawn into unwanted arbitral proceedings. A consumer can cancel an arbitration agreement at any time, unless he or she is a claimant in the arbitral proceedings (Arbitration Law Supplementary Provisions, art 3). An arbitration agreement the subject of which is individual labour-related issues that may arise in the future is null and void (Arbitration Law Supplementary Provisions, art 4).'

[158] Tega (Japan): `A consumer may cancel the arbitration agreements between consumers and businesses (JAL supplementary provision art. 3(1)). And, any arbitration agreements, the subject of which constitutes individual labor-related disputes, shall be null and void (JAL supplementary provision art. 4).'

A Guimarães Pereira and Eduardo Talamini (Brazil),[159] and Rolf Stürner (Germany).[160]

(8) PUBLIC POLICY AND MANDATORY RULES

As Viktória Harsági (Hungary) notes,[161] public policy can impinge either at the stage of national proceedings for annulment of an arbitral award, or at the level of foreign recognition or enforcement of an award. Even if the relevant national arbitration legislation is silent, arbitrators will be mindful of the need to adhere to these restraints, as, for example, Carlos Esplugues (Spain)

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[159] Pereira and Talamini (Brazil): `there is still a great resistance in Brazil to the admissibility of arbitration. Brazilian law contains certain very protective provisions concerning consumers in arbitration, particularly article 51, VII, of the Consumer Protection Code (which considers as void the contractual clauses in consumer contracts that "*command the mandatory use of arbitration*") and article 4, § 2, of the Arbitration Act ("*in agreements by adhesion, the arbitration clause shall only be effective if the adhering party takes the initiative to commence arbitration or expressly agrees to the arbitration, provided that it does so in writing in an attached document or in bold letters, with a signature or initials specifically made for this clause*").'

[160] Stürner (Germany): `In consumer cases arbitration agreements are not really frequent; for the necessary protection of consumers from unfair clauses the agreement with a consumer must be set forth in a separate individual document and must be signed by both parties by their own hands, an electronic version must comply with the Electronic Signature Act (see § 1031 German Civil Procedure Code). There are some fields of law where arbitration agreements are not permitted or only allowed when restrictive preconditions are fulfilled. The purpose of these restrictions is mainly the protection of the weaker or inexperienced party from unfair arbitration agreements, in part they are the result of the legislature's intention to maintain the jurisdiction of state courts for cases of special social significance. Restrictions apply, e.g., in residential landlord-tenant cases (§ 1030(2) German Civil Procedure Code), in securities litigations (§ 37h German Law on Bond Trading), in cases derived from stock broking transactions with persons who are not admitted to stock exchange transactions with futures (§§ 28, 53(1) German Stock Exchange Law), and – last but not least – in labour law cases (§ 101 German Labour Court Law).'

[161] Viktória Harsági (Hungary): `In the system of relations between arbitral tribunals and state courts in Hungary a central position is occupied by public order (Kecskés, László / Nemessányi Zoltán, `Magyar közrend – nemzetközi közrend – közösségi közrend' (2007) 3 Európai Jog, 25 ff). In the Act, public order appears as an obstacle to the recognition and enforcement of foreign court judgements and foreign arbitration awards (Arbitration Act, § 59) and as a ground for overturning the awards of arbitral tribunals by state courts (Arbitration Act, §§ 54-55). The Arbitration Act – similarly to the UNCITRAL Model Law – does not provide a definition for public order. In Supreme Court decisions taken concerning this subject, among the grounds for setting aside, the interpretation of public order has caused the most problems. The definitions of the other grounds for nullification contain relatively precise and common legal terms, therefore it is difficult to interpret them with an extended meaning, on the other hand, there has not evolved a similar straightforward practice of interpretation for "public order" (V Harsági, `Ordre Public and Arbitration in Hungary,' paper delivered to the symposium on `Recent Issues of International Business Litigation and Arbitration', Nagoya, 14–15 November 2009.'

notes.[162] Canada adopts a narrow concept of public policy, as Nicholas Pengelley notes.[163] And there are some interesting general observations on this topic by Rolf Stürner (Germany).[164] Roman Khodykin (Russia) comments `that there have been cases where Russian courts have demonstrated an 'anti-arbitration' approach, refusing to enforce arbitral awards on purely formalistic grounds or by broad interpretation of public policy.'[165] And he

[162] Esplugues (Spain): `No reference to mandatory and public law is made by the AA. Nevertheless it is broadly accepted in Spain that the arbitrator has an implicit duty to render an enforceable award and that, accordingly, mandatory rules of the country where the award has been rendered and is to be enforced should be taken into account by him. '

[163] Pengelley (Canada): `Public policy is narrowly construed by Canadian courts. In *STET*,[163] Madam Justice Lax approved other Canadian and US decisions which held that, for an award to be set aside on public policy grounds, it must violate Ontario's (for which, read Canada's) "most basic notions of morality and justice". Lax J referred to the *New York Convention travaux preparatoire* for guidance on "public policy" in the context of international law, noting the instances given in the relevant UNCITRAL report:[163] "such as corruption, bribery or fraud and similar serious instances", which would constitute grounds for setting aside an award. These instances would, of course, offend Canadian notions of morality and justice, but the list is unlikely to be expanded much beyond this, other than to encompass specific crimes, as reflected in the Canadian Criminal Code. In practice, in Canada, as was once said by an English court, public policy "is never argued at all but where other points fail."'[163]

[164] Stürner (Germany): `There are, nevertheless, rules of conflict of laws which are part of a worldwide international standard and are not subject to party disposition, e.g. the *lex rei sitae* for interests in land. Furthermore, norms of public policy of legal systems where the parties to litigation have to act and to live, should be taken into account by the arbitral tribunal. If a depository bank is located in England and is obliged to transfer bonds which are in its custody, a foreign arbitration court should not render a decision which conflicts with English banking law. A decision on the conveyance of land which is, e.g., located in the U.S., must take into account the land law of the individual American state where the land is located. Like the Uncitral Model Law, the German Civil Procedure Code does not contain special provisions for these cases. But if a tribunal gives a decision which conflicts with the public policy or fundamental legal principles of the country where the decision is to be executed, the courts of the state of execution will refuse to acknowledge and enforce the arbitral decision. The choice of a national law which has not any reasonable connection to the decisive issues of the case or does not allow the necessary execution under the law of the affected foreign legal system may be considered an infringement of public policy (Article V(2)(a) UNCITRAL Model Law).'

[165] Khodykin (Russia): `Russian courts usually dismiss applications for enforcement if there is a Russian judgment declaring the relevant agreement invalid. There have been cases where, for example, a third party not bound by an arbitration agreement (a shareholder of a party to the arbitration) brought a claim in a Russian court seeking a declaration that the contract on which the claims in arbitration were based is null and void *ab initio*. The Russian courts have sometimes declared the underlying contract to be void, which had the result that enforcement of the arbitral award based on that contract was denied on the grounds that it would contravene public policy.'

elaborates upon the broad approach to `public policy' adopted by some Russian court decisions.[166]

Under the New York Convention (1958) the enforcing court need not give effect to a foreign award if this would be contrary to its domestic conception of public policy: Article V(2)(b). The UNCITRAL Model Law contains similar provisions concerning both annulment and refusal to recognise or enforce awards: Articles 34(2)(b)(ii) and 36(1)(b)(ii). Andrew Cannon (Australia) reports that the New South Wales legislation makes clear that `public policy' in this context *includes* the fact that the `making of the award was induced or affected by fraud or corruption', or that `a breach of the rules of natural justice occurred in connection with the making of the award'.[167]

Within the European Union, the Rome Convention (`Rome I')[168] is *not applicable to `arbitration agreements and agreements on the choice of law'*[169] (but for court litigation, that Convention contains provisions concerning rules which cannot be `derogated from by agreement',[170] `overriding mandatory provisions',[171] including those of the law of the forum,[172] and conflicts between

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[166] Khodykin (Russia): `According to Article 1193 of the Civil Code, applicable foreign law provisions should not be applied if so doing would be contrary to Russian public policy. Where necessary, Russian law rules are to be applied instead. It should be noted that there exists no statutory definition of public policy. Case law describes it quite broadly, allowing for court discretion in deciding whether or not public policy may be invoked in a particular case (Decree of the Moscow Okrug Federal Arbitrazh Court dated 14-21 June 2007 No. KG-A40/5368-07 in case No. A40-3513/07-40-34, Decree of the East Siberia Okrug Federal Arbitrazh Court dated 22 January 2007 in case No. A58-5134/06-F02-7285/06-S2). Recognition and enforcement of an award in Russia may be denied if a court finds it would violate Russian public policy (Article 244 of the Arbitrazh Procedure Code).'

[167] Cannon (Australia), noting s 8(7A), Commercial Arbitration Act 2010 (NSW).

[168] `The Law Applicable to Contractual Obligations' (Regulation (EC) No 593/2008, of 17 June 2008, affecting agreements formed after 17 December 2009, ibid, Article 28); and replacing the Rome Convention of the same title of 19 June 1980.

[169] The Law Applicable to Contractual Obligations' (Regulation (EC) No 593/2008, of 17 June 2008, Article 1(2)(e).

[170] ibid, Article 3(3); similarly there is a saving for mandatory aspects of Community Law, Article 3(4).

[171] ibid, Article 9.

[172] ibid, Article 9(2).

the law specified by that Convention and `the public policy (*ordre public*) of the forum').[173]

(9) ARBITRABILITY

Bart Groen (Netherlands) suggests this example (although even this example might be peculiar to Dutch conceptions of the scope of `arbitrability'):

> *`The arbitral tribunal should also consider, whether the matter at hand can be decided by arbitration. For example: a divorce case cannot be decided by arbitration. However, matters of alimony can.'*

Roman Khodykin (Russia) reports that all questions concerning title to immovable property in Russia have been declared to lie beyond the competence of arbitrations on the ground that such issues are not `arbitrable'.[174]

Under the New York Convention (1958) the enforcing court need not give effect to the relevant foreign award if `the subject matter of the difference is not capable of settlement by arbitration under the law of that county': Article V(2)(a). The UNCITRAL Model Law contains similar provisions concerning both annulment and refusal to recognise or enforce awards: Articles 34(2)(b)(i) and 36(1)(b)(i).

Canada recognises a broad notion of `arbitrability, as Nicholas Pengelley notes.[175]

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[173] ibid, Article 21.

[174] Khodykin (Russia):` One of the most important trends is more detailed regulation of precisely which disputes are arbitrable. In particular, disputes in matters related to rights to immovable property situated and/or registered in Russia are not arbitrable. According to recent case law, such disputes are not arbitrable if they involve or entail the need for state registration of a right to the immovable property in question. On the other hand, disputes involving pecuniary claims related to immovable property (e.g. recovery of outstanding rent) are arbitrable.'

[175] Pengelley (Canada): `As for arbitrability, there are almost no restrictions on resolving disputes by arbitration under Canadian law. This was affirmed by the Supreme Court of Canada in *Desputeaux v Editions Chouette* [2003] 1 SCR 178, where the Court held that parties are not precluded from arbitration of a dispute unless expressly
prohibited by statute or otherwise prevented by Canadian public policy. In that case the Court found that copyright disputes were arbitrable. Conversely, in *Dell Computer Corp v Union des consommateurs* [2007] 2 SCR 801, the Supreme Court held that certain consumer contracts were barred by legislation.'

VIII
STANDARDS
(1) INDEPENDENCE AND IMPARTIALITY

The UNCITRAL Model Law, Article 12, requires prospective arbitrators to disclose `circumstances likely to give rise to justifiable doubts' concerning arbitrators' `impartiality or independence'. Andrew Cannon (Australia) reports that the New South Wales legislation has amplified this by adopting this test: `there is a real danger of bias on the part of the person in conducting the arbitration'.[176]

Hogan Lovells (London) provide a clear overview of this topic, emphasising both the external benefit of arbitrators being independent and impartial, and the internal favourable dynamic if members of the tribunal are perceived to be offering objective suggestions to fellow panel members.[177] They also note that leading arbitration institutions' rules insist on this requirement. [178] Finally, they draw attention to the *IBA Guidelines on Conflicts of Interest in*

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[176] Cannon (Australia), noting s 12(5),(6), Commercial Arbitration Act 2010 (NSW).

[177] Hogan Lovells (London): `Arbitration benefits from a pool of experienced arbitrators who have a reputation for impartiality and independence and are likely to be appointed to sit on tribunals. Choosing arbitrators with an established and impartial reputation can significantly assist a party because: (a) the appointment of an unbiased or impartial arbitrator will likely not threaten the enforcement and recognition of an award; and (b) the views of an arbitrator who is seen by his fellow co-arbitrators unbiased or impartial will more readily be taken into consideration than a person viewed as partial to their appointing party.'

[178] Hogan Lovells (London): ` institutional arbitration provides an initial layer of scrutiny of arbitrators to assess their impartiality and independence. Both the LCIA and the ICC require prospective arbitrators to sign a declaration of their independence, and to disclose in writing any potential conflict which, in the words of Article 7(2) of the ICC Rules, "might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties". Under Article 5.2 of the LCIA Rules "[a]ll arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties. . . ." The ICC Rules provide, at Article 7(1), that "[e]very arbitrator must be and remain independent of the parties involved in the arbitration." These ongoing duties create an initial and continuous duty of impartiality and independence for Arbitrators.[Therefore, the] party nominating an arbitrator therefore has to consider his choice carefully to ensure it will pass the scrutiny of the arbitral institution at the appointing stage and any potential challenges that could result thereafter.'

International Arbitration, promulgated by the International Bar Association in 2004.[179]

Similar guarantees and declarations exist in, for example: Brazil, as explained by Cahali, Amaral, Wambier (Brazil), who also note the importance of the IBA Guidelines;[180] and in
Japan, as noted by Hayakawa and Tamaruya,[181] in Austria, as noted by Christian Koller,[182] and in Germany, as noted by Rolf Stürner.[183]

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[179] Hogan Lovells (London): `These Guidelines are intended to provide specific guidance to arbitrators, parties, institutions and courts as to what situations do or do not constitute conflicts of interest or should be disclosed. Examples and the principles themselves are helpfully distilled into different categories of conflict and what action must, or must not, be taken - i.e. "a non-waivable Red list" which, depending on the situation and facts, give rise to justifiable doubts as to the arbitrator's impartiality and impendence; or, on the other side of the coin, a "Green List" which contains an "enumeration of specific situations where no appearance of, and not actual, conflict of interest exists from the relevant objective point of view.'

[180] Cahali, Amaral, Wambier (Brazil): `Brazilian statutory law expressly requires, as a demand on arbitral jurisdiction, that the arbitrator shall not have any impairment/disqualification or recusation (Arbitration Act, art. 14), including the "duty of disclosure" (art. 14, § 1º), and has the duty to proceed with "impartiality, independence, competence, diligence and discretion" (Arbitration Act, art. 13, § 6º), and the main arbitration institutions also demand that the arbitrator sign, for each dispute, an independence statement, or equivalent document.'

[181] Hayakawa and Tamaruya (Japan): `Justifiable doubts as to impartiality or independence are part of the grounds for challenge: Arbitration Law, art 18(1)(ii): *'A party may challenge an arbitrator … if circumstances exist that give rise to justifiable doubts as to its impartiality or independence')*. A potential arbitrator has an obligation to disclose such circumstances and an arbitrator is under a continuing duty to disclose (Arbitration Law, art 18(3)(4)). These provisions essentially follow the Model Law, art 12. In addition, arbitration institutions can respond to a request to challenge an arbitrator. For example, when the Commercial Arbitration Association (JCAA) receives such a request in writing, it will, after giving notice to the other party and the arbitrators, hold a hearing, consult with the Association's Committee for the Review of Challenges to Arbitrators, and make a decision on the challenge (JCAA's Commercial Arbitration Rules, rule 29). For this purpose, an arbitrator has an obligation to disclose to the JCAA any and all circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence (JCAA's Commercial Arbitration Rules, rule 28). An arbitrator or a potential arbitrator who accepts, demands or promises to accept a bribe is subject to criminal sanctions (Arbitration Law, Arts 50 to 55).'

[182] Koller(Austria): `In accordance with international standards, particularly art 12 Model Law and the IBA Guidelines on Conflicts of Interest in International Arbitration, Austrian law requires an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence exist (see sec 588[2] ACCP). If such circumstances exist an arbitrator may be challenged. Sec 588(2) lays down an objective standard, i.e. from the perspective of a reasonable third person. Procedure: The challenge mechanism provided in sec 589 follows a two-tier procedure. In the first tier the parties are free to agree on a procedure for challenging arbitrators, e.g. by reference to arbitration

Calavros and Babiniotis (Greece) note that Greek law regards independence and impartiality as fundamental, and provides an array of measures (challenge, annulment, compensation, even punishment) to control deviation or abuse.[184] At the same time, party-appointed arbitrators often conduct themselves as the parties' representatives,[185] a feature of arbitral practice which is not peculiar to Greece.

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rules (see sec 589[1]). Failing such agreement the arbitral tribunal shall decide on the challenge. In any case, however, if the challenge remains unsuccessful the challenging party may proceed to the second tier of the challenge mechanism, i.e. request a court to decide on the challenge pursuant to the mandatory provision of sec 589(3).'

[183] Stürner (Germany): `It is a fundamental principle of the administration of justice that nobody can be judge or arbitrator in his or her own case. Members of a representing organ of a party, board of directors, etc., therefore, cannot be arbitrators, though the Federal Supreme Court was more generous in a case where the member of a party's board of directors was appointed after the commencement of the dispute. A party may challenge an arbitrator when it gets knowledge of circumstances which affect an arbitrator's neutrality after appointment. If the arbitrator does not resign or if the arbitral tribunal does not exclude the challenged arbitrator, the affected party may apply to the State Court of Appeals for a final decision (see § 1037 ZPO). But the arbitral tribunal may go on to proceed at the risk that the arbitral award could be revoked by the court of appeals in case of a later judicial exclusion of the challenged arbitrator (§ 1059(2)(d) ZPO). The same is true when a party gets knowledge of relevant facts after the rendition of the tribunal's final decision. Party appointed arbitrators have often more or less closer relations to the appointing party, and sometimes forms of a beauty contest between possible arbitrators precede the appointment. It would be a good cause to challenge an arbitrator if the beauty contest was used to discuss legal or factual issues of the case. Parties should avoid too intensive dialogues with future arbitrators during the preparation phase.'

[184] Calavros and Babiniotis (Greece): `Impartiality and independence are requirements essential and inherent to the judicial nature of the arbitrator's authority. Although distinct, the two notions are generally understood and applied interchangeably. However, independence refers to lack of any connection of dependence with the parties which is material, that is, sufficiently inclined by nature or circumstances to affect the judgment of the arbitrator, whereas impartiality refers to the absence of risk of bias. The Greek Supreme Court has ruled that since the arbitrator acquires in his capacity the status of a judge, impartiality and independence constitute conceptual characteristics of the very notion of "arbitration". On that rationale the Supreme Court has ruled that a party cannot act as arbitrator in a dispute which involves him. Lack of impartiality and independence provides ground for challenging the arbitrator during the arbitration proceedings as well as a ground for setting aside the arbitral award subject to limitations. Furthermore, the arbitrators may be found liable to pay damages to the parties or even liable to punishment for failing to observe those fundamental requirements under the same rules which are applicable to state judges. An arbitrator may be liable to punishment even for not disclosing in advance material facts which, if known, would shed doubt on his impartiality and independence.'

[185] Calavros and Babiniotis (Greece): `In practice it is considered common ground by practitioners and their clients that the arbitrators appointed by the parties are expected to act as their "attorneys" whereas the chairman of the arbitral tribunal (umpire) – who is appointed usually by the court following the

Roman Khodykin (Russia) notes judicial insistence that arbitrators should disclose `information about their participation in conferences sponsored by any of the parties' and `whether they have been appointed by a party too frequently'. [186]

Herbert Smith (London) note: `*One area of controversy that sometimes arises as a result of the nature of the English bar, with self-employed barristers operating together in chambers, is when an arbitrator and counsel come from the same chambers.*'[187]

Complications in Italy concerning challenges to arbitrators on the basis of lack of independence or lack of partiality are explained in detail by Elena Zucconi, Luca Passanante, and Luca Radicati di Brozolo (too detailed to cite in the notes). However, Passanante notes that the position is by no means as exacting as might be desired.[188] But Luca Radicati di Brozolo (Italy) records

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failure of the parties or their arbitrators to agree on a certain person – is expected to act as an impartial and independent judge.'

[186] Khodykin (Russia): `As Russian courts have the power to assess the procedure of appointment of arbitrators who are to consider applications to enforce or cancel awards, certain circumstances that potential arbitrators must disclose can be found in the case law. In particular, it was recently ruled that arbitrators should disclose information about their participation in conferences sponsored by any of the parties to arbitration (Decree of the Moscow Okrug Federal Arbitrazh Court dated 26 July, 13 August 2007 No. KG-A40/6775-07 and Ruling of the Supreme Arbitrazh Court dated 10 December 2007 No. 14955/07). Arbitrators should also disclose if they have been appointed by a party too frequently (Decree of the Moscow Okrug Federal Arbitrazh Court dated 13 October 2008 No. KG-A40/9254-08).'

[187] Herbert Smith (London): further commenting that `Whilst this is not usually considered an issue in England, it can cause disquiet amongst parties and practitioners from other parts of the world, and in one ICSID case has resulted in the tribunal directing that one of the parties refrain from using counsel from the same chambers as the president of the tribunal (*Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008, available at http://icsid.worldbank.org/ICSID/FrontServlet).'

[188] Passanante (Italy): `According to the Italian code of civil procedure the arbitrators are not obliged by the law to disclose typical or untypical circumstances that can affect their impartiality. Although arbitrators are expected to make such disclosure according to the rules of professional conduct, infringement of these rules has rather mild consequences and anyway would not affect the validity of the award, which cannot be appealed on this ground. This lack in the rules that govern arbitration has given rise to much criticism, but no changes are expected in the next future in the relevant legislation.'

that the Milan Arbitration Chamber is introducing standards which will mirror those observed internationally.

More generally, it is important that arbitrators should approach a particular issue with an open mind. But on some matters the supply of open minds has dwindled. Thus Sir Elihu Lauterpacht QC (Cambridge and London) makes this interesting observation: `There is a growing difficulty now about finding arbitrators who have not already had their views on the issue in question tainted by involvement in other arbitrations.'

(2) DUE PROCESS[189]

Besides independence and impartiality (just treated), cardinal features of the arbitration process are: equal treatment of the parties, the right to present one's contentions and supporting evidence, the right to be heard, the expectation that decisions will normally be reasoned, and that he award will be binding as between the two parties (subject only to the possibility of judicial annulment or refusal by foreign courts to enforce, as regulated by the New York Convention, 1958, on these matters see Section IX below). As the author has said elsewhere:[190]

> *`Arbitration shares with court adjudication two core procedural values or principles: impartiality of the arbitrator, and a duty to hear the other's case.*[191] *The arbitration tribunal must respect the parties' right to present points of claim, defence, to adduce evidence, and to make submissions concerning substantive norms....The parties must enjoy an equal opportunity to present their cases. The tendency is for the matter to be considered in an intense and focused way. The neutral arbiter must preserve his appearance of impartiality. He should not become enthusiastic in pursuing his initial perception of the case's merits before all the relevant material is assembled. The arbitrator must examine the dispute judiciously...In England, the arbitration tribunal should give reasons in support of their award,*[192] *unless the parties have 'contracted*

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[189] The arbitral community might find useful, when refining these cardinal principles, the canon of principles expounded in *American Law Institute/UNIDROIT's Principles of Transnational Civil Procedure* (Cambridge University Press, 2006).

[190] Neil Andrews, *The Modern Civil Process* (Mohr & Siebeck, Tübingen, Germany, 2008), 12.03 to 12.05.

[191] Neil Andrews, *English Civil Procedure* (Oxford University Press, 2003), 4.28 ff, 5.01 ff.

> *out' of this requirement.*[193] *In fact most awards are reasoned. In England, the arbitral award on the merits becomes res judicata. And so it is binding on the parties and their successors in title.'*[194]

Rolf Stürner encapsulates the requirements of fair process applicable in Germany:

> *`...there are indispensable requirements of a fair procedure which limit the tribunal's freedom of discretion. The most important principles are the equality of the parties (§ 1042(1) ZPO), the right to be heard and the right to be represented by a counsel admitted to the courts (§ 1042(2) ZPO). Especially the right to be heard protects the parties from orders which limit their right to present their case and to give evidence arbitrarily, and it forces the tribunal to consider all factual assertions carefully against the background of the applicable legal theory for the solution of the dispute. It is my experience as a judge of a state court of appeals during many years that an infringement of the right to be heard is the most important ground for the denial of enforceability.'*

Claudia Perri (Brazil) notes the clear requirement that Brazilian arbitration must be conducted in accordance with constitutional norms requiring `due process'.[195]

(3) FORMAL BARS

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[192] On this principle, in the context of English civil court proceedings, ibid, 5.39 ff.

[193] s 69, Arbitration Act 1996 (England); if 'reasons' are dispensed with, by agreement, there is no such right of appeal: s 69(1) Arbitration Act 1996 (England): 'An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section…'; and s 45(1), ibid.

[194] s 58(1), Arbitration Act 1996 (England).

[195] Perri (Brazil): `the margin of flexibility both the parties and the arbitrator have with regard to the development of the arbitration procedure is considerably wider. However, this does not imply that the arbitrator may be absolutely free to create and implement procedural rules at his discretion. The law itself provides for a limitation to the powers of the arbitrator, who must establish (and conduct) the proceeding in compliance with the constitutional principle of the due process of law ('CFB' – Brazilian Constitution, art. 5, LIV and LV c/c art. 21, Par. 2, of the 'LAB'), under penalty of the award being revoked by means of a claim for annulment (art. 32, VIII c/c art. 33, both in the 'LAB').'

Arbitration cannot be assigned to those under age, or whose criminal tendencies mark them out as untrustworthy. The topic of arbitral capacity has received detailed examination in Hungary, as Viktória Harsági notes.[196]

IX
REVIEW AND ANNULMENT

(1) INTERNAL

Some institutional arbitration bodies provide scrutiny of proposed awards. This is reported by Alan Uzelac (Croatia),[197] Bart Groen (Netherlands),[198] Carsten Kern (Germany, noting the procedure adopted by the ICC in Paris),[199] Roman Khodykin (Russia),[200] and by Hogan Lovells (London, offering a global survey in this respect,[201] including extensive discussion of ICSID

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[196] Harsági (Hungary): `The following may not be arbitrators: a) those under 24 years of age; b) those who have been barred from public affairs by a final court judgment; c) those who have been placed under curatorship by the court; d) those who have been sentenced to imprisonment, until they are dispensed from the disadvantages attached to a criminal record. [Arbitration Act, §§ 11-12].'

[197] Uzelac (Croatia): `The only relevant arbitration institution, the PAC-CCC, has adopted a system according to which the arbitration awards, prior to being sent to the parties, have to be submitted to the Court, which may order changes in the form, and draw attention of the arbitrators to certain matters relevant for the substance of the award. In practice, this function is being discharged by the President and the Presidium of the arbitration institution. This way of supervision is regularly used and contributes to harmonization of the form and standards of decision making, although in some cases it could not prevent different positions on same or similar legal issues. Another way of supervision and assistance is contained in the authorities of the Secretary General to attend the hearings and discuss with the tribunal, without voting rights, the matters that may be of relevance for the decision making. The letter mode of supervision is in practice used only exceptionally.'

[198] Groen (Netherlands): `The Netherlands Arbitration Institute offers arbitrators, nominated by the administrator of that Institute, the possibility of having their decision examined on formal aspects.'

[199] Kern (Germany): `Article 27 of the ICC Rules of Arbitration 1998 is probably the best known example of a non-judicial scrutiny of arbitral awards by an arbitration institution. `Article 27 states: `Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.'

[200] Khodykin (Russia): `The latest edition of the ICAC Rules (International Commercial Arbitration Court) empowers the secretariat to scrutinise awards without interfering with the decision-making.'

[201] Hogan Lovells (London): `With the exception of some maritime and commodity arbitrations (e.g. the Grain and Feed Trade Association (GAFTA)), the majority of arbitral institutions do not employ internal

internal reviews).[202] Herbert Smith (London) report `mixed views concerning this process'.[203]

But not all arbitral institutions have adopted this mechanism, for example it is unknown in Austria,[204] Belgium (as noted by Françoise Vidts and Didier Matray), Brazil (as noted by Claudia Perri), Italy (Luca Radicati di Brozolo noting that the Milan Arbitration Chamber has no such mechanism), nor is it known in Spain, as Carlos Esplugues reports.[205]

It is possible that a particular system of arbitration might provide an internal and formal method of appeal. But this is rare [206] (Rolf Stürner has provided a

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scrutiny of arbitration awards. The two main exceptions to this is the ICC and the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID").'

[202] Hogan Lovells (London): `Under the ICSID Arbitration Rules a party who is dissatisfied with and ICSID award can apply to the ICSID Secretariat for the interpretation, revision or actual annulment of an award. If the application is made for annulment under Article 52(1) of the ICSID Arbitration Rules, ICSID will set up an *ad hoc* committee of three members to determine the application. In the history of ICSID, there have been a total of 39 annulment proceedings. Of the 24 that were not discontinued or settled, ad hoc committees have annulled 11 awards in full or in part. This represents a 46% annulment rate, which is quite exceptional. Indeed, in 2010 ICSID *ad hoc* annulment committees have annulled two substantial ICSID awards on the ground of manifest excess of powers (see *Sempra Energy International v. Argentine Republic*, Decision on the Argentine Republic's Request for Annulment of the Award, ICSID Case No. ARB/02/16, June 29, 2010; and, see *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. The Argentine Republic*, Decision on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/13, July 30, 2010).'

[203] Herbert Smith (London): `Most arbitral institutions do not scrutinise arbitration awards. The key exception is the ICC, where the ICC Court scrutinises awards of arbitral tribunals operating under the ICC Rules (Article 27 ICC Rules). There are mixed views concerning this process. Some are concerned that, although scrutiny is intended to be limited to issues of form, rather than substance, the boundary is not always clear and on occasions the Court may interfere with areas that would more properly be seen as issues of substance that should be within the Tribunal's exclusive domain.'

[204] Koller (Austria): `The practically most important arbitral institution in Austria dealing with international cases is the Vienna International Arbitration Center ("VIAC"). Unlike art 27 ICC Rules, the Vienna Rules do not provide for a scrutiny of arbitral awards rendered under the auspices of the VIAC.'

[205] Esplugues (Spain): `To my knowledge no Spanish Arbitration Institution seems to control *ex post* the award rendered by the arbitrator.'

[206] Koller (Austria): `The parties are free to provide for an appeal to a second arbitral instance in the arbitration agreement or by reference to arbitration rules, which is rare in practice and does not affect the possibility of a request to have the award set aside under sec 611 ACCP.'

helpful conspectus of these arrangements).[207] Within the world of sports arbitration, there is such an internal appellate mechanism, as noted in an English decision.[208]

An interesting variation, as noted by Hiroshi Tega (Japan), is to seek formal *interpretation of an award by the arbitral tribunal*.[209]

(2) JUDICIAL

Most nations seem to follow the restricted grounds for annulment listed in the UNCITRAL Model Law, Article 32(2). This is the position in Greece,[210] and in Russia,[211] and it appears in Hungary[212] and in Germany.[213] The English (and

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[207] Stürner: `The only German arbitration institution of significance is the "Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS)". Its arbitration rules do not provide internal non-judicial supervision of arbitration awards. The arbitration rules of organizations or associations may sometimes establish two instances of arbitration tribunals for disputes with their members. In these cases, decisions of first instance tribunals are appealable and the tribunal of second instance may challenge the first instance court's decision and render a new decision. But real appellate structures of institutional arbitration systems are rare. Sometimes the "first instance decision" is not a real arbitration decision but a disciplinary measure of an association's administrative organ only. The remedy against such measures is not an appeal, it is an application for a first review by an arbitration tribunal of first instance which determines the legal correctness of the disciplinary measure. In the field of sports and its special fabric of justice, those structures are very common, and sometimes the real nature of the deciding first instance body is in dispute. The legal organization of a tribunal must meet the requirements of neutrality and full independence of its arbitrators and, according to the more and more prevailing opinion, its competence must be based on an individually concluded arbitration agreement, clauses in the association's regulation do not suffice.'

[208] *Sheffield United Football Club Ltd v West Ham United Football Club plc* [2008] EWHC 2855 (Comm); [2009] 1 Lloyd's Rep 167.

[209] Tega (Japan): `a party may make a request to the arbitral tribunal for interpretation of arbitral award. The request may only be made where if so agreed by the parties, and within 30 days of the receipt of the notice of the arbitral award. The requesting party shall also notify the other party of such a request. The arbitral tribunal shall make a ruling within 30 days of receipt of the request, and may extend the period for its response.'

[210] Calavros and Babiniotis (Greece): `With regard to international commercial arbitration, Article 34 of Law 2735/1999 provides the criteria for setting aside an arbitral award which reflect the grounds for annulling an arbitral award laid out in Article 34 of UNCITRAL Model Law.'

[211] Khodykin (Russia): `According to Article 34 of the ICAA (International Commercial Arbitration Court), upon application of a party, an arbitral award may be set aside by the competent Russian court if the party so applying furnishes proof that: (i) a party to the arbitration agreement was under some incapacity, or said agreement is not valid under the governing law chosen by the parties (or, in the absence of such choice, under Russian Federation law); or (ii) the party making the application was not

Australian) mechanism for controlled appeals on points of English law has been examined earlier: III(6).

Cahali, Amaral, Wambier (Brazil) report fairly intense levels of successful applications for annulment by Brazilian courts, and they note an empirical survey of the grounds for this, based on a sample of 80 such applications.[214] They cite the following comment on this process:[215]

> *`Deviations from the norms must be corrected. Thus, far from weakening the institute of arbitration, correct judicial annulments strengthen it. When any of the hypotheses catered for by the law occur, it is up to the Judiciary to assure the integrity of the rights of the parties. As could be observed in the judgements*

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duly notified of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or (iii) the award was made in relation to a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains a decision on matters beyond the scope of the arbitration agreement (where only part of an award is outside the scope of the arbitration agreement, then only that part of the award may be set aside); or (iv) the composition of the arbitral tribunal or the arbitral procedure was inconsistent with that agreed by the parties, unless such agreement was in conflict with a provision of the ICAA from which the parties cannot deviate; or (v) if the court finds *ex officio* that: the subject matter of the dispute is not capable of settlement by arbitration under Russian law; or the award is in conflict with Russian public policy. Finally, the parties cannot agree to exclude any basis of challenge against an international arbitral award.'

[212] Viktória Harsági (Hungary), summarising the provisions of the Hungarian Arbitration Act, sections 54, 55.

[213] Kern (Germany): `In common with the Model Law (and unlike sec. 69 of the English Arbitration Act 1996), there is no provision for an appeal on the merits. Also in common with the Model Law, the time for setting aside an award is limited to three months from receipt of the award. However, the German Act contains stricter provisions than the Model Law in this context where a request has been made to the tribunal for correction or interpretation of the award (§ 1059 (3) of the Code of Civil Procedure/Zivilprozessordnung).'

[214] Cahali, Amaral, Wambier (Brazil): (This is a highly abbreviated portion from the very interesting material). `A recent survey, conducted in an "Academic-Scientific Institutional Partnership" between the Brazilian Arbitration Committee (CBA) and FGV's (Fundação Getúlio Vargas) Sao Paulo Law School (DireitoGV), analysing 90 cases judged by State Courts involving the claim or request for annulment of arbitral awards: noting Revista Brasileira de Arbitragem – *IOB-CBAr.*, n. 22 – Apr/Mayo/Jun 2009, p. 7 and ss., which published "Relatório do 1º Tema: Invalidação da Sentença Arbitral, da pesquisa "Arbitragem e Poder Judiciário".'

[215] Cahali, Amaral, Wambier (Brazil): (This is a highly abbreviated portion from the very interesting material).Revista Brasileira de Arbitragem – *IOB-CBAr.*, n. 22 – Apr/Mayo/Jun 2009, p. 7 and ss., which published "Relatório do 1º Tema: Invalidação da Sentença Arbitral, da pesquisa "Arbitragem e Poder Judiciário".'

presented here, that is exactly what the Brazilian Judiciary has been doing since the enactment of the Arbitration Act.'

Bart Groen (Netherlands) notes that Dutch law permits an application for *annulment* (according to restricted criteria) to be considered by the first instance court,[216] but an application for *revocation* (based on slightly expanded criteria) can be heard by the appeal court.[217] Similar factors has been adopted in Italy, as explained by Luca Passanante.[218] But, as Alan Uzelac (Croatia)

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[216] Groen (Netherlands): `A party can ask the court of first instance, that has jurisdiction for the place of arbitration, to *annul* the decision or ask the court of appeal that has jurisdiction for the place of arbitration, to *revoke* the decision. With respect to *annulment* these grounds are: lack of a valid agreement on arbitration; or the tribunal has been composed in violation of the rules for composition; or the tribunal has not acted according to its assignment; or the arbitral decision has not been signed according to the provisions of the law or has not been reasoned; or the arbitral decision, or the way it has been brought about, is in violation with public order or good morals.'

[217] Groen (Netherlands): `With respect to a request to *revoke* the decision these grounds are: 1. discovery, after the decision has been rendered, that the decision rests (partly) on deceit committed by, or with the knowledge of, the other party in the arbitral procedure; or 2. the decision rests (partly) on documents revealed to be false after the decision has been rendered;, or 3. a party has, after the decision has been rendered, obtained documents which were withheld by the other party and which could have been of influence on the decision.'

[218] Passanante (Italy): `The arbitration award can be appealed before National Courts for some specific reasons with the aim to annul it.

The parties can appeal the award before the Court of Appeal within 90 days from its service:

1) If the arbitration agreement is invalid;
2) If the arbitrators have not been appointed according to the rules of the code of civil procedure, providing the relevant issue had been raised in the arbitration process;
3) If the award has been given by a person that could not have been appointed as an arbitrator;
4) If the award has been rendered outside the limits of the arbitration agreement – provided the interested party has promptly objected during the arbitration procedure – or if the arbitrators have made a decision on the merit and couldn't do so;
5) If the award has been given without:

a. Motivation
b. The order that should be embodied in it
c. The signature of arbitrators.

6) If the award has been given after the deadline fixed by the parties or by the law, provided the interested party has declared, pending the arbitral proceeding, the purpose of grounding an appeal on this issue;
7) During the arbitral proceeding the rules provided for by the parties haven't been complied with either by the parties or by the arbitrators, provided the breach of these rules is sanctioned with a nullity and this has not been healed;

admits, even these attempts at circumscribing the grounds of annulment do not prevent judicial hearings from lasting for an intolerable time.[219]

As Shukun Zhao shows, the grounds for annulment in China are broad. Much will depend on the discipline of the Chinese courts if this is not to become an open charter for considering matters *de novo* within those courts.[220]

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8) If the award is contrary either to another final award or to a final judicial decision affecting both the parties, provided the award or the judicial decision have been filed in the arbitration proceeding;
9) If the arbitration proceeding did not comply with the principle of a fair trial;
10) If the arbitration award does not decide the case on the merit, as it was expected to do;
11) If the award embodies conflicting orders;
12) If the award does not embody any decision of a claim or a defence forwarded by the parties according to the arbitration agreement.

...Furthermore, the parties are allowed to challenge the award if:

a) It is the result of one of the parties' malice to the detriment of the other one;
b) If it has been given on the basis of evidence found false after the award was rendered or that the losing party did not know were found false before the award was rendered;
c) If, after the award was rendered, were found one or more conclusive documents that the parties could not file in the arbitration proceeding because either of force majeure or of the behaviour of the opposing party;
d) If the award is the result of the arbitrators' fraud recognised by a final judgment.'

[219] Uzelac (Croatia); `Although reasons for setting aside are today rather limited, the court process is adversary and could take place in three instances (Commercial Court, High Commercial Court, Supreme Court). A step forward was that the law in 2001 reduced the number of courts that deal with setting aside to four or five (from over 100 in previous times). Yet, the court processes can last for years. In theory, stay of enforcement of the award due to setting aside action should only very exceptionally be granted; in practice, it happens almost regularly. '

[220] Zhao (China): `According to the Arbitration Act of PRC, there are some clauses associating the annulment by national courts of national arbitration awards.

> "Article 58 The parties may apply to the intermediate people's court at the place where the arbitration commission is located for cancellation of an award where they provide evidence proving that the award involves one of the following circumstances: 1.there is no arbitration agreement between the parties; 2.t he matters of the award are beyond the extent of the arbitration agreement or not within the jurisdiction of the arbitration commission; 3.the composition of the arbitration tribunal or the arbitration procedure is in contrary to the legal procedure; 4. the evidence on which the award is based is falsified; 5. the other party has concealed evidence which is sufficient to affect the impartiality of the award; and 6.the arbitrator(s) has (have) demanded or accepted bribes, committed fraud, or perverted the law in making the arbitral award.
>
> The People's court shall rule to cancel the award where the existence of one of the circumstances prescribed in the preceding clause is confirmed by its collegiate bench.
>
> The People's court shall rule to cancel the award where it holds that the award is contrary to the social and public interests."'

(3) SCRUTINY DURING TRANSNATIONAL ENFORCEMENT

This is considered at X(1) below.

X

ENFORCEMENT

(1) THE NEW YORK CONVENTION (1958)[221]

Foreign awards are enforceable in over 140 different countries by way of the New York Convention (`NYC 1958'). Hogan Lovells (London) have summarised this fundamental pillar of cross-border arbitral recognition and enforcement, and for reasons of space the reader is referred to this note for details.[222] It is common to regard this instrument as one of the great success stories of modern arbitration. For example, enforcement of foreign awards

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[221] New York Convention (1958): The grounds for the refusal of recognition and enforcement of an arbitration award are as follows:

(a) The parties to the arbitration agreement were under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made (Article V.1(a));

(b) A party was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present its case
(Article V.1(b));

(c) The award deals with issues not contemplated or not falling within the
terms of the submission to arbitration or contains decisions on matters
beyond the scope of the submission to arbitration (Article V.1(c));

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place
(Article V.1(d)); or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award has been made (Article V.1(e)).

[222] Hogan Lovells (London):`arbitral awards enjoy the significant advantage of being enforceable in over 140 different countries by way of the New York Convention (`NYC 1958'). Indeed, for those countries that have signed up to the NYC 1958, there is said to be a presumptive obligation to enforce and recognise foreign arbitral awards that fulfil the criteria set out in that instrument. The threshold issue when attempting to enforce an award under the NYC 1958 is establishing the existence of an award. This is contained in Article IV. Once this has been established, the NYC 1958 leaves many of the issues for enforcement of an award to the national laws of those countries that are party to the Convention. (e.g. Sections 100 to 103 of the (English) Arbitration 1996 Act). The NYC 1958 does not allow any review of the merits of an award (and neither does the UNCITRAL Model Law). Additionally, grounds for refusal of enforcement and recognition under the New York Convention are exhaustive. While the NYC 1958 is used by the majority of legal forums in the world, its provisions are inconsistently applied by national courts. However, these decisions have no binding authority on courts in other jurisdictions that are party to the Convention.'

proceeds smoothly, for the most part, in Spain, as Carlos Esplugues reports.[223] But, for an example of a national court (England) refusing to give effect to a foreign (French) arbitral award, see III(7) above on the UK Supreme Court's decision in *Dallah Real Estate & Tourism Holding Co v Pakistan* (2010).[224]

Of course, not all foreign awards fall for recognition or enforcement under the NYC (1958). And so it is necessary to have more general criteria, although these will often reflect the terms of the NYC 1958. This topic is addressed in the Greek report.[225]

Claudia Perri (Brazil) reports that it is not yet clear whether the Brazilian courts will refuse to enforce a foreign arbitration award on the basis that it does not contain adequate reasoning.[226]

(2) NATIONAL CRITERIA GOVERNING DOMESTIC AWARDS

For reasons of space, this topic is omitted.

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[223] Esplugues (Spain): `The attitude maintained by Spanish Courts as regards foreign arbitration awards is very flexible and positive. Recognition is made in application of the New York Convention of 1958 and is granted in most of the cases requested.'

[224] [2010] UKSC 46; [2010] 3 WLR 1472.

[225] Calavros and Babiniotis (Greece): `Foreign arbitral awards which do not fall within the scope of the New York Convention are recognized and enforced pursuant to the relevant articles of the Greek Code of Civil Procedure and in particular articles 903, 905 and 906. Following application of the said articles a foreign arbitral award is declared enforceable upon request by the court provided that: (a) the arbitration agreement is valid under the applicable law; (b) the subject matter of the award is arbitrable under Greek law; (c) lack of pending procedure for annulling the arbitral award; (d) no violation of the right to defense of the defeated party has occurred; (e) the arbitral award is not contrary to the res judicata effect of a Greek court decision rendered between the same parties; (f) the arbitral award is not contrary to the public order or the morality.'

[226] Perri (Brazil): `Another issue that has been widely debated is the requirement contained in art. 26, II, of the 'LAB' and the lack of supporting arguments (grounds) in most of the foreign arbitral awards[226] to the extent that important arbitration rules worldwide permit rendering an arbitral award without stating its grounds. The matter is quite delicate in that the ratification, in Brazil, of foreign awards cannot breach the public policy rules. It is noteworthy that the need to furnish grounds is related to the principle of "justification of decisions", as per the Constitution. Therefore, and as occurred before, the recognition of a foreign arbitral award (without stating its grounds) may be challenged if such recognition is found to be a violation to the public policy. Unfortunately, the STJ has not yet issued any opinion on this, as in one of the cases in which the ratification of an arbitral award was challenged based on such grounds, the ratification was denied for different reasons.'

(3) EFFECT OF NATIONAL COURT'S ANNULMENT OF AWARD

This topic has inspired a large literature, including the remarkable study by Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, Leiden, and Boston, 2010). Here it is enough to note what Alan Uzelac (Croatia) has referred to the `new fashion' for some state courts to contemplate that a foreign award, even though annulled in the jurisdiction where the arbitration had its `seat', might still be recognised or enforced in another jurisdiction. This possibility exists, according to the jurisprudence of certain national systems, but it is too early to declare that this is likely to become the predominant possibility amongst leading trading nations. Moreover, it should be noted that the New York Convention (1958) states, Article V(10(e), that an enforcing court can choose not to recognise or enforce a foreign award if it has been annulled in the courts of the relevant `seat'. But this is not regarded as a mandatory ground for refusing to recognise or enforce such an award.

This sub-topic was recently noted in extensive *dicta* of Lord Collins in the *Dallah* case (2010),[227] noting French and Swiss approaches,[228] and contrasting

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[227] [2010] UKSC 46; [2010] 3 WLR 1472, at [129] and [130].

[228] *per* Lord Collins, in the *Dallah* case, ibid: `In France the leading decisions are *Pabalk Ticaret Sirketi v Norsolor*, Cour de cassation, 9 October 1984, 1985 Rev Crit 431; *Hilmarton Ltd v OTV*, Cour de cassation, 23 March 1994 (1995) 20 Yb Comm Arb 663 , in which a Swiss award was enforced in France even though it had been set aside in Switzerland: " … the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside …" (at p 665); *République arabe d'Egypte v Chromalloy Aero Services*, Paris Cour d'appel, 14 January 1997 (1997) 22 Yb Comm Arb 691 . Thus in *Soc PT Putrabali Adyamulia v Soc Rena Holding*, Cour de cassation, 29 June 2007 (2007) 32 Yb Comm Arb 299, an award in an arbitration in England which had been set aside by the English court (see *PT Putrabali Adyamulia v Soc Est Epices* [2003] 2 Lloyd's Rep 700) was enforced in France, on the basis that the award was an international award which did not form part of any national legal order. Those decisions do not rest on the discretion to allow recognition or enforcement notwithstanding that "the award … has been set aside … by a competent authority of the country in which … that award was made" (New York Convention, article V(1)(e)). They rest rather on the power of the enforcing court under the New York Convention, article VII(1) , to apply laws which are more generous to enforcement than the rules in the New York Convention: see Born, International Commercial Arbitration (2009), pp 2677—2680; Gaillard, "Enforcement of Awards Set Aside in the Country of Origin" (1999) 14 ICSID Rev 16; and *Yukos Capital SARL v OAO Rosnef*t, 28 April 2009, Case No 200.005.269/01 Amsterdam Gerechtshof.'

the American approach.[229] Christian Koller (Austria) notes that the Austrian Supreme Court has adopted this approach, but in a case not falling within the New York Convention (1958).[230]

However, Rolf Stürner (Germany) indicates that this would not be possible in Germany, where the fate of the foreign award would be conclusively determined if it had been annulled by the courts of the relevant `seat'.[231] The same is true of Croatia, according to Alan Uzelac.

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[229] *per* Lord Collins, in the *Dallah* case, ibid: `In the United States the courts have refused to enforce awards which have been set aside in the State in which the award was made, on the basis that the award does not exist to be enforced if it has been lawfully set aside by a competent authority in that State: *Baker Marine (Nigeria) Ltd v Chevron (Nigeria) Ltd*, 191 F 3d 194 (2d Cir 1999); *TermoRio SA ESP v Electranta SP*, 487 F 3d 928 (DC Cir 2007). But an Egyptian award which had been set aside by the Egyptian court was enforced because the parties had agreed that the award would not be the subject of recourse to the local courts: *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996). That decision was based both on the discretion in the New York Convention, article V(1) and on the power under article VII(1) (see *Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F 3d 357, 367 (5th Cir 2003)) and whether it was correctly decided was left open in *TermoRio SA ESP v Electranta SP* , ante, at p 937.'

[230] Koller (Austria): `The OGH has hitherto only once decided on the enforcement of an arbitral award set aside at the place of arbitration (OGH 3 Ob 117/93 and 3 Ob 115/95, YB Comm Arb 1999, 919). In this case an award which had been rendered under the auspices of the Foreign Trade Arbitration Court at the Yugoslav Chamber of Commerce in Belgrade was set aside by the Supreme Court of Slovenia on the ground that it violated the public policy of Slovenia. Both Slovenia and Austria are contracting states to the European Convention 1961. The OGH therefore applied art IX of the European Convention holding that "a plain reading of art IX shows that the setting aside of an arbitral award for violation of the public policy of the Contracting State where it was rendered does not appear among the grounds exhaustively listed in art IX(1) of the European Convention as justifying a refusal of recognition or enforcement of an arbitral award." As regards the relationship with the NYC the OGH noted that the violation of public policy in the country of origin is not one of the grounds to be considered under art IX European Convention and that this limitation binds also the states which are parties to both the European Convention and the NYC pursuant to art IX(2). Against this background it is irrelevant that the NYC applies to Austria as well as to Slovenia and that it contains grounds for the refusal of enforcement that are broader than those of the European Convention. According to the OGH art IX of the European Convention effectively limits the application of Article V(1)(e) NYC, which provides that the setting aside of the arbitral award is a ground for refusal without limitation.'

[231] Stürner (Germany): `In case of judicial revocation of an arbitral award in the country of its origin, the affected party may apply for revocation of a German decision of executability (§ 1061(§) ZPO) which was rendered in the meantime. Consequently, a revoked foreign arbitral award cannot be acknowledged and executed in Germany, even if the deciding German court does not share the foreign courts point of view regarding the grounds for revocation and non-recognition.'

XI
CONNECTIONS WITH MEDIATION AND SETTLEMENT

(1) MEDIATION BEFORE COMMENCEMENT OF ARBITRATION

It has become common for a multi-tier dispute resolution clause to provide that mediation should be attempted before proceeding to arbitration or court litigation.[232] The leading English decision concerning mediation clauses is *Cable & Wireless v IBM United Kingdom Ltd* (2002).[233] This case concerned the grant of a stay when London High Court proceedings were commenced prematurely. That commencement of court proceedings involved breach of a multi-level dispute clause, requiring the parties first to engage in mediation. It would appear that a similar response –an arbitral stay of arbitration proceedings--would be adopted where the premature activity was unilateral commencement of arbitration proceedings in breach of a multi-level dispute clause, requiring the parties first to engage in mediation. It is also possible that the English courts would be prepared to grant anti-suit injunctions to restrain parties from commencing or continuing foreign (or perhaps English) arbitration if this were a violation of such a clause.

Michele Lupoi and Caterina Arrigoni (Italy) consider the possibility that sometimes commencement of arbitration might be regarded as premature by reason of a recent statute. This Italian law renders mediation a mandatory prior stage in respect of certain categories of dispute.[234]

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[232] D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd edn, London, 2010), Part III; K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (London, 2007) ch 9; see also Centre for Effective Dispute Resolution at: www.cedr.co.uk/library/documents/contract_clauses.pdf; D Spencer and M Brogan, *Mediation: Law and Practice* (Cambridge University Press, 2006), ch 12 for Australian material. The School of International Arbitration, Queen Mary, University of London, report (2005), available on-line at:
http://www.pwc.com/Extweb/pwcpublications.nsf/docid/0B3FD76A8551573E85257168005122C8.

[2002] 2 All ER (Comm) 1041, Colman J.

[234] Lupoi and Arrigoni (Italy): `In 2010, decreto legislativo n. 28 introduced a comprehensive legislation on mediation.In particular, according to art. 4, from March 2011, before starting judicial proceedings in several matters (e.g. lease contract, real property, wills and succession, medical liability, libel…), mediation must mandatorily be attempted. If such attempt is not performed, the court will adjourn the case and remand the parties to mediation. Apparently this also applies vis à vis arbitration in the same subject matters. Article 5, para. 5, moreover, expressly states that, when the parties have contractually

(2) SEPARATE AND PARALLEL MEDIATION WHEN ARBITRATION IS PENDING

David Steward (Ince & Co, London) reports:

> *`In our experience, it is not inconvenient to conduct a mediation [by a mediator appointed separately from the arbitrator] while an arbitration is pending, just as in court proceedings. The mediation is often short (a day or two), and need not significantly disrupt the conduct of the arbitration.'*

There is also some experience in London of use of mediation as a possible solution to the common problem of jurisdictional wrangling, arising from disputed arbitration clauses and complex national judicial litigation aimed at determining the validity or scope of such clauses, or challenging the assertion of arbitrators of jurisdiction: see discussion at Section V(1) above of *C v RHL* (2005).[235]

(3) THE CONSERVATIVE VIEW: ARBITRATOR NOT TO COMBINE THE FUNCTION OF A MEDIATOR

Some commentators consider that it is confusing and undesirable for the arbitration tribunal itself to engage in mediation. Sir Elihu Lauterpacht QC (London) puts the matter pithily: *`there is a grave danger that if an arbitrator acts like a mediator and the mediation fails that the arbitrator's final decision may be adversely influenced.'*

However, as we shall see, some national commentators report flexible arrangements permitting an arbitrator to conduct mediation, failing which, the arbitration will continue: but this requires clear party consent, and other appropriate safeguards.

Hogan Lovells (London) suggest that it is often unsafe to require them to conduct mediation as a preliminary phase. This is because arbitrators are required to act as final decision-makers:: *`an arbitrator has a duty to remain independent and impartial which may be compromised by his involvement in a*

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agreed on mediation before litigation, the arbitrators have to remand the parties to mediation if such attempt has not been performed beforehand.'

[235] [2005] EWHC 873 (Comm), Colman J.

settlement agreement. In many jurisdictions arbitrators will not attempt to act or play the role of mediator since this may create the appearance, valid or not, that the arbitrator is no longer impartial and independent.' David Steward (Ince & Co, London) agrees, and adds: `If the arbitrator were to stray into the arena of settlement, he would risk giving the appearance of partiality.' Art Hinshaw (USA) also concurs. He suggests that `proposing settlements for the parties is...dicey, not only because of issues relating to role-confusion, but because of the signals that such proposals send to the parties.'

Furthermore, individual arbitrators are not necessarily well-suited to change role and become mediators: *`a competent arbitrator may not always be a competent mediator...an arbitrator may not have the suitable skills to enable the parties to reach an agreement, as the goal of arbitration is to get results rather than to bring about a settlement.*' Even the making by arbitrators of strong settlement suggestions might place an arbitrator in hot water, according to Natalie Moore (London): `if they were to start making settlement suggestions, they might even get into trouble with the parties – that is not their role.'

In addition, Renato Nazzini (England and Italy) makes the practical point: *`As far as I know, it is now generally recognized that it would be improper for a mediator to act as arbitrator and vice-versa. Obviously, if the parties consent, the problem in principle goes away but, in reality, the parties would not be as candid as they should in the mediation knowing that the mediator would/could then decide the dispute. I would refuse to perform both roles, if asked*.'

As for civil law systems, Alan Uzelac (Croatia) suggests that mediation and arbitration are `separate worlds', despite attempts to promote `med-arb' clauses. He adds the telling remark: `early settlements may impede arbitrators from earning their full fees, which might urge some of them to think about the assistance in settlements as a self-destructive action.' Christian Koller also notes that Austrian law is disinclined to permit a mediator to act as arbitrator within the same dispute.[236]

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[236] Koller (Austria): `s 16(1) of the Austrian Mediation Act (Zivilrechts-Mediations-Gesetz, BGBl I 29/2003) provides that the mediator of a conflict cannot become the decision-making body in that very conflict and vice versa. It is argued in legal literature that s 16(1) is non-mandatory and therefore the parties may derogate from it. Additionally, the arbitrator that previously acted as a mediator would have to disclose any circumstances that give rise to justifiable doubts as to his or her impartiality or independence. In such cases the parties may, however, waive their right to challenge an arbitrator (for a detailed analysis see M Pitkowitz & M-T. Richter, May a Neutral Third Person Serve as Arbitrator and Mediator in the same Dispute? German Arbitration Journal 2009, p 228; A Petsche & M Platte, The

A similar bifurcation of the activities of mediators and arbitrators emerges from comments made by Cahali, Amaral, Wambier (Brazil).[237] However, Claudia Perri (Brazil) hints at greater flexibility if the parties so choose, although she admits that the main arbitration institutions adhere to a traditional separation between mediation and arbitration.[238]

In Hungary Viktória Harsági reports that mediators and arbitrators are regarded as engaged in separate activities, but institutional rules can lead to appointment of those who are customarily engaged as arbitrators to act as mediators, on the understanding that this neutral will not combine the functions of mediator and arbitrator.[239] The versatile neutral is not a peculiarity of Hungary. No confusion will result if it is clear that the neutral is performing as mediator or as arbitrator, and not simultaneously juggling these two roles.

Arbitrator as Dispute Settlement Facilitator, Austrian Arbitration Yearbook 2007, p 87). Provided that the parties' right to due process (including the arbitrator's impartiality and independence) is guaranteed, Austrian law does not specifically restrict the arbitrator's right to encourage settlements between the parties.'

[237] Cahali, Amaral, Wambier (Brazil): `In the Arbitration Act, there is an express recommendation to the arbitrator (or arbitration tribunal) to attempt conciliation. However, the development of mediation (as opposed to the conciliation overseen directly by the arbitrator) is carried out independently, in separate proceedings, and handled by a mediator, not by an arbitrator.'

[238] Perri (Brazil): `there are certain rules of arbitration institutions expressly establishing that, unless otherwise provided by the parties, the mediator or conciliator acting in the case cannot be appointed as an arbitrator because, during the mediation or conciliation process, one of the parties may allege that such professional tended to be in favour of the other party's argumentation, thus lacking the impartiality required from arbitrators. Nevertheless, prohibiting a mediator or conciliator from acting as an arbitrator is not a general rule, as many times the mediator or conciliator may indeed be appointed as arbitrator in view of his personal abilities and the trust the parties may place on him.'

[239] Viktória Harsági (Hungary): `With regard to settlements, a new position has become outlined in professional legal literature, according to which "arbitral tribunals do not necessarily have to urge parties to strike a settlement concerning the dispute by all means. A settlement often carries with it the psychical disadvantage that both parties may feel they had to reduce their claims". The Rules of Proceedings of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry provide a detailed regulation of the relationship between conciliation-mediation and arbitration proceedings... If the parties agree on the conciliation-mediation proceedings, the President of the Arbitration Court shall appoint a conciliator-mediator from the arbitrators listed in the roll of arbitrators... At the joint request of the parties, the President of the Arbitration Court shall appoint the conciliator-mediator as sole arbitrator. The sole arbitrator shall render an award containing the agreement reached and signed by the parties. [Rules of Proceedings, Article 52].'

(4) PARTIES CONSENTING TO ARBITRATORS ACTING AS MEDIATORS: THE TRANSNATIONAL RISE OF THE CHAMELEON `NEUTRAL'

Amongst the Common Law jurisdictions, Australia (specifically New South Wales) has embraced the chameleon mediator-arbitrator. Andrew Cannon (Australia) reports that the New South Wales legislation permits an arbitrator to act first as a mediator and then (if necessary) to arbitrate the dispute.[240] He explains:[241]

> *`The process typically commences as an arbitration (so that there is a dispute that can result in an enforceable arbitration award), but then proceeds by way of mediation. If that is unsuccessful then the mediator/arbitrator can then, if the parties consent in writing, move to arbitration. There are concerns that the hybrid process may constrain frankness and flexibility in the mediation phase and risk complaints of bias and lack of due process where private sessions occur in the mediation. However, the requirement of consent before a shift to arbitration and a requirement that the arbitrator then disclose relevant material discussed in private session obviates some of these problems.'.*

Herbert Smith (London) report a satisfactory instance[242] of the parties themselves agreeing that the arbitrator should act as mediator. In the relevant case a settlement was achieved as a result, although caution should be exercised to ensure that this process of mediation does not `back-fire'.[243]

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[240] Cannon (Australia): noting s 27 D, Commercial Arbitration Act 2010 (NSW).

[241] Cannon (Australia).

[242] Herbert Smith (London): `In our view, in appropriate cases, and provided it is done with the parties' consent (and with sufficient safeguards in place to minimise the risk of any subsequent challenge to the arbitrators or the Final Award – for example by excluding caucusing from the process), it may be beneficial for the tribunal to facilitate a mediation or settlement process. For example, in one recent case (ICC arbitration with seat in Austria) the tribunal, following the exchange of written submissions, evidence and witness statements, proposed a meeting where they would give preliminary views on the merits of the dispute, and then seek to assist the parties in reaching a settlement. At the meeting, which lasted 2 days, the tribunal spent a number of hours going through their views of the merits of the case (including their views of the documentary evidence) in a fairly forthright manner, before facilitating a mediation process. Whilst this process did not lead to an immediate settlement and the proceedings continued, the reality check it provided to the parties was instrumental in the parties reaching a settlement within a matter of weeks and in advance of the substantive hearings.'

[243] Herbert Smith (London): `However, although the process worked well in the case described above, in our view it is only in rare cases that an arbitrator acting as mediator will work in such a positive manner. The roles of arbitrator (a finder of fact and decision maker) and mediator (facilitating the

More generally, the Centre for Effective Dispute Resolution (London) notes[244] the perils of arbitrators conducting intra-arbitral mediation (`med-arb') and then returning to act in the same dispute as arbitrators. The arbitrator will have gained *ex parte* information during the unsuccessful mediation stage.[245] Use of this, or perceived influence by it, might jeopardise the fairness of the arbitration and the validity of the eventual award.[246] CEDR suggest that this risk must be explained to the parties *ex ante*, and at the same stage there should be discussion of possible use of an external mediator.[247]

But if the Arbitration Tribunal, or one of its members, is allowed by the parties to engage in mediation, CEDR's solution is that there must be full and informed party consent, in writing. This is necessary to counter the challenge that the decision made by the former mediator, now resuming his role of as arbitrator, might be influenced by information obtained *ex parte* during the unsuccessful mediation stage.[248]

However, Carsten Kern (Germany) notes that some German arbitral proceedings might proceed subject to an institutional mandate to promote and consider settlement.[249]

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parties reaching their own settlement) are fundamentally different, and one individual (or tribunal) fulfilling both roles presents a number of practical problems, such as:

(i) as a party you will be quite guarded in what you choose to say to the arbitrator(s) sitting in any mediation process, whereas with a mediator who will not be a finder of fact and decision maker there will be more confidence in telling the whole story in an informal way.

(ii) From the arbitrator's point of view, there is the danger that one party or another will lose confidence if, in the course of the mediation, the arbitrator expresses views one way or the other about the merits.

In conclusion, we believe the role of a mediating arbitrator is something to be approached with caution; but can be a useful (if risky) technique in some cases.'

[244] `CEDR Commission on Settlement in International Arbitration', Final Report, 2009, Appendix 2: http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf

[245] ibid, Appendix 2, para 4.

[246] ibid, at para 5.

[247] ibid, at para 6.

[248] ibid, at para 7.

[249] Kern (Germany): `The DIS Arbitration Rules 1998 expressly provide for a more pro-active role of the arbitral tribunal in settling disputes: "Section 32 Settlement: At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute."'

Rolf Stürner (Germany) endorses this. He develops this point in an interesting passage concerning German adjudication in general, both from the perspective of courts and arbitrators.

> *`In all German court proceedings the judge plays an important role in fostering resolutions by agreement. In this role the judge functions under the following statutory admonition: "The court shall be mindful at all stages of the proceedings of the potential for an agreed disposition of the legal dispute or individual issues thereof (§ 278(2) ZPO)." Most German judges take their role as facilitators of settlements very seriously. German civil procedure has the character of a dialogue between court and parties. The judge's duty to give hints and feedback on the legal and factual sufficiency of the parties' position is at the core of the judicial function in civil litigation.'*

Stürner adds::

> *`The court has to put the open cards on the table. A court should not render a decision which is unexpected and surprising for the parties. According to the understanding of many legal cultures and especially the Anglo-American legal culture, there is a deep conflict of roles between mediation and decision-making. This is true for legal cultures which define the judge's role as one of a passive umpire who renders a final decision without a preceding dialogue between court and parties. If, on the other hand, civil procedure is organized on the basis of a dialogue between court and parties to find a correct decision, there is no remarkable conflict of roles between mediation and decision-making, because both settlement and decision are the result of mutual discovery and clarification.'*

And he concludes:

> *`Against this background of mediatory traditions in German court procedures, it is clear that arbitrators in German arbitration proceedings should also foster resolutions by agreement, and in practice this is done regularly. Arbitrators prefer rights-based mediation. Without the consent of the parties they should not take into consideration facts which were not asserted by the parties as a basis of their claims and defences. Parties could challenge state court judges*

> *and arbitrators who try to pierce the parties' veil with the intention to have a better knowledge of the dispute's "real" factual basis for the furtherance of an interest-based settlement. Mediatory attempts of arbitrators should be done in the presence of both or all parties without caucusing. This is necessary to avoid an infringement of the right to be heard which is an essential element of the principle of "audiatur et altera pars". In practice, however, arbitrators sometimes negotiate settlement proposals in the absence of the opponent with the opponent's consent. Caucusing is a questionable technique even in private out-of-court mediation and should not be practised in court proceedings or arbitration. Even if it is done with the parties' consent, it may damage the parties' confidence in the arbitrator's neutrality in later phases of the arbitral proceedings.'*

Hayakawa and Tamaruya report that Japanese law permits an arbitrator to act as a mediator only if the parties have expressly consented to this,[250] and Hiroshi Tega (Japan) endorses this.[251] Laura Ervo (Finland) also states: `it is not the task of the arbitrators to push' settlement proposals.'[252] The same approach is reported in Italy by Radicati di Brozolo, and in Spain by Carlos Esplugues (Spain).[253] As for the Netherlands, Bart Groen reports that a fluid practice exists: arbitrators (with the parties' consent) feel free to engage in

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[250] Hayakawa and Tamaruya (Japan): `An arbitral tribunal may attempt to settle the dispute subject to the arbitral proceeding, but this is allowed only when the parties consent in writing (Arbitration Law, art 38(4)). ... Today, certainly in arbitral proceedings involving foreign (non-Japanese) parties, there will be no settlement attempt in the absence of explicit party agreement...Rule 47 of the JCAA Commercial Arbitration Rules authorises the arbitral tribunal to settle the dispute in the arbitral proceedings, but only if all of the parties consent. Rule 8 of the JCAA International Commercial Mediation Rules provides for the possibility of a mediator acting as an arbitrator, but only upon party consent.'

[251] Tega (Japan): `attempts by arbitral tribunal at settlement may only be made where both parties consent to it (JAL art 38(4)).'

[252] Ervo (Finland), citing Risto Ovaska, *Välimiesmenettely – kansallinen ja kansainvälinen riidanratkaisukeino* (Edita, Helsinki, 2007), 170; Ervo comments: `Ovaska uses the word"push" in Finnish and it describes well the existing attitudes: mediation is not seen as arbitrator's duty.'

[253] Esplugues (Spain): `Spain lacks a real culture of arbitration and negotiation. So far practice shows that some arbitrators at the beginning of the procedure ask parties to try to settle their dispute, but this does not mean that they actually act as mediators. In fact, in so far the parties want their disputes to be subjected to arbitration and they appoint an arbitrator (or arbitrators) in this regard this would prevent him/them to act as a mediator. This will finally be something for the parties to request the arbitrator to perform on mutual agreement basis and not for the arbitrator to be adopted on his own.'

settlement discussions.[254] China appears to stand at the extreme end of this spectrum. Shukun Zhao notes that arbitrators are positively mandated by statute to promote conciliation.[255]

Beyond the heartland of commercial disputes, Alan Rycroft (South Africa) notes that there is an intertwining of mediation and arbitration within the practice of labour law dispute resolution.[256] Elena Zucconi reports a similar approach in relation to Italian labour disputes.[257]

(5) INSTITUTIONAL SUPPORT FOR CONTRACTUALLY MANDATING ARBITRATORS TO FACILITATE SETTLEMENT

The Centre for Effective Dispute Resolution (London) has issued its `*CEDR Rules for the Facilitation of Settlement in International Arbitration*'.[258] The same CEDR report collects other national arbitration rules concerning arbitration and the promotion of settlement.[259] For convenience, these are the main points within the CEDR Rules, First, such arrangements can be `incorporated on an

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[254] Groen (Netherlands): `Arbitrators may ask the parties if they are interested in a session where the parties try, with possible help of the arbitrators, to consider their differences in a more open way. A session whereby each party is invited to comment in a constructive way on the positions taken by the other party. Arbitrators often do suggest in such sessions, or after the hearing, when each of the parties have let off steam, settlement proposals. Such proposals can end up in an arbitral settlement award, signed by the parties and arbitrators.'

[255] Zhao (China): `In China, mediation is a way of solving the disputes even if in arbitration. The Arbitration Act of PRC prescribes the relations between arbitration and mediation. So, the arbitrators behave like mediators and propose their settlement.

> "*Article 51: Before giving an award, an arbitration tribunal may first attempt to conciliate. Where the parties apply for conciliation voluntarily, the arbitration tribunal shall conciliate. Where conciliation is unsuccessful, an award shall be made promptly. When a settlement agreement is reached by conciliation, the arbitration tribunal shall prepare the conciliation statement or the award on the basis of the results of the settlement agreement. A conciliation statement shall have the same legal force as that of an award.*
> *Article 52: A conciliation statement shall set forth the arbitration claims and the results of the agreement between the parties. The conciliation statement shall be signed by the arbitrators, sealed by the arbitration commission, and served on both parties. A conciliation statement shall have legal effect once signed and accepted by the parties. Where the parties fall back on their words before the conciliation statements is signed and accepted by them, an award shall be made by the arbitration tribunal promptly."'*

[256] Rycroft (South Africa): `The Labour Relations Act 66 of 1995 encourages informality and recourse to conciliation even during the arbitration.'

[257] Zucconi (Italy): `a 2010 law on labour law (l. 183/2010) has established that a special commission can act as a mediator and, subsequently, as an arbitrator on the same issue.'

[258] http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf

[259] ibid, Appendix 4, `Table of existing provisions on settlement in arbitration'.

ad hoc basis by agreement of the Parties, as part of an institution's rules, or within a contract clause requiring arbitration.'[260] Secondly, the arbitral tribunal (with the parties' agreement) can then take `proactive steps' to `assist the parties to reach a negotiated settlement',[261] such as (a) issuing preliminary views on issues and evidence; and making (b) preliminary non-binding findings of law, facts or issue; or (c) suggesting possible terms for further settlement negotiation; and (d) chairing of settlement meetings..[262] The Tribunal is empowered to place the arbitration `on hold' if mediation appears to be a possibility:[263] `*the Arbitration Tribunal shall: insert a Mediation Window in the arbitral proceedings when requested to do so by all Parties in order to enable settlement discussions, through mediation or otherwise, to take place; adjourn the arbitral proceedings for a specified period so as to enable mediation to take place when requested to do so by a Party in circumstances where the contract in dispute contains a mandatory mediation provision which requires the Parties to mediate any relevant dispute, and the Parties have failed to do so before the time the issue is raised in the arbitration (provided that such failure was not due to the action or inaction of the Party requesting the adjournment).*'

Failure to `beat' a settlement offer, or to comply with a contractual undertaking to mediate or negotiate, or an `unreasonable refusal' to `make use of a Mediation Window' can justify the Tribunal in making an appropriate `allocation' of `the costs of the arbitration'.[264]

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[260] CEDR Rules for the Facilitation of Settlement in International Arbitration (`CEDR Rules'), introduction, para 2.

[261] Art 3(2), CEDR Rules.

[262] Art 5(1), CEDR Rules:

`the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties' dispute:

> provide all Parties with the Arbitral Tribunal's preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues;
>
> provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration;
>
> where requested by the parties in writing, offer suggested terms of settlement as a basis for further negotiation.
>
> where requested by the Parties' in writing, chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated.'

[263] Art 5(3), CEDR Rules.

[264] Art 6, CEDR Rules.

As for Settlement Negotiation Privilege, the Rules provide that:[265] *`Nothing said or done by any Party or its counsel in the course of any settlement discussions, or in the course of any other steps taken by the Arbitral Tribunal to facilitate settlement, shall be used against a Party in the event that the arbitration resumes (save as regards the allocation of costs in accordance with Article 6 [costs provision, see text below] of these Rules).'*[266]

The Rules also state: *`The Arbitral Tribunal shall not take into account for the purpose of making an award, any substantive matters discussed in settlement meetings or communications, unless such matter has already been introduced in the arbitration. Further, the Arbitral Tribunal shall not judge the credibility of any witness on the basis of either the witness having been a party representative during settlement discussions, or anything said by or about, or attributed to, the witness during settlement discussions.'*[267]

The Tribunal's impartiality is preserved:[268] *`The Arbitral Tribunal shall not: meet with any Party without all other Parties being present; or obtain information from any Party which is not shared with the other Parties.'*

The Arbitral Tribunal must refrain from acting ` knowingly' so as to `make its award susceptible to a successful challenge'.[269]

Finally, a Tribunal (or Tribunal member's) engagement in settlement efforts will not be used by a Party to seek disqualification of that Tribunal or individual, or as a basis for challenging any award.[270] *`The Parties agree that the Arbitral Tribunal's facilitation of settlement in accordance with these Rules will not be asserted by any Party as grounds for disqualifying the Arbitral Tribunal (or any member of it) or for challenging any award rendered by the Arbitral Tribunal.'* If real doubts emerge in this regard, the Arbitrator should resign:[271] *`If, as a consequence of his or her involvement in the facilitation of settlement, any arbitrator*

[265] Art 3(4), 3(5), CEDR Rules.
[266] Art 3(4), CEDR Rules.
[267] Art 3(5), CEDR Rules.
[268] Art 5(2), CEDR Rules.
[269] Art 3(1), CEDR Rules.
[270] Art 3(3), CEDR Rules.
[271] Art 7, CEDR Rules.

develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator shall resign.'

XII
CONCLUDING REMARKS

On other occasions (lectures given in Pavia (2009),[272] Sao Paulo, and Curitiba (2010)), I have referred to `Civil Justice's Double Helix',[273] that is, to the complex interaction, and mutual support, between the court system and the non-court system. The metaphor expresses the idea that one strand—consisting of ADR, including arbitration and mediation—and the other strand—the court process—are complementary and entwined. Together the two strands of the court process and the alternative forms of dispute resolution have considerable strength.

In this general report I have cited abundant evidence of the global tendency to broker a marriage of the state administered court system and the systems of arbitration, mediation, and settlement. The marriage at times can be tempestuous, at other times harmonious, but it is always interesting. The marriage has not broken down: too many depend on its success.

For the future, the five main issues would seem to be these.

First, there is a need to ensure consistently high standards of arbitration, and to strike a balance between arbitral autonomy and external curial review.

Secondly, it will be important to tap the potential of arbitration to provide efficient and attractive adjudication.

Thirdly, it will be necessary to cope with the problematic features of privatised justice: protection of vulnerable parties; compliance with

[272] Published now as Neil Andrews, `The Modern Civil Process in England: Links between Private and Public Forms of Dispute Resolution' (2009) 14 ZZP Int *Zeitschrift für Zivilprozess International*: Germany 3-32 also translated as `La "Doppia Elica" della Giustizia Civile: I Legami tra Metodi Privati e Pubblici di Risoluzione delle Controversie' in *Rivista Trimetrale di Diritto e Procedura Civile* (2010) 529-48 (I am grateful to Elisabetta Silvestri, Pavia, for this excellent translation).

[273] The `Double Helix' structure of DNA was discovered by Francis Crick and James Dewey Watson (Nobel Prize 1962); the latter is an Honorary Fellow of Clare College, Cambridge, where the author is a Fellow; and there is a sculpture of the Double Helix within the college's grounds.

mandatory laws and elements of public policy; reflections on the limits of `arbitrability'; and steps to enable interesting arbitral case law to become visible without sacrificing party confidentiality.

Fourthly, Gaillard has referred to the `international legal order'; by which he suggests that international commercial arbitration will continue to stimulate and develop an autonomous system of a-national substantive norms and procedural practices.[274]

Finally, perhaps the most interesting and challenging emerging trend—which is controversial—is for parties to permit the arbitrator to wear two hats: as an ultimate decision-maker and as a mediator charged with the task of facilitating a settlement, failing which he will revert to his `default' function as an arbitrator. The next decade or so will reveal whether the chameleon mediator/arbitrator (a `one-stop' private dispute-resolution neutral) will prove successful. There are sceptics who prefer the traditional approach: that the role of mediator —the man of peace—and the role of decision-maker—*iudex or arbiter*—are functions which should be performed by separate procedures and by different persons possessing different procedural capacities.

But one thing seems clear: the chances of arbitrators renouncing a case by referring it to outside mediation are small, even zero, unless the arbitrators' fee is payable whether or not the reference results in an arbitral award; whereas courts and judges receive their salaries independently of the number of judgments they receive. It comes as no surprise therefore that mediation has become a flourish adjunct to court litigation, whereas the current debate is whether mediation can be satisfactorily internalised as part of the arbitration process.

[274] Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, Leiden, and Boston, 2010).

Appendix

CEDR Rules for the Facilitation of Settlement in International Arbitration

Introduction

1. These CEDR Settlement Rules are designed to increase the prospects of Parties tointernational arbitration proceedings being able to settle their disputes without theneed to proceed through to the conclusion of those proceedings. The Rules outlinesteps which Arbitral Tribunals are to take (and are not to take) with a view tofacilitating settlement by the Parties.

2. The CEDR Settlement Rules are designed to supplement the legal provisions and theinstitutional or *ad hoc* rules according to which the Parties are conducting theirarbitration. The Rules can be incorporated on an ad hoc basis by agreement of theParties, as part of an institution's rules, or within a contract clause requiringarbitrationThe following is sample wording for inclusion in a contract clause: "In the conduct of any arbitration under this[Agreement], the Arbitral Tribunal shall apply the CEDR Rules for the Facilitation of Settlement in InternationalArbitration Proceedings".

3. These Rules were first introduced by The CEDR Commission on Settlement in International Arbitration whose report of November 2009 provides guidance andbackground informationhe full report is available at www.cedr.com

Article 1 Definitions

1. "Arbitral Tribunal" means a sole arbitrator or a panel of arbitrators

2. "CEDR Settlement Rules" means the CEDR Rules for the Facilitation of Settlement in
International Arbitration

3. "First Procedural Conference" means the first conference between the Arbitral Tribunaland the Parties (whether by meeting or otherwise) at which the procedure for theconduct of the arbitration is discussed and established

4. "General Rules" mean the institutional or *ad hoc* rules according to which the Partiesare conducting their arbitration

5. "Mediation Window" means a period of time during an arbitration that is set aside sothat mediation can take place and during which there is no other procedural activity

6. "Party" means a party to the arbitration

Article 2 Scope of Application

Settlement in International Arbitration - Rules and Recommendations

1. Subject to Articles 2.1 and 2.2, whenever the Parties have agreed to apply the CEDR

Settlement Rules, the Rules shall govern the steps taken by the Arbitral Tribunal tofacilitate settlement of the Parties' dispute.
2. In case of conflict between any specific provision of the CEDR Settlement Rules and anymandatory provision of law determined to be applicable to the case by the Arbitral
Tribunal, the mandatory provision of law shall prevail. The Arbitral Tribunal shall applythe CEDR Settlement Rules in the manner that it determines best in order to accomplishtheir purpose, without contravention of the conflicting mandatory provision of law.
3. In case of conflict between any provisions of the CEDR Settlement Rules and the
General Rules, the Arbitral Tribunal shall apply the CEDR Settlement Rules in themanner that it determines best in order to accomplish the purposes of both the GeneralRules and the CEDR Settlement Rules, unless the Parties agree to the contrary.
4. In the event of any dispute regarding the meaning of the CEDR Settlement Rules, the
Arbitral Tribunal shall interpret them according to their purpose and in the mannermost appropriate for the particular arbitration.
5. Insofar as the CEDR Settlement Rules and the General Rules are silent on any matterconcerning the facilitation of settlement and the Parties have not agreed otherwise,the Arbitral Tribunal may facilitate settlement, as it deems appropriate, in accordancewith the general principles of the CEDR Settlement Rules.

Article 3 General Principles

1. In assisting the Parties with settlement, the Arbitral Tribunal shall not knowingly act insuch a way as would make its award susceptible to a successful challenge.
2. Subject to Article 3(1), the Arbitral Tribunal will take proactive steps in accordancewith these CEDR Settlement Rules to assist the Parties to achieve a negotiatedtheir dispute.
3. The Parties agree that the Arbitral Tribunal's facilitation of settlement in accordancewith these Rules will not be asserted by any Party as grounds for disqualifying the Arbitral Tribunal (or any member of it) or for challenging any award rendered by the Arbitral Tribunal.
4. Nothing said or done by any Party or its counsel in the course of any settlementdiscussions, or in the course of any other steps taken by the Arbitral Tribunal tofacilitate settlement, shall be used against a Party in the event that the arbitrationresumes (save as regards the allocation of costs in accordance with Article [6] of theseRules).
5. The Arbitral Tribunal shall not take into account for the purpose of making an award,any substantive matters discussed in settlement meetings or communications, unlesssuch matter has already been introduced in the arbitration. Further, the

ArbitralTribunal shall not judge the credibility of any witness on the basis of either the witnesshaving been a party representative during settlement discussions, or anything said by orabout, or attributed to, the witness during settlement discussions.

Article 4 Discussion at First Procedural Conference

CEDR Commission on Settlement in International Arbitration - Rules and Recommendations

1. The Arbitral Tribunal shall invite the Parties themselves (represented by a member oftheir management or in-house legal function) to participate in the First ProceduralConference (or such other early hearing or discussion as is used to establish theprocedure for the arbitration). The Parties shall be encouraged to speak directly withthe Arbitral Tribunal during the First Procedural Conference on matters relating tosettlement.

2. At the First Procedural Conference, the Arbitral Tribunal shall:

2.1. ensure that the Parties understand that they can settle their dispute or part oftheir dispute at any time;

2.2. ensure that the Parties are aware of the different dispute resolution processes(such as mediation) which, in the opinion of the Arbitral Tribunal, might assist theParties in settling their dispute;

2.3. where appropriate, discuss with the Parties how other dispute resolution processesused to facilitate settlement might be accommodated at an appropriate timewithin the procedure for the arbitration (for example by way of a MediationWindow);

2.4. discuss and agree with the Parties the steps that the Arbitral Tribunal will betaking in accordance with Article 5 of the CEDR Settlement Rules to facilitatesettlement;

2.5. discuss and agree with the Parties whether the Arbitral Tribunal, when allocatingthe costs of the arbitration between the Parties, is to take into account offers tosettle in the manner described in Article [6] below; and

2.6. discuss and agree with the Parties the points during the course of the arbitrationwhen the topic of settlement will be discussed again between the Parties and theArbitral Tribunal.

Article 5 Facilitation of Settlement by Arbitral Tribunal

1. Unless otherwise agreed by the Parties in writing, the Arbitrconsiders it helpful to do so, take one or more of the following steps to facilitate athe Parties' dispute:

1.1. provide all Parties with the Arbitral Tribunal's preliminary views on the issues indispute in the arbitration and what the Arbitral Tribunal considers will benecessary in terms of evidence from each Party in order to prevail on those issues ;

1.2. provide all Parties with preliminary non-binding findings on law or fact on keyissues in the arbitration;
1.3. where requested by the parties in writing, offer suggested terms of settlement asa basis for further negotiation.
1.4. where requested by the Parties' in writing, chair one or more settlement meetingsattended by representatives of the Parties at which possible terms of settlementmay be negotiated;
2. The Arbitral Tribunal shall not:
2.1. meet with any Party without all other Parties being present; or
2.2. obtain information from any Party which is not shared with the other Parties;

CEDR Commission on Settlement in International Arbitration - Rules and Recommendations

3. The Arbitral Tribunal shall:
3.1. insert a Mediation Window in the arbitral proceedings when requested to do so byall Parties in order to enable settlement discussions, through mediation orotherwise, to take place;
3.2. adjourn the arbitral proceedings for a specified period so as to enable mediationto take place when requested to do so by a Party in circumstances where thecontract in dispute contains a mandatory mediation provision which requires theParties to mediate any relevant dispute, and the Parties have failed to do sobefore the time the issue is raised in the arbitration (provided that such failurewas not due to the action or inaction of the Party requesting the adjournment).

Article 6 Costs

1. When considering the allocation between the Parties of the costs of the arbitration,(including the Parties own legal and other costs) the Arbitral Tribunal may take intoaccount
1.1. any offer to settle that has been made by a Party where the Party to whom such an offer has been made has not done better in the award of the Arbitral Tribunal than the terms of the offer to settle;
1.2. any unreasonable refusal by a party to make use of a Mediation Window; or
1.3. any failure by a Party to comply with a requirement to mediate or negotiate in thecontract between the Parties which is the subject of the arbitration.

Article 7 Arbitrator impartiality and independence

1. If, as a consequence of his or her involvement in the facilitation of settlement, anyarbitrator develops doubts as to his or her ability to remain impartial or independent inthe future course of the arbitration proceedings, that arbitrator shall resign.