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Editorial

International arbitration scholarship is constantly evolving. As early as forty years ago, arbitration was not considered a subject of academic importance. Arbitration courses, therefore, were not included in generalist law degrees (like J.D. or LL.B. programmes) or in LL.M. curricula. At best, arbitration was considered a subordinate legal subject. For example, in Germany and in a number of German-influenced jurisdictions, such as Austria, the Netherlands, Greece and Italy, arbitration has mainly been treated as procedural law; this explains why arbitration laws are still included in their national codes of civil procedure. Moreover, in France and Switzerland, arbitration has been viewed as private international law or as a conflict of laws subject and, in the common law world, arbitration has traditionally been treated as a version of ordinary contract law. This explains why scholarly work in arbitration largely drew on theories, concepts and doctrines of private international law, civil procedure and contract law. It was only in 1985 that Professor Julian Lew (a visionary arbitration lawyer) introduced an international arbitration course in the LL.M. curriculum of Queen Mary University of London.

Since then, international arbitration scholarship has expanded rapidly, transcending different fields both across and beyond law. Indeed, international arbitration is now the subject of academic research from the perspective of both private and public international law, legal theory, legal history, law, economics and legal sociology. There is also a surge of empirical studies on international arbitration. At the same time, of course, a wide range of interesting and important doctrinal work is conducted in international arbitration which aims to inform the way arbitration is practised and identify the legal rules and principles of international arbitration law.

It is this inclusive approach to the study of international arbitration which this Journal has decided to adopt. We believe that international arbitration is an exciting new field which gives rise to several diverse questions, which require different methods and approaches to address. And we welcome scholarly articles which aim to contribute to and advance the academic debate, as well as articles which aim to provide analysis of developments in case law, legislation and practice in the field of dispute resolution.

The current issue demonstrates a very interesting mix of articles focusing on different aspects of arbitration. Caroline Larson takes a theoretical approach and examines the important question of fairness in international arbitration, and whether an appeal process would make international arbitration a fairer dispute resolution process. Reyadh Seyadi examines the, always important, role of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, while Georgios Martsekis investigates the growing relevance of international arbitration in finance transactions. Adesina Bello looks into what will soon be the zeitgeist of arbitration scholarship, namely AI and new forms of online dispute settlement, while Ekaterina Sjöstrand examines the concept of “proper notice” in the light of the recent decision of the English courts in *Zavod Ekran v Magneco Metrel*.

We are also delighted to include two excellent conference papers (from the CI Arb’s very successful 2017 conferences on arbitration culture) by two distinguished authors: Derek Wood examines the role and importance (as well as the weaknesses) of common law advocacy in international arbitration; Professor Janet Walker provides a very interesting overview of the factors that affect the choice of the seat international arbitration and the usefulness of the GAR-CI Arb Seat Index based on the London Principles.

The issue concludes with very informative book reviews by Reza Mohtashami and Michael Kotrly and our book review editor, Gordon Blanke.

Stavros Brekoulakis
Editor

Articles

Substantive Fairness in International Commercial Arbitration: Achievable through an Arbitral Appeals Process?

Caroline Larson*

Abstract

The general absence of any review on the merits is considered to be one of the key features of international commercial arbitration and is generally regarded as a comparative advantage over litigation in national courts, which typically provide for multiple levels of appeal. The quid pro quo of finality is said to be fairness, given that there is generally no means of correcting an arbitral award which contains errors. However, a growing movement places a greater emphasis on fairness, advocating the introduction of some form of appeals mechanism. This article seeks to evaluate whether an arbitral appeals mechanism would achieve the objective of enhancing fairness in international commercial arbitration by examining the error correction function of appellate courts. It engages in a comparative analysis of the structure and contextual context of appeals in national court systems and the purposed arbitral appeals process in international commercial arbitration. It is argued that the absence of a hierarchical structure and its integral features, which are considered to be fundamental to the error correction function, together with the highly contextual and systemic nature of correcting errors on appeal in national court systems present significant challenges to achieving the objective of enhancing fairness through an appeals process in international commercial arbitration.

1. Introduction

One of the key principles of international commercial arbitration is finality, which is widely understood as the absence of any substantive review of the merits of an arbitral award.¹ The absence of substantive review is in stark contrast to national legal systems which typically provide for a multi-tiered appellate process in which first instance court decisions are subjected to relatively extensive examination by appellate courts.² Finality in international commercial arbitration is not simply regarded as a virtue in itself, leading to the quick resolution of disputes, but also as engendering the additional benefits of time and cost savings.³ However, the trade-off to finality is said to be fairness, given that generally there

* I am extremely grateful to Professor Stavros Brekoulakis, my LLM dissertation supervisor at Queen Mary University School of Law. I would also like to thank the CI Arb editorial team for their helpful suggestions. Lastly, I would like to thank Sean Hilton for his support and encouragement.

¹ Gary B Born, *International Arbitration: Law and Practice* (2nd edn, Wolters Kluwer 2016) 11. National courts are generally restricted to an extremely limited review of awards in relation to issues of procedure, jurisdiction and public policy. In addition, the vast majority of national arbitration legislation and institutional arbitral rules exclude any appeal to a reviewing authority. eg pursuant to the London Court of Arbitration Rules 2014, art 26.8: "the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority". Under the English Arbitration Act 1996, s 69 parties may appeal on a point of English law. However, s 69 is a non-mandatory provision, meaning that the parties are free to exclude it.

² Gary Born, *International Arbitration: Law and Practice* (2nd edn, Wolters Kluwer 2016) 11.

³ William H Knull III and Noah D Rubins, "Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?" (2000) 11 Am Rev Intl Arb 531, 531.

is no means of correcting an arbitral award that contains error. In choosing international commercial arbitration, as opposed to national court litigation, the parties are considered to have chosen to prioritise the finality of an award over its correctness.⁴

The pre-eminence of finality has created tensions where an award appears to be based on mistake.⁵ This has contributed to a growing movement in international commercial arbitration which advocates enhanced scrutiny of the merits of arbitral awards, and in particular through an appeal to an appellate arbitral tribunal.⁶ The arguments of many scholars and practitioners for an appeals process in international commercial arbitration are predicated on the idea that parties may not deem finality to be appropriate in certain cases, and in particular in high-value, complex, “bet-the-company” type disputes. In such cases, it is argued, the parties should have the option to prioritise fairness, in the form of a correct award, through the process of an appeal.⁷

This article seeks to contribute to the fairness versus finality debate by evaluating whether an arbitral appeals mechanism would actually achieve the objective of enhancing fairness in international commercial arbitration. It begins by unpacking the concept of fairness into procedural and substantive notions and linking substantive fairness in the form of a correct decision to an appeals process.⁸ This is followed by a brief background to the review of arbitral awards and surveys the current debate regarding appeals in international commercial arbitration. The evaluation of whether an appeals process would serve to enhance substantive fairness begins in the next section with an analysis of appeals in litigation, which are generally understood as performing two functions: error correction and law-making. Focusing on the error correction function, this section goes on to compare the structural and contextual conditions of error correction in national court systems and in international commercial arbitration. It is argued that the absence of hierarchy and the systemic, policy-based nature of the error correction function of appellate courts pose significant challenges to achieving the objective of enhancing substantive fairness through an appeals process in international commercial arbitration.

⁴ This sentiment was expressed recently by the Singapore Court of Appeal in *AKN v ALC* [2015] 3 SLR 488 [38]: “[t]he parties to an arbitration do not have a right to a ‘correct’ decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process”; see Sundaresh Menon CJ, “Standards in Need of Bearers: Encouraging Reform from Within” *Chartered Institute of Arbitrators: Singapore Centenary Conference* (3 September 2015) 11: <<http://www.ciarb.org.sg/wp-content/uploads/2015/09/Keynote-Speech-Standards-in-need-of-Bearers-Encouraging-Reform-from-.pdf>> accessed 13 March 2018.

⁵ Hans Smit, “Contractual Modifications of the Arbitral Process” (2008–2009) 113 Penn St L Rev 995, 998.

⁶ The idea of an arbitral appellate has found favour amongst scholars including William H Knull III and Noah D Rubins, “Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?” (2000) 11 Am Rev Intl Arb 531; Paul Bennett Marrow, “A Practical Approach to Review of Commercial Arbitration Awards: Using an Appellate Arbitrator” (2005) 60 Disp Resol J 10; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109; Mateus Aimore Carreiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752055> accessed 13 March 2018. The prevailing view amongst commentators seems to be that an appeal to an arbitral appellate tribunal is more acceptable than an appeal to a national court.

⁷ See, eg William H Knull III and Noah D Rubins, “Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?” (2000) 11 Am Rev Intl Arb 531; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109; Mateus Aimore Carreiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185.

⁸ Whilst reviewing litigation appeals for procedural legitimacy and substantive correctness, this article links procedural fairness with the procedural grounds of annulment and substantive fairness with a review of the merits. Whilst admittedly this does not capture the entire picture, it is submitted that substantive review is more closely linked to appeals.

2. What is fairness?

Critics often deride fairness as a “problematic concept” with “slim objective content”.⁹ Yet despite its admittedly “grubby” nature,¹⁰ fairness has been shown to matter to users of international commercial arbitration. According to one survey of in-house corporate counsel, “fairness” was rated above all other considerations in choosing a dispute resolution mechanism.¹¹ Another study found that parties rated a “fair and just result” in arbitration above all other considerations including cost, finality, speed and privacy.¹²

Whilst fairness is often referred to within international commercial arbitration scholarship, notions of fairness are often left implicit.¹³ This article adopts a practical approach to defining fairness, conceptualising it as comprising distinct notions of procedural fairness and substantive fairness or, colloquially, “right process” and “right result”.¹⁴ Procedural fairness is concerned with the fairness of the dispute resolution procedure itself, independent of outcome.¹⁵ The metrics of procedural fairness incorporate well-known, widely accepted principles such as the right to be heard, the right to respond to the case put forward by the other side and equal treatment of the parties. Other expressions of procedural fairness in international commercial arbitration include being given proper notice of the appointment of the arbitrators and the proceedings themselves.¹⁶ Such principles of procedural fairness are reflected universally across the various arbitration laws and arbitral institutional rules, as well as in the 1958 New York Convention (the New York Convention).¹⁷

Substantive fairness, on the other hand, is concerned with outcome and obtaining the “right result”. However, defining and measuring what is the “right result” presents significant challenges, and thus notions of procedural fairness tend to dominate not only the literature in international commercial arbitration but civil adjudication more generally.¹⁸ The reasons for the prevalence of procedure include, perhaps most obviously, the fact that procedural fairness provides a pragmatic and arguably more objective alternative to substantive fairness.

For the purposes of this article, substantive fairness is defined in terms of correctness or accuracy. The focus of this article is on legal accuracy,¹⁹ and accordingly substantive

⁹ William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012) 91.

¹⁰ Barbara Wilson and Alastair Wilson, “Why is Fairness ‘Grubby’?—Semantics, Etymology, and Perspectives in Dispute Resolution” (2006–2007) 13 *Tex Wesleyan L Rev* 795.

¹¹ Queen Mary University of London School of International Arbitration and PWC, “Corporate Choices in International Arbitration: Industry Perspectives” 2013 *International Arbitration Survey*, 6–7: <www.arbitration.qmul.ac.uk/research/2013> accessed 13 March 2018.

¹² Richard W Naimark and Stephanie E Keer, “What Do Parties Really Want from International Commercial Arbitration?” (November 2002/January 2003) 57(4) *Dis Resol J* 78.

¹³ See, eg Hossein Abedian, “Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review” (2011) 28(6) *J Int Arb* 590. Abedian equates fairness with a degree of judicial review in his article; Rowan Platt, “The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?” (2013) 30(5) *J Int Arb* 53; Platt uses fairness as an analytical tool without defining what it is but rather by equating fairness to judicial review of arbitral awards.

¹⁴ Richard W Naimark and Stephanie E Keer, “What Do Parties Really Want from International Commercial Arbitration?” (November 2002/January 2003) 57(4) *Dis Resol J* 78.

¹⁵ Robert G Bone, “Agreeing to a Fair Process: The Problem with Contractarian Theories of Procedural Fairness” (2003) 83 *BU L Rev* 485, 508–10.

¹⁶ Julian D M Lew, Loukas A Mistelis and Stefan Kröll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 674.

¹⁷ See, eg the 2017 Arbitration Rules of the International Chamber of Commerce art 22, which mandates that arbitrators must act fairly and impartially as between the parties, and each party must have a reasonable opportunity to present its case. The UNCITRAL Model Law art 18 is similar, stating that parties are to be treated equally and given a full opportunity to present their cases. The 1958 Convention and many national laws stipulate that enforcement of an award may be refused by a national court if basic standards of procedural fairness are not met, for instance the losing party had been unable to present its case.

¹⁸ See, eg Robert G Bone, “Agreeing to a Fair Process: The Problem with Contractarian Theories of Procedural Fairness” (2003) 83 *BU L Rev* 485 explaining how outcome-based theories often fall within the realm of procedural fairness so that it is the fairness of the *procedure* which is determined by the quality of the outcome.

¹⁹ Such focus reflects the fact that appellate courts in many jurisdictions focus on legal errors. For example, in the US the scope of review by appellate courts of factual findings by a trial court is extremely deferential whereas legal determinations are usually *de novo*: Mateus Aimoré Carreteiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) *J Int Arb* 185, 191.

fairness may be evaluated on the basis of the extent to which a final arbitral award reflects “an accurate application of the relevant law to the facts of the case”.²⁰ The standard of measurement for substantive fairness is therefore substantial accuracy, which includes a set of reasonable perspectives; an unreasonable view would be considered as substantive unfairness.²¹

3. International commercial arbitration and fairness

The modern form of international commercial arbitration emerged during the unprecedented economic transformations of the nineteenth century.²² Businesses were then more engaged in international markets than at any other point in history²³ and turned to arbitration to provide a more efficient, cost-effective and final method of dispute resolution than litigation.²⁴ As arbitration gained momentum, courts eyed arbitration with suspicion and mistrust²⁵ and sought to retain control over it by, for instance, subjecting arbitral awards to reviews on the merits.²⁶ Yet this perceived “second guessing” of arbitral awards was largely ended with the ratification of the New York Convention and the adoption of national laws designed to enhance the finality of awards through less intrusive judicial review.²⁷

The vast majority of modern national arbitration legislation excludes appellate review of awards on the merits.²⁸ In addition, national courts are generally restricted to an extremely limited review of arbitral awards in relation to issues of the integrity of the arbitral process, the jurisdiction of the tribunal and wider public policy considerations.²⁹ The current system of limited review of arbitral awards for, what are in essence, basic procedural fairness requirements is designed to ensure that arbitration does not simply become a precursor to court litigation.³⁰ Limited review preserves the benefits initially sought by the parties in choosing arbitration, namely a final resolution to their dispute, cost and time savings and a neutral forum independent of national courts.³¹

²⁰ Robert G Bone, “Agreeing to a Fair Process: The Problem with Contractarian Theories of Procedural Fairness” (2003) 83 BU L Rev 485, 510.

²¹ Robert G Bone, “Agreeing to a Fair Process: The Problem with Contractarian Theories of Procedural Fairness” (2003) 83 BU L Rev 485, 510.

²² Thomas Hale, *Between Interests and Law: The Politics of Transnational Commercial Disputes* (CUP 2015) 28.

²³ Thomas Hale, *Between Interests and Law: The Politics of Transnational Commercial Disputes* (CUP 2015) 28.

²⁴ Hiro N Aragaki, “Constructions of Arbitration’s Informalism: Autonomy, Efficiency, and Justice” (2006) 1(10) J Disp Resol 141, 153: <<http://scholarship.law.missouri.edu/jdr/vol2016/iss1/10>> accessed 13 March 2018.

²⁵ Amy J Schmitz, “Ending a Mud Bowl: Defining Arbitration’s Finality through Functional Analysis” (2002–2003) 37 Ga L Rev 123, 132.

²⁶ Amy J Schmitz, “Ending a Mud Bowl: Defining Arbitration’s Finality through Functional Analysis” (2002–2003) 37 Ga L Rev 123, 141; Alejandro I Garcia, “Is the Principle of Finality ‘Losing its Appeal?’” (Kluwer Arbitration Blog, 18 May 2011) <<http://kluwerarbitrationblog.com/2011/05/18/is-the-principle-of-finality-losing-its-appeal/>> accessed 13 March 2018.

²⁷ Amy J Schmitz, “Ending a Mud Bowl: Defining Arbitration’s Finality through Functional Analysis” (2002–2003) 37 Ga L Rev 123, 131.

²⁸ The notable and oft-cited exception to this is the English Arbitration Act 1996. In the US, some courts have held that there is a non-statutory ground of *vacatur* under which an arbitrator’s “manifest disregard” for the law constitutes a valid reason for the non-recognition of an arbitral award. However, there is much disagreement as to whether or not a “manifest disregard” standard exists. See, eg Gary Born, “Manifest Disregard after Hall Street” (Kluwer Arbitration Blog, 9 March 2009): <<http://kluwerarbitrationblog.com/2009/03/09/manifest-disregard-after-hall-street/?print=pdf>> accessed 13 March 2018.

²⁹ Gary Born, *International Arbitration: Law and Practice* (2nd edn, Wolters Kluwer 2016) 11.

³⁰ Amy J Schmitz, “Ending a Mud Bowl: Defining Arbitration’s Finality through Functional Analysis” (2002–2003) 37 Ga L Rev 123, 140.

³¹ Amy J Schmitz, “Ending a Mud Bowl: Defining Arbitration’s Finality through Functional Analysis” (2002–2003) 37 Ga L Rev 123, 132; Mateus Aimoré Carreiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185, 186. However, the common assumption that arbitration is quicker and cheaper than litigation is not necessarily true. Particularly in large commercial disputes, arbitration can be just as time consuming and costly as litigation (see, eg James H Carter and Joseph E Neuhaus, “Arbitration under Expedited Discovery Procedures: What are the Sacrifices?” *The Arbitration Review of the Americas 2011* <<http://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2011/1036658/arbitration-under-expedited-discovery-procedures-what-are-the-sacrifices>> accessed 13 March 2018).

The principle of finality is a distinguishing characteristic in international commercial arbitration³² and has contributed to its unprecedented growth³³ over the past 40 years³⁴ and its status as the preferred method of resolving international commercial disputes.³⁵ Finality, however, is said to come at the risk of an aberrant arbitral award. Given the virtual absence of any means of correcting awards based on error, arbitral awards stand whether or not they are legally or factually correct.³⁶ Whilst finality calls for limited review, fairness is said to demand greater scrutiny of awards.³⁷

Finality is said to be at the very essence of what international commercial arbitration is, reflected by the fact that it often forms part of its very definition: “a specially established mechanism for the *final* and binding determination of disputes ...”.³⁸ Finality is often understood as an extension of the principle of party autonomy,³⁹ which allows the parties the freedom to make choices about the process of resolving their dispute according to their specific needs.⁴⁰ In having made an express choice to arbitrate and not litigate their dispute, the parties are said to have chosen finality over fairness. The choice reflects in part the fact that the parties seek to avoid the costs and inefficiencies of national court litigation.⁴¹ Had the parties wished to prioritise substantive fairness they could have instead subjected their dispute to a national legal system with its multiple levels of appeal.

The balance struck between the rival objectives of finality and fairness in international commercial arbitration is regarded by many as wholly appropriate, given that it respects the parties’ choice for finality but maintains a degree of scrutiny for grosser forms of

³² Gary Born, *International Arbitration: Law and Practice* (2nd edn, Wolters Kluwer 2016) 3.

³³ Mateus Amoré Carreteiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) *J Int Arb* 185, 186.

³⁴ Stavros Brekoulakis, “Introduction: The Evolution and Future of International Arbitration” in Stavros Brekoulakis, Julian D M Lew and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Wolters Kluwer 2016) 5. Along with the extraordinary rise in the sheer number of cases submitted to arbitration, there has also been an unprecedented increase in terms of the size and complexity of the disputes. Whilst it is impossible to know with certainty how many cases are being arbitrated, the statistics provided by the International Chamber of Commerce (ICC), the most popular arbitral institution, are illustrative of general trends. For example, according to the ICC, 801 new cases were filed with it alone in 2015, which was the second highest number in its 93-year history. Furthermore, the ICC’s statistics show that 2015 was a record year for the quantum of new cases. The average value in dispute in 2015 was US\$ 84 million, compared to US\$ 63 million in 2014, with the largest dispute valued at over US\$ 1 billion: ICC, “ICC Arbitration Posts Strong Growth in 2015” (Paris, 11 May 2016) <<https://iccwbo.org/media-wall/news-speeches/icc-arbitration-posts-strong-growth-in-2015/>> accessed 13 March 2018.

³⁵ Gary Born, *International Arbitration: Law and Practice* (2nd edn, Wolters Kluwer 2016) 7. The limited review of awards by national courts is considered to be of the utmost importance to the success of international commercial arbitration. Provided minimum standards of procedural fairness are met, the general pro-arbitration policy of national courts favours enforcement of awards. This, in turn, contributes to certainty and predictability for commercial parties, which are paramount to international commerce: Julian D M Lew, Loukas A Mistelis and Stefan Kröll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 731.

³⁶ *Raymond James Financial Services Inc v Fenyk* United States Court of Appeals, No 14-1252 (1st Circuit, 11 March 2015) <<http://caselaw.findlaw.com/us-1st-circuit/1694058.html>> accessed 13 March 2018.

³⁷ Hossein Abedian, “Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review” (2011) 28(6) *J Int Arb* 590, 590–591. This is considered an axiomatic *quid pro quo* in international commercial arbitration. This means that, in choosing arbitration, parties forgo appellate review in order to realise benefits such as a faster and less costly process afforded by a more flexible method of dispute resolution. See, eg Stephen P Younger, “Agreements to Expand the Scope of Judicial Review of Arbitration Awards” (1999–2000) 63 *Alb L Rev* 241, 241; *Stolt-Nielsen SA v Animal Feeds Int’l Corp* 559 US 662 (2010), in which the US Supreme Court held that when parties opt for arbitration they “forgo the procedural rigor of appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed and the ability to choose expert adjudicators to resolve specialized disputes”.

³⁸ Julian D M Lew, Loukas A Mistelis and Stefan Kröll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 1, emphasis added.

³⁹ See, eg Diane A Desierto, “Rawlsian Fairness and International Arbitration” (2015) 36(4) *U Pa J Intl L* 939 <<http://scholarship.law.upenn.edu/jil/vol36/iss4/3/>> accessed 13 March 2018, 981–82: “The principle of finality of arbitral awards extends from the fundamental principle of party autonomy in international arbitration”.

⁴⁰ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109, 1117: quoting Thomas J Stipanowich, “Arbitration: The ‘New Litigation’” (2010) *U Ill L Rev* 1, 51: “the central and primary value of arbitration is not speed, or economy, or privacy, or neutral expertise, but rather the ability of users to make key process choices to suit their particular needs”.

⁴¹ Diane A Desierto, “Rawlsian Fairness and International Arbitration” (2015) 36(4) *U Pa J Intl L* 939, 949.

procedural unfairness.⁴² For example, William Park asserts that “[t]he possibility that an arbitrator might make a mistake ... remains a risk assumed by both sides. By contrast, a violation of arbitration’s basic procedural fairness does and should give rise to sanctions”.⁴³ The procedural safeguards are considered sufficient to ensure that international commercial arbitration remains “fair enough”.⁴⁴

However, a debate has recently emerged in which critics argue that parties should have the option for substantive review in instances in which an award appears to contain mistakes.⁴⁵ In terms of the finality versus fairness debate, the thrust of proponents of an appeals process is that more emphasis should be placed on the correctness of awards, and thus on substantive fairness. For example, a number of scholars and practitioners argue that finality is not necessarily a virtue in all cases.⁴⁶ Lawyers William Knull III and Noah Rubins contend that parties to high stakes, “bet-the-company” type disputes may perceive finality not as an advantage but instead as representing an immeasurable risk.⁴⁷ The US Supreme Court expressed a similar view in *AT&T Mobility LLC v Concepcion*, stating that “[w]e find it hard to believe that defendants would bet the company with no effective means of review...”.⁴⁸ A review of an award for correctness is seen as a means of safeguarding against erroneous awards and therefore enhancing substantive fairness in international commercial arbitration. Accordingly, a growing movement proposes a form of substantive review.⁴⁹

Whilst the principle of party autonomy is invoked on the one hand to defend the absence of any review on the merits, it is equally employed to advocate the opposite position on the basis that parties should have the freedom to agree to prioritise substantive fairness, in the form of a review on the merits, over finality.⁵⁰ One modality of review that has attracted support is review by national courts.⁵¹ However, aside from the practical disadvantages for the parties of judicial review,⁵² a number of jurisdictions have held that contracts which purport to expand the grounds of review of arbitral awards by courts are unenforceable.⁵³

⁴² William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012), 316; Hossein Abedian, “Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review” (2011) 28(6) *J Int Arb* 590, 591.

⁴³ William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012) 7.

⁴⁴ Nana Japaridze, “Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration” 36 *Hofstra L Rev* 1415.

⁴⁵ See, eg William H Knull III and Noah D Rubins, “Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?” (2000) 11 *Am Rev Intl Arb* 531; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109; Mateus Aimoré Carreteiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) *J Int Arb* 185.

⁴⁶ See, eg William H Knull III and Noah D Rubins, “Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?” (2000) 11 *Am Rev Intl Arb* 531; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109; Mateus Aimoré Carreteiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) *J Int Arb* 185.

⁴⁷ William H Knull III and Noah D Rubins, “Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?” (2000) 11 *Am Rev Intl Arb* 531, 532–33 quoting one former in-house counsel: “speed and finality are virtues, but only if you win. They are not virtues if a fundamental mistake has been made”.

⁴⁸ *AT&T Mobility LLC v Concepcion* 563 US 333 (2011).

⁴⁹ The form of substantive review is by way of either judicial review or arbitral appeal. Stephen P Younger, “Agreements to Expand the Scope of Judicial Review of Arbitration Awards” (1999–2000) 63 *Alb L Rev* 241; William H Knull III and Noah D Rubins, “Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?” (2000) 11 *Am Rev Intl Arb* 531; Paul Bennett Marrow, “A Practical Approach to Review of Commercial Arbitration Awards: Using an Appellate Arbitrator” (2005) 60 *Disp Resol J* 10; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109; Mateus Aimoré Carreteiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) *J Int Arb* 185 are amongst those who support arbitral appellate review. Others such as Hossein Abedian, “Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review” (2011) 28(6) *J Int Arb* 590 support review by way of national courts.

⁵⁰ See, eg Rowan Platt, “The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?” (2013) 30(5) *J Int Arb* 53.

⁵¹ See, eg Hossein Abedian, “Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review” (2011) 28(6) *J Int Arb* 590.

⁵² Namely the sacrifice of neutrality, speed and cost.

⁵³ Maxi Scherer, “The Fate of Parties’ Agreements on Judicial Review of Awards: A Comparative Analysis and Normative Analysis of Party-Autonomy at the Post-Award Stage” (2016) 32 *Arbitration International* 437, 457.

For instance, in the much commented upon case of *Hall Street Associates LLC v Mattel Inc (Hall Street)*,⁵⁴ the US Supreme Court held that, despite what was described by one justice in a dissenting opinion as a “rather glaring error of law” by the arbitrator, parties are not permitted to modify the statutory grounds of annulment.⁵⁵ Particularly following *Hall Street*, the idea of arbitral appellate mechanisms has gained in momentum in the literature⁵⁶ and within international commercial arbitration practice, with one of the main arbitral institutions, the American Arbitration Association (AAA), introducing its Optional Appellate Arbitral Rules in 2013.⁵⁷

Still ardent critics of the introduction of an appeal process see appeals as contrary to the very nature of arbitration and an unacceptable departure from the fundamental principles upon which arbitration was founded.⁵⁸ The reasoning behind these arguments seems overly deterministic. As Maxi Scherer recognises, the default position in arbitration is that it results in a final award but this does not mean that parties cannot opt for something different.⁵⁹ More convincingly, other critiques focus on the practical implications of introducing appeals, namely additional costs and delays which ultimately undermine arbitration’s attractiveness as a method of dispute resolution.⁶⁰

Practical concerns find empirical support amongst users of international commercial arbitration. For instance, over 75 per cent of respondents to a 2015 Queen Mary University Survey did not favour an appeals process, indicating a strong preference for arbitration to remain a “one stop shop” form of adjudication.⁶¹ In a 2005 Survey of Corporate Attitudes, over 90 per cent of respondents rejected the idea of an appeal. For the respondents, having an end to a dispute was of the greatest priority. Furthermore, they remarked that an appeal would make arbitration more like litigation, thus almost completely negating the advantages of arbitration.⁶² It is also notable that in revising its arbitral rules in 2017, the International Chamber of Commerce (ICC), unlike the AAA, made no provision for an appeals process.⁶³ In sum, it seems that many users of international commercial arbitration do not favour the option of having a “second bite at the cherry”.

As the foregoing section has sought to illustrate, the appellate debate in international commercial arbitration is far from settled. The purpose of this article is not to delve into

⁵⁴ *Hall Street Associates LLC v Mattel Inc* 552 US 576 (2008); Cornell Law School Legal Information Institute, LII Supreme Court Bulletin, “AT&T Mobility LLC v Conception (09-893)” <<https://www.law.cornell.edu/supct/cert/09-893>> accessed 13 March 2018.

⁵⁵ *Hall Street Associates LLC v Mattel Inc* 552 US 576 (2008); see the dissenting opinion of Justice John Paul Stevens [9]–[11].

⁵⁶ See, eg Mateus Aimoré Carreiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) *J Int Arb* 185, 187.

⁵⁷ AAA Optional Appellate Rules <<https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf>> accessed 13 March 2018; Robert N Rapp and Alexander B Reich, “AAA Shakes Up ADR with New Rules to Permit Appeals of Arbitration Awards” *Lexology* <<https://www.lexology.com/library/detail.aspx?g=1d466bd0-aeff-43e5-96b9-def338ff7baf>> accessed 13 March 2018.

⁵⁸ See, eg Nana Japaridze, “Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration” 36 *Hofstra L Rev* 1415, 1418: “appellate review and arbitral finality are incompatible with one another, and attempts to combine these two concepts will result in compromising the nature of international commercial arbitration”; Hilary Heilbron, “Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration” (2016) 32 *Arbitration International* 216, 273: “I believe that an appeal is inimical to the whole process based on finality and the remarkable success of the New York Convention. If parties want to go through appellate procedures they should opt for national courts”.

⁵⁹ Maxi Scherer, “The Fate of Parties’ Agreements on Judicial Review of Awards: A Comparative Analysis and Normative Analysis of Party-Autonomy at the Post-Award Stage” (2016) 32 *Arbitration International* 437, 455.

⁶⁰ See, eg Jan Paulsson, *The Idea of Arbitration* (1st edn, OUP 2013) 292–93.

⁶¹ Queen Mary University, School of International Arbitration & White & Case, 2015 *International Arbitration Survey: Improvements and Innovations in International Arbitration*, 8 <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>> accessed 13 March 2018.

⁶² Loukas Mistelis, Research Report, “International Arbitration—Corporate Attitudes and Practices: 12 Perceptions Tested: Myths, Data and Analytics” 571 <http://www.academia.edu/262782/International_Arbitration-Corporate_Attitudes_and_Practices-12_Perceptions_Testing_Myths_Data_and_Analysis_Research_Report> accessed 13 March 2018. 91% of respondents surveyed did not support the idea of appeal on the merits.

⁶³ ICC 2017 Rules <<https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/>> accessed 13 March 2018.

the normative debate on whether parties should be able to contract for a review on the merits, and in this sense opt for substantive fairness over finality. Instead, the question that this article seeks to address is whether an appeals process would actually serve to enhance substantive fairness in international commercial arbitration.

4. Would an appellate mechanism serve to enhance substantive fairness in international commercial arbitration?

The central question of this article of whether an appellate mechanism would serve to enhance substantive fairness in international commercial arbitration is prompted by the largely essentialist treatment of appeals in the literature which equates an appeals process to fairness. Appeals are perceived as paradigmatically fair, absent any considered explanation as to what it is about them which makes them fair.⁶⁴ Rather than rely on an implicit assumption that appeals enhance substantive fairness, this section seeks to analyse whether this would in fact be the result. It begins with a functional analysis of the role of appeals in national court systems, followed by a comparative analysis of appeals in litigation and the proposed arbitral appeals process in international commercial arbitration in order to evaluate whether substantive fairness would be enhanced in international commercial arbitration through an appeals process.

Functional analysis of appeals in litigation

A general right to appeal trial court decisions is a virtually universal feature within all legal systems.⁶⁵ Appeals in common law court systems, as many have observed, serve two core functions: error correction and law-making.⁶⁶ An appeal provides an opportunity to correct errors in the initial proceedings and in this way is a means by which to produce better, more accurate decisions. Law-making aims to achieve greater consistency in the interpretation and application of the law⁶⁷ and, somewhat paradoxically, enables appellate courts to restate the law in order to adapt to new circumstances.⁶⁸

Error correction

An appeal process in any adjudication system represents a recognition of human fallibility, and thus the inevitability of making a mistake.⁶⁹ In litigation, appellate courts review lower court decisions to correct errors of law or fact, or both. The purpose of error correction is to rectify mistakes of the lower court and ultimately arrive at correct outcomes.⁷⁰

The quality of error correction is largely a function of appellate design. Virtually all judicial systems are structured hierarchically, a structure which is designed not only to

⁶⁴ As Robert G Bone, "Agreeing to a Fair Process: The Problem with Contractarian Theories of Procedural Fairness" (2003) 83 BU L Rev 485 argues at 505: "[i]t is not enough simply to specify a set of procedures as paradigmatically fair without also explaining what it is about those procedures that makes them fair". For examples of the largely essentialist treatment of fairness in the fairness versus finality debate in international commercial arbitration, see, eg Hossein Abedian, "Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review" (2011) 28(6) J Int Arb 590; Rowan Platt, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?" (2013) 30(5) J Int Arb 53.

⁶⁵ Steven Shavell, "The Appeals Process as a Means of Error Correction" (1995) 24 J Leg Stud 379, 379.

⁶⁶ Chad M Oldfather, "Error Correction" (2010) 85 Ind L J 49, 49; Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1110; Mateus Aimoré Carreteiro, "Appellate Arbitral Rules in International Commercial Arbitration" (2016) 33(2) J Int Arb 185, 190 points out that traditionally the main function served by "ordinary" appeals in civil law systems is error correction.

⁶⁷ Noemi Gal-Or, "The Concept of Appeal in International Dispute Settlement" (2008) 19(1) EJIL 43.

⁶⁸ Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1186.

⁶⁹ Mateus Aimoré Carreteiro, "Appellate Arbitral Rules in International Commercial Arbitration" (2016) 33(2) J Int Arb 185, 189.

⁷⁰ Steven Shavell, "The Appeals Process as a Means of Error Correction" (1995) 24 J Leg Stud 379, 379.

improve the outcome⁷¹ but also to confer superiority and greater legitimacy on the decisions of appellate courts over those of trial courts.⁷² Several features of an appellate structure have been identified as improving the process and thus the quality of the outcome, thereby contributing to the idea that appellate court decisions are superior to those of trial courts.⁷³ For instance, a case is often decided at first instance by one judge but is heard on appeal by three judges.⁷⁴ An increase in the number of adjudicators is said to improve outcome. There are different theories as to why this is so, including simply that the relative probability of arriving at a correct decision is greater for three individuals than it is for one.⁷⁵ Others theorise that the collegiate nature of appellate bodies contributes to decision-making which is more contemplative,⁷⁶ or that the presence of other judges has a restraining effect on a judge who might be disposed to errant decision-making.⁷⁷

In addition to an increase in the number of judges, appellate-level judges tend to be more experienced and subject to fewer time constraints than their trial court counterparts.⁷⁸ Hierarchy also enables specialisation: trial courts are typically tasked with determining fact, leaving appellate courts to focus on resolving legal questions.⁷⁹ Finally, a hierarchical system may serve to correct errors indirectly by having a disciplining effect on trial court judges. As E W Thomas recognises, no judge wants to be reversed regularly or reversed in a way which calls into question his or her ability to judge.⁸⁰ It is therefore often thought that trial court judges take additional care in the decision-making process in order to avoid errors.⁸¹ Appellate hierarchy, and with it some progression of judicial authority, is said to be fundamental to the nature of appellate review.⁸²

Law-making

The other key function of appellate courts is law-making, sometimes referred to as institutional review.⁸³ Law-making encompasses a broad range of activities but the two main objectives are promoting uniformity of decisions and creating new law in order to adapt to novel circumstances.⁸⁴ In accordance with the first objective, appellate courts are

⁷¹ Jonathan Remy Nash and Rafael I Pardo, "An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review" (2008) 61(6) V and L Rev 1745.

⁷² Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1140.

⁷³ Jonathan Remy Nash and Rafael I Pardo, "An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review" (2008) 61(6) V and L Rev 1745, 1748.

⁷⁴ Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1140.

⁷⁵ Jonathan Remy Nash and Rafael I Pardo, "An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review" (2008) 61(6) V and L Rev 1745, 1748.

⁷⁶ Jonathan Remy Nash and Rafael I Pardo, "An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review" (2008) 61(6) V and L Rev 1745, 1748.

⁷⁷ Edmund W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (1st edn CUP 2005) 243–44.

⁷⁸ Mateus Aimoré Carreireiro, "Appellate Arbitral Rules in International Commercial Arbitration" (2016) 33(2) J Int Arb 185, 190.

⁷⁹ Jonathan P Kastellec, "The Judicial Hierarchy: A Review Essay" (2016) *Oxford Research Encyclopedia of Politics*, Forthcoming, 3–4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716282> accessed 13 March 2018.

⁸⁰ Edmund W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (1st edn CUP 2005) 243–44.

⁸¹ Mateus Aimoré Carreireiro, "Appellate Arbitral Rules in International Commercial Arbitration" (2016) 33(2) J Int Arb 185, 190.

⁸² See, eg Robert B Ahdieh, "Between Dialogue and Decree: International Review of National Courts" (2004) 79 NYULR 2029, 2047: "the various characteristics and functions of appellate review ... suggest that some gradation of judicial authority is central to the nature of appellate review" and that "[a]n appellate system of review ... is one defined by *hierarchy*" (emphasis in original).

⁸³ Daniel John Meador and Jordana Simone Bernstein, *Appellate Courts in the United States* (West Publishing Co 1994) 4.

⁸⁴ Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1186.

designed to ensure that lower courts apply the law uniformly.⁸⁵ Consistent interpretation of the law fosters legal certainty by guaranteeing, so far as possible, that “rights and obligations remain identical and universal across time and subject matter as they arise in different cases and under varying circumstances”.⁸⁶ At the same time, appellate courts develop the law to adapt to the changing needs of society.⁸⁷

Law-making has an aggregate function, implicating not only the individual litigants to a particular claim but also the development of the law as a whole. Appellate courts thus have a dual purpose in relation to each case: “to formulate a clear and persuasive basis for the decision in the instant case, and to shape and restate the developing body of relevant legal doctrine in a way that is both just and ‘coherent’”.⁸⁸ So whilst one of the aims on appeal is to reach a fair result in the individual case, the overarching duty of appellate courts is to set predictable general rules for society.⁸⁹

Would an appellate mechanism serve to enhance substantive fairness in international commercial arbitration?

The previous section provided a summary of the functions of appellate courts, namely error correction and law-making. Given that the principal objective of error correction is to rectify incorrect or inaccurate findings of a trial court, it is this function which directly implicates substantive fairness because its purpose is to achieve a correct or accurate decision in the individual case. That being so, error correction is the focus of this article. However, the law-making function has been the emphasis of a fairness debate in relation to appeals in international investment arbitration⁹⁰ and so this section begins by briefly surveying this debate by way of comparison with the debate in international commercial arbitration.

Law-making function and international investment arbitration: fairness as consistency

The law-making function has formed the basis of arguments put forward by proponents of an appellate mechanism in international investment arbitration.⁹¹ International investment

⁸⁵ Andrea Kupfer Schneider, “Error Correction and Dispute System Design in Investor-State Arbitration” Marquette University Law School Legal Studies Research Paper Series, Research Paper No 13-18 (2013) 5 *Yearbook on Arbitration and Mediation* 194, 207 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2292184> accessed 13 March 2018.

⁸⁶ Noemi Gal-Or, “The Concept of Appeal in International Dispute Settlement” (2008) 19(1) *EJIL* 43, 47.

⁸⁷ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109, 1186.

⁸⁸ Tony Blackshield, “Judicial Reasoning” in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (1st edn, OUP 2001), 375.

⁸⁹ Albert Tate Jr, “‘Policy’ in Judicial Decisions” (1959) 20(1) *Louisiana Law Review* 61, 68. It is often said that appellate courts explain and give expression to rights, see, eg John Thomas, “Developing the Commercial Law through the Courts: Rebalancing the Relationship Between the Courts and Arbitration” 17 *The Bailii Lecture* 9 March 2016, 17 <<https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>> accessed 13 March 2018. In fulfilling that duty, courts are said to pronounce on public values, see, eg Owen M Fiss, “The Forms of Justice” (1979) 93(1) *Harv L Rev* 35, 30–31.

⁹⁰ See, eg Noemi Gal-Or, “The Concept of Appeal in International Dispute Settlement” (2008) 19(1) *EJIL* 43, 46–47.

⁹¹ For a summary of these arguments, see, eg Andrea Kupfer Schneider, “Error Correction and Dispute System Design in Investor-State Arbitration” Marquette University Law School Legal Studies Research Paper Series, Research Paper No 13-18 (2013) 5 *Yearbook on Arbitration and Mediation* 194, 207, 207–8; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109, 1169–1203; Mateus Aimoré Carreteiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) *J Int Arb* 185, 190–95. However, it should be noted that an impassioned debate exists in England in relation to the law-making function in commercial arbitration. The debate was sparked largely by a controversial speech by the then Lord Chief Justice in 2016 in which he argued that the development of the English common law was being hindered by the strict threshold test for leave to appeal to the court introduced by the English Arbitration Act 1996 s 69 (see John Thomas, “Developing the Commercial Law through the Courts: Rebalancing the Relationship Between the Courts and Arbitration” 17 *The Bailii Lecture* 9 March 2016, 17). A similar argument in relation to the US is put forward by Drew M Gulley, “The

arbitration, like international commercial arbitration, is designed to resolve international disputes but the two forms of arbitration differ in significant respects.⁹² For one, investment arbitration always involves claims against states or quasi-state entities, and thus implicates the public interest of the particular state concerned. The claims are based on investment treaties, which often contain similar provisions which are designed to protect the rights of overseas investors in the host state.⁹³ By contrast, the participants in international commercial arbitration are generally commercial parties whose disputes arise out of private commercial dealings.⁹⁴

The majority of international investment disputes are administered by one institution only: the International Centre for Settlement of Investment Disputes (ICSID).⁹⁵ International investment awards are frequently published and tribunals regularly consider previous decisions and make reference to them in their awards.⁹⁶ So whilst there is no system of binding precedent per se, tribunals tend to agree that earlier decisions need to be taken into account.⁹⁷ International commercial arbitrations, by contrast, are administered by a number of institutions as well as on an ad hoc basis. Awards are also usually confidential⁹⁸ and as such they are generally not considered to be of precedential value to other arbitral tribunals.⁹⁹

The growth in the number of investment treaties and investment treaty disputes has contributed to serious concern within international investment arbitration in relation to a perceived fragmentation of investment law.¹⁰⁰ Whilst international investment arbitration is similar to international commercial arbitration in that there is generally no appeal on the merits,¹⁰¹ the motivation behind calls for a permanent appellate mechanism in international investment arbitration is to achieve “jurisprudential coherence and consistency”.¹⁰² That being so, the principal objective is the creation of consistent rules for the international investment arbitration system.¹⁰³

The focus is therefore on the law-making function of appellate courts, and specifically their role of determining whether a decision of a lower court conforms to existing

Enhanced Arbitration Appeal Amendment: A Proposal to Save American Jurisprudence from Arbitration, Modeled on the English Arbitration Act of 1996” (2008) 36 Hofstra L Rev 1095.

⁹² Mateus Aimore Carreiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185, 192.

⁹³ Andrea Kupfer Schneider, “Error Correction and Dispute System Design in Investor-State Arbitration” Marquette University Law School Legal Studies Research Paper Series, Research Paper No 13-18 (2013) 5 *Yearbook on Arbitration and Mediation* 194, 195; Mateus Aimore Carreiro, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185, 192; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1112.

⁹⁴ Irene M Ten Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1112–13.

⁹⁵ International Centre for Settlement of Investment Disputes (ICSID), “About ICSID” <<http://icsid.worldbank.org/en/Pages/about/default.aspx>> accessed 13 March 2018.

⁹⁶ Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” The 2006 Freshfields Lecture, 368 <<http://www.arbitration-icca.org/media/4/77507134886347/media01231914308713000950001.pdf>> accessed 13 March 2018.

⁹⁷ Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” The 2006 Freshfields Lecture, 376.

⁹⁸ See, eg the UNCITRAL Arbitration Rules art.32(5), which provides that the consent of the parties is required to publish the award. W Michael Reisman, “‘Case-Specific Mandates’ versus ‘Systemic Implications’: How Should Investment Tribunals Decide?” The Freshfields Arbitration Lecture (2013) 29(2) *Arbitration International* 131, 135, confirms that “[m]ost international commercial awards are not published”.

⁹⁹ Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” The 2006 Freshfields Lecture, 362–63.

¹⁰⁰ Andrea Kupfer Schneider, “Error Correction and Dispute System Design in Investor-State Arbitration” Marquette University Law School Legal Studies Research Paper Series, Research Paper No 13-18 (2013) 5 *Yearbook on Arbitration and Mediation* 194, 203, citing the much commented upon “Argentina cases” in which different tribunals came to different, conflicting outcomes in cases involving virtually the same facts and similar treaty provisions.

¹⁰¹ Within the framework of the ICSID, awards may be subject to review through an annulment process but that review by an ad hoc ICSID annulment committee is limited to procedural integrity and does not extend to the correctness of the award: Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1172–73.

¹⁰² Diane A Desierto, “Rawlsian Fairness and International Arbitration” (2015) 36(4) U Pa J Intl L 939, 982.

¹⁰³ Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” The 2006 Freshfields Lecture, 368, 376.

precedent.¹⁰⁴ The emphasis of the fairness argument is different from international commercial arbitration as rather than a correct outcome per se, the aim in international investment arbitration is to achieve a kind of “proportionate equality” so that similar cases are treated alike.¹⁰⁵

Error correction in international commercial arbitration: fairness as correctness

The error correction function has the most immediate connection with substantive fairness as defined in this article because it is concerned with obtaining an accurate outcome in the individual case. The key question in determining whether an appeals process would enhance substantive fairness is therefore the extent to which the conditions for error correction in court litigation are or can be replicated in international commercial arbitration. To answer this question, this section embarks upon a comparative analysis of these conditions. The absence of a hierarchical structure and, to a lesser extent, the wide degree of arbitral discretion have been recognised by scholars as hurdles to achieving error correction in international commercial arbitration.¹⁰⁶ This section contributes to this existing scholarship by arguing that error correction is a highly systemic and policy-based exercise, and as such presents an additional and significant challenge to achieving error correction, and thus enhancing substantive fairness, in international commercial arbitration because the very meaning of error and the bases for correction are often contextually defined.

The absence of hierarchy

As already discussed, the error correction function of appeals is predicated upon a hierarchical structure. Yet, as scholars have pointed out, many of the features of an appellate process which account for an improvement in the quality of the outcome are already present in international commercial arbitration. The principle of party autonomy means that the parties in international commercial arbitration have the freedom to tailor the process in order to enhance the quality of the decision-making in the initial proceedings and thus improve the accuracy of outcomes. The model of international commercial arbitration is thus designed to reduce the occurrence of error at the first instance.¹⁰⁷

For instance, whilst in court litigation the decision of a sole trial court judge is often appealed to a panel of three appellate judges, in international commercial arbitration, and particularly in the vast majority of high-value cases, the tribunal is already made up of three members.¹⁰⁸ Accordingly, most arbitral appeals would involve a decision made by a tribunal comprised of three arbitrators being appealed to another tribunal of three arbitrators. This has led some proponents of an arbitral appeals process to advocate appeals only in cases of a sole arbitrator.¹⁰⁹ Yet in choosing one arbitrator, one could infer that the objective of the parties was for an expedient, less costly resolution to their dispute.¹¹⁰ That being so, it seems

¹⁰⁴ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1190–95.

¹⁰⁵ William D Bader and David R Cleveland, “Precedent and Justice” (2011) 49(1) Duq L Rev 35, 37. Bader and Cleveland submit at 45: “[h]umans have an inherent expectation that precedent will be followed and that, when followed, it results in fair outcomes. Failure to follow precedent results in a sense of unfairness and injustice unless a reason for departure is given”.

¹⁰⁶ See, eg Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109; Mateus Aimoré Carretero, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185.

¹⁰⁷ Steven Shavell, “The Appeals Process as a Means of Error Correction” (1995) 24 J Leg Stud 379, 423–24.

¹⁰⁸ Hilary Heilbron, “Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration” (2016) 32 *Arbitration International* 216, 265.

¹⁰⁹ Jan Paulsson, *The Idea of Arbitration* (1st edn, OUP 2013) 292; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1157.

¹¹⁰ Mateus Aimoré Carretero, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185, 212.

unlikely that the parties to arbitrations presided over by one arbitrator would opt for the additional cost and time of an appeals process.

Furthermore, the benefit of having more experienced adjudicators at the appellate level in litigation is present from the beginning in arbitration. In general, the parties in international commercial arbitration are able to select at least one member of the tribunal.¹¹¹ The parties can therefore ensure a high level of quality and experience in their adjudicator,¹¹² including an in-depth understanding of their industry and the commercial context.¹¹³ Through the process of selecting an arbitrator, the parties thus reduce the chance of error at the first instance.¹¹⁴ Given that the parties have the freedom to select arbitrators on the basis of their expertise, it seems unlikely that the appellate tribunal would be comprised of somehow better qualified arbitrators, particularly as presumably the parties selected the best qualified arbitrators at the outset.¹¹⁵ For commentators who suggest an appeal would only be appropriate in high-value, complex disputes,¹¹⁶ it is argued that these are precisely the types of disputes for which the parties would have elected for a tribunal comprised of three highly experienced arbitrators.¹¹⁷

In fact, an arbitral appeal may instead serve to diminish the quality of the tribunal. For example, in niche areas there may be insufficient numbers of individuals with the requisite expertise to comprise a second panel.¹¹⁸ In addition, the parties may be limited at the appellate level in their choice of an arbitrator or have no choice whatsoever. Under the 2013 AAA Optional Arbitral Appellate Rules, the default position is that the AAA will consider requests from the parties for specific qualifications but ultimately the institution provides the parties with a list of names from a standing panel of arbitrators.¹¹⁹ The European Court of Arbitration, which introduced an optional appeal process in 2015, does not permit the parties to have any involvement in the selection process and instead its rules stipulate that the power to appoint all three members of the appellate tribunal vests in the institution.¹²⁰

Another feature of appeals in litigation which is said to improve outcomes is the division of perceived competencies between trial courts and appellate courts, the former being an expert fact-finder and the latter being better qualified to determine questions of law.¹²¹ Yet an arbitral tribunal is expected to excel at determining both facts and questions of law. Therefore, an appellate tribunal is unlikely to deliver the perceived advantage of greater legal competence. Finally, the disciplining effect of appellate courts on trial courts, which is said to reduce errors at first instance, operates to a certain degree in international commercial arbitration. Arbitrators have only one opportunity to “get it right”,¹²² and because

¹¹¹ Mateus Aimore Carretero, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185, 203.

¹¹² Hilary Heilbron, “Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration” (2016) 32 *Arbitration International* 216, 266.

¹¹³ Joshua Karton, “The Arbitral Role in Contractual Interpretation” (2015) 6 JIDS 4, 32.

¹¹⁴ Steven Shavell, “The Appeals Process as a Means of Error Correction” (1995) 24 J Leg Stud 379, 423–24.

¹¹⁵ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Int L & Pol 1109, 1143: “[t]o put it bluntly, within the current arbitration framework, the best guarantee against a rogue tribunal is not to appoint one”.

¹¹⁶ William H Knull III and Noah D Rubins, “Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?” (2000) 11 Am Rev Int Arb 531; Mateus Aimore Carretero, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185.

¹¹⁷ Jan Paulsson, *The Idea of Arbitration* (1st edn, OUP 2013) 292; Mateus Aimore Carretero, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185, 213.

¹¹⁸ Alejandro I Garcia, “Is the Principle of Finality ‘Losing its Appeal’?” (Kluwer Arbitration Blog, 18 May 2011).

¹¹⁹ AAA Optional Appellate Rules <<https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf>> accessed 13 March 2018 art.A-5. This provision applies in circumstances in which the parties have not appointed an arbitral appeal tribunal or have not provided for another method of appointment.

¹²⁰ The European Court of Arbitration, 2015 Arbitration Rules art.28.5 <<http://cour-europe-arbitrage.org/archivos/descargas/79.pdf>> accessed 13 March 2018.

¹²¹ Mateus Aimore Carretero, “Appellate Arbitral Rules in International Commercial Arbitration” (2016) 33(2) J Int Arb 185, 191.

¹²² William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012) 84: “... arbitrators bear a heavy burden to ‘get it right’ on the law, since their mistakes cannot be corrected in an appellate chain”.

of their reliance on repeat appointments and professional reputations,¹²³ it could be said that there are already strong disciplining effects built into the system.

Given that an appellate tribunal would essentially be equivalent to the first tribunal in terms of the number of adjudicators, expertise and experience, it is not immediately apparent why the decision of the appellate tribunal should be considered to be superior to that of the first tribunal.¹²⁴ Critics of an appeals process in international commercial arbitration rightly question why the decision of a person in a position to review the merits of an award is of greater quality than that of the first person.¹²⁵

Despite the absence of many of the features of hierarchy present in a national court system, Irene Ten-Cate maintains that the fact that arbitrators are typically appointed by the parties contributes to their being less able to objectively consider evidence and thus be effective in preventing errors.¹²⁶ However, this position seems tenuous given that arbitrators have a duty to be independent and impartial¹²⁷ and the fact that a neutral chairperson will often cast the decisive vote.¹²⁸ Moreover, there is no consensus on whether party appointment actually affects arbitrator decision-making.¹²⁹ Even if one accepts that party appointment is an influencing factor, it is argued that the absence of the majority of features of a hierarchical structure casts doubt on the effectiveness of arbitral appellate review for error and thus its ability to enhance substantive fairness in international commercial arbitration.

Error correction as a systemic, policy-based exercise

The absence of a hierarchical structure in an arbitral appellate process presents challenges from a formalist perspective to the assumption that an appeals process would improve the correctness of outcomes and thus enhance substantive fairness in international commercial arbitration. Yet a formalist approach does not explain *how* error correction is actually performed. The following paragraphs explore contextual features of error correction in national legal systems and once again engages in a comparative analysis with international commercial arbitration. In doing so, it argues that error correction is often a systemic and policy-based exercise by appellate courts. Given that arbitrators are not bound to any particular legal system, and instead operate in an a-national space, it is submitted that it is doubtful whether the function of error correction could be achieved effectively in international commercial arbitration.

¹²³ Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1110, 1151.

¹²⁴ Jan Paulsson, *The Idea of Arbitration* (1st edn, OUP 2013) 292.

¹²⁵ Jan Paulsson, *The Idea of Arbitration* (1st edn, OUP 2013) 292. See also Elihu E Lauterpacht, "Aspects of the Administration of International Justice" *Hersch Lauterpacht Memorial Lectures* vol 9 (Grotius Publications Ltd 1991) 111–12 in relation to the introduction of an appeals system in international investment arbitration: "the concept of appeal also reflects another unarticulated assumption, namely, that those to whom appeal lies are as judges in some way better than, or superior to, those whose judgment is being reviewed. If that element of superiority is lacking, appeal ... is merely the substitution of one person's view of the situation for that of another".

¹²⁶ Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1150–51.

¹²⁷ Hilary Heilbron, "Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration" (2016) 32 *Arbitration International* 216, 266; LCIA Arbitration Rules (2014) art 5.3 is representative: "[a]ll arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration".

¹²⁸ Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1150; Hilary Heilbron, "Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration" (2016) 32 *Arbitration International* 216, 266.

¹²⁹ Hilary Heilbron, "Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration" (2016) 32 *Arbitration International* 216, 267.

Identifying error

Intrinsic to error correction is the assumption that error can be ascertained.¹³⁰ The legal realist position is now almost universally accepted, which recognises that the law is indeterminate in that any given legal question often lacks a singularly correct answer.¹³¹ The issue of legal indeterminacy, simply put, is that “law is not math”.¹³² Legal rules are frequently ambiguous, inconsistent with other rules and archaic.¹³³ As Stephen Waddam observes, “on a controversial legal question two or more conflicting principles can usually—perhaps always—be identified”.¹³⁴ Legal interpretation is perhaps, therefore, better understood as a “debate between possible solutions” rather than “a direct way to the target, inscribed in the corpus of law”.¹³⁵ A good illustration of this is the frequency with which appellate court judges disagree with one another on the basis of conflicting, yet equally credible reasoning.¹³⁶ Error is therefore often a debatable matter,¹³⁷ undermining the very notion that there is a “right” answer.¹³⁸ And the more difficult the case, the more true this is said to be.¹³⁹ Given the general existence of barriers to appeal, appellate courts are frequently confronted with these so-called “hard cases” in which it is possible to reach more than one reasonable conclusion on the facts.¹⁴⁰

Whilst legal indeterminacy and lacunae are issues for domestic courts and arbitral tribunals alike, they are particularly acute in instances in which discretion and judgement are exercised.¹⁴¹ Therefore the task of ascertaining error is considered to be an even thornier issue in arbitration than in court litigation because arbitrators are generally afforded broad discretion in the application of the governing law.¹⁴² In addition, the very international nature of international commercial arbitration complicates matters.

To begin with, arbitrators, unlike judges, do not function as part of a national legal system. Since arbitrators are not bound to any national system, the relationship between arbitrators and the governing law is much looser than it is for a judge.¹⁴³ Indeed, this looser attachment to the law is considered to be an important competitive advantage of international commercial arbitration over litigation.¹⁴⁴ Arbitrators are not required to apply the applicable law according

¹³⁰ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109.

¹³¹ Chad M Oldfather, “Error Correction” (2010) 85 Ind L J 49, 67.

¹³² Chad M Oldfather, “Error Correction” (2010) 85 Ind L J 49, 53.

¹³³ Richard Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) 175: “Rules of law are often ... vague or ambiguous or inconsistent with one another, and often therefore cases arise that can’t be said to be covered by any rule—the judge must make up a rule to cover it”.

¹³⁴ Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (CUP 2011) 17–18.

¹³⁵ Joanna Jemielniak, *Legal Interpretation in International Commercial Arbitration (Law, Language and Communication)* (Routledge 2014) 2.

¹³⁶ Lord Neuberger, “‘Judge Not, That Ye Be Not Judged’: Judging Judicial Decision-Making”. F A Mann Lecture 2015 para 13 <<https://www.supremecourt.uk/docs/speech-150129.pdf>> accessed 13 March 2018, noting that it is: “scarcely surprising that one not infrequently sees sharp differences of opinion between Judges in appellate courts”.

¹³⁷ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1136.

¹³⁸ Lord Neuberger, “‘Judge Not, That Ye Be Not Judged’: Judging Judicial Decision-Making” F A Mann Lecture 2015 para 13.

¹³⁹ Lord Neuberger, “‘Judge Not, That Ye Be Not Judged’: Judging Judicial Decision-Making” F A Mann Lecture 2015 para 13.

¹⁴⁰ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1136, fn 94: “The theory is that relatively few appeals are taken from decisions that are clearly correct, leaving decisions that are clearly incorrect and decisions whose accuracy is debatable.” See also Scott J Shapiro, *Legality* (The Belknap Press of Harvard University Press, 2011) 234.

¹⁴¹ Chad M Oldfather, “Error Correction” (2010) 85 Ind L J 49, 51; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1138.

¹⁴² Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1137–38.

¹⁴³ Fabio Bortolotti, “Introduction” in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014) 7.

¹⁴⁴ Joshua Karton, “The Arbitral Role in Contractual Interpretation” (2015) 6 JIDS 4, 16.

to strictly defined rules¹⁴⁵ and indeed tend to apply an approximation of the law.¹⁴⁶ There are several reasons for this.

First, arbitrators will hail from a great variety of legal, linguistic and cultural backgrounds.¹⁴⁷ By contrast, national judiciaries tend to be a fairly homogenous group¹⁴⁸ and are conditioned within a particular legal system.¹⁴⁹ In addition, given the diversity of tribunals, at least some, if not all, of the arbitrators will be applying a law which is not their own.¹⁵⁰ Arbitrators will bring with them their background and training within their own legal system, which is bound to influence their interpretation of contracts and the substantive law which may ultimately impact upon the outcome reached.¹⁵¹

A practical example is the methods of contractual interpretation.¹⁵² In a generalised characterisation, the common law tradition is objective and as such emphasises the actual text of the contract. Extrinsic evidence such as evidence of pre-contractual negotiations is generally excluded. The civil law method is subjective in its quest to ascertain the actual intention of the parties and therefore extrinsic evidence is admissible.¹⁵³ So an arbitrator from France tasked with applying the law of England and Wales may well be influenced by civil law norms in the face of ambiguous contractual terms and seek to establish the intention of the parties by, for instance, hearing evidence from a witness heavily involved in the negotiation of the contract.¹⁵⁴ As Joanna Jemielniak observes, arbitrators who are interpreting and applying a law different from that of their own country may project on to that law interpretive patterns acquired from their own legal training and thus the very nature of international commercial arbitration introduces an “outsider” perspective on domestic law.¹⁵⁵ National judges, on the other hand, will more frequently than not adopt the interpretive methodology prescribed by the law of the legal system of which they are part.¹⁵⁶

A second reason for arbitrators applying an approximation of the law is that arbitrators are tasked with applying a national law designed for the domestic context to an international

¹⁴⁵ Joshua Karton, “The Arbitral Role in Contractual Interpretation” (2015) 6 JIDS 4.

¹⁴⁶ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1137, quoting W Laurence Craig, “The Arbitrator’s Mission and the Application of Law in International Commercial Arbitration” 21 Am Rev Intl Arb 243, 256: “the result in many cases will be the application of an approximation of the national law rather than the application of the national law in precisely the same way a court of that jurisdiction would apply it”.

¹⁴⁷ Lucy Reed, “Arbitral Decision-Making: Art, Science or Sport?” The Kaplan Lecture 2012, 7 <http://www.arbitration-icca.org/media/4/42869508553463/media/11358156990377/reed_tribunal_decision-making.pdf> accessed 13 March 2018; Hilary Heilbron, “Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration” (2016) 32 *Arbitration International* 216, 263.

¹⁴⁸ Stavros Brekoulakis, “Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making” in Tony Cole (ed), *The Roles of Psychology in International Arbitration* (Wolters Kluwer 2017) 360–61, observing that scholars have shown that “[e]ducation, social background, and the early professional life of potential judges are crucial factors that are heavily influenced by the class structure of a State and further contribute to the homogeneity of national judiciaries”. The effect, combined with other “institutional processes” such as stare decisis, is that “national judiciaries tend to be a cohesive group of decision makers ...”.

¹⁴⁹ Julian D M Lew, Loukas A Mistelis and Stefan Kröll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 439; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1137; Stavros Brekoulakis, “Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making” in Tony Cole (ed), *The Roles of Psychology in International Arbitration* (Wolters Kluwer 2017) 360–61.

¹⁵⁰ Fabio Bortolotti, “Introduction” in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014) 7.

¹⁵¹ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1137.

¹⁵² Joshua Karton, “The Arbitral Role in Contractual Interpretation” (2015) 6 JIDS 4, 4–6.

¹⁵³ Joshua Karton, “The Arbitral Role in Contractual Interpretation” (2015) 6 JIDS 4–6.

¹⁵⁴ Joshua Karton, “The Arbitral Role in Contractual Interpretation” (2015) 6 JIDS 4, 12–13. Karton uses ICC Case No 12172 as an example: the applicable law was that of England and Wales, however the sole arbitrator, in the civil law tradition, “considered the testimony of a witness ‘directly responsible for negotiating the contract with the Respondent’”.

¹⁵⁵ Joanna Jemielniak, *Legal Interpretation in International Commercial Arbitration (Law, Language and Communication)* (Routledge 2014) 3.

¹⁵⁶ Julian D M Lew, Loukas A Mistelis and Stefan Kröll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 439.

dispute. By contrast, national judges predominantly decide national cases.¹⁵⁷ So whilst the parties expect the arbitrators to apply the chosen applicable law, they also expect arbitrators to have in mind the international nature of their dispute and thus avoid, to the greatest extent possible, solutions which would not be appropriate in the circumstances.¹⁵⁸ An oft-cited example is national law rules on interest, which are often regarded as being intended for domestic situations only.¹⁵⁹ It has also been observed that arbitrators tend to “transnationalise” legal rules that they apply in order to extricate the dispute from potential deficiencies of domestic law.¹⁶⁰ For instance arbitrators will often resort to legal norms, such as good faith, *contra proferentem* and the obligation to mitigate damage even if such principles are not incorporated into the governing law.¹⁶¹

Finally, the application of an “approximation of the law” is fundamentally due to the fact that arbitrators are “creatures of consent” in that their authority derives from the parties’ arbitration agreement.¹⁶² As such, they have a duty to act in accordance with the intentions and expectations of the parties.¹⁶³ Arbitrators will be particularly cognisant of the commercial context of the dispute. For example, arbitrators, who are often chosen for their industry expertise, may arrive at a different conclusion than a judge as to the reasonableness of conduct based upon their knowledge of the commercial context.¹⁶⁴ The importance of the commercial context is reflected in a number of arbitral rules which give arbitrators the discretion to consider evidence of trade usages, whereas judges would often be prohibited by the substantive law from doing the same.¹⁶⁵

National court judges, by contrast, derive their authority from the state and their duty is to the broader society in which they operate. Judges must apply the law in a systematic manner, which is primarily achieved through the doctrine of *stare decisis*.¹⁶⁶ Even in civil law countries, where lower courts are not legally obliged to adhere to precedent, judges tend to follow existing jurisprudence.¹⁶⁷ A system of precedent therefore operates as a type of control mechanism by which lower courts follow precedent created by superior courts.¹⁶⁸

¹⁵⁷ Julian D M Lew, Loukas A Mistelis and Stefan Kröll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 439.

¹⁵⁸ Fabio Bortolotti, “Introduction” in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014) 8.

¹⁵⁹ Joshua Karton, “The Arbitral Role in Contractual Interpretation” (2015) 6 JIDS 4, 18.

¹⁶⁰ Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” The 2006 Freshfields Lecture, 364; Joanna Jemiłniak, “Transnationalization of Domestic Law in International Commercial Arbitration through Comparative Analysis: Challenges for the Legal Profession” (2014) 72(2) *Contemp Asia Arb J* 309, 320–21.

¹⁶¹ Seyoum Yohannes Tesfay, “The Normative Basis for Decision on the Merits in Commercial Arbitration: the Extent of Party Autonomy” (2016) 10 *Mizan L Rev* 341, 346.

¹⁶² William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012) 84.

¹⁶³ François Perret, “Resolving Conflicts Between Contractual Clauses and Specific Rules of the Governing Law: Strict Application or Flexible Approach?” in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014) 109.

¹⁶⁴ Joshua Karton, “The Arbitral Role in Contractual Interpretation” (2015) 6 JIDS 4, 33.

¹⁶⁵ Joshua Karton, “The Arbitral Role in Contractual Interpretation” (2015) 6 JIDS 4, 32. See also Gary Born, *International Arbitration: Law and Practice* (2nd edn, Wolters Kluwer 2016) 250: pointing out the importance of trade usages that “underscore arbitration’s historic roots in, and objective of, providing resolutions of disputes in a manner that accords with commercial expectations and practices”.

¹⁶⁶ Stavros Brekoulakis, “Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making” in Tony Cole (ed), *The Roles of Psychology in International Arbitration* (Wolters Kluwer 2017) 362.

¹⁶⁷ Fabio Bortolotti, “Introduction” in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014) 7: “[e]ven in countries where precedents are not binding, he [a State judge] will normally conform to the existing jurisprudence in order to minimise the risk that his judgment may be reversed by a higher court”; Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” The 2006 Freshfields Lecture, 359.

¹⁶⁸ Stavros Brekoulakis, “Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making” in Tony Cole (ed), *The Roles of Psychology in International Arbitration* (Wolters Kluwer 2017) 362: observing that *stare decisis* is an “institutional determinant of judicial decision-making” and even where precedent is not binding, judges tend to follow previous decisions. See also Jonathan Remy Nash and Rafael I Pardo, “An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review” (2008) 61(6) *V and L Rev* 1745, 1750: “rules of precedent ... while not absolute, create barriers against courts overruling holdings of earlier cases. As a general matter, under so-called horizontal *stare decisis*, high courts and intermediate appellate

It has been recognised that the effect of *stare decisis* often reduces the role of the judge to fitting the facts of the case into existing precedent.¹⁶⁹

Arbitrators, on the other hand, have much greater freedom.¹⁷⁰ Arbitrators are not subject to precedent in the same way as national judges are and therefore may adopt a legal interpretation which is not necessarily in accordance with the prevailing opinions on the substantive law of a particular national system.¹⁷¹ For instance, arbitrators may depart from the judicial case law of the applicable substantive law.¹⁷² Such departure may be warranted if, for instance, the arbitrators are satisfied that the decision of the court does not accord with the commercial needs of the parties.¹⁷³ This might arise where the parties have chosen the law of a third country for its neutrality, given that the parties are unlikely to be familiar with the intricacies of the law particularly in regard to the meaning prescribed to rules through case law.¹⁷⁴ In this way, arbitrators may arrive at an outcome which better accords with the parties' expectations, based upon a looser application of the substantive law. Such an approach recognises that the parties expect the foreseeability and certainty attendant on the application of the law that they have chosen but at the same time they expect arbitrators to have an understanding of the commercial reality in their application of that law.¹⁷⁵

This is not to suggest however, as some commentators do, that arbitration is "lawless".¹⁷⁶ Indeed, unless arbitrators have express authorisation from the parties to act *ex aequo et bono* or amiable composition, they do not have authority to disregard the substantive law and invoke whatever basis is preferred in order to reach what they sense is a fair outcome.¹⁷⁷ Instead, arbitral discretion is a recognition of the broad discretion *within* the confines of the substantive law and the mandate of the parties with which arbitrators are afforded.¹⁷⁸

courts will follow their own earlier precedents. Further vertical *stare decisis* binds inferior courts generally to follow governing precedents issued by superior courts within the hierarchy".

¹⁶⁹ Stavros Brekoulakis, "Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making" in Tony Cole (ed), *The Roles of Psychology in International Arbitration* (Wolters Kluwer 2017) 362; see also Joanna Jemielniak, "Transnationalization of Domestic Law in International Commercial Arbitration through Comparative Analysis: Challenges for the Legal Profession" (2014) 72(2) *Contemp Asia Arb J* 30, 321, likening the decision-making process of domestic judges to that of chefs, "preparing a meal from ingredients already lying on the table".

¹⁷⁰ Fabio Bortolotti, "Introduction" in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014) 8.

¹⁷¹ See, eg Joanna Jemielniak, "Transnationalization of Domestic Law in International Commercial Arbitration through Comparative Analysis: Challenges for the Legal Profession" (2014) 72(2) *Contemp Asia Arb J* 30; Fabio Bortolotti, "Introduction" in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014) 7-9; François Perret, "Resolving Conflicts Between Contractual Clauses and Specific Rules of the Governing Law: Strict Application or Flexible Approach?" in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014).

¹⁷² Guilherme Rizzo Armalar, "Judicial Precedent and Arbitration: Are Arbitrators Bound by Judicial Precedent?: A Comparative Study Among the United Kingdom, the United States and Brazil" Lecture given at the Edinburgh Centre for Commercial Law on 28 February 2017, 5 <https://34bbc950-a-62cb3a1a-s-sites.googlegroups.com/site/srddhsrhd1213/sgsdfasgs2435/Judicial-Precedent-and-.pdf?attachauth=ANoY7coJTtxEGwR_HxFl_UHwP2fgvDUWoeP3ZFxmHdQ3uRpeTBB3vg7wGZ38wuBlVnmXC8EYIGAs02uOscOj5SCOn85uWUilW8qly3jM0wRt50iCrs8ujfU-w4-IZxG5IY44m_4kafIDwV/Mgk1wIPLpigOxnfol5HoRZjxaaMZs8ZZh17OU4hxhm87PqckCbJn7o9wO494Uji7iq_Ea2v3SRoumZTIQR4x6gmY2q_pA_NIVsvO5o-kQ4p23bNT6a22AO_Y&attredirects=0> accessed 13 March 2018.

¹⁷³ Klaus Berger, "To What Extent Should Arbitrators Respect Domestic Case Law? The German Experience Regarding the Law on Standard Terms" (2015) 32(1) *Arbitration International* 243 <<https://academic.oup.com/arbitration/article-abstract/32/2/243/1741456/To-what-extent-should-arbitrators-respect-domestic?redirectedFrom=PDF>> accessed 13 March 2018.

¹⁷⁴ Fabio Bortolotti, "Introduction" in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014) 8.

¹⁷⁵ Fabio Bortolotti, "Introduction" in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014) 9.

¹⁷⁶ C R Drahozal, "Is Arbitration Lawless?" (2006) 40 *Loyola Law Review* 187 provides a summary of the debate.

¹⁷⁷ Christopher Rossi, "Equity and International Law: A Legal Realist Approach to International Decision-making" in Richard Falk (ed), *Innovation in International Law* (Transnational Publishers Inc 1993) 63.

¹⁷⁸ See, eg Fabio Bortolotti, "Introduction" in Fabio Bortolotti and Pierre Mayer (eds), *The Application of the Substantive Law by International Arbitrators* (Kluwer Law International, ICC 2014) 9, noting that "arbitrators must be aware of the international context of the dispute when applying a domestic law, but at the same time they cannot disregard this law simply because it does not correspond to what they consider to be the right solution of the dispute".

Due to the lack of systemic constraints, arbitrators have the freedom to arrive at more creative solutions than national courts.

The error correction function, and thus the extent to which appeals can enhance substantive fairness, depends on the appellate body being able to assess whether the application of the law and, in international commercial arbitration, other applicable rules, were accurate in the first instance.¹⁷⁹ The fact that arbitrators do not operate as part of a national legal system affords significant flexibility in both identifying the content of substantive law and other rules and applying them to the factual situation of the dispute.¹⁸⁰ The great extent of discretion afforded to arbitrators and the international setting of arbitration pose significant challenges to an appellate tribunal in determining whether the decision of the first tribunal is erroneous.

Judges apply the law within the constraints of a system, and therefore what constitutes an error is very often context-bound. By way of example, failure to follow existing judicial precedent is one category of legal error in national court systems. However, in international commercial arbitration, a tribunal has the discretion to disregard a particular precedent on the basis that it was not intended to be applied to international disputes.¹⁸¹ The non-application of a particular precedent is an error in a national legal system due to *stare decisis* and the overall objective of maintaining consistency with existing legal standards which have been articulated by superior courts for that particular society.¹⁸² By contrast, the decision of the tribunal not to apply a particular precedent is not necessarily “wrong”.

Correcting error

The indeterminacy of the law and *lacunae* mean that there are generally a range of possible solutions to any particular legal question. The question on appeal becomes, why does an appellate court choose one outcome over another of equal validity? In essence, what justifies the appellate court’s “correction” of a trial court decision that is not obviously wrong? This section explores the importance of the systemic context in which the correction of errors occurs at the appellate level in national legal systems. In particular, it examines the influence of policy considerations on judicial decision-making and the determination of what the correct outcome should be in any given case. Despite the recognition of the importance of policy in judicial decision-making, and in particular at the appellate level,¹⁸³ there is virtually no mention of it in the literature on appeals in international commercial arbitration. This section analyses the contextual nature of error correction in national legal systems, and in particular the role of policy, and compares it to international commercial arbitration in order to evaluate the effectiveness of a proposed appeals process in enhancing substantive fairness.

The starting point is the recognition that the judiciary is a pillar of the State. Judicial decision-making takes place within a national legal system that is rooted in a particular

¹⁷⁹ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 NYU J Intl L & Pol 1109, 1139 suggesting that: “although disputes that raise questions of first impression are in some ways distinct from those in which there may be reasonable disagreement about how the law applies to a given situation, both types of cases require adjudicators to try to determine which result is most accurate in light of the surrounding legal context”.

¹⁸⁰ Julian D M Lew, Loukas A Mistelis and Stefan Kröll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 439; Joanna Jemielniak, “Transnationalization of Domestic Law in International Commercial Arbitration through Comparative Analysis: Challenges for the Legal Profession” (2014) 72(2) *Contemp Asia Arb J* 30, 32, 1 noting that: “when tasked with determining, interpreting and applying relevant rules, arbitrators are faced not with a monolithic and predetermined order of norms, but with an entire legal cornucopia of rules of different force, origin and scope of application” and that “arbitrators make choices as to the proper components in a much more discretionary, but also much more challenging way”.

¹⁸¹ Klaus Berger, “To What Extent Should Arbitrators Respect Domestic Case Law? The German Experience Regarding the Law on Standard Terms” (2015) 32(1) *Arbitration International* 243.

¹⁸² Robert S Summers, *Essays in Legal Theory* (Springer Netherlands 2000) 210: in common law countries, “failure to follow precedent is treated as an error of law that, if prejudicial, will lead to reversal of the court below”; Chad M Oldfather, “Error Correction” (2010) 85 *Ind L J* 49, 68.

¹⁸³ See, eg John N Drobak and Douglass C North, “Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations” (2008) 26 *Wash UJL Poly* 131; James Plunkett, “Principle and Policy in Private Law Reasoning” (2016) 75(2) *CLJ* 366.

society. Judges do not operate in a vacuum; instead, they are obliged to respond to important societal values of the time¹⁸⁴ and appellate court judges in particular, weigh up different policy considerations in deciding cases.¹⁸⁵ Policy considerations may be defined as “substantive justifications to which judges appeal when the standards and rules of the legal system do not provide a clear resolution to a dispute”.¹⁸⁶ Policy in the private law context is usually defined narrowly to include social, economic and political considerations.¹⁸⁷ In this way, policy considerations are concerned with objectives or goals of society as a whole.¹⁸⁸ For example, the floodgates principle is employed by judges to reject a particular ruling on the basis that if it were to be adopted, the result would be an inundation of the courts with new cases based upon that ruling.¹⁸⁹

Although error correction and law-making are often treated by scholars as two distinct functions, they are in fact inextricably entwined. This is because every appeal necessarily involves a claim that the trial court has made an error. Accordingly, the law is restated or revised only through the enterprise of error correction.¹⁹⁰ The role of policy considerations at the appellate level in correcting error is particularly apparent in situations in which the court creates new law, either because the facts of the case are not covered by existing rules or because circumstances have changed to such an extent as to require a reconsideration of existing legal rules.¹⁹¹ In such instances, an appellate court does not necessarily afford any deference to the trial court’s decision on the merits. Rather, the appellate court may identify or establish a different rule and declare that the lower court ruling was wrong.¹⁹² The decision of the trial court is arguably not “wrong” per se but the appellate court may decide that the determination of the trial court is nevertheless erroneous.¹⁹³ Appellate courts therefore often “correct” decisions which are not obviously wrong on the basis of policy considerations, namely that they believe their interpretation or reformulation of the law is most in accordance with the dominant values of society at the time.¹⁹⁴

Policy considerations therefore act as a kind of “second order criterion” for appellate courts to determine “which conflicting line of cases to follow, how to differentiate holdings from dicta, whether to read a holding broadly or narrowly, and, especially, whether to follow, distinguish, or overrule a precedent”.¹⁹⁵ The determination by an appellate court of which outcome is most in accordance with the law is heavily influenced by its law-making

¹⁸⁴ William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012) 84.

¹⁸⁵ Albert Tate Jr, “‘Policy’ in Judicial Decisions” (1959) 20(1) *Louisiana Law Review* 61. Of course, there are many explanations for judicial preferences, including for instance psychological ones, see, eg John Bell, *Policy Arguments in Judicial Decisions* (OUP 1983) 23.

¹⁸⁶ John Bell, *Policy Arguments in Judicial Decisions* (OUP 1983) 22–23.

¹⁸⁷ James Plunkett, “Principle and Policy in Private Law Reasoning” (2016) 75(2) *CLJ* 366, 371–72.

¹⁸⁸ James Plunkett, “Principle and Policy in Private Law Reasoning” (2016) 75(2) *CLJ* 366, 371–72. See also John Bell, *Policy Arguments in Judicial Decisions* (OUP 1983) 22: “[i]n justifying the choices they make, judges have recourse to policy arguments. In that the reasons they offer are of a generalized kind, rather than confined to one particular situation alone, they are proposing a strategy for resolving similar disputes in the future. In this way, the decision represents the adoption of a policy with regard to the particular area of law in question, a course of action pursued as advantageous in the government of society”.

¹⁸⁹ Toby J Stern, “Federal Judges and Fearing the ‘Floodgates of Litigation’” (2003) 6 *University of Pennsylvania Journal of Constitutional Law* 377.

¹⁹⁰ Chad M Oldfather, “Error Correction” (2010) 85 *Ind L J* 49, recognising at 64: “[i]n operation, these two functions often work in tandem. Every appeal necessarily involves at least one claim that the trial court erred. As a consequence, appellate courts can create or refine the law only in the context of exercising the error-correction function”.

¹⁹¹ John Bell, *Policy Arguments in Judicial Decisions* (OUP 1983) 37.

¹⁹² Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109, 1138.

¹⁹³ Chad M Oldfather, “Error Correction” (2010) 85 *Ind L J* 49, 64.

¹⁹⁴ Stavros Brekoulakis, “Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making” in Tony Cole (ed), *The Roles of Psychology in International Arbitration* (Wolters Kluwer 2017) 359: “decision-makers, who are institutionally-embedded, are bound by legal precedent and text but they tend to decide on the basis of what they believe to be the most authentic interpretation and representation of law in light of the dominant values of the institutional context within which they decide”.

¹⁹⁵ Scott J Shapiro, *Legality* (The Belknap Press of Harvard University Press, 2011) 245–46.

function. Appellate courts seek to make rules not only to provide a satisfactory outcome in the instant case but also to establish a suitable rule to be applied to future cases. In this way appellate courts choose:

“from among competing rules which may with equal validity be held applicable, the general rule which will provide what the court hopes will be the fairest and wisest disposition of the present and future controversies arising out of the same or similar behaviour.”¹⁹⁶

Due to the fact that appellate court determinations as to the most “correct” of the alternative formulations are frequently based upon broader systemic implications, appellate court decision-making may be understood as being “contextual and policy-based”.¹⁹⁷

By contrast, international commercial arbitrators are a-national, in that they do not make law, nor do they interpret it for others.¹⁹⁸ International commercial arbitration is a private, contractually based process which is concerned with settling the specific dispute and not with external implications of its decisions.¹⁹⁹ It may therefore be understood as a “rule-based and textual” form of dispute resolution.²⁰⁰ There are no institutional implications of decision-making in terms of broader social, political and economic effects. Arbitrators are afforded much greater discretion than national court judges and thus are able to be creative in their outcomes, especially when a strict application of the substantive law might result in what is considered to be an unjust outcome.²⁰¹

In fact, it has been suggested that the real purpose of error correction is refinement of the law.²⁰² For example, William Landes and Richard Posner argue that the absence of appeals in international commercial arbitration is due to the fact that commercial arbitrators do not make law. Accordingly, they posit that the primary importance of appeals in litigation is not to correct errors but to formulate legal rules.²⁰³ This is reflected, for instance, in the rationale behind a de novo review of legal questions by appellate courts, which essentially means that legal questions are reviewed by the appellate court as if the trial court judgment never existed.²⁰⁴ Conversely, the standard of review on appeal for fact is usually highly deferential. It has been submitted that the difference in the standards and scope of review for errors of law and fact suggest that the principal concern of appeals is not with the

¹⁹⁶ Albert Tate Jr, “‘Policy’ in Judicial Decisions” (1959) 20(1) *Louisiana Law Review* 61, 72. Tate goes on to explain at 72: “Having made the choice (or having the choice made by it by a higher tribunal), the perceptive court will apply the rule not by rote but in light of the rule’s underlying reasons in policy. In this sense, these policy reasons play a part in the decision of even routine cases ...”.

¹⁹⁷ W Michael Reisman, “‘Case-Specific Mandates’ versus ‘Systemic Implications’: How Should Investment Tribunals Decide?” The Freshfields Arbitration Lecture (2013) 29(2) *Arbitration International* 131, 132–33. Reisman identifies and contrasts two distinct methodological approaches to decision-making: “case-specific and rule-and-text based on the one hand” and “policy-and-context-based taking full account of systemic-implications” on the other.

¹⁹⁸ Geoffrey M Beresford Hartwell (ed), *The Commercial Way to Justice: The 1996 International Conference of the Chartered Institute of Arbitrators* (Kluwer Law International 1997) 11.

¹⁹⁹ Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” The 2006 Freshfields Lecture, 375–76; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109, 1153.

²⁰⁰ W Michael Reisman, “‘Case-Specific Mandates’ versus ‘Systemic Implications’: How Should Investment Tribunals Decide?” The Freshfields Arbitration Lecture (2013) 29(2) *Arbitration International* 131, 132.

²⁰¹ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109, 1153: “arbitrators may be more prone than judges to creativity, especially when a strict approach seems to result in an unjust or impractical outcome. In part, this is because arbitrators are not burdened by the constraints that come with responsibility for the development of a substantive body of law”.

²⁰² William M Landes and Richard Posner, “Adjudication as a Private Good” (1979) 8(2) *Journal of Legal Studies* 235, 252.

²⁰³ William M Landes and Richard Posner, “Adjudication as a Private Good” (1979) 8(2) *Journal of Legal Studies* 235, 252.

²⁰⁴ Daniel John Meador and Jordana Simone Bernstein, *Appellate Courts in the United States* (West Publishing Co 1994) 60; Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109, 1138–39.

individual case because, if it were, errors of fact would equally be subject to de novo review.²⁰⁵

Appellate courts in particular are guided by policy considerations when deciding between different arguments and determining the relative weight to afford to various outcomes in order to arrive at the outcome which is most accurate. Superior courts often decide that existing precedent is no longer valid for a variety of reasons, including, for instance, a change in societal morals.²⁰⁶ Particularly in the absence of a definitive rule, the value of appellate review is greatly reduced given that the second tribunal's decision would merely be its own speculation on which outcome is most correct.²⁰⁷ Irene Ten-Cate argues that despite this challenge, the error correction function still has merit as an appellate arbitral tribunal could determine the outcome which is most in accordance with the substantive law.²⁰⁸ However, it is likely that this would result in an undesirable and muddled enterprise of qualitatively assessing different yet "accurate" answers given the absence of broader contextual considerations.

The wider context of error correction also implicates precedent, which has an important influence on the notion of error, as briefly referred to the preceding section, and thus on its correction. Indeed, the main purpose of error correction is considered by many commentators to be ensuring the uniform application of the law.²⁰⁹ So, for instance, when deciding whether to choose a broader or more restricted view of precedent, appellate courts will be guided by an overarching concern for the consistency of the jurisprudence as a whole.²¹⁰ In this way consistency is used as a criterion by appellate courts to evaluate whether a decision is erroneous. Consistency therefore provides a constraint on the notion of error and also a justification for correcting the decision of a trial court.²¹¹ Unlike national court systems, which strive to achieve uniformity in the treatment of cases with similar facts, inconsistency is a feature of international commercial arbitration given that each tribunal is tasked with applying the substantive law to a particular set of facts without concern for the uniformity of interpretation and application of the law.²¹² Furthermore, as already discussed, there is no system of precedent and awards largely remain confidential.²¹³ Accordingly another contextual justification of appellate courts for correcting trial court awards, namely adherence to existing precedent, is absent in international commercial arbitration.

International commercial arbitrators are often said to be law-appliers rather than law-makers.²¹⁴ Conversely, in the exercise of correcting errors, national courts and

²⁰⁵ Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1139.

²⁰⁶ Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" The 2006 Freshfields Lecture, 360: providing the example of the Swiss Supreme Court, which must only depart from previous case law when such departure is "grounded in objective reasons such as a better understanding of the intent of legislators, a change in circumstances, a change in legal conceptions or an evolution of societal mores".

²⁰⁷ Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1138.

²⁰⁸ Irene M Ten-Cate, "International Arbitration and the Ends of Appellate Review" (2011–2012) 44 NYU J Intl L & Pol 1109, 1139.

²⁰⁹ David Frisch, "Contractual Choice of Law and the Prudential Foundations of Appellate Review" (2003) 56 Van L Rev 57, 75.

²¹⁰ Tony Blackshield, "Judicial Reasoning" in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (1st edn, OUP 2001) 375.

²¹¹ Chad M Oldfather, "Error Correction" (2010) 85 Ind L J 49, 61.

²¹² Andrea Kupfer Schneider, "Error Correction and Dispute System Design in Investor-State Arbitration" Marquette University Law School Legal Studies Research Paper Series, Research Paper No 13-18 (2013) 5 *Yearbook on Arbitration and Mediation* 194, 207: "uniformity is not written into any standard of review for arbitration. Inconsistency is seen as a distinct possibility in arbitration with the ability of individual arbitrators to apply the law to each particular set of facts unconcerned with uniformity per se".

²¹³ See, eg Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" The 2006 Freshfields Lecture, 363: "Aside from procedural issues, perhaps, one can see no precedential value or self-standing rule creation in commercial arbitration awards". Yet others disagree, such as Gary Born, *International Arbitration: Law and Practice* (2nd edn, Wolters Kluwer 2016) 374: "[w]here awards have addressed substantive issues of commercial law, they have and should have precedential weight ...".

²¹⁴ William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012) 84.

particularly appellate courts, often consider policy arguments in order to revise or reformulate the law.²¹⁵ Arbitrators do not operate in a national legal system and therefore key justifications for an appellate court “correcting” first instance decisions are non-existent. Coupled with the absence of a hierarchical structure imbuing superiority and the various factors which have been postulated by theorists as enhancing the quality of the review process and thus the accuracy of the outcome,²¹⁶ there is a risk that, faced with a decision which is not obviously wrong, an arbitral appellate tribunal’s determination may simply be a substitution of its own decision as to the correct outcome.²¹⁷ That being the case, it is argued that the extent to which arbitral appeals can enhance substantive fairness in international commercial arbitration is doubtful.

5. Conclusion

The debate on whether there should be an appeals process is likely to play a significant role in the development of international commercial arbitration in the coming years.²¹⁸ In this way, the fairness versus finality debate remains extremely relevant. Whilst this article maintains the distinction in the finality versus fairness debate, with fairness being understood in terms of legal accuracy, it could equally be argued that cost and delay must form part of any definition of fairness. So, rather than a constraint on fairness, cost and delay are at the very essence of what fairness is.²¹⁹ Particularly in a commercial setting, time is often a key concern to the parties²²⁰ so the inevitable delay to a final outcome caused by an appeal may have significant consequences. For example, delay may erase the value of the successful outcome if it means that the award is rendered too late to be effectively enforced.²²¹ Given the inevitable cost and delay of an appeals process, a dissatisfied party may also see an appeal as dilatory tactic to frustrate the other party.²²² In addition, the extra cost may exceed the quantum of the dispute, rendering the award merely a Pyrrhic victory for the successful party.

The additional cost and delay caused by an appeals process are genuine concerns but are outside the scope of this article. Instead, the main question is whether an arbitral appeals process would enhance substantive fairness, in terms of the quality of the outcome. This

²¹⁵ Scott J Shapiro, *Legality* (The Belknap Press of Harvard University Press 2011) 240–48; Tony Blackshield, “Judicial Reasoning” in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (1st edn, OUP 2001) 375: “As Martin Golding observed in 1963, what matters is ... whether it [the court] is engaged in a process of ‘principled decision-making’—in which choices between wider or narrower views of the precedents are guided by an explicit or intuitive sense of policy considerations and values, and concern for the good order of the body of legal doctrine as a whole. This concern for ‘good order’—sometimes explained in terms of ‘coherence’ or ‘consistency’ of the legal system ... is part of the Court’s role in every case, since each new litigious problem requires the Court to revisit a particular area of legal doctrine, and to reappraise or restate it to ensure that it remains in good working order”.

²¹⁶ Jonathan Remy Nash and Rafael I Pardo, “An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review” (2008) 61(6) *V and L Rev* 1745.

²¹⁷ Irene M Ten-Cate, “International Arbitration and the Ends of Appellate Review” (2011–2012) 44 *NYU J Intl L & Pol* 1109, 1138: questioning rhetorically, from the standpoint of critics of an appeals process, “[w]hen no unequivocal rule can be identified, why substitute the second tribunal’s speculation on which decision is most in keeping with the law for that of the first tribunal?”

²¹⁸ Jonathan Mackojc, “10 Hot Topics for International Arbitration in 2017” (Kluwer Arbitration Blog, 18 February 2017) <<http://kluwerarbitrationblog.com/2017/02/18/booked/>> accessed 13 March 2018. Appeals are listed as #6.

²¹⁹ Robert G Bone, “Agreeing to a Fair Process: The Problem with Contractarian Theories of Procedural Fairness” (2003) 83 *BU L Rev* 485, 514. In relation to litigation, Bone argues: “In addition to considering the risk of error, a theory of procedural fairness must also take account of process costs, including the social costs of additional procedure to reduce error, and it must do so within the framework of the fairness theory itself”.

²²⁰ Jessica L Gelernder, “Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations” (1997) 80 *Maq L Rev* 625, 641.

²²¹ John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (CUP 2014) 85, quoting Jeremy Bentham: “Too great a delay ... can render substantive justice’s achievement valueless if judgment comes too late to be enforced effectively”.

²²² Jessica L Gelernder, “Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations” (1997) 80 *Maq L Rev* 625, 642 recognises this “harassment” potential in relation to a dissatisfied party submitting the award to review by national courts.

article concludes that whilst the option for a “second look” may be a comforting thought to some, the absence of hierarchy and the contextual, policy-based environment in which the function of error correction is exercised in national court systems means that it is doubtful whether an appeals process in international commercial arbitration would achieve its intended objective. As a number of scholars have recognised, the parties begin the arbitration process with many of the features which are perceived as enhancing the quality of outcome characteristic of a hierarchical appellate system. The one-tier structure of international commercial arbitration thus poses significant challenges to enhancing the quality of outcomes through an appeal and to conferring greater superiority on the decisions of the appellate body.

In addition, it has been argued that there are contextual features which also cast doubt on the ability of an appeal to an arbitral tribunal to produce a more accurate outcome. It has been submitted in this article that error correction is a contextual, policy-based exercise. National judiciaries decide cases within the context of a national legal system. Lower court judges apply the law in a similar way and are subjected to systemic constraints such as precedent. The task of identifying error is therefore more straightforward in national systems given that error is contextually defined, for instance because an outcome does not comply with existing case law. Similarly, appellate courts often “correct” lower court decisions on the basis of policy considerations, as they are tasked with determining the correct rule for society as a whole. By contrast, international commercial arbitration tribunals are outside the constraints of any national legal system. Arbitrators therefore have the freedom to apply an approximation of the law and other applicable rules to adapt to the international nature of the dispute and the intentions and expectations of the parties. With such difficulty in differentiating between “correct” and “incorrect” decisions, it is difficult to understand the relevance of error correction in international commercial arbitration.²²³ Given that international commercial arbitration is not tethered to any national context, there are no extrinsic reasons for justifying the substitution of the appellate tribunal’s decision for that of the first panel of arbitrators. Whilst it is not denied that some arbitral awards are based upon questionable legal positions,²²⁴ it is argued that in many cases an appeals process will not enhance substantive fairness, predominantly because error correction is a contextual, policy-based exercise.

²²³ Chad M Oldfather, “Error Correction” (2010) 85 *Ind L J* 49, 77 quoting Harlon L Dalton, “Taking the Right to Appeal (More or Less) Seriously” (1985) 95 *Yale L Rev* 62, 74: “[i]t is meaningless to talk about error correction if we cannot, at least theoretically, isolate correct and incorrect outcomes. If the vast majority of outcomes are hopelessly ambiguous, or if we view the criteria for judging correctness as impossibly subjective, the error correction rationale for appeal of right is perforce dubious”. Oldfather at fn 115 adds his own gloss to this statement, concluding that: “More generally, selection effects are likely to make it the case that some substantial portion of the cases that make it to the appellate stage will be ‘close cases’ in some general sense of it not being clear at the outset of the litigation who the rightful winner is”.

²²⁴ Elihu E Lauterpacht, “Aspects of the Administration of International Justice” *Hersch Lauterpacht Memorial Lectures*, Vol 9 (Grotius Publications Ltd 1991), 109–10: suggesting that critics of an appeals process in international investment arbitration will acknowledge that many decisions are based on questionable positions but that ultimately finality should trump correctness.

Enforcement of Arbitral Awards Annulled by the Court of the Seat

Reyadh Seyadi

Abstract

One of the distinctive features of arbitration is that it is regulated by a consistent framework of law that allows arbitration to function effectively across state boundaries, enabling the free flow of international trade. In addition, the effective enforcement mechanism of arbitral awards is currently guaranteed by a harmonised international and domestic framework of law. It might be fair to state that a foreign arbitral award is enforceable unless one of the grounds for refusal listed in art V of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NY Convention) exists. This research focuses on one of the grounds for refusal listed in the NY Convention and which has been subject to considerable debate in practice. It relates to the recognition and enforcement of a foreign arbitral award that has been set aside by the court of the country in which or under the law of which that award was made. There is case law in which some national courts of the NY Convention states parties grant enforcement of foreign arbitral awards even though they have been set aside by the court of the country where they were made. The purpose of this research article is to answer two central questions: first, whether it is possible under the detailed reading of the NY Convention to enforce an annulled arbitral award. Secondly, is it beneficial for the development of international commercial arbitration to enforce an annulled arbitral award? The article concludes that although the literal reading of the NY Convention, particularly art VII(1), suggests the possible enforceability of a foreign arbitral award that has been annulled by the court of the place of arbitration (*lex arbitri*), this practice might not be beneficial for the development of international commercial arbitration.

1. Introduction

Arbitration has become the principal method of resolving multinational commercial disputes involving states, individuals and corporations.¹ This is one of the consequences of the increased globalisation of world trade and investment. It has resulted in increasingly harmonised arbitration practices by specialised international arbitration practitioners who speak a common procedural language, whether they practise in the East or West, or any other part of the world. One of the key features of arbitration that inspired the topic of this research paper is the finality and easy enforceability of international arbitral awards throughout the world.² International commercial arbitration would diminish in value if arbitral awards had no effective enforcement mechanism. Accordingly, many countries have endorsed national laws and regional and international treaties that regulate the recognition and enforcement of arbitral awards. The most important and widely accepted

¹ A few surveys were conducted by the Queen Mary University of London, School of International Arbitration in the period 2006–15. These surveys empirically show the prevalence of arbitration over litigation in many different types of international commercial activities. These surveys are available at <<http://www.arbitration.qmul.ac.uk>> accessed 9 March 2018.

² Keren Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP 2007) 39; Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 28; Gary Born, *International Commercial Arbitration: Cases and Materials* (Aspen Publishers 2011) 13; David Holloway and others, *Schmitthoff: The Law and Practice of International Trade* (12th edn, Sweet & Maxwell 2012) 587; Roy Goode and others, *Transnational Commercial Law: Text, Cases, and Materials* (OUP 2007) 623.

multilateral treaty is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which is often referred to as the New York Convention of 1958 (NY Convention).³ In today's practice, the international commercial arbitration system based on the NY Convention effectively facilitates resolution of multinational commercial disputes and contributes to the world's continuing economic development.⁴

This research article aims to examine the emerging notion of the recognition and enforcement of foreign arbitral awards that are annulled by the court of the country of origin (seat court). There is case law evidence in which a foreign arbitral award that was annulled by the court of the country of origin has been enforced in another country under the scheme of the NY Convention.⁵ This approach is opposite to that suggested in art V(1)(e) of the NY Convention. This provision provides that if an arbitral award was annulled by the court of the seat, its enforcement *may* be refused in another country. This research article seeks to answer the following two questions: first, whether it is possible under the wording of the NY Convention to recognise and enforce a foreign arbitral award that was annulled by the court of the seat. Secondly, is the enforcement of a foreign arbitral award that was annulled by the court of the seat beneficial for the development of international commercial arbitration?

This article concludes that the enforcement of an arbitral award that has been set aside by the seat court occurs through three approaches: first, through the national arbitration laws that are not consistent with art V of the NY Convention. Some national arbitration laws do not list the setting aside of the arbitral award by the seat court as a ground to refuse its enforcement. This practice is not free from criticism; however, it is permitted pursuant to the literal reading of art VII(1) of the NY Convention (the pro-enforcement provision). Secondly, through the approach of international and national annulment standards. Thirdly, through the approach of local enforcement standards. This article argues that the recognition and enforcement of annulled foreign arbitral awards are not beneficial to the development of international commercial arbitration and might negatively affect the efficiency of arbitration as a preferable method for dispute resolution in international trade. The recognition and enforcement of such annulled awards might generate a feeling of injustice and unpredictability regarding court decisions on the NY Convention in terms of the argument that it bypasses the aim and purpose of the NY Convention in unifying and limiting the grounds for refusal of recognition and enforcement of foreign arbitral awards.

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) UNTS 330, Registration No 4739.

⁴ The NY Convention was adopted in 1958 by the United Nations to facilitate the Recognition and Enforcement of Foreign Arbitral Awards. Today some 157 nations (up to the time of writing) have ratified the Convention, including most major trading nations and many developing countries from all regions of the world. It has been broadly considered as the most successful convention in international arbitration, if not in international commercial law. Despite the brevity of the NY Convention—it includes only seven substantive articles—it is now widely regarded as the “cornerstone of international commercial arbitration”. See the UNCITRAL official website; Michael Mustill, “Arbitration: History and Background” (1989) 6(2) *Journal of International Arbitration* 34, 47; David Holloway and others, *Schmitthoff: The Law and Practice of International Trade* (12th edn, Sweet & Maxwell 2012) 580; Gary Born, *International Commercial Arbitration: Cases and Materials* (Aspen Publishers 2011) 33.

⁵ Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 1; Ulrich Mayer, “The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention” (1998) 3 *Uniform Law Review* 583; Albert Berg, “Should the Setting Aside of the Arbitral Award be Abolished?” (2014) 29(2) *ICSID Review* 263; Christopher Koch, “The Enforcement of Awards Annulled in their Place of Origin” (2009) 26(2) *Journal of International Arbitration* 267; Albert Berg, “Enforcement of Annulled Awards” (1998) 9 *The ICC International Court of Arbitration Bulletin* 15; Jan Paulsson, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment” (1998) 9 *The ICC International Court of Arbitration Bulletin* 14, also published in (1998) 6(2) *Asia Pacific Law Review* 1; Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International 2002); Albert Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam” (2010) 27(2) *Journal of International Arbitration* 179; Georgios Petrochilos, “Enforcing Awards Annulled in their State of Origin under the New York Convention” (1999) 48(4) *International and Comparative Law Quarterly* 856; Keren Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP 2007) 440; Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 649; Emmanuel Gaillard, “The Enforcement of Awards Set Aside in the Country of Origin” (1999) 14(1) *ICSID Review* 16.

2. Article V(1)(e) of the 1958 New York Convention

Article V(1)(e) of the NY Convention states that:

“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (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, that award was made.”⁶

Enforcement of a foreign arbitral award that has been set aside by the court of the seat or under the law of which the award was made (*lex arbitri*) constitutes a much-debated question and many different views and opinions have emerged and are still developing.⁷ It is crucial to ask whether it is possible under the wording of the NY Convention to enforce an arbitral award that has been annulled by the court of the seat. This question is important not just in the context of the literal wording of the NY Convention, but also in the broader context of international arbitration as an effective system of dispute resolution in international trade. This research article focuses only on the case where the party resisting enforcement has successfully applied for setting aside the award. To the extent that the NY Convention does not harmonise the rules under which awards may be challenged, the local standard for annulment of awards has been referred to as the “anathema of local particularities”.⁸ However, the enforcing court has discretion to enforce the award even though it was successfully challenged at the place of arbitration. Awards set aside by the court of the country of the place of arbitration have been enforced in some countries that are NY Convention states parties, as will be seen later. The discretion exercised by courts in recognising and enforcing awards set aside at the place of arbitration has been welcomed by many writers⁹ and criticised by others.¹⁰

⁶ Emphasis added.

⁷ Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 1; Ulrich Mayer, “The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention” (1998) 3 *Uniform Law Review* 583; Albert Berg, “Should the Setting Aside of the Arbitral Award be Abolished?” (2014) 29(2) *ICSID Review* 263; Christopher Koch, “The Enforcement of Awards Annulled in their Place of Origin” (2009) 26(2) *Journal of International Arbitration* 267; Albert Berg, “Enforcement of Annulled Awards” (1998) 9 *The ICC International Court of Arbitration Bulletin* 15; Jan Paulsson, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment” (1998) 9 *The ICC International Court of Arbitration Bulletin* 14, also published in (1998) 6(2) *Asia Pacific Law Review* 1; Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International 2002); Albert Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam” (2010) 27(2) *Journal of International Arbitration* 179; Georgios Petrochilos, “Enforcing Awards Annulled in their State of Origin under the New York Convention” (1999) 48(4) *International and Comparative Law Quarterly* 856; Keren Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP 2007) 440; Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 649; Emmanuel Gaillard, “The Enforcement of Awards Set Aside in the Country of Origin” (1999) 14(1) *ICSID Review* 16.

⁸ Jan Paulsson, “The case for disregarding local standard annulments under the New York Convention” (1996) 7 *American Review of International Arbitration* 99.

⁹ Christopher Koch, “The Enforcement of Awards Annulled in their Place of Origin” (2009) 26(2) *Journal of International Arbitration* 267; Albert Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam” (2010) 27–(2) *Journal of International Arbitration* 179.

¹⁰ Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 1, 6; Albert Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam” (2010) 27(2) *Journal of International Arbitration* 179, 196.

Understanding the discretionary power under the modal verb “may” in art V of the NY Convention

The use of *may* in the opening line of art V of the NY Convention caused much debate in practice.¹¹ The debate centres on the extent to which national courts may exercise their discretionary power under the verb *may* and enforce an arbitral award despite the presence of one or more of the grounds for refusal listed in art V. This even led one commentator to argue that it might not be helpful to understand the judicial exercise of discretion under the verb *may* as it is better to understand the means of discretion in different legal systems.¹² However, to understand the nature of this debate clearly, it is important at the outset to understand the meaning of “discretionary power” in the legal doctrinal sense.

In the context of the doctrinal debates about the nature of law and judicial practices, Ronald Dworkin highlighted three different ways in which the word “discretion” is conventionally used.¹³ First, the judge might have a wide degree of discretionary power when the legal rules provide for *open concept or open-text legal rules*. For example, art V(1)(b) of the NY Convention provides that the arbitral award may be refused enforcement if one of the parties is not given proper notice or a fair opportunity to present its case. The NY Convention does not explain what is proper notice or what is a fair opportunity. In such open-text legal rules, the judge has a wide range of discretion to evaluate the facts of the case to examine whether or not there is a lack of due process. However, art V(1)(e) of the NY Convention does not suggest open-text legal rules; it expressly mentions that the setting aside of the arbitral award in the country of origin or under the law of which the arbitral award is made is a ground to refuse its enforcement in another country. It is sufficient that the court of the country in which the award was made issued a decision to set aside the arbitral award to declare its unenforceability by the enforcing court.

The second category of the conventional uses of discretionary power as suggested by Dworkin is related to the situation where the decision of the court is not subject to review by another court, for example, where a case reaches the highest court of the state, where the judge might have wider discretion than the judges in lower courts. This category does not seem to be related to the sort of discretion derived from the use of *may* in the opening line of art V of the NY Convention and thus it might not be relevant to our discussion.

The third way in which the word “discretion” is conventionally used is that the judge might have a wide degree of discretion if the articulation of the legal rule does not provide for binding standards.¹⁴ This is relevant to the use of the verb *may* in the opening line of art V of the NY Convention, which results in different interpretations among the national courts of the extent to which discretionary power may be exercised to enforce an arbitral award despite the presence of one of the grounds for refusal listed in art V. The effect of these differences is not necessarily a problem; however, in some instances the use of this discretionary power has led to uncertainty surrounding the question of the extent to which national courts might enforce an arbitral award despite its having been set aside by the seat court.

For example, in some precedents where an annulled arbitral award has been enforced in France, the court suggests that the international arbitral award is not anchored to any legal system, including the country of the place of arbitration.¹⁵ The court also argues that this is

¹¹ Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 1; Ulrich Mayer, “The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention” (1998) 3 *Uniform Law Review* 583, 588.

¹² Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 3.

¹³ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 31–39, 68–74.

¹⁴ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 31–39, 68–71.

¹⁵ *Hilmarton Ltd v Omnium de Valorisation* [1994] case no 92-15.137 French Court of Cassation, published in XX YBCA (1995) 663, *Société Egyptian General Petroleum Corporation v Société National Gas Company* [2011] 10/16525 Paris Court of Appeal.

allowed under the discretionary power granted to the national courts under the use of *may* in the opening line of art V of the NY Convention. Also, the US courts in some cases differentiate between national and international annulment standards in their court decisions that have enforced foreign annulled arbitral awards.¹⁶ Importantly, both courts justify the application of these local norms under the discretion granted using *may* in the opening line of art V. Hence, the following section will discuss the legal basis generated from precedents that enforced the arbitral awards set aside by the court of the seat.

3. Different approaches to enforcing foreign annulled arbitral awards

The use of *may* indicates that the national court is not obliged to refuse enforcement in the presence of one of the grounds for refusal listed in art V, such as the arbitral award being annulled by the court of the seat. This is because art V uses the term *may* rather than *shall*. The language is permissive, not mandatory. The question to be raised is how this discretion is applied in the practice of recognition and enforcement of foreign arbitral awards. A leading commentator on the NY Convention noted that: “even if one of the grounds listed which would justify refusal of enforcement is proven by the award debtor, the court has a *residual discretion* to enforce the award”.¹⁷ Although this opinion is supported by a literal reading of the opening line of art V(1), it is potentially misleading.¹⁸ Some national courts seem sympathetic to this opinion but the problem with it is that the use of discretion to enforce an arbitral award, despite the presence of one of the grounds for refusal listed in art V, led in some instances to a different understanding of the international norms that regulate the recognition and enforcement of foreign arbitral awards. However, a leading commentator on the NY Convention states: “As far as the grounds for refusal for enforcement of the award as enumerated in art V are concerned, it means that they should be construed narrowly”.¹⁹ This is the prevailing interpretation that is supported by the words “only if” that are also found in the introductory sentence of art V and because of the exclusivity and narrow interpretation features of the grounds of refusal.²⁰ For example, in *Diag Human SE v The Czech Republic*,²¹ the England and Wales High Court affirmed that:

“Under the Convention the grounds for refusing enforcement are restricted and *constructed narrowly*, enforcement may be refused *only if* one of the listed grounds, which are *exclusive* ...”²²

There is also another argument and case law evidence that refers to the discretion under the use of *may* to enforce the arbitral award if the alleged ground for refusal is minor or does not affect the outcome of the arbitral award.²³ The different interpretations among national courts is a normal result of different legal traditions and of course fall within the scope of court discretion to interpret a non-mandatory legal rule such as the verb *may* be used in the introductory line of art V. Along these lines, some commentators argue that the use of discretion to enforce an arbitral award despite the presence of one of the grounds of

¹⁶ *Corporacion Mexicana de Mantenimiento Integral v PEMEX* [2013] 962 F Supp 2d 642 (Southern District, New York, 2013).

¹⁷ Julian Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) [26]–[68].

¹⁸ Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 1, 4.

¹⁹ Albert Berg, “Enforcement of Annulled Awards” (1998) 9 *The ICC International Court of Arbitration Bulletin* 15 (emphasis added).

²⁰ Albert Berg, “New York Convention of 1958: Refusals of Enforcement” (2007) 18(2) *ICC International Court of Arbitration Bulletin* 2; Albert Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam” (2010) 27(2) *Journal of International Arbitration* 179.

²¹ *Diag Human SE v The Czech Republic* [2014] EWHC 1639 (Comm).

²² *Diag Human SE v The Czech Republic* [2014] EWHC 1639 (Comm) [12] (emphasis added).

²³ Albert Berg, “Should the Setting Aside of the Arbitral Award be Abolished?” (2014) 29(2) *ICSID Review* 263, 268.

refusal listed in art V “is discretionary only in a formal sense; in substance it depends on the application of the framework of rules and principles that are provided in certain legal systems”.²⁴ Hill, for example, argues that the discretion provided under the use of *may* must be interpreted by referring to international standards and doctrines rather than relying solely on the court’s views of the exercise of that discretion.²⁵ The problem in the use of the discretion that derives from the use of *may* led in some instances to a problematic understanding of the operation of the NY Convention in “hard cases”²⁶ such as the recognition and enforcement of an arbitral award that has been set aside by the court of the country where the award was made.

Court discretion to enforce foreign annulled arbitral awards

The literal reading of art V(1) of the NY Convention supports the enforcement of a foreign arbitral award even though it has been set aside by the court of the country of origin. This is because of the use of permissive language, that is, the verb *may* in art V. However, some commentators suggest that as the national courts have residual discretion to refuse enforcement as suggested by art V, the enforcement of an arbitral award despite the presence of one of the grounds of refusal should not be the case with all the grounds for refusal listed in art V, and in some instances the refusal is *mandatory*.²⁷ This view is particularly relevant to art V(1)(e), which provides that enforcement should be refused if the court of the country where the award is made has set aside the arbitral award.²⁸ This view is particularly relevant to the doctrinal means of discretionary power discussed above in the sense that art V(1)(e) does not provide for *open-text legal rules*, as is the case with the other grounds for refusal. This means that the enforcing courts always have discretionary power to evaluate whether the public policy, lack of due process and procedural irregularities exist or not, and whether they are sufficient as a ground to refuse enforcement. By contrast, art V(1)(e) is not used as an *open-text legal rule* as in the other grounds for refusal. It is clearly stated that an annulment decision issued by the court of the seat is a ground to refuse enforcement in other jurisdictions. Therefore, there is no discretion under the wording of art V(1)(e).

In addition, the use of *may* in art V also suggests a level of discretion within the conventional means of discretion (a non-mandatory legal rule) to enforce the arbitral award despite it having been set aside by the court of the seat. Nevertheless, Berg, who is one of the leading commentators on the NY Convention, argues that “the current version of the NY Convention offers no possibility to recognise and enforce an arbitral award *that has been set aside* in the country of origin”.²⁹ In his opinion, the enforcement of an annulled arbitral award occurs because of art VII(1) of the NY Convention, which provides a justification for the enforcement courts to refer to their national arbitration laws and to act more liberally than under the provisions of art V.³⁰

²⁴ Albert Berg, “Enforcement of Annulled Awards” (1998) 9 *The ICC International Court of Arbitration Bulletin* 3.

²⁵ Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 1, 8.

²⁶ Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 1, 3.

²⁷ Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 1, 6; Albert Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam” (2010) 27(2) *Journal of International Arbitration* 179, 196.

²⁸ Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 1, 6; Albert Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam” (2010) 27(2) *Journal of International Arbitration* 179, 196.

²⁹ Albert Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam” (2010) 27(2) *Journal of International Arbitration* 179, 196.

³⁰ Albert Berg, “Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam” (2010) 27(2) *Journal of International Arbitration* 179, 196.

The influence of art VII(1) on enforcing annulled foreign arbitral awards

Article VII(1) of the NY Convention states that:

“The provisions of the present Convention *shall* not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed *by the law or the treaties* of the country where such award is sought to be relied upon.”³¹

This provision is sometimes referred to as the “more favourable right provision”.³² It provides that the party seeking recognition and enforcement of a foreign arbitral award can rely on any other international treaty ratified by the state, or even the national laws of the state, if they provide more liberal room to enforce the arbitral award than the provisions established by the NY Convention. However, art VII(1) caused a great deal of debate in practice, as it does not provide further explanation about the extent of this liberality.³³ Some state parties to the NY Convention do not list some of the grounds for refusal that come under art V in their national arbitration laws. Therefore, the national courts of these states interpret art VII(1) in a way that allows the courts to enforce an arbitral award in the presence of one of the grounds listed in art V.

However, art VII(1) suggests a different understanding to the debatable position that national law could prevail over international law.³⁴ It is accepted that there is a different understanding of the implementation of international law in domestic legal systems (dualism and monism theories), and it is beyond the scope of this research article to examine this in detail. It seems that art VII(1) is biased in favour of the position that national law could prevail over international law. For example, the French arbitration law and the US Federal Arbitration Act (FAA) do not list the setting aside of the award in the country of origin as a ground to refuse enforcement, and thus the parties may ask the courts of France and the US to enforce the arbitral award according to the French arbitration law and the US FAA as a more favourable law of enforcement.³⁵ The rationale of this view is based on the argument that art VII(1) should be retained in its present form and, further, that it will become increasingly important as national courts seek to escape the restrictions of art V of the NY Convention.³⁶

For example, in *Chromalloy Aeroservices v Arab Republic of Egypt*,³⁷ the Paris Court of Appeal and the US courts enforced a foreign arbitral award that was previously annulled

³¹ Emphasis added.

³² Kenneth Davis, “Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (2002) 37 *Texas International Law Journal* 43; Albert Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (Kluwer Law International 1981) 81.

³³ Kenneth Davis, “Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (2002) 37 *Texas International Law Journal* 43, 47.

³⁴ Roy Goode and others, *Transnational Commercial Law: Text, Cases, and Materials* (Oxford University Press 2007) 680.

³⁵ France Arbitration Law 2011 art (1525) and art (1520), US Federal Arbitration Act (1994) s (10). The US FAA takes an arguable position. Gary Born notes that: “there is considerable ‘overlap’ among the various sources of US law affecting international arbitration agreements and awards. Arbitral awards and agreements falling under the New York Convention are of course governed by both the Convention and the second chapter of the FAA (which implements the Convention). However, these awards are also ordinarily governed by the first, ‘domestic’ chapter of the FAA, at least to the extent it is not in conflict with the Convention ... It is not always clear whether precedents developed under the domestic FAA are applicable under the Act’s second chapter.” See Gary Born, *International Commercial Arbitration in the United States: Commentary and Materials* (Kluwer Law and Taxation Publishers 1994) 32.

³⁶ Emmanuel Gaillard, “The Enforcement of Awards Set Aside in the Country of Origin” (1999) 14(1) *ICSID Review* 16.

³⁷ *Chromalloy Aeroservices v Arab Republic of Egypt* [1997] 95/23025 Paris Court of Appeal, *Chromalloy Aeroservices v The Arab Republic of Egypt* [1996] case no 94-2339 US District Court, District of Columbia, United States.

by the court of the seat, that is, the Egyptian Court of Appeal.³⁸ Both the French and US courts referred to art VII(1) of the NY Convention and applied the same arguments discussed above (more favourable law for enforcement). The US court noted that:

“While under Article V, recognition and enforcement of an award *may* be refused if it has been set aside under the *lex arbitri*, Article VII of the New York Convention stated that “no party *shall* be deprived of the rights it would have to avail itself of an arbitral award in the manner and to the extent allowed by the law ... of the country where such award is sought to be relied upon.”³⁹

Thus, the US court in the above interpretation confirmed the permissive “may” and referred to its discretion to enforce the annulled arbitral award. The court also confirmed the mandatory *shall* of art VII(1) of the NY Convention used to ensure the party had the right to invoke the more favourable national law of the country where the enforcement was sought. The French court⁴⁰ affirmed this position in many other cases while the US courts have changed their position and attacked the rationale provided in *Chromalloy* by relying on art VII(1) of the NY Convention.⁴¹ Although the US court in a few cases⁴² refused to enforce the arbitral award that was annulled by the country of origin by relying on art VII(1), the court also suggested that the arbitral award annulled by the court of origin *may* be enforced in the US under the scheme of the NY Convention *only if* the reason for the annulment was that the arbitral award violated the domestic public policy of the jurisdiction of the seat.⁴³ It seems that the US court gave effect to the concept of international and national annulment standards as a ground to enforce foreign annulled arbitral awards.

The approach of international and national annulment standards to enforcing annulled foreign arbitral awards

Some commentators suggest that the enforcement of annulled arbitral awards is possible despite art V(1)(e).⁴⁴ They argue that annulled arbitral awards could be enforced because of the wording of the article. The use of *may* instead of *shall* in the opening line of art V indicates a level of discretion granted to the national courts. Therefore, even if the arbitral award were annulled by the court of the seat, other countries may enforce it by referring to the discretion granted to the court by the use of the verb *may*. The rationale of this opinion lies in the fact that the national courts should allow international arbitration to become truly

³⁸ *Chromalloy Aeroservices v The Arab Republic of Egypt* [1995] Cairo Court of Appeal, published in 24 YBCA (1999) 265.

³⁹ *Chromalloy Aeroservices v The Arab Republic of Egypt* [1996] case no 94-2339 US District Court, District of Columbia, United States (emphasis added).

⁴⁰ The last published decision of the French courts on art VII(1) is found in *Société Egyptian General Petroleum Corporation v Société National Gas Company* [2011] 10/16525 Paris Court of Appeal.

⁴¹ *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd & Chevron Corp Inc; Baker Marine (Nig) Ltd v Danos and Curole Marine Contractors Inc* [1999] 191 F3d 194 2d Cir, published in 24 YBCA (1999) 909; *Termorio SAESP v Electranta SP* [2006] 241 F Supp 2d 87 (DDC 2006) published in XXXI YBCA (2006) 1457. In *Baker Marine* the US court notes: “We reject Baker Marine’s argument. It is sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated under the laws of Nigeria ... Furthermore, as a *practical matter*, mechanical application of domestic arbitral law to foreign awards under the NYC would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been issued in its favour can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary with enforcement actions from country to country until a court is found, if any, which grants the enforcement”. See YBCA (1999) 911.

⁴² *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd & Chevron Corp Inc; Baker Marine (Nig) Ltd v Danos and Curole Marine Contractors Inc* [1999] 191 F3d 194 2d Cir, published in 24 YBCA (1999) 909; *Termorio SAESP v Electranta SP* [2006] 241 F Supp 2d 87 (DDC 2006) published in XXXI YBCA (2006) 1457.

⁴³ Jonathan Hill, “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) *Oxford Journal of Legal Studies* 1, 25.

⁴⁴ Jan Paulsson, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment” (1998) 9 *The ICC International Court of Arbitration Bulletin* 1; Ulrich Mayer, “The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention” (1998) 3 *Uniform Law Review* 583, 588; Julian Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) [26]–[68].

international.⁴⁵ Paulsson, a leading scholar supporting this view, argued that if the annulment was based on “local standards” then the arbitral award should be enforced in other countries, while if the arbitral award was annulled on the basis of “international standards” then it should not be enforced in another country.⁴⁶ The difficult question, therefore, is what criteria are used to differentiate between national and international standards in the enforcement of an arbitral award that has been set aside by the court of the country in which it was made.

There is no precise answer to this question. According to those who support this position, the term “local annulment standards” refers to a situation where an arbitral award has been annulled for reasons that are not internationally recognised. For example, some arbitration laws allow for an appeal of an arbitral award on its merits, and thus an arbitral award annulled on its merits according to this position can be enforced in other courts under the NY Convention. Another example is where an arbitral award has been annulled for domestic public policy reasons; it can then be enforced in other countries.⁴⁷ For example, in *Corporacion Mexicana de Mantenimiento Integral v Pemex*,⁴⁸ the US courts enforced the arbitral award, notwithstanding the annulment decision issued by the court of the seat (the Mexican court). The US court justified the enforcement on the ground that the annulment decision issued by the Mexican court was based on the fact that the arbitral award violated the basic notion of justice of the domestic legal system of Mexico, but that it did not violate the international public policy of the US.⁴⁹

This position might sound ambitious in view of the fact that the arbitral award is not anchored to a particular legal system, especially the jurisdiction of the seat, but it was adopted in a 2014 case.⁵⁰ It has become well established in the US courts that arbitral awards that were set aside by the court of the seat are not enforceable in the US under art VII(1) of the NY Convention (on the basis of a more favourable law of enforcement). This argument is in line with one suggested earlier by Gary Born, who noted that:

“There is considerable overlap among the various sources of US law affecting international arbitration agreements and awards. Arbitral awards and agreements falling under the NY Convention are of course governed by both the NY Convention and the second chapter of the FAA (which implements the NY Convention). However, these awards are also ordinarily governed by the first, ‘domestic’ chapter of the FAA, at least to the extent it is not in conflict with the NY Convention.”

It is not always clear whether precedents developed under the domestic FAA are applicable under the Act’s second chapter.⁵¹ It seems that the US courts use the discretionary power derived from the verb *may*, in the opening line of art V, to examine the reasons for annulment, and whether they are based on domestic or international annulment standards.⁵²

The first possible criticism of this position is that neither the NY Convention nor the preparatory works provide for such classifications of “international and national annulment

⁴⁵ Jan Paulsson, “Delocalisation of international commercial arbitration: when and why it matters” (1983) 32(1) ICLQ 53, 55.

⁴⁶ Jan Paulsson, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment” (1998) 9 *The ICC International Court of Arbitration Bulletin* 1, 25.

⁴⁷ Jan Paulsson, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment” (1998) 9 *The ICC International Court of Arbitration Bulletin* 1, 27.

⁴⁸ *Corporacion Mexicana de Mantenimiento Integral v PEMEX* [2013] 962 F Supp 2d 642 (Southern District, New York, 2013).

⁴⁹ *Corporacion Mexicana de Mantenimiento Integral v PEMEX* [2013] 962 F Supp 2d 642 (Southern District, New York, 2013) 31.

⁵⁰ *Thai-Lao Lignite (Thailand) Co Ltd and Hongsa Lignite (Lao PDR) v Government of the Lao People’s Democratic Republic* [2014] 10-Cv-5256 US (District Court, Southern District of New York) 13.

⁵¹ Gary Born, *International Commercial Arbitration in the United States: Commentary and Materials* (Kluwer Law and Taxation 1994) 32.

⁵² Gary Born, *International Commercial Arbitration in the United States: Commentary and Materials* (Kluwer Law and Taxation 1994) 32; Christopher Koch, “The Enforcement of Awards Annulled in their Place of Origin” (2009) 26(2) *Journal of International Arbitration* 267, 284.

standards”.⁵³ Article V of the NY Convention has set out the minimum conditions that an arbitral award should meet for its enforcement to be granted by national courts. One of these conditions is that if the court of the seat has annulled the arbitral award, other countries *may* not enforce the arbitral award. Therefore, the enforcing courts under the NY Convention are not required to examine whether the annulments were based on national or international annulment standards. In addition, how can the enforcing court differentiate between international and national annulment standards? For example, even if an arbitral award was annulled due to an invalid arbitration agreement or procedural irregularities (which might be considered as an international annulment standard), the annulment might be correlated with reasons of domestic public policy. Therefore, what is considered an invalid arbitration agreement in one country might not be viewed in the same way in another country. This means that an invalid arbitration agreement or procedural irregularities might also come within the meaning of national annulment standards. The differentiation between national and international annulment standards might suggest another tier of different interpretations to that which constitutes international and national annulment standards.

The local standard approach to enforcing foreign annulled arbitral awards

The French Supreme Court in *Hilmarton*⁵⁴ enforced an arbitral award that had been annulled in the country of origin (Switzerland) and established that:

“the arbitral 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, and its recognition in France is not contrary to international public policy.”⁵⁵

It might be difficult to accept the local standards suggested by the French courts in *Hilmarton* under the legal framework regulating the recognition and enforcement of foreign arbitral awards as developed by the NY Convention and the Model Law. The rationale adopted in *Hilmarton* was that an international arbitral award is not linked to the legal system of the place of arbitration (*lex arbitri*). This argument is based on delocalisation theory.⁵⁶ The rationale of this theory is derived from the autonomy of parties that aim to free arbitration as much as possible from the national laws of the country of the place of arbitration (*lex arbitri*).⁵⁷ It has two basic roots. First, it is assumed that international commercial arbitration is autonomous and regulated by its own rules that are chosen by the parties or by the arbitral tribunal. Secondly, any control over the arbitration should only come from the law of the country in which enforcement of the arbitral award is sought.⁵⁸

However, the power of the seat theory is that it provides a certain legal system instead of the arbitration being “floating”; the arbitration is firmly anchored to a specific legal system. Redfern noted that the core point of the seat theory is that it provides a certain legal system governing the arbitration process.⁵⁹ Delocalisation theory, in contrast, is based on

⁵³ UNCITRAL, “UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): Excerpt, guide on article VII” (2013) Forty-sixth session, document No A/CN.9/786, p 14 para 40.

⁵⁴ *Hilmarton Ltd v Omnium de Valorisation* [1994] case no 92-15.137 French Court of Cassation, published in XX YBCA (1995) 663.

⁵⁵ *Hilmarton Ltd v Omnium de Valorisation* [1994] case no 92-15.137 French Court of Cassation, published in XX YBCA (1995) 665 para 5 (emphasis added).

⁵⁶ Berthold Goldman and others, *International Commercial Arbitration* (Kluwer Law International 1999) 635; Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 188; Keren Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP 2007) 246; Roy Goode and others, *Transnational Commercial Law: Text, Cases, and Materials* (OUP 2007) 649; Jan Paulsson, “Delocalisation of international commercial arbitration: when and why it matters” (1983) 32(1) ICLQ 53.

⁵⁷ Claudia Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards* (Peter Lang GmbH 2010) 50.

⁵⁸ Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 190.

⁵⁹ Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 191.

detaching the arbitration from control by any legal system except at the enforcement stage. In fact, the seat theory establishes a legal link between the arbitration proceedings and the laws of the location where the arbitration legally takes place.⁶⁰ The court of the seat also plays a crucial role in challenging the final arbitral award. For example, under the NY Convention, the court of the seat has exclusive jurisdiction to set aside or annul an arbitral award. If the court of the seat annuls the arbitral award, it may not be enforceable in other countries under the NY Convention.⁶¹ Under delocalisation theory, if an international arbitral award is not anchored to any legal system, including the country of the place of arbitration, how can justice be achieved? Indeed, under what legal basis can the national courts of the place of arbitration support the process of arbitration? The parties to the arbitration may need to request the seat court to assist in the appointment of the arbitral tribunal or order interim measures of protection and many other functions.⁶²

In addition, it is accepted that any national courts can establish jurisdiction over an arbitral award; however, this jurisdiction is not without limits. The question of whether an arbitral award is valid or not, only the courts of the place of arbitration may decide, under the powers granted to them pursuant to the wording of art V(1)(e).⁶³ If this were not the case, what would be the benefit of having an international convention such as the NY Convention that regulates the jurisdiction of national courts over arbitral awards? The enforcing court has the jurisdiction to enforce or not enforce an arbitral award, but the question of the validity of the arbitral award is granted (with limitations) to the court of the seat. This is because art V(1)(e) of the NY Convention considers the court that is competent to annul the arbitral award to be the court of the seat of the place of arbitration or under the law of which the award is made (*lex arbitri*).

If this were not the case, award creditors would try to enforce annulled arbitral awards in country after country until they found a court that would enforce the annulled arbitral award. Parties would refrain from doing this if the annulled award was not open to enforcement in any other state, as suggested by art V(1)(e). This seems to be the philosophy behind the presence of this article, which granted the court of the seat exclusive jurisdiction to annul the arbitral award.

4. Presumed practical difficulties in enforcing foreign annulled arbitral awards

Some thought might be given to the critical position of the recognition and enforcement of an arbitral award that has been set aside by the court of the country in which it was made. Relying solely on art VII(1) in omitting one of the grounds for refusal listed in art V might raise a concern about the international commercial arbitration justice system that sought to be protected by the provisions of art V by listing a number of international grounds for refusal. The system set up by the NY Convention in providing exclusive grounds for refusal has achieved considerable success in practice. It is well known, in the practice of international arbitration, that arbitral awards are not open to challenge before national courts, except under the limited grounds listed in art V and adopted by most modern national arbitration laws. Indeed, by allowing the enforcement court to refuse enforcement of an annulled award, art V(1)(e) creates a presumption that annulled awards are not enforceable foreign awards.

⁶⁰ Jonathan Hill, "Determining the seat of an international arbitration: party autonomy and the interpretation of arbitration agreements" (2014) 632 ICLQ 517, 517; William Park, "The Lex Loci Arbitri and International Commercial Arbitration" (1983) 32(1) ICLQ 21; Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 180; Keren Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP 2007) 233.

⁶¹ NY Convention, art V(1)(e).

⁶² Keren Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP 2007) 250.

⁶³ Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International 2002) 11–15.

If an arbitral award annulled by the court of the place of arbitration no longer exists, how can a court in a different country enforce it?

In addition, being favourable to the enforcement of annulled arbitral awards under art VII(1) may not enhance the establishment of a consistent legal regime governing the recognition and enforcement of foreign arbitral awards. The exclusive applicability of art V of the NY Convention to the recognition and enforcement of foreign arbitral awards would increase the degree of certainty as to which awards are enforceable and which are not.⁶⁴ As it now stands, those awards which do not comply with the NY Convention have an uncertain status. This is because national courts may deviate from the provisions of art V and rely on their own national arbitration laws that provide more liberal grounds for refusal, such as in enforcing an annulled foreign arbitral award. This practice is allowed under art VII(1) of the NY Convention, as explained earlier.

However, the French and US approaches discussed above are logically coherent and conform to the letter of the NY Convention. The local standard suggested by these approaches under art VII(1) may not correspond to the spirit of the Convention. It would involve creating a national set of local enforcement standards for foreign awards that, in effect, bypass the NY Convention, and involve the international harmonisation of the rules pertaining to the enforcement of foreign arbitral awards. What would the world of international award enforcement look like if each of the over 157 countries that are signatories to the NY Convention defined its own, ostensibly more favourable, standards to evaluate the validity of a foreign award? Enforcement would not become simpler but more complex because the international coordination effect created by a uniform set of rules would be lost.

Moreover, local standard enforcement also runs against the principle of party autonomy.⁶⁵ When parties directly or indirectly choose the place of arbitration (seat of jurisdiction), this choice implies an agreement to submit the arbitration to the *lex arbitri* and the supervisory powers of the judicial system at the seat. Local standard enforcement ignores this choice, making it completely unpredictable whether or not an award may be seen to be valid. The enforcement of an annulled arbitral award obviously eliminates the steering effect of a “primary” jurisdiction to which the NY Convention gives the power to determine the international validity of an award. This is obviously not to the advantage of anyone, not even necessarily to the party benefiting from the enforcement of an annulled award. The seat of jurisdiction is a direct or indirect choice of the parties. If parties have chosen a country that is not arbitration friendly, enforcement courts are not there to rescue them from their choice.⁶⁶

Finally, reading art VII(1) of the NY Convention separately as a justification to enforce an annulled arbitral award might violate the purpose of the NY Convention in establishing a consistent framework of law that regulates the recognition and enforcement of foreign arbitral awards.⁶⁷ Neither the text nor the legislative history of the NY Convention allows the Convention to be interpreted as permitting the court to enforce an award that has been set aside in the country of origin. Article V provides the minimum grounds for recognition and enforcement that should be met for the arbitral award to be enforceable. It is argued that art V leaves no room for doubt that the drafters of the Convention aimed to put in place the minimum conditions for setting aside an award or refusing its enforcement.⁶⁸ States

⁶⁴ Albert Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law International 1981) 83.

⁶⁵ Christopher Koch, “The Enforcement of Awards Annulled in their Place of Origin” (2009) 26(2) *Journal of International Arbitration* 267, 288.

⁶⁶ Albert Berg, “Should the Setting Aside of the Arbitral Award be Abolished?” (2014) 29(2) *ICSID Review* 263, 286.

⁶⁷ Christopher Koch, “The Enforcement of Awards Annulled in their Place of Origin” (2009) 26(2) *Journal of International Arbitration* 267, 287; Albert Berg, “Should the Setting Aside of the Arbitral Award be Abolished?” (2014) 29(2) *ICSID Review* 263, 286.

⁶⁸ Albert Berg, “Should the Setting Aside of the Arbitral Award be Abolished?” (2014) 29(2) *ICSID Review* 263, 264.

have a discretion to act more liberally than the NY Convention under art VII(1), but not to ignore or omit one of the minimum grounds listed in art V.⁶⁹ Therefore, art VII(1) might be interpreted within the limitation of the words *only if* that appear in the opening line of art V.

Thus, it might be useful for UNCITRAL to issue guidance that clarifies the degree of freedom that national courts are allowed under art VII(1) of the NY Convention. It is recommended that this guidance explain the extent of this freedom to not ignore the presence of one of the grounds for refusal listed in art V, particularly s (e). The degree of freedom might be within the narrow interpretation of the grounds for refusal and pro-enforcement bias but does not involve omitting one of the grounds of refusal listed in art V of the NY Convention.

5. Conclusion

Article V of the NY Convention leaves no room for doubt that the drafters of the NY Convention aimed to put in place the minimum conditions for setting aside an award or refusing its enforcement.⁷⁰ At first glance, the recognition and enforcement of an annulled arbitral award is prohibited under art V(1)(e); there is, however, a legal basis for enforcing such awards in line with a detailed reading of the NY Convention. First, the enforcing court has a discretionary power to enforce a foreign annulled arbitral award under the permissive language used in the opening line of art V. However, this discretion is not unlimited in the sense that the articulation of art V(1)(e) does not provide for an open-text legal rule or a non-mandatory rule. According to art V(1)(e), the enforcing court is required to refuse enforcement if the arbitral award has been set aside by the court of the seat. The rule is not an open-text legal rule like the other grounds for refusal such as the lack of due process or public policy defences, where the enforcing court has a discretionary power to examine the existence and fairness of the allegation prior to refusing or granting enforcement. Secondly, the enforcing court may enforce a foreign annulled arbitral award according to the national arbitration laws of the enforcing state pursuant to art VII(1), even if this law is not consistent with the NY Convention, or the court may not consider the setting aside of arbitral awards as a ground for refusal. Certainly, the enforcing court has a discretion to act more liberally than the NY Convention under art VII(1), but not to ignore or omit one of the minimum grounds listed in art V.⁷¹ Furthermore, this provision is in line with the debatable position that national laws prevail over international law, and an increased use of this provision by national courts might affect the structural integrity of arbitration.

In addition, neither the text nor the legislative history of the NY Convention allows enforcing courts to examine the reasons for annulment, whether these are national or international, as suggested by some court practices where foreign annulled awards have been enforced. States' commitment under the NY Convention is to refuse enforcement whenever an arbitral award has been set aside by the court of the country of origin. If such an arbitral award is enforceable in other countries, then the party would try to enforce the annulled arbitral award from country to country until he or she found a court that would accept the enforcement of the annulled arbitral award. The party would refrain from doing this if the annulled award was not open to enforcement in any other state. One of the core benefits of arbitration is that it is insured by an international and domestic framework of law, which provides a significant degree of harmonisation, allowing it to function in a coherent manner across state boundaries. There is no doubt that the NY Convention achieved

⁶⁹ Albert Berg, "Enforcement of Annulled Awards" (1998) 9 *The ICC International Court of Arbitration Bulletin* 15.

⁷⁰ Albert Berg, "Should the Setting Aside of the Arbitral Award be Abolished?" (2014) 29(2) *ICSID Review* 263, 264.

⁷¹ Albert Berg, "Enforcement of Annulled Awards" (1998) 9 *The ICC International Court of Arbitration Bulletin* 15.

considerable success in practice as it became the principal treaty in the domain of recognition and enforcement of foreign arbitral awards. However, it might be the ultimate dream if the NY Convention provisions have been interpreted and applied harmoniously by national courts to avoid legal disharmony in the implementation of the NY Convention. It might lead to a sense of injustice or could weaken the efficiency of the NY Convention.

Arbitration in International Project Finance Transactions: The Path to Financial Arbitration

Georgios Martsekis*

Abstract

In the midst of the spread of financial transactions around the globe, arbitration is gaining ground as an effective dispute resolution method. The incremental nature of its methodology seems to some extent to surpass the rigid characteristics of litigation. Although litigation is well established, recent practices deployed in the context of the International Swaps and Derivatives Association (ISDA) master agreement, the development of the Panel of Recognised International Market Experts in Finance (PRIME Finance) and a current ICC Report on Financial Institutions and International Arbitration call for new empirical data on the workability of arbitration in this respect. This paper seeks to demonstrate arbitration's compatibility with project finance transactions, mostly through a comparative analysis of arbitration and litigation. The author explains the nature of these international transactions, the most appropriate forum for the disputes that arise and the optimal method of resolution. This is an attempt to balance the interests of the contracting parties and justice. A new international financial court, the author suggests, may be the most competent body to resolve this kind of dispute effectively.

1. Introduction

There has indisputably been great interest in major infrastructure projects, from Greek and Roman times until the 1997 Asian financial crisis. Interest peaked again by virtue of the rapid development of OECD countries. Quite recently, there has been a significant demand for project financing mechanisms to support large-scale projects in the transportation, mining, energy, health care and other areas and this requires thorough examination.

This paper focuses first on explaining how project finance and ordinary financing work in the context of infrastructure projects and then asks why litigation has been the dominant dispute resolution method, particularly between bank institutions acting as lenders and investors as borrowers. However, the complex and international nature of financial transactions provides evidence in support of arbitration over litigation. In the same vein, the issuing of the ISDA Memorandum on the use of arbitration in relation to derivatives transactions and the development of PRIME Finance affirm the necessity of a different approach to achieving the optimal method of dispute resolution.

The heart of the subject of this paper is a comparative analysis of litigation and arbitration as methods of resolving disputes arising between bank institutions and sponsors involved in the construction, start-up and operation of projects. The comparative analysis is divided into two main sections. The first includes six heads of comparison: (1) the rigid nature of financial contracts; (2) precedent; (3) expertise; (4) summary judgment; (5) equitable awards; and (6) multi-contract and multi-party proceedings. The second section is dedicated to the value of the New York Convention 1958 in the context of disputes arising primarily out of loan agreements between lenders and borrowers. The concern here is particularly on an assessment of enforcement regimes, considering: (1) the current legal situation of the

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Brussels I Regulation; (2) the prevalence of arbitration in relation to enforceability issues; and finally (3) annulment proceedings, which also have to be examined, as they are interwoven with the enforceability of a judgment.

The final concern is whether the establishment of an International Court for Financial Disputes (ICFD) could overcome the difficulties that courts, arbitral institutions and ad hoc arbitration deal with. The question is how a global arbitral court may benefit project finance transactions and financial transactions generally.

The goal of writing this paper is to address the unjustified opposition to arbitration in financial contracts and explain why arbitration can work more effectively than litigation in this context. The proposal for an international arbitral court administering this kind of dispute may open the path to financial arbitration.

2. The mechanism of project finance and dispute resolution

There is no single definition of project finance but there are a variety of terms used by different authors trying to describe it. Park and Buljevich refer to it as¹:

“the financing technique by which lenders agree to look initially to the projected revenues of a project and to the assets given as the basis for their credit analysis and as the main source of repayment of their loans, independently of their credit standing of the developers of such projects.”

Steve Mills achieves a more succinct definition²:

“a financial structure where lenders have recourse primarily to the cash flow of the project or asset they are financing, rather than to the balance sheet of the sponsors.”

Put simply, project finance involves the funding of the construction and operation of large-scale and long-term projects in several areas, such as mining, infrastructure, health care, energy renewables, oil and gas fields. Examples include the design and construction of roads, bridges, dams, tunnels, telecoms networks, power stations, the operation of satellites, pipelines, hospitals and so on. A fairly typical model will involve the grant of a licence or a concession by a governmental authority for the development and subsequent exploitation of an asset over a period of time.³ It is targeted to the financing of large or even mega-projects, such as the Channel Tunnel, the Charilaos Trikoupi Bridge in Greece, the International Space Station, the Panama Canal Expansion Project, the Three Gorges Dam in China, the Hong Kong-Zhuhai-Macao Bridge, Al Maktoum International Airport in Dubai, and future ambitious projects, such as Azerbaijan Tower.

Project finance structure

The sponsors of the project will form a Special Purpose Vehicle (SPV) which might be achieved by a partnership or a joint venture between the sponsors or a limited liability partnership (LLP). The vehicle will be the grantee of a licence or concession which the vehicle will have bid or tendered for, having conducted preparatory investigation and feasibility reports; it will then enter into contractual arrangements for the completion and maintenance of the project.⁴ These arrangements usually include construction or “turnkey” contracts with a single contractor responsible for procurement, construction and delivery of the facility after testing it. Operation, maintenance and insurance contracts, political risk

¹ Esteban C Buljevich and Yoon S Park, *Project Financing and the International Financial Markets* (Kluwer 1999) 88 as cited in Peter K Nevitt, *Project Financing* (5th edn, Euromoney Publications 1989) 3. Included in George Walker, “Project Finance Notes” (2016), Lecture.

² Steve Mills, “Project Finance Lectures” (2016), Presentation.

³ Andrew Mcknight, *The Law of International Finance* (Oxford University Press 2008) 717.

⁴ Andrew Mcknight, *The Law of International Finance* (Oxford University Press 2008) 717, 718.

insurance agreements with private insurers or government agencies, such as the Overseas Private Investment Corporation (OPIC) in the US, credit support agreements and off-taker or consumer agreements can also be made.⁵

A multitude of contracts

Project finance's advantage rests on the isolation of the investors' project company by transferring economic and political risks to other entities, hence, a multitude of contracts arises.⁶ Apart from the main loan agreement, there must be agreements between the banks, other inter-creditor agreements, insurance agreements by an export credit agency (ECA) and companies, and contractor's and operator's agreements, and others. The common ground is the viability of the project. A simple example of a typical project finance contractual framework is illustrated in Figure 1.1.

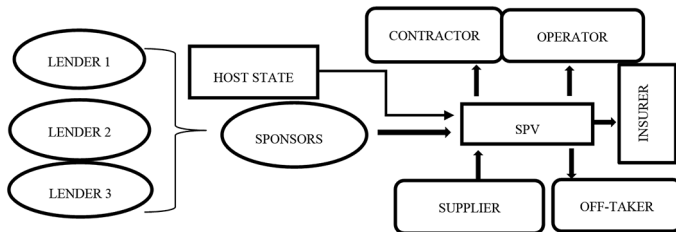


Figure 1.1 Typical project finance contractual framework

Figure 1.1 illustrates the project cycle. Banks as lenders will not normally wish to provide all the financing themselves. It is common practice for banks to combine and form syndicates to provide a syndicated loan facility. Large sophisticated arrangements are underpinned by a detailed allocation of risks among different stakeholders.⁷ This kind of risk is also increased by the particularities of each contract which, for instance, might be governed by different laws. Given that the compatibility of the various contracts is necessary for the feasibility and viability of the whole project, each must be examined objectively.

The focus of this paper is the loan agreement, but it cannot be examined separately from the other contracts. As Christopher Dugué points out, “because of the very intricate nature of project financing, a dispute over one contract without doubt can have certain ramifications for the whole project”.⁸

For instance, a default in the loan agreement might have a negative impact on the continuance and viability of the remaining contracts and the project itself. It is prudent therefore to bear in mind the correspondence between the different agreements involved.

The traditional way of resolving disputes

Historically, the use of litigation as a common and proven mechanism for resolving disputes arising out of project finance transactions and most importantly in the context of lender-borrower relations is well established.

⁵ Quite often the transaction may involve the vehicle building the relevant facility and then transferring it to public authorities by means of a number of new optional arrangements including build own operate (BOO) agreements, build operate lease (BOL) agreements or build operate subsidise and transfer (BOST) agreements as discussed in Andrew McKnight, *The Law of International Finance* (Oxford University Press 2008) 717, 718.

⁶ Christopher Dugué, “Dispute Resolution in International Project Finance Transactions” [2000] 24 *Fordham International Law Journal* 1064, 1067.

⁷ David Gardner and James Wright, “Project Finance” <<https://www.hsbcnet.com/gbm/attachments/products-services/financing/project-finance.pdf>> accessed 13 March 2018.

⁸ Christopher Dugué, “Dispute Resolution in International Project Finance Transactions” [2000] 24 *Fordham International Law Journal* 1064, 1067.

Banks, acting as lenders in major infrastructure projects, have a broad bargaining power to insist on the governing law of their choice (either New York or English law) and the jurisdiction of their preference.⁹ The banks' predisposition towards litigation was justified by their need to submit disputes, either to courts in the bank's jurisdiction, or to the courts of major money markets such as London or New York,¹⁰ so as to avoid any advantage to borrowers from litigating disputes in their home jurisdiction.

Litigation has had the advantage that it favours "one-shot money disputes".¹¹ Moreover, it is inherent in litigation that there should be a strict contractual basis to negotiating the loan agreement, since the extent to which the lender can control the borrower and manage the risk¹² is limited. Most of the risk is borne by banks, particularly in the construction period when defaults may occur. As a result, the banks have to undertake the risks associated with the birth and lifetime of the project.¹³ This is why banks are concerned about preventing these risks by including in the agreement condition precedents, representations and warranties and covenants, as already mentioned.

The advantage of summary judgment procedures to recover debt claims, or even the coercive power of the courts to impose strict penalties or condemn a litigant to jail, have to be considered, as well as the reasons for the so far firm position held by litigation.¹⁴

As Jeffrey Golden and Peter Werner observe, financial institutions, being the key parties to the project finance nexus, "have been 'allergic' to [other dispute resolution methods, such as] arbitration. In the words of one US banker: 'If we are owed money we sue. Why bother with arbitration?'"¹⁵

Another important feature of banks' sympathy to litigation is thought to be the need for disclosure of documentary evidence and witnesses' testimony. US broad pre-trial discovery methods pursuant to the US Federal Rules of Civil Procedure and state procedural rules, the duty of the parties to disclose documents to the other party in England and Wales, or even the French approach to disclose "when it is indispensable for the discovery of truth of the matter"¹⁶ form part of an established well-nourished tradition to the end that any alternative dispute resolution method seems to be entering uncharted waters.

Before we move on to a thorough examination of the appropriate dispute resolution method in this context, it should be recalled that the subject of this paper is the loan agreement as a funding mechanism. But it is also the major document that triggers the project cycle and ensures the income stream. Despite that, it cannot be examined separately from the impact it might have on contractors' agreements or operational contracts. This paper focuses on bank-to-companies disputes, not bank-to-consumer disputes, while there is not the space to include investment disputes arising between host states and investors (sponsors).

⁹ Audley Sheppard, "Arbitration of International Financial Disputes" (Kluwer Arbitration Blog, 19 March 2009) <<http://kluwerarbitrationblog.com/2009/03/19/arbitration-of-international-financial-disputes/>> accessed 13 March 2018.

¹⁰ William W. Park, "Arbitration in Banking and Finance" in *Yearbook of International Financial and Economic Law 1997* (Kluwer Law International, 1999) 141.

¹¹ Disputes between contracting parties which do not have a long-term future relationship, only a short one.

¹² Maria Davies, "The Use of Arbitration in Loan Agreements in International Project Finance: Opening Pandora's Box or an Unexpected Panacea?" (2015) 32(2) *Journal of International Arbitration* 143, 146.

¹³ The acceptability of risks by banks refers to "bankability": "This means that banks will accept the risks that crude oil prices, for example, will collapse because analysts make predictions based on historical data or the limited delay of the contractor, who then has to pay liquidated damages", as cited in Graham Vinter and Gareth Price, *Project Finance: a Legal Guide* (3rd edn, Sweet & Maxwell 2006) 139.

¹⁴ For a detailed analysis of summary proceedings see below.

¹⁵ Jeffrey Golden and Peter Werner, *The Modern Role of Arbitration in Banking and Finance* (Oxford University Press 2015) 1.22 as cited in Anthony Connerty, "Documentary Credits: A Dispute Resolution System from the ICC" [1999] 143 *Journal of Int'l Banking Law* 65.

¹⁶ John Dewar, *International Project Finance: Law and Practice* (Oxford University Press 2011) 14.11.

3. The international element of contested disputes and their complexity

It goes without saying that disputes arising out of project finance agreements have an international character. That is to say, the parties, such as banks, sponsors, contractors and operators, are frequently located in different countries. The corollary is that they choose domestic courts for the resolution of future disputes, either of the seat of incorporation or of the place of business: it might be the seat of the bank or of the leading bank in a syndicate, the seat of the sponsors or the seat of the contractors.¹⁷ For instance, a major US bank may be approached by English sponsors planning to start a solar energy facility in Ruritania, while the contractor's nationality is German. The English corporation might fear that the commercial law of the country where the project will be undertaken is unfamiliar. They might also fear that the judges of that country might favour the interests of the government, or there is a perception that the legal system is slow and formalistic.¹⁸ The state government might not be willing to be subject to US or English law because it might regard that as a partial suppression of its sovereign immunity, hence, it might be comfortable with a "neutral" law. Similarly, the contractor might opt for internationally accepted principles of substantive and procedural law (*lex mercatoria*), principles of international business or non-legal standards, such as *amiable compositeur* ("amiable composition") and *ex aequo et bono* ("in justice and fairness"). One party could also favour the law of the other party because of the likelihood of being able to take advantage of the other party with regard to discovery proceedings or enforcement issues.¹⁹

The international nature of these contracts and the highly decentralised financial marketplace, embracing new financiers with strong positions from the western hemisphere to the Far East, is intensified by the complexity of these disputes. True, collateral valuations provided by sponsors to lenders, financial statements about projected income streams, in the form of financial ratios,²⁰ or other techniques employed to assess the risk that a specific project entails and feasibility studies by sponsors to estimate its financial value require technical expertise. The pool of competent talent to resolve disputes effectively remains to be identified among experts who then are to be recruited to the task and to instill confidence in the parties.²¹

The complexity of the matters involved calls for professionalism. This does not mean that judicial authorities are incompetent, only that the parties' view is that their case needs to be decided by someone with legal expertise in the applicable law or the procedural particularities of the dispute.

4. Change of attitudes in the financial sector

It is a truism to say that the ISDA master agreement is the principal document governing around 90 per cent of the derivatives market (worth 691 trillion dollars).²² In September

¹⁷ Christopher Dugué, "Dispute Resolution in International Project Finance Transactions" [2000] 24 *Fordham International Law Journal* 1064, 1072.

¹⁸ Michael Black, Wendy Kennedy Venoit and George J Pierson, "Arbitration of Cross-Border Disputes" [2007] 27 *Construction Lawyer* 5.

¹⁹ However, the selection of the applicable law in the interests of the parties might be limited by exclusive jurisdiction pertaining to matters such as immovable property, the validity of a constitution, the dissolution of companies, registration of patents, trademarks, etc. pursuant to the EC Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

²⁰ These ratios are used by banks to monitor the functioning of a project. If ratios are not adequate, banks might accelerate, cancel outstanding amounts or suspend existing loans, as stated in World Bank Group, Public-Private-Partnership in Infrastructure Resource Centre, "Key Issues in Developing Project Financed Transactions" <<http://ppp.worldbank.org/public-private-partnership/financing/issues-in-project-financed-transactions>> accessed 13 March 2018.

²¹ Jeffrey Golden and Peter Werner, *The Modern Role of Arbitration in Banking and Finance* (Oxford University Press 2015) 1.28.

²² Jeffrey Golden and Peter Werner, *The Modern Role of Arbitration in Banking and Finance* (Oxford University Press 2015) 1.05. See also the estimate of Bank for International Settlements <http://www.bis.org/publ/otc_hy1411.htm> accessed 13 March 2018.

2013, ISDA published a guide accompanying the existing set of model arbitration clauses on dispute settlement by arbitration; this gave reasons why ISDA members should consider arbitration in complex disputes under ISDA master agreements.²³

The compatibility of arbitration clauses with the financial world can be illustrated in *Bankers Trust Company (BTC) and Bankers Trust International (BTI) v PT Jakarta International Hotels and Development (JIHD)*²⁴ where a series of seven Indonesian rupiah/US dollar cross-currency swap transactions were concluded.²⁵ BTC and BTI applied on an ex parte basis to the High Court in London for an injunction to prevent JIHD from commencing proceedings in the Indonesian courts in breach of their agreement to refer disputes to arbitration in London under the LCIA Rules, as provided for in the ISDA master agreement.²⁶ Creswell J granted the injunction on the grounds that the ISDA master agreement contained an arbitration clause broad enough to encompass the respondent's allegations and that there is every good reason to do so, given the established function of the LCIA Court.²⁷ Differences in national laws and jurisdictions become hurdles to efficiency and to the adoption by the parties of a sole, specialist and speedy dispute resolution procedure.²⁸ Consequently, arbitration is the best solution.

Following some growth of arbitration in relation to ISDA master agreements, each model clause specifies the governing law of the master agreement and the seat of arbitration. Where the seat of arbitration is not the same as the governing law, the governing law of the separable arbitration clause has also been included.²⁹ The guide provides that³⁰:

“[these clauses] may have to be tailored specifically to the transaction concerned [and] among the matters that parties may wish to take into account are the location of assets ... or enforcement of the award in these particular jurisdictions.”

Among the advantages of arbitration is the flexibility parties have to adjust the clauses to the circumstances of their particular case and their needs, confidentiality and enforcement in all the 157 state parties to the New York Convention 1958.

In addition to ISDA Arbitration Guide, there is also another indication that the antipathy of banks towards arbitration has reduced. PRIME Finance was established to facilitate dispute resolution, reduce legal uncertainty and strengthen stability in global financial transactions.³¹ Because it facilitates the ongoing dialogue between experts in finance and experts in dispute resolution PRIME can be really helpful in resolving project finance transactions which are based on financing from banks.³² Professionalism plays an important role in this regard: the publication of the PRIME Finance Rules together with the vast store of collective knowledge³³ of PRIME financial and legal experts guarantees the effective

²³ *ISDA Arbitration Guide* (2013) <<https://www.isda.org/a/6JDDE/isda-arbitration-guide-final-09-09-13.pdf>> accessed 13 March 2018. See also Jeffrey Golden and Peter Werner, *The Modern Role of Arbitration in Banking and Finance* (Oxford University Press 2015) 1.01.

²⁴ *Bankers Trust Company and Bankers Trust International v PT Jakarta International Hotels and Development* [1999] 1 Lloyd's Rep 910 (QB Comm Ct).

²⁵ Joanna Gray, “Litigation fall-out from South East Asian financial turmoil: High Court enforces arbitration clause in ISDA master agreement” (1999) 7 *Journal of Financial Regulation and Compliance* 272.

²⁶ Joanna Gray, “Litigation fall-out from South East Asian financial turmoil: High Court enforces arbitration clause in ISDA master agreement” (1999) 7 *Journal of Financial Regulation and Compliance* 272.

²⁷ Joanna Gray, “Litigation fall-out from South East Asian financial turmoil: High Court enforces arbitration clause in ISDA master agreement” (1999) 7 *Journal of Financial Regulation and Compliance* 272.

²⁸ Joanna Gray, “Litigation fall-out from South East Asian financial turmoil: High Court enforces arbitration clause in ISDA master agreement” (1999) 7 *Journal of Financial Regulation and Compliance* 272.

²⁹ James Stacey, “Welcome to the club: ISDA publishes model arbitration clauses” (2013) 11 *Journal of International Banking and Financial Law* 704.

³⁰ *ISDA Arbitration Guide* (2013) <<https://www.isda.org/a/6JDDE/isda-arbitration-guide-final-09-09-13.pdf>> accessed 13 March 2018, 3.5.

³¹ Daniella Strik, “Launch of P.R.I.M.E. Finance Arbitration Rules: dispute resolution in global financial markets” (Kluwer Arbitration Blog, 17 January 2012) <<http://kluwerarbitrationblog.com/2012/01/17/launch-of-p-r-i-m-e-finance-arbitration-rules-dispute-resolution-in-global-financial-markets/>> accessed 13 March 2018.

³² Jeffrey Golden and Peter Werner, *The Modern Role of Arbitration in Banking and Finance* (Oxford University Press 2015) 1.34.

³³ PRIME Finance <<http://primefinancedisputes.org/>> accessed 13 March 2018.

resolution of disputes. The appropriateness and effectiveness of PRIME in financial disputes was reflected in 2015 in *Caesar Entertainment Operating Company* (CEOC), where the PRIME Finance specialist arbitrators resolved in just eight days a US \$1.7 billion credit derivatives dispute in favour of CEOC. The award was upheld after an expedited procedure at a cost of US \$50,000.³⁴

5. Litigation or arbitration? A comparative analysis

As reflected in the 2016 ICC Report on Financial Institutions and International Arbitration, based on interviews with 50 financial institutions and banking counsel internationally,³⁵ the use of arbitration in banking and financial transactions is broad, but still evolving due to the lack of awareness of its potential benefits. Bankers have started to consider using arbitration as a 2013 survey conducted by Queen Mary University demonstrates; 69% in banking and finance clearly favour arbitration as the preferred dispute resolution method.³⁶ In the future, the core benefits of arbitration should seriously be considered in a dynamic environment where the parties' needs are ever changing.

The rigid nature of financial contracts

According to the simplicity theory, when a debtor does not pay the interest or the principal, the terms of the contract are clear: if he defaults, he must be forced by a court judgment to pay.³⁷ The lenders can take collateral on the borrower's assets for the conclusion of the loan agreement. If the borrower makes no further payments, the lender may foreclose on its assets. Effectively the loan agreement governs straightforward payments with simple legal questions, but the nature of the loan agreement proves to be more complex taking into consideration the sophisticated grounds of termination, eg under cross-default clauses, cross-acceleration, Market Adverse Changes (MA) and domestic bankruptcy statutes.³⁸ This could become even more complex if the foreclosure on a troubled project is dependent on the collateral law of the host country.³⁹

It is perceived that litigation under the contractual nexus between lenders and borrowers does not usually involve any fact finding or technical questions; it is only required that the court orders specific performance forcing the borrower to act rather than pay monetary damages.⁴⁰

It is worth mentioning though that international projects require a lot of fact finding; they involve complicated issues of facts and law. For instance, factual analysis should be employed in case of a government embargo prohibiting certain actions; whether a government embargo falls within the meaning of force majeure depends on the wording of the force majeure clause about the particular project agreement.

Financial contracts need not be rigid if arbitration is employed. Arbitration allows more disclosure of evidence than European civil law systems (but less than the US system) while the parties, unless it is otherwise agreed, will be given access to documents that are relevant

³⁴ The decision is available at <<http://dc.isda.org/documents/2015/02/20150210-isda-caesars-erp-dafinal-feb10-2015.pdf>> accessed 13 March 2018.

³⁵ The ICC Commission Report can be found here <<https://cdn.iccwbo.org/content/uploads/sites/3/2016/11/ICC-Financial-Institutions-and-International-Arbitration-ICC-Arbitration-ADR-Commission-Report.pdf>> accessed 13 March 2018.

³⁶ PwC International Arbitration Survey, "Corporate Choices in International Arbitration" (2013) <<http://www.arbitration.qmul.ac.uk/research/2013/index.html>> accessed 13 March 2018.

³⁷ Yiming Shen, *Resolution of Disputes Between Foreign Banks and Chinese Sovereign Borrowers* (Kluwer Law International 2000) 59.

³⁸ Klaus Peter Berger, "The aftermath of the financial crisis: why arbitration makes sense for banks and financial institutions" [2009] 3(1) *Banking Law Institute, Law and Financial Markets Review* 55.

³⁹ Scott Hoffman, *The Law and Business of International Project Finance* (3rd edn, Cambridge University Press 2007) 365.

⁴⁰ Maria Davies, "The Use of Arbitration in Loan Agreements in International Project Finance: Opening Pandora's Box or an Unexpected Panacea?" (2015) 32(2) *Journal of International Arbitration* 143, 146.

and material.⁴¹ Also, arbitrators have the advantage of determining each case by conducting an empirical analysis of the law and facts of the specific case. Combining common and civil law traditions that are both necessary when a multi-jurisdictional dispute arises, they can apply either the adversarial or inquisitorial system when appropriate on a case-by-case basis. As a result, the flexibility of arbitration corresponds to the flexibility these international contracts need.

Precedent

The strength of litigation is considered to be the broad use of precedent, usually called *stare decisis*. This is in principle true for common law countries. Precedent increases the predictability and consistency of decisions and as a result legal certainty is preserved. The preference for stability is demonstrated if a party considers that lenders favour routes for dispute resolution which are known to aid consistent decision making⁴²; the courts of London, New York, Luxembourg and Switzerland are “guarantors” of the continuous observance of case law.

Despite this, Lord Denning had emphasised, “if we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both”.⁴³

This is undeniably true in disputes related to project financing. Litigation proves to be laggard in a dynamic and risk-related effort like project finance. Furthermore, a typical project finance transaction might also include general principles of law stemming from national laws or international treaties and business practices. Arbitrators can use *pacta sunt servanta*, *venire contra factum proprium*, mitigation of damages, good faith, concurrent liability and force majeure in determining and applying the law that governs the merits of a particular case.⁴⁴ Party autonomy and parties’ desire to protect their interests are not compatible with any precedent.

The doctrine of party autonomy can also prove invaluable where the parties have not chosen any governing law. Arbitrators, unlike judges, have a broad discretion to reveal the true intent of the parties and what is appropriate in line with the specificities of the case. For instance, in *Sulamerica v Enesa*⁴⁵ there was no express governing law of the arbitration agreement. The fact that the seat of arbitration was in London indicated that English law and not Brazilian (governing the contract) was applicable, according to English courts. Hence, the methodological tools of arbitrators seem to be more appropriate in international transactions where the dispute resolution has to be tailor-made to the needs and position of the parties. The “transnationalised” rules⁴⁶ that are often applied are inherent to cross-border disputes among banks, project companies and other parties.

It can be concluded that the “freedom of the arbitrator to apply the law taking into account the specificities of the case and the case driven propensity to transnationalize the law contradict the very essence of precedent”.⁴⁷

⁴¹ John Dewar, *International Project Finance: Law and Practice* (Oxford University Press 2011) 14.19; and IBA Guidelines arts 2 and 3 (b): “... any party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce. A Request to Produce shall contain: ... (b) a statement as to how the Documents requested are *relevant* to the case and *material* to its outcome”.

⁴² Deyan Draguiev, “Arbitration vs Litigation in Financial Agreements: A Policy Perspective” (Kluwer Arbitration Blog, 10 September 2015) <<http://kluwerarbitrationblog.com/2015/09/10/arbitration-vs-litigation-in-financial-agreements-a-policy-perspective/>> accessed 13 March 2018.

⁴³ Lord Alfred Denning, *The Discipline of Law* (Oxford University Press 1979) 296.

⁴⁴ Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” (2006) 23 *Arbitration International* 364.

⁴⁵ *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 CA.

⁴⁶ Such as *lex mercatoria*, the UNIDROIT principles, and so on.

⁴⁷ Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” (2006) 23 *Arbitration International* 364, 365.

The foreseeability of the outcome that litigation usually guarantees is not applicable in the case of project finance transactions. Instead, arbitration provides parties with confidence in selecting the most talented professionals for an outcome that is dynamic rather than foreseeable.

Expertise

Before initiating the cycle of the project all the relevant data should be in place. The banks and other financiers who are approached by the sponsors to provide funds consider the viability of the project from a technical, legal and commercial perspective.⁴⁸ This is because the banks are interested in the income stream the project will generate in the long run. They have to determine, assess and mitigate the risks involved. For this reason, they opt for experienced arbitrators capable of understanding the financial surveys, diagrams, feasibility studies and technical exhibits provided. The domestic courts lack the relevant expertise because they deal with such a wide range of matters, such as crime, insolvency, tax and family law, and cannot obtain specialised knowledge of specific legal or technical problems.

In addition, arbitrators can contribute to the consistency of interpretation of major financial documents. The interpretation of a document must be done with precision and certainty because a judicial mistake made when interpreting a standard term can “infect trillions of dollars based on the same term”.⁴⁹ This requires practical familiarity,⁵⁰ which is an inherent skill of arbitrators.

Summary judgment

According to summary proceedings theory, arbitration is slower than the summary judgment a court can order.⁵¹ Lenders might prefer the speediest way to achieve the desired outcome. In effect, they are sometimes willing to deviate from a full trial of the case, or they might feel that they will lose in the court proceedings. Summary judgment or curtailed adjudication is employed for the enforcement of monetary payments, usually promissory notes.

An arbitral tribunal normally cannot grant those measures; it can only order interim relief. The International Chamber of Commerce Rules art 28(2) reads: “the parties are at liberty to apply, even after the file is transmitted to the tribunal in exceptional circumstances, to any judicial authority for interim relief”.⁵²

Nonetheless, this is not always true. In *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd (EGFL)*,⁵³ Travis applied for summary judgment before the tribunal and EGFL argued that the tribunal did not have the power to determine the claim concerning summary proceedings. The latter ruled that it had the power and ordered EGFL to pay Travis. Travis applied to English courts and obtained judgment to enforce. EGFL applied to vacate the award but did not succeed. The English court ruled that the power of the tribunal to make summary judgments is contingent upon the terms of the arbitration agreement and the procedure the arbitrators apply. Not only that but it also held that the tribunal did its best to conduct the proceedings in a cost-effective and speedy manner and observe due process providing for a fair hearing.

It can be concluded that there is some scope for arbitration to favour summary proceedings, depending on the case at hand. In particular, in project financing it is arguable, even if the

⁴⁸ Andrew Mcknight, *The Law of International Finance* (Oxford University Press 2008) 735.

⁴⁹ Jeffrey Golden and Peter Werner, *The Modern Role of Arbitration in Banking and Finance* (Oxford University Press 2015) 1.29.

⁵⁰ Jeffrey Golden and Peter Werner, *The Modern Role of Arbitration in Banking and Finance* (Oxford University Press 2015) 1.29.

⁵¹ Yiming Shen, *Resolution of Disputes Between Foreign Banks and Chinese Sovereign Borrowers* (Kluwer Law International 2000) 63.

⁵² ICC Rules art 28(2).

⁵³ *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] EWCA 2510 (Comm).

tribunal had the power to order on a summary basis, whether there would be any point in doing so. The rationale is that project disputes involve a great many factual matters that cannot be resolved with summary proceedings.⁵⁴ A factual process might be quite lengthy, involving “US-style pre-trial discovery” with sworn oral examinations and disclosure of documents.⁵⁵

Equitable awards

The most common misunderstanding in the financial world occurs because arbitrators tend to render equitable awards.⁵⁶ The fear of “splitting the baby” or deciding the dispute according to non-legal standards, such as *ex aequo et bono*, is totally unjustified. It is not a mandatory and inevitable result of arbitration, but a matter of choice rooted in the fundamental doctrine of party autonomy which means that the parties can, if they wish, authorise arbitrators to choose between law and equity.⁵⁷ If arbitrators act without authorisation, they violate the public policy of the state of the seat of arbitration.⁵⁸ The LCIA Rules provide in art 22(4) that “the arbitral tribunal shall only apply to the merits of the dispute principles deriving from *aequo et bono* or amiable composition ... where the parties have so agreed in writing”.⁵⁹

Similarly, the Swiss Arbitration Rules state in art 33(2) that “the tribunal shall decide as amiable compositeur or *ex aequo et bono* only if the parties have expressly authorized the tribunal to do so”.⁶⁰

The flexibility of arbitration should not be misunderstood. Instead, it is worth bearing in mind that it honours, better than any other dispute resolution method, the agreement made by the parties.

Multi-contract and multi-party proceedings

Initially it is vital to distinguish between multi-contract and multi-party situations. A multi-contract proceeding involves two parties who have concluded a multitude of contracts, all of them connected by an economic and operational link.⁶¹ In this context, consolidation can take place given that it is likely that disputes will arise under both the loan agreement and other credit support documents,⁶² such as guarantees provided by the sponsors to the banks.⁶³ Litigation faces no problems because the court has the power, of its own volition, to order consolidation of proceedings; an arbitral tribunal, on the other hand, does not have such power unless the parties have so agreed. If they have, then arbitrators can consolidate and provide workable solutions without undermining the total benefit of arbitration. Not only this, but *de facto* consolidation is also possible regarding arbitration. In *Abu Dhabi v Eastern Bechtel*, Lord Denning opined that the London Court of Appeal had “ample power under s 10 of Arbitration Act 1950 to appoint the same arbitrator in each arbitration so that there would be no inconsistent findings”.⁶⁴

⁵⁴ John Dewar, *International Project Finance: Law and Practice* (Oxford University Press 2011) para 14.10.

⁵⁵ John Dewar, *International Project Finance: Law and Practice* (Oxford University Press 2011) para 14.10.

⁵⁶ Klaus Peter Berger, “The aftermath of the financial crisis: why arbitration makes sense for banks and financial institutions” [2009] 3(1) *Banking Law Institute, Law and Financial Markets Review* 55.

⁵⁷ Yiming Shen, *Resolution of Disputes Between Foreign Banks and Chinese Sovereign Borrowers* (Kluwer Law International 2000) 61.

⁵⁸ Yiming Shen, *Resolution of Disputes Between Foreign Banks and Chinese Sovereign Borrowers* (Kluwer Law International 2000) 61.

⁵⁹ LCIA Rules art 22(4).

⁶⁰ Swiss Arbitration Rules art 32(2).

⁶¹ Martin Platte, “When Should an Arbitrator Join Cases?” (2002) 18 *Arbitration International* 67.

⁶² Examples include comfort letters, completion and interest guarantees, insurance contracts and other credit enhancement documents in derivatives transactions hedging the risks.

⁶³ Inka Hanefeld, “Arbitration in Banking and Finance” (2012–2013) 9 *New York Journal of Law and Business*

934.

⁶⁴ *Abu Dhabi Gas Liquefaction Co Ltd v Eastern Bechtel Corp* [1982] 2 Lloyd’s Rep 425 CA.

By contrast, multi-party arbitration is dealt with more reluctantly. It is acknowledged that construction projects involve many participants. The complexity arises in relation to the number of contractual chains involved. Sub-subcontractors will be engaged in different and separate contracts,⁶⁵ host governments also will have a dynamic presence with the aim, *inter alia*, to conduct inspections and provide necessary permits. Finally, operators and suppliers are necessary for the maintenance and fulfilment of the project. Thus, the banks concluding an arbitration agreement with the project company might be entangled in different arbitral proceedings. As long as the lenders are aware that there could be an “umbrella” arbitration agreement signed by all relevant parties to all related agreements,⁶⁶ they expressly give their consent for a possible consolidation of the proceedings. Similarly, there could be a specific arbitration clause to which the various contracts of the project may refer.⁶⁷ Effectively, lenders should be very careful during the drafting of an arbitration agreement, since they are in danger of getting involved in an arbitration to which they never consented. A characteristic example can be found in the Hong Kong International Arbitration Centre (HKIAC) Rules, specifically in art 28(1), which stipulates that the Centre⁶⁸:

“has the power at the request of a party ... to consolidate two or more arbitrations pending where a. the parties agree to consolidate or b. all of the claims in the arbitrations are made under the same arbitration agreement, or c. the claims are made under more than one arbitration agreement, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transactions or series of it and HKIAC finds the arbitration agreement compatible.”

The scope of this article is wider than articles in other arbitration rules⁶⁹ in that it allows consolidation even if the parties participate in different arbitrations.

Moreover, the Belgian Centre for Arbitration and Mediation (CEPANI) cases no 2176 and 2189 provide an illustration of this “risky” consolidation as Bernard Hanotiau observes: a sale repurchase agreement was provided under Belgian law and the ICC Rules in Luxembourg. A shareholder agreement was concluded as well, with some sellers being shareholders, along with other shareholders, involving X International SA and a Swiss bank. The purchasers filed against the sellers due to breach of representations and warranties and the respondents filed a counterclaim against the claimants and the bank (which was not a party in the arbitration). The respondents started a separate arbitration against the bank and later asked for a consolidation of both arbitrations. The claimants objected to this, claiming that each arbitration had a different claim and therefore they were not closely related. The first one considered the breach of the purchase agreement, while the second one the shareholder agreement.⁷⁰

Similar situations might arise in project finance transactions and the financiers or the banks might incur an inevitable and unwanted consolidation if an allegation that different arbitrations are closely related, or an assertion that common questions of law and facts arise in both arbitrations are approved by the tribunal. It should be remembered that banks are primarily concerned about the income stream generated; the last thing they desire is to be drawn into a multi-party situation.

Even though banks normally want to avoid multi-party proceedings if they opt for arbitration, such involvement may occur because they are also concerned about the viability of the project in question. As regards development banks, such as the Asian Development

⁶⁵ Andrew Mcknight, *The Law of International Finance* (Oxford University Press 2008) 731.

⁶⁶ Michael Young, “Demystifying the use of arbitration clauses in international finance documents” (2012) 27 *Journal of International Banking and Financial Law* 357.

⁶⁷ Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 16–56.

⁶⁸ HKIAC Rules art 28(1).

⁶⁹ ICC Rules art 10 and LCIA Rules art 22(1)(x).

⁷⁰ Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue and Class Actions* (Kluwer Law International 2005) 412.

Bank (ADB),⁷¹ which finances a large proportion of these projects, a default in a single agreement might endanger the completion of the project or bring it to a halt. Due to the humanitarian nature of the involvement of the ADB, it is concerned about the transactional unity and safety of the whole project. If these are jeopardised, the bank's purpose is suspended.

Other instances demonstrating creditors' interest in participating in these multi-party disputes are worth noting. As the complexity of the construction industry is continually growing, disputes between parties can have an impact on stakeholders, including creditors. Effectively, creditors might want to participate in another arbitration or it is in their best interests to invite other parties into arbitral proceedings. For example, a guarantor may remain outside the arbitration between creditors and debtors (eg the sponsors), although this arbitration might well determine that the guaranteed debt has not been extinguished; in this situation the creditor would have an obvious interest in binding the guarantor.⁷²

Where the sponsors have not provided their financial contribution from the outset, banks might seek to obtain covenants from the sponsors, so as to be sure that the sponsors will make their contributions for the beginning of the project cycle.⁷³ These covenants might be included in a separate agreement between lenders and borrowers, or lenders might be added as parties to the agreement between sponsors and the project company (SPV) which provides for these contributions.⁷⁴ In such a situation, parties with an active role in the project are in danger of being excluded from arbitration, even though they have a substantial legal and economic interest.⁷⁵

On top of that, there is a possibility that fragmentation of the substantive unit and proliferation of either judicial or arbitral proceedings⁷⁶ may be caused. Inconsistent decisions, particularly in multi-contract proceedings, are reflected in the following example. The scheduling clauses in the construction contract are essential to the implementation of a petroleum sales agreement between the project company and a purchasing corporation,⁷⁷ or to the original agreement between the project company and the banks. Inconsistent findings by different competent courts governing these agreements during the lifetime of a project are certainly not desirable, as they can frustrate the parties' expectations and bring the whole project to a halt.

It is recommended that the banks should carefully consider the above issues as soon as they draft the arbitration agreement so as to overcome the potential problems a consolidation might involve. There can also be potential benefits. In this case, banks should not adopt a strict and high threshold of party autonomy.

Moreover, neutrality is fundamental in multi-contract proceedings as it ensures that an impartial and neutral non-domestic forum resolves the disputes effectively, understanding the legal systems of the different jurisdictions but at the same time without adhering to the requirements of one local law.

⁷¹ Available at <<http://www.adb.org/news/infographics/key-accomplishments-under-strategy-2020>> accessed 13 March 2018.

⁷² Stavros Brekoulakis, "The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited" (2005) 16 *American Review of International Arbitration* 177.

⁷³ Andrew Mcknight, *The Law of International Finance* (Oxford University Press 2008) 723.

⁷⁴ Andrew Mcknight, *The Law of International Finance* (Oxford University Press 2008) 723.

⁷⁵ Stavros Brekoulakis, "The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited" (2005) 16 *American Review of International Arbitration* 177, 189.

⁷⁶ Audley Sheppard, "Res Judicata and Estoppel" in Bernardo M Cremades and Julian D M Lew (eds), *Parallel State and Arbitral Procedures in International Arbitration* (Dossiers-ICC, Institute of World Business Law 2005) 219.

⁷⁷ Christopher Dugué, "Dispute Resolution in International Project Finance Transactions" [2000] 24 *Fordham International Law Journal* 1064, 1070.

6. The need for an effective cross-border enforcement mechanism and conditions for successful enforcement

It is crucial to bear in mind, especially in project finance transactions involving multiple jurisdictions, that the main concern of the parties is to ensure that any decision, irrespective of whether it is an award or court judgment, will be upheld in the relevant jurisdiction.⁷⁸

The enforceability of foreign judgments is governed by the rules of the Brussels I Regulation,⁷⁹ the Lugano Convention regarding the EU and EFTA region, the “Arab League Judgements Convention” and the 1995 Protocol on the Enforcement of Judgments Letters Rogatory as regards the Middle East and the 1889 and 1940 Montevideo treaties regarding Latin America, and other multilateral treaties around the world.⁸⁰ In other words, there is not yet a global regime for the enforcement of foreign court judgments that can be compared to the New York Convention 1958. Not only is the number of its contracting parties still growing (currently 157), but it is the only international instrument facilitating the enforcement of foreign awards and also harmonising the national rules on enforcement.⁸¹

This can be understood when it is considered that a number of countries, principally Nordic and Eastern European countries, refuse to enforce absent a treaty relationship with the rendering state. Alternatively, they might deny enforcement on the grounds that the debtor did not receive adequate notice of the period of the foreign proceedings, that the foreign judgment conflicts with a local judgment or that there is no reciprocity between states for the recognition and enforcement of decisions rendered in one, but enforced in the other.⁸² Other possible grounds of denial might be that the foreign judgment does not comply with the local standards of procedural regularity and fairness⁸³ or, finally, because of the principle of *forum non conveniens*.

The Brussels I Regulation and the Recast Regulation

The Brussels I Regulation, as amended by the Recast Regulation in 2012,⁸⁴ facilitates the enforcement of judgments in the EU when the disputing parties are EU members (except for a few circumstances allowing non-EU members). It is clearly stated in art 73(2) that the application of the New York Convention 1958 on the Recognition and Enforcement of Arbitral Awards takes precedence over the Brussels Regulation.⁸⁵ This is a reflection of its widespread use and effectiveness. If, for instance, a project company has substantial assets within the EU then it will be easy for the banks to enforce the judgment of an English court against the company pursuant to the Brussels Regulation.⁸⁶ By contrast, in a scenario where the sponsors (who form the project company) have substantial assets outside the EU, notably in the US, the banks have to start new legal proceedings to obtain a US judgment. Effectively, the Brussels regime proves, in this situation, to be inadequate in its scope.

⁷⁸ Jeffrey Golden and Peter Werner, *The Modern Role of Arbitration in Banking and Finance* (Oxford University Press 2015) 1.30.

⁷⁹ Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) [2001] OJ L12/1.

⁸⁰ Jeffrey Golden and Peter Werner, *The Modern Role of Arbitration in Banking and Finance* (Oxford University Press 2015) 32.

⁸¹ Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 26–19.

⁸² Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Kluwer Law International 2010) 153.

⁸³ Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Kluwer Law International 2010) 153.

⁸⁴ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Regulation) [2012] OJ L351/1.

⁸⁵ Regulation 1215/2012 (Recast) art 73(2).

⁸⁶ James Stacey, “Welcome to the club: ISDA publishes model arbitration clauses” (2013) 11 *Journal of International Banking and Financial Law* 704.

The prevalence of arbitration

Similarly, assuming that the borrower has attachable assets in Russia, it is uncertain whether English banks acting as lenders to the project company can enforce an English judgment in Russia, given that there is no agreement between the UK and Russia on the enforcement of judgments.⁸⁷ The only possible method whereby UK parties can enforce is based on the non-binding principle of reciprocity or comity. The New York Convention regime, however, binds both the UK and Russia; therefore, the award becomes enforceable in both territories.

In the hypothetical situation where an Australian bank is asked to finance the construction of a solar energy facility in Shanghai, the banks might be reluctant to litigate and enforce (due to a major default in the agreement) against the sponsors if no binding bilateral or multilateral agreement exists. From a practical point of view this is quite right: in 2006, an Australian company requested enforcement of a judgment of the Supreme Court of Western Australia in the Shenzhen Intermediate People's Court; this court and the High People's Court refused enforcement on the grounds that no reciprocal agreement between Australia and China existed.⁸⁸

Accordingly, in project finance, arbitration "has the upper hand when it comes to enforcement of awards and judgements. Some countries which will not directly enforce a court judgement are nevertheless parties to the New York Convention 1958".⁸⁹

Annulment proceedings

It should be noted that the success of enforcement is dependent not only on whether the award or judgment is capable of being collected, but also on whether annulment proceedings are likely to be brought. The New York Convention 1958 does not open the floodgates for eternal annulment proceedings. The setting aside of the award in the seat of arbitration does not preclude enforcement in other jurisdictions. France, Belgium and the US have held that annulment does not entail denial of recognition and enforcement; the language is clear to this effect since art V(1)(e) of the New York Convention 1958⁹⁰ stipulates that a court in the place of enforcement may refuse enforcement of an award that has been set aside.⁹¹

Even where an action to set aside is pending, art VI states, "the authority ... may ... adjourn the decision on the enforcement of the award",⁹² thus giving the authority the discretion to enforce even though annulment is still outstanding.

Given parties' autonomy to select the applicable law and the seat of arbitration, it is unlikely that lenders would agree to arbitrate in the host country as it involves great danger for the recognition and enforcement of the award.⁹³ However, if they do, annulment in the seat of arbitration does not mean that enforcement is going to be suspended pursuant to the wording of art V(I) of the New York Convention ("may"). In fact, the New York Convention 1958 provides for a global regime whereby enforcement can be achieved wherever the borrower has assets, even if they are scattered all over the world.

⁸⁷ Jenny Lau and James Lewis, "Litigation or Arbitration?" Fieldfisher 2014 <<http://www.fieldfisher.com/publications/2014/10/litigation-or-arbitration#sthash.Zj89M7Gc.q9jPQxta.dpbs>> accessed 13 March 2018.

⁸⁸ H E Qisheng, "The Recognition and Enforcement of Foreign Judgments between the United States and China: A Study of Sanlian v Robinson" (2013–2014) 23 *Tsinghua China L. Rev.* 35.

⁸⁹ Graham D Vinter and Gareth Price, *Project Finance: A Legal Guide* (3rd edn, Sweet & Maxwell 2006) 137.

⁹⁰ New York Convention art V(1)(e).

⁹¹ Steven P Finizio and Duncan Speller, *A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy* (Sweet & Maxwell 2010) 349.

⁹² New York Convention art VI.

⁹³ Maria Davies, "The Use of Arbitration in Loan Agreements in International Project Finance: Opening Pandora's Box or an Unexpected Panacea?" (2015) 32(2) *Journal of International Arbitration* 143, 163.

7. The establishment of an international court for financial disputes

The term “finance” has many different meanings. Broadly speaking, it is “the management of large amounts of money either by governments or large companies”.⁹⁴ It includes financing methods such as project finance, which is the main topic of this paper.⁹⁵ Litigation, as has been demonstrated above, proves to be ineffective and sometimes monolithic in large-scale projects, which require the parties to take a holistic approach to the issues that arise. A speedy outcome often depends on the expertise of the arbitrators with regard to sophisticated issues. To this end, arbitration can be preferred, but without excluding litigation.

The establishment of an International Court for Financial Disputes (ICFD) is urgent. This need seems to be immense in the context of project finance transactions, due to the complexity of the contractual framework, the requirement for extensive due diligence and the anticipated risks. This global mecca for the resolution of financial disputes would offer many advantages. It would consist of a large number of arbitrators experienced in financial market essentials. As a result, the technical expertise obstacles that local judges have hitherto had to deal with would be avoided. Expedited procedure could be adopted by a way of “fast-track” rules like those that the London Arbitration Club has issued.⁹⁶ The Dubai International Financial Arbitration Centre (DIFC) is an example of a centre specialising in financial matters, but it is assisted in the administration of arbitral disputes by the LCIA.

Jeffrey Golden had foreseen the necessity for a global financial court as cross-border financial transactions have become an everyday phenomenon. In this context, it is indispensable that:

“a) the courts stay updated with global financial developments, b) the judges have the required competence to unravel facts and apply laws in cases that they did not anticipate and c) they make sure that a wrong decision is a systemic risk in the interconnected financial market and has to be mitigated.”⁹⁷

Three parameters have to be contemplated for the establishment of this unique court.

Expertise is highly important

Regarding the amount of project finance loans, project financing saw a period of rapid growth until the 2008 financial meltdown. By then it had peaked at a figure of US \$247 billion, but dropped sharply in 2009. At the end of 2013, it reached a peak of US \$204 billion.⁹⁸ The development of the market is taking off in emerging economies in Africa, the Middle East and South Asia. Disputes in project finance, therefore, have to be resolved in the fastest and most effective manner possible since project financing has a social impact on these economies. The expertise of arbitrators under the auspices of a global court would guarantee the exceptional administration of these complex legal and factual matters that project finance involves. Judges and arbitrators with common law training and civil law experience are needed.⁹⁹ They have the knowledge to understand the financial tools that financial markets develop to attract large amounts of capital in response to “supply (infrastructure gap) and demand (search for an asset for a given asset allocation)” and

⁹⁴ *Oxford Dictionaries* 2015 <<http://www.oxforddictionaries.com/definition/english/finance>> accessed 13 March 2018.

⁹⁵ Inka Hanefeld, “Arbitration in Banking and Finance” (2012–2013) 9 *New York Journal of Law and Business* 918.

⁹⁶ Available at <<http://arbitrationclub.org.uk/financial-sector/eplaunch>> accessed 13 March 2018.

⁹⁷ Jeffrey Golden, “We need a world financial court with specialist judges” *Financial Times* (9 September 2009).

⁹⁸ Raffaele Della Croce and Stefano Gatti, “Financing Infrastructure—International Trends” (2014) 1 *OECD Journal* 127.

⁹⁹ Jeffrey Golden, “We need a world financial court with specialist judges” *Financial Times* (9 September 2009).

different financing models in capital channelling or complex econometric analyses to estimate the project default risks.¹⁰⁰

The need for centralisation

It would seem undesirable for the parties to seek resolution before a court of general jurisdiction, especially a local court, if the issue is multi-jurisdictional. Local courts are decentralised and can sometimes cause delays by sending the parties to a court far away, with logistical and linguistic obstacles or frequently with no jurisdiction established.¹⁰¹ Centralisation, on the other hand, through the establishment of an international court of arbitration for financial disputes, would enhance predictability. A recent paper published by the Monetary and Capital Markets Department of IMF, in light of the 2008 financial crisis, states¹⁰²:

“Regulators need better information on a much wider range of financial institutions, including ‘off balance sheet’ risks (involving better consolidated supervision), and the risks of financial interlinkages. Investors also need more disclosure and a higher level of granularity in information provided. Careful consideration will have to be given to the costs and benefits of enhanced information collection and disclosure, especially the additional information that regulators require.”

Predictability therefore can be achieved in project finance transactions through thorough knowledge of multi-jurisdictional legal issues, which involve technical details. This knowledge can be demonstrated by well-versed arbitrators recruited by the international court. They will instil confidence in projects, contributing to economic stability and prosperity in the host state.

More justice is required

Delay in project finance disputes is a denial of justice. Launching a new set of rules under the auspices of an international arbitration court could offer an expedited and therefore fair outcome. This proposal is supported by realistic examples: the American Arbitration Association (AAA) provides for special arbitral rules for commercial and financial disputes, the rules of the London Arbitration Club aim to achieve the fair resolution of disputes in the shortest possible time, the China International Economic and Trade Arbitration Commission (CIETAC) has rules of a similar nature and finally the European Centre for Financial Dispute Resolution (EuroArbitration) offers specialised rules in this respect.¹⁰³

Hence, expertise, predictability and specialised rules are the key elements for the effective resolution of project finance disputes. This can ideally be achieved in the manner suggested, guaranteeing the banks’ position, the sponsors’ interests and the economic development of the host state.

8. Conclusion

Project finance is the principal method for financing large construction projects. Its significance rests on the fact that it is associated with the financial stability and economic, political and social growth of a host country. The main source of financing is the loan

¹⁰⁰ Raffaele Della Croce and Stefano Gatti, “Financing Infrastructure—International Trends” (2014) 1 OECD Journal 127

¹⁰¹ Jeffrey Golden and Peter Werner, *The Modern Role of Arbitration in Banking and Finance* (Oxford University Press 2015) 1.18.

¹⁰² IMF, “Lessons of the Financial Crisis for Future Regulation of Financial Institutions and Markets and for Liquidity Management” (2009) 5.

¹⁰³ Klaus Peter Berger “The aftermath of the financial crisis: why arbitration makes sense for banks and financial institutions” [2009] 3(1) *Banking Law Institute, Law and Financial Markets Review* 55.

agreement, which is affected by economic and legal consequences of the construction, concession, operation and other agreements. Litigation has for a long time been the preferred dispute resolution method in project finance, given the antipathy of the banks towards other options. This perception was fostered by the systematic practice of litigation in major money markets and the alleged control this option offers to lenders. The international character of disputes involving parties from multiple jurisdictions and the complexity of the legal, financial and technical issues of such projects render litigation outdated. This can also be explained by the necessary unity of these transactions. A default in one agreement might “cross-default” the others; or contradictory determinations of local courts on different project contracts can lead to fragmentation of justice. The existence of a neutral forum for these disputes, therefore, is imperative. It is suggested that this can be achieved by a non-domestic tribunal deciding in a fair manner according to the specific needs and choices of the parties.

The arbitration guide adopted by the ISDA master agreement and PRIME Finance indicates that the antipathy of banks towards arbitration, concerning cross-border financial transactions, has been mitigated. The incompatibility of litigation with project finance transactions is detected in the strict interpretation mechanisms of litigation, which cannot effectively facilitate fact-finding. Precedent usually has no place in these disputes, because project finance contracts are tailor-made to the specific interests of the parties and circumstances surrounding the viability of the project. Consistency, as argued in this paper, can be safeguarded by other means, such as arbitrators’ experience.

Moreover, the inability of a tribunal to order summary proceedings is not always a disadvantage. On the contrary, case law proves that a tribunal does have the power to a certain extent, although the use of summary proceedings is not always appropriate in respect of the significant quantity of documents that have to be examined in these proceedings. Equitable awards are only made if the parties so agree. Litigation has the advantage of consolidation and joinder without parties’ consent. The consensual nature of arbitration excludes third-party participation without consent. In some cases the lenders, in particular, might be interested in joining third parties or in consolidating proceedings. As a result, multi-party proceedings become relevant and creditors should pay close attention to the drafting of the arbitration clause if they wish to consider consolidation or joinder.

The most essential benefit of arbitration is undeniably enforcement. An award under the New York Convention 1958 becomes enforceable worldwide in the territory of all the parties to the New York Convention 1958. This outcome could not be achieved through bilateral treaties and the principle of reciprocity. Finally, although this is not yet testified, the proposed international arbitral court could be beneficial. It would comprise the best and most experienced arbitrators in financial disputes. The creation of such a court would achieve centralisation and would reinforce the predictability and consistency of awards since one single arbitral court would solve multi-jurisdictional issues effectively without acting under the prism of a single jurisdiction. The publication of expedited rules would then contribute to fair decision-making. This court, if these requirements are met, could efficiently establish arbitration in project finance and in financial disputes generally. Arbitration as a flexible route for dispute resolution should be preferred. The appropriateness discussed above not only serves the interests of the parties. It primarily serves justice, which instills confidence in the construction of large projects that are of public benefit.

Online Dispute Resolution Algorithm: The Artificial Intelligence Model as a Pinnacle

Adesina Temitayo Bello

Abstract

The major characteristic of alternative dispute resolution (ADR) is the informality of the dispute settlement process. Online dispute resolution (ODR) can help to resolve disputes, maintain conventional informality, ensure cost effectiveness and speed through the use of Artificial Intelligence (AI) to help disputants and streamline dispute processes. ODR refers to processes that are based on information and connection. This article demonstrates that ODR gained popularity by facilitating inexpensive dispute resolution through electronically delivered briefs, video conference hearings and automated online processes. The disputants best suited to take advantage of ODR are those operating globally. This makes ODR particularly appropriate for international commerce and e-commerce, where the disputants are separated geographically and the amount involved is minimal. This article indicates that AI in ODR has made rapid progress. It concludes that even if humans can make mistakes in dispute resolution, society would perhaps still prefer to employ human judges than give full control to a machine. Many consider justice to be a uniquely human process that it may be extremely difficult for AI to execute no matter what its level of sophistication in programming.

1. Introduction

Conflicts are universal and thus there is an immense need to develop processes to minimise, manage and hopefully resolve them. The ideal dispute resolution process is one in which the two parties are better at the end of the course of action than they were at the beginning.

Arbitration, which is one vital aspect of ADR, has achieved global recognition as a result of its potency as a veritable tool in dispute resolution.

According to Professor Dr J Olakunle Orojo CON and Professor M Ayodele Ajomo:

“Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties.”¹

Rene David² defined arbitration as a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons—the arbitrator or arbitrators—who derive their powers from a private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such agreement.

According to Bennett,³ arbitration is a method in which the two parties also use the help of a third independent and neutral entity for solving a dispute but, unlike in mediation, this entity has no active role in helping the parties throughout the process. In this approach the non-aligned party, the arbitrator, simply hears the parties and, based on the facts presented, takes a decision without influencing the parties during their presentations. Traditionally,

¹ J Orojo Olakunle and M Ajomo Ayodele, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates (Nig) Ltd 1999).

² Rene David, *Arbitration in International Trade* (Kluwer Law and Taxation Publishers 1985) 5.

³ Steven C Bennett, *Arbitration: essential concepts* (ALM Publishing 2002).

the outcome of an arbitration process is binding, ie there is a final enforceable award that the parties will respect. However, arbitration can also be non-binding.

Although the term dispute resolution is from time to time used to describe ADR methods,⁴ it broadly denotes a process in which two or more parties engage in order to set out their differences. In that sense, dispute resolution can be divided into two main types: judicial dispute resolution and alternative dispute resolution. The most common form of judicial dispute resolution is litigation, involving a plaintiff and a defendant. The legal system has the coercive power to enforce an outcome. This means that at the end of the process, the parties are bound by the decision of the court, although in some cases parties may appeal against a decision.

Outcomes are decided either by a judge or a jury or a combination of both, taking into account the facts presented by the parties and the application of the law. All these processes are very formal and are defined by rules established by a legislature. Litigation is generally seen as an inefficient process, the most important disadvantages of which are high costs and the length of the proceedings. However, another important characteristic is that courtrooms are generally highly competitive milieux, in which parties and their representatives will blindly pursue the maximisation of their own personal profit, without regard for the other party's interests. This constitutes the main obstacle to achieving a mutually satisfactory outcome, increasing the dissatisfaction of the parties and consequently the number of appeals, contributing to a slower and more inefficient judicial system. In order to counter this trend, courts began to adopt some extrajudicial dispute resolution methods as a first attempt to solve cases before advancing to litigation. These methods include a number of traditional ones such as arbitration and others like collaborative law or mediation, among others. These can also be used independently by parties, with the assistance of institutions that are not part of the judicial system. The steady development of this trend in dispute resolution is due to a perception of greater flexibility, lower costs than those of litigation and faster resolution of disputes. Parties will also often mention the increased privacy and fewer formalities as advantages.

Abraham Lincoln stated, "Discourage litigation; persuade your neighbour to compromise where you can. Point out to them how the nominal winner is often the loser ... in expenses and waste of time". ADR is a method that aims to solve disputes without recourse to the traditional judicial process, ie litigation in courts. ODR uses these methods in a technological context, either supported by technology or in a virtual computational environment. Historically, alternative methods have faced some resistance but they have since been used by both the legal system and the parties involved as the first stage in resolving a dispute. There are countries in which parties are encouraged or required to try some kind of alternative method before advancing to court.

Arbitration has many advantages over litigation for the resolution of disputes. Although speed of resolution and low cost have often been claimed as among these advantages, there is now some dispute as to whether arbitration is indeed quicker and cheaper than litigation. But even if arbitration is not always quicker and cheaper there are a number of procedures or methods that can be employed to increase the efficiency of arbitration, to speed its resolution and to reduce its cost. More specifically, as information technology (IT) has developed in recent years, IT applications have also increasingly been used in arbitrations with effective results.⁵

⁴ Henry Brown and Arthur Marriott, *ADR Principles and Practice* (Sweet and Maxwell 1999).

⁵ Thomas D Halket, "Using Information Technology in Arbitration" <https://www.americanbar.org/publications/gp_solo/2015/january-february/using_information_technology_arbitration.html> accessed 13 March 2018.

2. Technology and artificial intelligence in dispute resolution

According to the *Harvard Negotiation Law Journal*, AI involves the study of automated human intelligence. This includes both practically oriented research, such as building computer applications that perform tasks requiring human intelligence, and fundamental research, such as determining how to represent knowledge in a computer-comprehensible form. At the intersection of AI and law lies a field dedicated to the use of advanced computer technology for legal purposes: Artificial Intelligence and Law.⁶

IT has become fairly commonplace in today's business world although parties in arbitration may have differing financial or technical resources or technical competences which may affect their access to or ability to use a particular IT application. More broadly, IT applications may be used in ways that are inherently unfair. For example, emails, if not appropriately handled, may be improper ex parte communications between a party and the arbitral tribunal (the arbitrator or arbitrators). In any of these circumstances, a tribunal may need to take steps to ensure that the application in question is not used in a way that results in unequal treatment of the parties or that deprives a party of its ability to fully and fairly present its case.

AI will revolutionise legal practice. Over the next 20 years, the technologies with which we currently practise law will themselves begin to practise law.

Arbitration is not immune to this technological advancement. Imagine an AI lawyer that is capable of understanding arguments, ascertaining facts and determining the applicable law. There is one particular role that would value the neutrality and independence that such intelligent technology could provide—that of the arbitrator.

In reality, is AI many years away from making any real impact in the legal sector? And should law firms see this technical advancement as an opportunity or a threat?

Broadly speaking, AI is the theory and development of computer systems which will perform tasks that normally require human intelligence. This is often now referred to as cognitive computing.⁷

The significant form of AI for the legal industry today is Smart Apps, sometimes referred to as “Expert Systems”. With the advent of significantly more powerful computer processing power and better algorithms, Smart Apps are now capable of addressing multiple legal challenges. Smart Apps are best described as technologies that connect complex content and expert analysis of that content to provide precise, immediate answers. They focus on deterministic outcomes, that is, they answer specific questions. For example, can I or can't I make this payment under the Foreign Corrupt Practices Act (FCPA)? Or what is my level of risk in making this monetary transaction?

3. Where will artificial intelligence fit into the legal world today?

AI makes Smart Apps particularly useful in highly regulated markets. Every industry is facing growing regulation exposing businesses of all sizes to risk. Many global businesses find themselves navigating a spider's web of complex international rules and restrictions. Breach or failure can have significantly negative consequences, both financial and reputational. Smart Apps are able to rapidly answer complex regulatory questions immediately, and often with greater accuracy, without a human one-to-one bottleneck, therefore freeing up lawyers' time to deal with more complex bespoke legal tasks.

An example of this type of Smart App is Foley & Lardner's FCPA App.⁸ This mobile app allows their clients' sales teams to respond to self-service payment questions anywhere,

⁶ Arno R Lodder and John Zeleznikow, “Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Systems in a Three Step Mode” (2005) 10 *Harvard Negotiation Law Review* 287–338.

⁷ David Schatsky, Craig Muraskin and Ragu Gurumurthy, “Demystifying Artificial Intelligence” <<http://dupress.com/articles/what-is-cognitive-technology/?coll=12201>> accessed 13 March 2018.

⁸ See <<http://www.foley.com/grs/>> accessed 13 March 2018.

at any time around the globe. It has provided Foley with access to new clients among Fortune 500 companies and extended the firm's client base beyond what they were handling on a one-to-one human answer basis.⁹

Another example of the use of AI in law today is ComplianceHR,¹⁰ a self-service Smart App platform for HR questions powered by the expertise of Littler Mendelson,¹¹ the US's largest HR law firm. In this platform there are a series of Smart Apps including an Independent Contractor App that assesses the users' employment status in 51 jurisdictions by assessing some 1,400 cases and 80 weighting factors.

4. Artificial intelligence and online dispute resolution

Online activities, such as the use of e-commerce sites like amazon.com and e.com, have led to the development of online disputes.¹² It is argued that if a transaction occurs online, then disputants are likely to accept online techniques to resolve their disputes. Thus the development of e-commerce requires new ways of resolving conflicts. New ways of dispute resolution are therefore appearing, so that the disputant parties need neither to travel nor to meet in courtrooms or before arbitrators or mediators. Different forms or methods of ADR for electronic activities have been identified by legal doctrine. As a result, we can now speak of ODR as any method of dispute resolution in which, either wholly or partially, an open or closed network is used as a virtual location to resolve a dispute.¹³

A relevant issue is how (and to what extent) traditional methods such as negotiation,¹⁴ mediation¹⁵ or arbitration¹⁶ can be transplanted or adapted to the new electronic environments, taking advantage of all the resources made available by the newest information and communication technologies. In order to develop intelligent and efficient techniques to support ODR integration is needed.

AI-based problem-solving techniques can be used in conjunction with those of ODR. This information can be considered from two different perspectives: on the one hand, as a tool to help the parties and decision-makers to obtain the best possible results in solving commercial disputes and, on the other hand, as a new way of autonomous dispute resolution through the use of autonomous and intelligent software, supported by a knowledge base and decision capabilities. Thus, it will be important to consider the many alternatives for dispute resolution that arise from AI models and techniques (eg Argumentation, Game Theory, Heuristics, Intelligent Agents and Group Decision Systems) as described by Peruginelli¹⁷ and Lodder and Thiessen.¹⁸ In contrast to previous approaches, in ODR consideration must be given, not just to the disputant parties and the eventual third party (mediator, conciliator or arbitrator), but also to what Ethan Katsh and Janet Rifkin call "the fourth party", that is, the technological elements involved. An important element of this "fourth party" will obviously be the emergence of expert systems and intelligent software

⁹ See Neota Logic Webinar, "Foley GRS Case Study—Using Expert Systems to create innovative Legal Business Models" <<https://neotalogic-1.wistia.com/medias/gk9kqo4lcb>> accessed 13 March 2018.

¹⁰ See <<http://compliancehr.com/>> accessed 13 March 2018.

¹¹ See <<https://www.littler.com/>> accessed 13 March 2018.

¹² Ethan Katsh, Janet Rifkin and Alan Gaitenby, "E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of eBay Law" (1999) 15 *Ohio State Journal on Dispute Resolution* 705.

¹³ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass Wiley 2001).

¹⁴ Howard Raiffa, *The Art and Science of Negotiation* (Harvard University Press 2002).

¹⁵ Henry Brown and Arthur Marriott, *ADR Principles and Practice* (Sweet & Maxwell 1999).

¹⁶ Steven C Bennett, *Arbitration: Essential Concepts* (ALM Publishing 2002).

¹⁷ G Peruginelli and G Chiti, "Artificial Intelligence in Alternative Dispute Resolution" in Giovanni Sartor and Claudia Cevenini (eds), *Proceedings of the Workshop on the Law of Electronic Agents (LEA02)* (Bologna: CIRSFID 2002).

¹⁸ Arno Lodder and Ernest Thiessen, "The role of artificial intelligence in online dispute resolution" in Workshop on Online Dispute Resolution at the International Conference on Artificial Intelligence and Law, Edinburgh, UK (2003).

agents empowered to help the parties and the mediator/arbitrator in reaching a fair solution.¹⁹ And as Lodder²⁰ has already pointed out, there is also a “fifth party” to be considered, that is, the service providers, those who provide and deliver the technological elements. All this is turning ODR into a quite new and somewhat complex (but eventually quite fast, cheap and advantageous) way of interaction and of resolving conflicts.

The goal of AI research in this field is to attain a technological threshold, resulting in computational systems that are indeed the third party. In this sweeping approach, there is no human intervention on the outcome or in guiding the parties to a specific situation. There is, instead, a system that performs that major role. This is what is usually known as an electronic mediator or arbitrator. It should have skills for communicating with the parties and understanding their desires and fears and have the ability to decide on the best strategy to be followed in each possible scenario. This is evidently the most challenging approach to follow since it is not easy to implement in a computer system the cognitive abilities of a human expert, as well as the ability to perceive the emotions and desires of the parties involved. Furthermore, there is an inherent risk in letting machines take binding decisions that influence our lives.²¹

ODR systems can be categorised according to the function that machinery may play.²² First-generation ODR systems are those that are being used at present. With these systems human beings remain the central pieces in the planning and decision-making processes. Computational tools are evidently used, but they are seen as no more than equipment, without any autonomy or a major role in the course of action. In this kind of ODR system the main technologies used are instant messaging, forums, video and phone calls, video conferences, mailing lists and, more recently, Video Presence. Agent-based technologies may be used but have no active part or autonomy. These systems are common nowadays and are usually supported by a web page. They represent a first necessary step towards more autonomous systems, which are characterised by the use of intelligent systems. The second generation of ODR systems is essentially defined by a more effective use of technological tools. These tools are no longer used merely for putting the parties into contact and/or making access to information easier. They go beyond that and are used for idea generation, planning, strategy definition and decision making. In that sense, it can be said that second-generation systems go beyond those of the first generation with new intelligent and autonomous artefacts. This new generation relies on and is supported by technologies that allow for a regular connectivity among all the entities involved.

However, by using innovative technologies on top of this communication layer, it is possible to present services with more added value. For the implementation of such services, one can look at fields as diverse as AI, mathematics or philosophy. In the intersection of these fields can be found a range of technologies that will significantly empower the previous generation of ODR tools, namely artificial neural networks, intelligent software agents, case-based reasoning mechanisms, methods for knowledge representation and reasoning, argumentation, learning and negotiation. Thus, we move forward from a paradigm in which reactive communication tools are used by parties to share information, to a virtual environment in which ODR services proactively assist the disputant parties.

Therefore, it is clear that the involvement of different areas of research, specifically AI, may contribute to the development of ODR processes that will deal with other sorts of problems, namely complex multi-party, multi-issue and multi-contract ones. By using such

¹⁹ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass Wiley 2001).

²⁰ Arno R Lodder, “The Third Party and Beyond. An Analysis of the Different Parties, in particular The Fifth, Involved in Online Dispute Resolution” (2006) 15(2) *Information & Communications Technology Law* 143–155.

²¹ Arno R Lodder, and John Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press 2010).

²² G. Peruginelli and G Chiti, “Artificial Intelligence in Alternative Dispute Resolution” in Giovanni Sartor and Claudia Cevenini (eds), *Proceedings of the Workshop on the Law of Electronic Agents (LEA02)* (Bologna: CIRSFID 2002).

technologies it will also be easier to develop processes that mimic the cognitive processes of human experts, leading to more efficient ODR tools.

According to Lodder and Zeleznikow²³ the ODR environment should be envisaged as a virtual space in which disputants have a variety of dispute resolution tools at their disposal. Participants can select any tool they consider appropriate for the resolution of their conflict and use the tools in any order or manner they desire, or they can be guided through the process.

They proposed a three-step model of ODR based on a fixed order. The system proposed conforms to the following sequencing, which in our opinion produces the most effective ODR environment²⁴:

- First, the negotiation support tool should provide feedback on the likely outcome(s) of the dispute if the negotiation were to fail—ie the “best alternative to a negotiated agreement” (BATNA).
- Secondly, the tool should attempt to resolve any existing conflicts using argumentation or dialogue techniques.
- Thirdly, for those issues not resolved in step two, the tool should employ decision analysis techniques and compensation/trade-off strategies in order to facilitate resolution of the dispute.

If the result from step three is not acceptable to the parties, the tool should allow the parties to return to step two and repeat the process recursively until either the dispute is resolved or a stalemate occurs. A stalemate occurs when no progress is made when moving from step two to step three or vice versa. Even if a stalemate occurs, suitable forms of ADR (such as blind bidding or arbitration) can be used on a smaller set of issues. By narrowing the issues, time and money can be saved. Further, the disputants may feel it is no longer worth the pain of trying to achieve their initially desired goals.

5. ODR tools

Email

Email is an obvious modern method for communication among the tribunal and the parties for filings, applications, notices and the like. It is fast and inexpensive, essentially instantaneous and free, and provides both a complete electronic record of all the filings and the ability to transmit them in electronic form. Its use, however, is not without some issues.

First, some arbitral administering bodies, for example the American Arbitration Association (AAA), require the parties to agree in writing to the AAA email protocol before email can be used directly between the parties and the tribunal. In the absence of such consent, all communication could still be made via email but must be directed through the administrator, with the resulting possibility of a significant decrease in the speed of communication. Even if the parties have consented to direct party-tribunal email communications under the AAA protocol, all such emails must be copied to both parties and the administrator, and *ex parte* email communication must be avoided.

Hearings by video conference

In today’s flat world, witnesses can be scattered all over the globe, even if most are located in or near one place. Also, arbitrators with the requisite background and experience may

²³ Arno R Lodder and John Zeleznikow, “Artificial Intelligence and Online Dispute Resolution” <http://www.mediate.com/pdf/lodder_zeleznikow.pdf> accessed 13 March 2018.

²⁴ Unlike many current ODR systems, it does not attempt merely to replicate traditional offline ADR systems in an online environment.

be distant from the location of the hearings agreed upon by the parties. Of course, one can require the arbitration participants to travel to the hearing site, but this can be expensive and time consuming. Travel may only be justified for large cases or important witnesses.

Fortunately, the ability to use IT to take live testimony from remote locations has greatly improved in recent years, while at the same time the cost of doing so has significantly decreased. Not too many years ago it was impossible to take remote testimony other than by phone. And although video conferencing predates the internet, its use then was complicated and expensive. With the advent of the internet, particularly with increases in transmission speeds and the constant improvement in equipment, together with lower costs for both the service and the equipment, live testimony by video conference over the internet has become a genuine tool for efficient and cost-effective arbitration. But as with email there are precautions, some mandatory and some merely recommended, applicable to video conferencing.

Thus, the parties and the tribunal should be aware that the local laws regarding the taking of testimony, particularly from third-party witnesses, can vary by location. Everybody should be operating under commonly shared expectations regarding the applicable law. To avoid *ex parte* communications with the tribunal or the possibility of improper witness coaching, neither witnesses nor the tribunal should be alone with only one party at any location. To protect the confidentiality of the proceedings, the video feed must not be subject to intrusion. If more than two locations are in play, a log should be kept as well as a list on the record of all who sign on and all who are in attendance and where they are.

E-briefs

Reasoned awards—an arbitral award that states the reasons for the result—are commonplace in international arbitration and more and more common in domestic arbitration as well. A reasoned award may be a simple, short statement of reasons or something as complicated as a full “judicial” opinion with findings of fact and conclusions of law. For a tribunal confronted with lengthy briefs and a substantial evidentiary record, preparing a reasoned award and verifying that the parties’ positions in their briefs are supported by the actual hearing transcript or documentary evidence can be no small chore. Bouncing between the briefs, on the one hand, and the transcript as well as multiple evidence binders, on the other, is time consuming and tedious. On top of this, one must also check the parties’ descriptions of the law against the actual authorities to which they have referred.

The solution to this is e-briefs. An e-brief is much more than a searchable electronic or software copy of the brief. To be sure it is that. But, in addition, it also provides the back-up documents to which the brief refers, linked to the textual references to those documents. In other words, each reference in an e-brief to the record or authority is a “hot” link on which the reader can mouse click, causing the record or authority in question to pop up in a separate window. There is no need to go back to the record itself or to dig out the legal authority; they are instantly available by just a mouse click.

Unfortunately, as they say, there is no free lunch. And that is true of e-briefs, for they usually need to be prepared by an outside vendor and are quite expensive. Accordingly, they should not be considered except for large cases where both the size of the record and the amount in controversy justify their use. In addition, one should be mindful that the parties may have unequal resources and that the cost of an e-brief, while justified by the size of the matter, may still be a burden, perhaps unbearably so, to the smaller party.

ODR represents a transformation in the practice of the legal profession. ODR technology is a reality and is on the rise. It further highlights that there are amazing possibilities that ODR offers beyond email and telephone.

There are commercially available ODR services which connect several technologies. Technologies are constantly on the change. That being so, the ways in which people

communicate and interact with one another invariably change too. As a result, the methods of conflict resolution and mediation have changed too.²⁵ Among others are:

- Web maps;
- wikis;
- social networking sites;
- Web forums;
- chat rooms;
- avatars;
- instant messaging;
- mobile and smart phone technology;
- blogs;
- artificial legal intelligence;
- VoIP (voice over internet protocol).

6. Lawyers and ODR

Of late, there has been much discussion in the legal community about the impact on the legal profession of super-fast computers with the capacity to simulate human intelligence and decision-making, that is, AI.²⁶ Hence the question, “Are lawyers the next profession to be replaced by computers?”

Janet Fuhrer,²⁷ Jordan Furlong²⁸ and Art Cockfield²⁹ have all had their share of opinions on answering the question, “Do you think AI will terminate jobs for lawyers, create new ones, or both?”

Janet Fuhrer has this to say:

“I think both, quite frankly. Some of the lower-level tasks that currently articling students or junior lawyers or newer lawyers often get assigned to do could easily be taken on by technology, whether it is Watson or some other system. Certainly there are still lots of opportunities for lawyers, even with technology, to provide services.”³⁰

According to Jordan Furlong:

“I recently came across a survey of large US law firms that asked whether Watson would replace various timekeepers in these firms in the next five to 10 years. Half the respondents said it would replace paralegals, 35% said first-year associates. Look at the American experience, where 55 to 60 percent of all law graduates in the last few years have law-related, full-time work nine months after graduation; that reflects the reality. The other interesting aspect of that survey was the response to the option ‘computers will never replace human practitioners’. That got a 46% affirmative response four years ago; this time around, just 20%. That’s a huge drop.”³¹

²⁵ Nadja Alexander (ed), “From ADR to ODR: Can technology shape the future of mediation practice?” <<http://mediationblog.kluwerarbitration.com/2012/02/11/from-adr-to-odr-can-technology-shape-the-future-of-mediation-practice/>> accessed 13 March 2018.

²⁶ Carl Wiens, “Law and Technology: How will artificial intelligence affect the legal profession in the next decade?” <<https://law.queensu.ca/how-will-artificial-intelligence-affect-legal-profession-next-decade>> accessed 13 March 2018.

²⁷ Janet Fuhrer is a partner with Ridout & Maybee LLP, Ottawa, and President of the Canadian Bar Association.

²⁸ Jordan Furlong is an Ottawa-based partner with Edge International, Senior Consultant with Stem Legal Web Enterprises, and author of *Law21: Dispatches from a Legal Profession on the Brink*.

²⁹ Art Cockfield, a Queen’s University Law Professor whose research interests include law and technology, is also a Surveillance Studies Centre executive committee member.

³⁰ Carl Wiens, “Law and Technology: How will artificial intelligence affect the legal profession in the next decade?” <<https://law.queensu.ca/how-will-artificial-intelligence-affect-legal-profession-next-decade>> accessed 13 March 2018.

³¹ Carl Wiens, “Law and Technology: How will artificial intelligence affect the legal profession in the next decade?” <<https://law.queensu.ca/how-will-artificial-intelligence-affect-legal-profession-next-decade>> accessed 13 March 2018.

Finally, Art Cockfield has stated:

“I was one of those lawyers doing due diligence in downtown Toronto for several years and left as a junior associate. It was tedious, but it was also an extremely well-paying job. Some of the drudge work will be gone, is that a good thing for lawyers? The outsourcing that Jordan referenced poses a similar situation, but there are a lot of jobs in big law at least that could potentially disappear as a result of AI.”³²

From the above survey it can be concluded that AI is not aimed at taking over the legal profession. Therefore, what advantageous purpose does AI serve in the legal profession?

AI is a trending phenomenon. The utilisation of robot lawyers allows access to justice to those who cannot afford a lawyer. Robot lawyers could make time-consuming, expensive court conflict a thing of the past.

Rachael Brown has stated that:

“An artificial intelligence platform, called *Rechtwijer*, could soon give lawyers in Australia a run for their money by being called on in legal battlegrounds like divorce, custody, employment and debt disputes.”

She refers to the Dutch technology being used by the National Legal Aid service and RMIT University. The dispute resolution robot originated in the Netherlands and can mediate everything from divorces, tenancy disputes, and employment to debt and consumer matters. Where, in a divorce matter, a dispute arises, the issue of child custody can be determined through use of a robot lawyer. The robot lawyer only needs to ask the ages of the children to be sensitive to their developmental needs. It further does this very well by recalling who the person is, and gives proposals based upon what other people have achieved in a resolution when they come to separate.³³

In Canada, the program had been moved into debt and tenancy issues, and in the Netherlands there is a working system for family law issues and resolution of child support. Thus, unlike the traditional modes of legal service delivery where the client is “in the back seat” and the lawyer is “driving the car”, here people are empowered to take the controls themselves.³⁴

It is obvious that not everyone has the resources to secure the services of a lawyer. Some people lose their legal rights as they do not qualify for legal aid. However, access to justice could become a reality for many if ODR becomes widespread.³⁵

7. Conclusion

The future of ODR lies in enhancing face-to-face ADR, and not in any way replacing it. It is therefore very desirable that legal practitioners identify the growth in technology-based tools in ADR and adopt those that they think can enhance their existing practice. Technological advances are increasing and cut across several spheres and professions. Based on this premise, we cannot avoid the integration of technology into the provision of legal services. Therefore, the best policy is to embrace this advance, and to utilise it tactically to aid the legal profession and legal practitioners. Genuine use by practitioners of ODR tools

³² Carl Wiens, “Law and Technology: How will artificial intelligence affect the legal profession in the next decade?” <<https://law.queensu.ca/how-will-artificial-intelligence-affect-legal-profession-next-decade>> accessed 13 March 2018.

³³ Rachael Brown, “Robot Lawyers could make time-consuming, expensive court conflict a thing of the past” <<http://www.abc.net.au/news/2016-07-06/robot-lawyers-dutch-conflict-resolution-technology-on-its-way/7572488>> accessed 13 March 2018.

³⁴ Rachael Brown, “Robot Lawyers could make time-consuming, expensive court conflict a thing of the past” <<http://www.abc.net.au/news/2016-07-06/robot-lawyers-dutch-conflict-resolution-technology-on-its-way/7572488>> accessed 13 March 2018.

³⁵ Rachael Brown, “Robot Lawyers could make time-consuming, expensive court conflict a thing of the past” <<http://www.abc.net.au/news/2016-07-06/robot-lawyers-dutch-conflict-resolution-technology-on-its-way/7572488>> accessed 13 March 2018.

as support mechanisms is the way for lawyers to reclaim control over technological integration in the legal profession.

8. Recommendations

The integration of technology with the legal profession is at the frontier although the concept is yet to be fully appraised by the legal profession. There is a need for a fundamental education in AI. Legal practitioners should be given a basic education on the workability and advantages of AI. Furthermore, legal practitioners should be encouraged to embrace AI as it is not aimed at taking over the legal profession (a threat) or retrenching lawyers. Rather, AI is focused on making the job of lawyers easier, faster and more productive. AI is basically an approach for the integration of technology with law in order to provide efficient legal services and legal aid to all.

Presentations

Common Law Advocacy in International Arbitrations: Fit for Purpose?

Derek Wood*

Abstract

This paper addresses the rights and obligations of advocates appearing in international arbitrations, and the forensic tactics which they are able to deploy in presenting their cases. It looks at the different legal cultures in which international advocates have received their training. Specifically, it raises the question: do advocates trained in the common law have the edge over their civil law counterparts? Or do they not? Is there a more distinct approach which is best suited to the exigencies and special characteristics of arbitration?

1. Introduction

I start with a proposition which all lawyers—disciples of civil codes and common law—can sign up to. Advocacy is not an abstract intellectual exercise. The purpose of the advocate is to persuade the decision-maker to accept the case they are engaged to present. The key to good advocacy is to get into the mind of the tribunal; to engage its interest; to help it understand the case that is being presented; and to present that case clearly, efficiently and persuasively.

Around 2,400 years ago the Greek philosopher Aristotle wrote a treatise on Rhetoric. The art of rhetoric is the ancient equivalent of what we now call public speaking; but Aristotle was particularly interested, as we are, in forensic advocacy. He identified three main attributes which the ideal orator—the advocate—must demonstrate: *logos*, *pathos* and *ethos*. These qualities, as I shall show, are timeless. They survive as the qualities which all advocates still require.

Logos is the intellectual organisation of both the subject matter of the dispute and the case the advocate has to advance on behalf of the client. *Pathos* is the ability to express the client's case in a persuasive and agreeable manner that will engage the sympathy of the tribunal. *Ethos* is the demeanour or behaviour of the advocate. Advocates must demonstrate first, a complete grasp of their subject matter; secondly, an attractive, personal style of presentation; and thirdly, ethical and professional values which will command the tribunal's respect and trust.

2. Common law advocacy

My training and experience as an advocate, in court and in other places, is firmly rooted in the adversarial style embedded in the common law. My experience as an arbitrator has exposed me to a range of different styles of presentation and expression, both orally and on paper. There are some challenging comparisons to be made.

One of the dominant features of the common law system, throughout its long history, is the emphasis on oral advocacy. Despite the inexorable growth of documentary evidence, the increasing practice of ever-lengthening written submissions, and the acknowledgement of the utility of documents-only dispute resolution, common lawyers continue to place their

* This is an expanded version of the author's contribution to a panel discussion at the CIArb International Arbitration Conference 2017 in Paris, 7 and 8 December 2017.

trust, rightly or wrongly, in oral advocacy at a live hearing before the decision-making tribunal, at trial and on appeal.

All barristers practising in England and Wales must belong to and have been admitted to practise by one of the four legal colleges known as the Inns of Court. The Inns, which also boast many overseas members, have historically taken the lead in the training of barristers in the art of oral advocacy in an adversarial system.¹

In an adversarial system it falls to each party to a dispute to present its own case to an impartial and largely passive tribunal, as professionally and effectively as it can, leaving it to the tribunal, whether it is a judge, jury, arbitrator or other body, to reach a conclusion on the evidence and the merits of the case as they have been presented by the opposing parties. A court might well conduct its own research into the law, in so far as it is not already informed of it, but it cannot carry out its own inquiries to cross-check the validity of the evidence, and, unless there are strong public policy reasons for doing so, it will not reach a decision outside the boundaries of the submissions it receives. It will not, for example, uphold or dismiss a claim on grounds which a party has not pleaded.

The duty to present the client's case, as forcefully as the facts and relevant legal principles permit, thus carries with it some ethical questions. How far can a common law advocate go in pursuing the client's case without affecting the due administration of justice? It is sometimes stated to be a weakness in the adversarial system that it may actually obstruct justice: it is essentially a competitive game played by the parties rather than an objective search for the truth. This problem may be avoided when the tribunal is entitled or required to take a more inquisitorial approach, independently seeking the just and correct outcome.

The English common law system tries to adjust for this. Counsel's obligation of partisanship is overridden by a higher duty, written into the Bar's and the solicitors' Codes of Conduct, to assist the tribunal in the proper administration of justice. For example advocates must draw the tribunal's attention to all relevant legal authorities of which they are aware, whether or not they support their client's case. In an international dispute depending on foreign (ie non-English) law, that will include ensuring that the applicable law is fully set out and explained to the tribunal by experts, in written reports or orally at a hearing, and by the citation of all relevant legal materials.

Allegations of dishonesty cannot be made without a firm evidential foundation. In relation to documents, there is an absolute obligation to disclose all relevant documents which the advocate knows about, unless the document is legally privileged, especially if it damages one's own case or helps the other side. In criminal cases the obligations of disclosure imposed on prosecuting authorities, including the police, are even more extensive.

It is not an exaggeration to say that the integrity of the common law system is critically dependent upon the due observance of these overriding obligations. Recent cases in our criminal justice system vividly demonstrate how miscarriages of justice will arise if they are breached.

In international disputes these duties, which are or should be part of the DNA of a common law practitioner, sometimes conflict with different but equally ethical codes binding on opposing lawyers practising in other jurisdictions, and can lead to misunderstandings. There is to my mind an urgent need to develop a generic ethical code for advocates practising in this specialised field, to parallel the IBA's guidelines on evidence.

The English lawyer's duty to the court certainly puzzles some clients. They believe that the gun they have hired can shoot indiscriminately. But respect for these principles is fundamental to the trust which a tribunal can place in the advocate. In its turn, that respect and trust can only assist the client. An advocate who has lost the trust of the tribunal runs the serious risk of throwing away a convincing case. *Ethos* rules.

¹ Basic training consists of the handling of witnesses, including experts, and making oral and written submissions, including skeleton arguments. Advanced training will extend into examining vulnerable witnesses or non-English-speaking witnesses using interpreters, and more complex work with non-experts and experts.

In the practical presentation of cases, the techniques of oral advocacy show weaknesses as well as strengths. (I should say in passing that Aristotle discusses at some length whether, from a tactical point of view, it is better to start off by emphasising the strength of one's own case before attacking the weak points on the other side, or vice versa. I shall go for the strengths first.)

At a time when international and domestic tribunals are overwhelmed by a tsunami of long-winded written opening and closing submissions, the short oral opening and closing address is, in my view, an indispensable aid to understanding, on both sides of the table. Barristers brought up in civil litigation in the English courts expect and welcome constructive dialogue with the tribunal. An important tactic in the advocate's toolbox is to know how to get the tribunal to open its mind on the points in issue, the better to focus the advocacy. On the tribunal's side a hopefully polite conversation can subtly shut counsel down on matters it has already fully understood, cross-question them on points of genuine difficulty and steer them away from the atrociously bad ones.

The choice and presentation of witnesses in English courts and in most arbitrations falls to counsel rather than the tribunal. Civil code practice is not the same. According to the traditional common law approach, a party presenting a witness of fact is obliged to let that witness tell his or her own story. In our criminal courts that is still the rule. This is achieved by asking open questions: "What is your name?" rather than "Is your name X?", "Where were you on 10 January?" rather than "Were you in your office on 10 January?" and so on. Questions which put words into the witness' mouth—leading questions—may be objected to. They can certainly weaken the credibility of the witness on crucial parts of the evidence.

There is art and skill in handling evidence in chief. But, outside the criminal courts, getting your own witnesses to tell their own story at trial is, nowadays, a near impossibility. The practice has fallen into desuetude except in the very limited circumstances in which it is desirable to re-examine a witness on points arising out of cross-examination, or where, in a sensitive case, the tribunal requires an open examination in chief on some issues.

In the interests of saving hearing time, and to eliminate the element of surprise, witnesses of fact are now committed to statements drafted for them, sometimes at length, by the lawyers, and then filed with the tribunal in advance of the hearing. At the hearing the hapless witness confirms the "truth" of a statement which he or she would never have written, at least in those terms, and is then exposed to cross-examination by opposing counsel. In my experience, some witnesses resent this entire process. They have their own story to tell but the legal process gets in their way.

Tactically, and in the knowledge of this problem, the presenting advocate will always try to have some "supplemental" questions which need to be cleared out of the way, some points of "clarification" or perhaps "correction" which the witness would like to deal with first. But I still regard this process as tainted with artificiality. When the tribunal takes the lead in questioning, the barriers to getting witnesses to tell their story, and the whole story, would seem to me to be less formidable.

Cross-examination is a different matter. It is looked upon as one of the more conspicuous strengths of common law procedure when it is done well. The main purpose of cross-examination is to test and hopefully damage the case being presented by an opposing witness. A properly conducted cross-examination by opposing counsel, using well-prepared, short, clearly formulated and focused questions, is one of the best ways of testing to destruction a witness' evidence. Leading questions are the weapon of choice.

Moreover, in common law proceedings, cross-examination is not limited to the evidence which the witness has given in chief. A witness can be cross-examined on any matter relevant to his or her evidence, including for example documents and events to which they have not referred, previous inconsistent statements and the evidence of others. This can be very damaging to their credibility. One of the duties of counsel calling the witness is to foresee and, within the bounds of propriety, to protect him or her from these lines of attack.

But in some common law jurisdictions—for example in England and Wales—the right to cross-examine is complicated by the duty to put to each witness that part of the opposing case which is in conflict with the evidence of that witness. The jurisprudential basis for this rule is that the other side’s witness must be given a fair opportunity to comment on the case he or she has to answer. Thus, a failure “to put one’s case” in cross-examination may lead to objections, on the ground of unfairness, at the stage of closing submissions, and a refusal on the part of the tribunal to accept that part of the party’s case. In the US, advocates are not bound by this duty: see Atticus Finch’s closing submission to the jury in *To Kill a Mockingbird*, which still provokes outrage in the Inns of Court.

However the duty “to put one’s case” often ends up as a duty to beat one’s head against a brick wall. We have all seen terrible cross-examinations, and in some cases it is this very duty “to put one’s case” which is to blame. Cross-examination is bad when the questions are long-winded and convoluted; when they raise several questions at the same time; when they do not follow a logical, or chronological sequence; when they are disorganised; when they do not seem to be aimed at making any particular point; when they are conducted in a discourteous, bullying or hectoring style; and when they are deliberately designed to humiliate or confuse the witness. It is unfortunate that many arbitrators do not have the courage to stop them. Many professional judges are reluctant to intervene. More should do so.

Cross-examination seems to me to work particularly well, and is indeed indispensable, with expert witnesses. I am very sceptical about procedures under which expert evidence is procured and produced by the tribunal, however much liberty is given to counsel to cross-examine. Court-appointed experts in some jurisdictions may be chosen after discussion with the parties. In others, for example in Italy, they are simply recruited from a published list. Many of them have retired from day-to-day practice. The parties may be supported with advice from experts of their own; but it is difficult if not impossible to eradicate the suspicion that, however much counsel may shake his or her evidence, the court- or tribunal-appointed expert will decide the case, if not actually write the judgment or award.

Under the rules of court in England and Wales a judge may be assisted by a court-appointed expert, but the practice is unpopular and rarely invoked, for that very reason. Arbitrators may appoint an expert “assessor” to help them understand the evidence being given by opposing experts. A non-lawyer arbitrator may appoint a legal assessor to help on points of law; but I do not regard that as the same thing at all.

Absent a tribunal-appointed expert, advocates who are properly briefed by their own expert can conduct a much more challenging cross-examination, and are free to carry out a much wider range of investigations. They have the confidence to know that they are competing on level terms with the expert on the other side, and do not have to fear instinctive bias on the part of the tribunal.

This method also has, in my experience, a salutary effect on the experts too. They will know that their evidence is likely to be rigorously tested in cross-examination by a well-informed opposing counsel, and that it will not be accepted by the tribunal unless it is as watertight as it can be. They will, or should, take a great deal more care in the preparation of their report. Issues can be reduced and shortened, and points of controversy clearly identified. That can only benefit the process.

3. Conclusion

I turn finally to what I think has emerged as a serious weakness. Traditional techniques of witness-handling pose considerable operational difficulties in cases involving heavy documentation, including (obviously) international arbitrations. Complex documentation, which is frequently excessive and expensively produced, does not lend itself to efficient oral examination in chief or cross-examination. Too much time is spent in turning up or calling up the document. That is followed by excessive reading-out of extracts before the

question is put. It takes a lot of skill to ask a pointed question about a document without reading it out first.

In these heavily documented cases I believe that the common law approach to the handling of witnesses has reached the end of the road. There is a strong case in my view, in these instances, for requiring counsel not only to identify in advance the documents on which they are going to cross-examine but also to file the questions they plan to ask. This would not in my opinion derogate from the duty of counsel to put the client's case as forcefully as possible, but it would alleviate much of the burden and indeed tedium of an oral hearing.

Oral hearings serve an important purpose and many clients would be very unhappy if their cases were decided entirely on paper. But it is time, in my view, for common lawyers at least to recognise that some of our old practices do not always or adequately meet the demands of today's market.

The London Principles and their Impact on Law Reform

Janet Walker*

Abstract

Critical to the effectiveness of an arbitral seat is its arbitration law, a feature that, unlike the geographic location or the basic infrastructure, can readily be improved by legislators who appreciate the financial benefits of attracting international arbitrations. The forthcoming GAR–CI Arb Seat Index, which is based on the London Principles, will establish a reliable and accessible reference point for commercial parties to make wise choices of seats and for all to be aware of the relative strengths and weaknesses of seats on the world stage. It is hoped that this will provide the incentive to legislators to reform arbitration statutes where this is necessary.

1. Choosing the seat in international arbitration

Choosing the seat for the arbitration of disputes that might arise in a business relationship is a critical feature of sound dispute management. The seat of an arbitration—the legal system within which it will be conducted—is one of the most important features of the arbitration agreement. It sets the framework for the law governing the arbitration and the rights relating to challenges to and the enforcement of an eventual award. With the increasing use of international arbitration, there is heightened awareness of the importance of choosing a good seat in planning for arbitration, and a heightened awareness among those in potential seats around the world of the financial benefits of attracting arbitrations to them.

This article describes the global competition among centres to attract arbitrations, the growing awareness of the importance of choosing a seat wisely, and the significance of the national law to that choice. It also describes recent developments in this area including two key initiatives to establish standards for assessing the suitability of traditional and emerging seats (the London Principles) and to provide ready access to reliable assessments of the range of potential seats (the GAR–CI Arb Seat Index), and their potential to prompt law reform.

2. The global competition among arbitral seats

The options for effective arbitral seats were once limited, and contracting parties chose from among a few cities in Europe, but in recent years many alternatives have emerged and many centres have begun to compete for arbitrations.

One striking example of a traditional seat promoting itself to international business was the 2006 publication of the Law Society of England and Wales, “England and Wales: The jurisdiction of choice”.¹ The brochure contained a Foreword by the Secretary of State for Justice and Lord Chancellor, the RT Hon Jack Straw MP, in which he said:

“The Ministry of Justice is committed to supporting the legal sector’s success on the international stage. I am therefore delighted to introduce this brochure by the Law Society promoting England and Wales as the jurisdiction of choice for the resolution of disputes arising all over the world. Our courts, particularly those in London, play

* This article is based on the author’s contribution to a panel discussion at the CI Arb International Arbitration Conference 2017, Paris, 7–8 December 2017.

¹ Available at <<http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf>> accessed 13 March 2018.

host to many parties from overseas: at the specialised Commercial Court, a staggering 80% of cases involve a foreign claimant or defendant. Of course, that has a knock-on effect and the success of the legal services sector plays an unquantifiable role in helping London to maintain its position as a major centre for global commerce. This brochure sets out the reasons for our success and lets people know why it is in their own interests to use English law and to settle their disputes here.”²

This publication was released by the Law Society, but it was sponsored by leading London law firms.³ Indeed, the enthusiasm to promote a city as a seat of international dispute resolution, including through arbitration, is based on far more than civic pride; it is fuelled by a keen sense of the financial benefits of attracting international arbitrations and, ultimately, hearings to the seat. In the thirty-fifth Annual Donald O’May Maritime Law Lecture London, Gross LJ underscored the fact that the interest in promoting a seat is more than a matter of patriotism, and is an interest not limited to the legal profession. Lord Gross set out the relevant considerations as follows⁴:

“Let us be clear as to the figures⁵: the UK’s legal services sector contributes £25.7 billion to the UK economy, or 1.6% of gross value added. It generates £3.3 billion in annual export revenue. Such figures matter in themselves. They also bolster the attractions of the City as a financial centre—a mutually supportive process, in that there can be no realistic doubt that the strength of the City is a key driver for the attractions of English legal services.⁶ CityUK and LegalUK enjoy a symbiotic relationship.”

London is far from the only centre in which it is appreciated that there are benefits to it as a financial and commercial centre of attracting international dispute resolution. In launching Arbitration Place, the leading hearing facility and chambers for international arbitration in Toronto, the founders commissioned a study by the consulting firm Charles Rivers Associates (CRA) to measure the economic impact of arbitrations in the city. According to the study, “CRA estimated approximately 425 arbitrations will occur in Toronto in 2012 with an economic impact on the economy of \$256.3 million”.⁷

In an even more dramatic fashion, the promotion of Singapore and the commitment to pursuing international recognition as a “dispute resolution hub” for the region and beyond have been explicit policies of the Singapore Government for many years. Indeed, the recognition of the benefit to the local economy is such that it has garnered far more government support than an endorsement in an industry-sponsored publication as occurred in London. In 2017, it was announced that the local hearing centre at Maxwell Chambers would be expanded:

“In a bid to boost Singapore’s position as an international dispute resolution hub, the Ministry of Law is planning to triple the current size of Maxwell Chambers, which houses hearing facilities and top international arbitration institutions.”⁸

² See <<http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWales.JurisdictionOfChoice.pdf>> accessed 13 March 2018.

³ Eversheds, Herbert Smith and Norton Rose.

⁴ Gross LJ, “A Good Forum to Shop in: London And English Law Post-Brexit” available at <<https://www.judiciary.gov.uk/wp-content/uploads/2017/11/gross-lj-omay-maritime-law-lecture-20171102.pdf>> accessed 13 March 2018 (citations in original).

⁵ Taken from The City UK, *UK Legal Services 2016* (July 2016) <<https://www.thecityuk.com/research/uk-legal-services-2016-report/>> accessed 13 March 2018.

⁶ “The UK Maritime Sectors Beyond Brexit” University of Southampton Report (2017), Executive Summary, para 1.10.

⁷ Gregory Bell and Andrew Tepperman, “Arbitration in Toronto: An Economic Study” available at <<http://www.crai.com/publication/arbitration-toronto-economic-study>> accessed 13 March 2018.

⁸ Andrea Soh, “Singapore’s arbitration hub status to receive boost with Maxwell Chambers expansion” *Business Times* 5 January 2017 available at <<http://www.businesstimes.com.sg/government-economy/singapores-arbitration-hub-status-to-receive-boost-with-maxwell-chambers>> accessed 13 March 2018.

While the public-sector commitment to build local infrastructure and expertise in arbitral centres in other countries may be less pronounced, there is undoubtedly a growing recognition of the financial benefits of attracting arbitrations. This, in turn, is fuelling growth not only in established arbitral centres, but in newer centres around the world.

3. Selecting the seat wisely

The rapidly expanding range of choices for arbitral seats has been accompanied by a growing awareness among corporate counsel of the importance of an arbitral seat as a term in negotiating their contracts to maximise the value of their business arrangements. In a panel discussion at the CI Arb 2015 Hong Kong Conference on “How Seats are Chosen: An Inside View” senior corporate counsel explained the significance to their clients of the selection of the seat in an arbitration agreement.

According to Jun Hee Kim, then General Counsel of Hyundai Heavy Industries, the largest shipbuilder in the world, “It can be a deal breaking situation . . . in a case where there are other inherent risks with the project itself, and there is concern about what will happen . . .”.⁹ Daniel Desjardins, Corporate Secretary of Bombardier, the world’s leading manufacturer of planes and trains, echoed this sentiment:

“In public tendering [in] . . . our transportation world, we rarely have the choice of law. The public utilities will insist that their local law will apply. So our battle is mostly then: Can we have arbitration?; Can we have a seat in neutral ground? That’s key to us because at least, as I said, we will have the certainty of a fair hearing; and for us, choosing our battle as to applicable law and seat, obviously seat and neutrality would matter in that context.”¹⁰

Paul Bruno spoke as Managing General Counsel of Fluor, the largest engineering and construction company in the Fortune 500 rankings, which provides services in oil and gas, industrial and infrastructure, government and power. According to Mr Bruno:

“We do have the opportunity to negotiate within a dispute resolution clause, often the seat—or the substantive law . . . as a compromise. If in fact [the counterparty] is governmentally owned or has a large percentage of government-owned corporations such as in the Middle East or in certain countries in South America, the substantive law is a critical issue for those kinds of clients and they insist upon it. But the substantive law, keep in mind, usually governs the parties’ rights and obligations under the contract, but not always does it apply to disputes about the validity and formation of a given contract or portion, disagreements about arbitrability of a given issue, and some other kinds of disputes that may arise, which are usually the province of a seat. So the seat is very important to us.”¹¹

With a growing recognition of the importance of the seat and the range of options, the question for commercial parties is how to identify and evaluate the seats best able to support the arbitrations that might be needed in their business relationships.

⁹ Jun Hee Kim, General Counsel of Hyundai Heavy Industries, “How Seats are Chosen: An Inside View” 21 March 2015; programme available at <http://www.ciarbasia.org/Centenary_Celebration/> accessed 13 March 2018; transcript on file with the author.

¹⁰ Daniel Desjardins, Corporate Secretary of Bombardier, “How Seats are Chosen: An Inside View” 21 March 2015; programme available at <http://www.ciarbasia.org/Centenary_Celebration/> accessed 13 March 2018; transcript on file with the author.

¹¹ Paul Bruno Managing General Counsel of Fluor, “How Seats are Chosen: An Inside View” 21 March 2015; programme available at <http://www.ciarbasia.org/Centenary_Celebration/> accessed 13 March 2018; transcript on file with the author.

4. The significance of the national law

Before turning to the means for making a comprehensive assessment of the seat, it is worth considering the significance of the national law. The “seat” or “place” of the arbitration—its home—has long been recognised as far more than a place where the main evidentiary hearing might be held. Indeed, in many arbitrations, procedural meetings and evidentiary hearings are often held remotely or in places other than the seat when this is more convenient to the parties and the tribunal. Still, it is now widely accepted that the choice of seat has a range of potentially significant implications for supporting—or undermining—the effective and efficient conduct of the arbitration and the enforceability of the result. Central to this is the national law.

It is easy for busy arbitration practitioners, whose workdays are filled with challenging legal issues in cases in established seats, to lose track of the basic assurances on which they rely in conducting their arbitrations. Chief among these are the provisions of the national law. It has long been clear that the support for international arbitration set out in the New York Convention is achieved in practical terms only with the benefit of a clear and effective international arbitration law. That recognition led to the development by UNCITRAL of a model law that has since been adopted around the world.¹²

Among the many features of the arbitral process that can be determined by the national law, as exemplified by the UNCITRAL Model Law, are:

- the extent of court intervention (art 5);
- the form of the arbitration agreement (art 7);
- the obligation of courts to refer matters to arbitration (art 8);
- the process for constituting the tribunal and grounds for challenge to an arbitrator (arts 10–15);
- the power of the tribunal to determine its own jurisdiction (art 16);
- interim measures (arts 9, 17);
- the entitlement of the parties to be treated equally (art 18);
- the freedom to set the procedure (art 19);
- the freedom to choose the seat and the place for hearings (art 20);
- the freedom to choose the language of the arbitration (art 22);
- the requirements for written pleadings and hearings (arts 23–24);
- the conduct of default proceedings (art 25);
- the use of experts (art 26);
- the availability of court assistance (art 27);
- powers of arbitrators (arts 28–29);
- settlement (art 30);
- the form, validity and finality of an award (arts 31, 33); and
- the right to challenge an award (arts 34–36).

The features noted above are cited to the Model Law, but they are equally to be found in the national laws of other well-established seats. To be sure, the features of the national law are routinely supplemented by provisions in the arbitral rules chosen by the parties and the specifications that the parties make in their arbitration agreement. However, where the provisions of the national law are mandatory, they can have important implications for arbitrations seated in the jurisdiction.

In this regard, the explanatory note to the Model Law points out that lack of clarity and significant disparity in the national law have the potential to create fundamental obstacles to the successful conduct of arbitrations. These were among the most compelling reasons to develop the Model Law.

¹² The UNCITRAL Model Law on International Commercial Arbitration, available at <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 13 March 2018.

One notable example of the importance of clarity is the current restatement project by the American Law Institute concerning the international commercial arbitration law of the US.¹³ As the Institute's website explains:

“The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. ALI drafts, discusses, revises, and publishes Restatements of the Law, Model Codes, and Principles of Law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education.”

Under the direction of Reporter Professor George Bermann, and Associate Reporters Professors Catherine Rogers, Christopher Drahozal and Jack Coe the multi-year project is in its final stages of completing an authoritative work that “restates” the law in terms that improve its clarity and accessibility. On one view, the need for a restatement to achieve this result could be regarded as an indication of the lack of clarity in the statute. However, in all common law jurisdictions and many civil law jurisdictions, judicial interpretation forms an essential part of the law where it is based on legislation. Accordingly, with the Restatement in place, the arbitration law of the US could be assessed for clarity and efficacy with the Restatement as an integral feature. Similarly, the significance of judicial interpretation and its value to countries that have adopted the Model Law is demonstrated by the 2012 *Digest of Case Law on the Model Law on International Commercial Arbitration*¹⁴ published by UNCITRAL. This digest aims to present information on the interpretation of the Model Law in a clear, concise and objective manner.

Turning from the importance of clarity to issues with major disparities in the law, a recent example of a legislative development that has caused concern for international commercial arbitrations seated in the country is the amendment to art 257 of the UAE Penal Code to impose criminal liability on, inter alia, arbitrators, who issue decisions and opinions run contrary to the duties of impartiality and neutrality.¹⁵ The result of this amendment, coupled with the potential for sanctions for resigning from an arbitral appointment, is that it has become dangerous to serve as arbitrator in a matter seated in the UAE and many arbitrators are reluctant to accept appointments to do so.¹⁶ There are indications that, if this is not amended, it may lead to a practice of counsel agreeing to change the seat upon the emergence of a dispute before commencing the arbitration.

All in all, it may fairly be said that of the many important features that affect the quality of an arbitral seat, there is, perhaps, none so significant as the national arbitration law.

5. Introducing the London Principles

In 2015, for the Chartered Institute of Arbitrators' centenary year, a working group led by Lord Peter Goldsmith QC and CI Arb Companion, Professor Doug Jones AO, developed a series of ten principles (the London Principles) comprising the elements of a safe seat for international arbitrations. The working group included Judith Gill QC, Julian Lew QC, Constantine Partasides QC, Karyl Nairn QC, Toby Landau QC, Sir Vivian Ramsay, Wendy Miles QC, Peter Rees QC, Maxi Scherer and Audley Sheppard QC.

The Principles were developed to provide a balanced and independent basis for the assessment of existing seats and to encourage the development of new seats. At its London centenary conference, the Working Group introduced “The CI Arb Centenary Principles for a Safe Seat” and invited attendees to comment on the formulation and operation of the Principles.

¹³ See <<https://www.ali.org/projects/show/international-commercial-arbitration/>> accessed 13 March 2018.

¹⁴ See <<http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf>> accessed 13 March 2018.

¹⁵ Federal Law No 7 of 2016, in force 18 October 2016.

¹⁶ See <<http://www.tamimi.com/law-update-articles/changes-to-uae-penal-code-may-scare-arbitrators-away-and-international-businesses-with-them/>> accessed 13 March 2018.

The Working Group initially resisted the name “London Principles”. They were of the view that every seat could be improved, and that a broad-based analysis would indicate particular strengths in a range of seats that were worth emulating even in seats that were otherwise sound and frequently chosen. However, in the end, as the Principles were introduced at the CI Arb London conference, the name “London Principles” won out.

The London Principles¹⁷ comprise ten elements:

- an arbitration law providing a good framework for the process, limiting court intervention, and striking the right balance between confidentiality and transparency;
- an independent, competent and efficient judiciary;
- an independent, competent legal profession with expertise in international arbitration;
- a sound legal education system;
- the right to choose one’s legal representative, local or foreign;
- ready access to the country for witnesses and counsel and a safe environment for participants and their documents;
- good logistical support, including facilities for transcription, hearing rooms, document handling and translation;
- professional norms embracing a diversity of legal and cultural traditions, and ethical principles governing arbitrators and counsel;
- adherence to treaties for the recognition and enforcement of foreign awards and arbitration agreements; and
- immunity for arbitrators from civil liability for anything done or omitted to be done in good faith as an arbitrator.

Covering the full range of considerations that affect the ability of a seat to support the arbitral process and secure the enforceability of the result, the London Principles are coming to be relied upon to assist in the wise choice of a seat for arbitrations.

6. Introducing the GAR–CI Arb Seat Index

With the establishment of the London Principles, it is now possible to make a balanced assessment of the options among potential seats. However, there remains a practical need for an accessible body of information across the range of possible seats and a reliable source providing a comparative assessment on which to base a wise choice. To fill this critical gap, GAR is assisting with the development and maintenance of an index of the world’s arbitral seats based on the London Principles.

The index will be developed from information provided by the arbitration community around the world and subjected to careful analysis by an assessment panel and an advisory board in a rigorous process chaired by Lord Goldsmith QC and Professor Jones AO. For the inaugural year, the assessment panel is convened by Professor Janet Walker, CARb, and includes: Francisco González de Cossío (Mexico), Daniel Kalderimis (Wellington), Sae Youn Kim (Seoul), Lawrence Schaner (Chicago) and Nathalie Voser (Zurich).

The initial confidential analysis by the assessment panel is based on the submissions of members of the GAR community and the wider arbitration community pursuant to well-publicised invitations to contribute through a survey portal maintained by GAR. Contributors must identify themselves and their geographic base for data control purposes, but their identities remain confidential, even from the assessment panel, who see only the geographic bases from which the various submissions are made.

¹⁷ CI Arb London Centenary Principles, available at <<http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-principles.pdf?sfvrsn=4>> accessed 13 March 2018.

Contributors are invited to provide comments with specific examples of the strengths or challenges faced in respect of any of the principles in the seat on which they have chosen to respond. These may include key features and notable developments that enhance or detract from the effectiveness of international arbitration in a particular seat in relation to the Principles. The initial assessment for each seat is conducted by a rotating group of a three-member Assessment Panel. The Panel draws on the information provided in the survey results, discounting any purely subjective impressions (eg “great arbitration law”) and irrelevant observations (eg “fantastic night life”) and supplementing, where necessary, available information and direct experience in areas in which responses are lacking or deficient. Should the panel members lack sufficient information to assess a seat in respect of a particular principle, they are instructed to refrain from doing so.

The initial analysis yields a report for each seat based on the assessment of the three-person panel that is then reviewed by members of the advisory board. It is expected that the requirement that contributors identify themselves, together with the natural enthusiasm for participation among persons who have an interest in the success of a particular seat, will have the effect of emphasising the positive qualities of a seat and de-emphasising any features that may detract from its effectiveness in supporting arbitration. It is the role, therefore, of the advisory board to provide a sober second look at the reports, supplementing missing information with their own experience in arbitrations in the seats assessed and suggesting any adjustments that they consider appropriate to the assessments. The members of the inaugural advisory board are: Yves Derains, Hilary Heilbron, Michael Moser, Peter Rees, John Townsend, and Carita Wallgren-Lindhomm. Following the advisory board review, the reports and recommendations are then ready for review by the co-chairs.

While the granularity necessary for a rigorous multi-factorial internal assessment warrants the use of a numbered rubric, the final comprehensive assessment is neither mathematical nor in the form of a ranking. Rather, the assessment assigned to each seat is based on a format similar to the well-known country credit ratings as follows:

- AAA—Highly desirable;
- AA—Desirable;
- A—Generally desirable;
- BBB—Reliably supportive of the process and the result;
- BB—Generally supportive of the process and the result;
- B—Supportive in some respects of the process and/or the result;
- CCC—Some risk to the process and/or the result;
- CC—Moderate risk to the process and/or the result;
- C—Substantial risk to the process and/or the result;
- D—Not recommendable.

In the inaugural year, six leading seats will be assessed: Hong Kong, London, New York, Paris, Singapore and Switzerland (comprising Geneva and Zurich). More seats will be added in coming years. These seats were chosen for assessment in the first year on the basis that they are among the best known and most frequently selected seats.

It is important in the inaugural year to establish a credible baseline of results in which the distinctive features of seats—their strengths and challenges—will be familiar to many of those viewing the assessments. In this regard, it is intended that the “news” in the results will relate more to the way in which the index operates than to the particular results it produces, and it will be easiest to see this with seats that are more familiar to the wider international arbitration community.

This will set the stage in the years ahead to highlight the qualities of other seats—in many cases, newer, smaller and less-well-known seats, many of which will have features that compare favourably with or exceed the standards set by this initial group in relation to particular principles.

In early public discussions of the index, there has been an interesting divide among persons closely associated with seats that have yet to be included among those reviewed. On the one hand, there has been an eagerness to be included in the process by those who anticipate that wider publicity for the strengths of the seat in question will attract more arbitrations to it. On the other hand, there has been concern on the part of those anxious that a lower overall rating than more popular seats will slow the trend of increased use of the seat that may support improvements.

The need to introduce seats into the process on a staged basis has already been discussed. As for exempting from assessment seats that might receive a lower rating, the reasons for resisting this impulse are threefold. First, the index is ultimately designed to serve the needs of commercial parties and arbitration practitioners in making wise choices that best suit their own needs. It is unreasonable to assume that, in the hands of increasingly sophisticated businesses and their advisors, this information will not be factored into the broader context of the particular local and regional interests of their operations and their dispute resolution needs. Secondly, the inexorable trend in the world of international arbitration to greater and greater transparency undermines any justification for concealing or camouflaging faults and deficiencies in arbitral seats. Thirdly, and perhaps most significantly, as the local businesses and governments in a seat increasingly appreciate the value of attracting arbitrations to them, a balanced and broad-based index of seats that highlights areas of potential improvement provides those who are in a position to support improvements with the necessary drive and impetus to do so.

Significantly, these rationales are applicable to all seats, from those that aspire to attract their first international arbitrations to those that have led the field for decades or centuries. While in the early years, members of the international arbitration community will look forward to the initial ratings accorded to each seat included, it is anticipated that, ultimately, it will be the way in which the ratings of developing and well-established seats are adjusted in response to positive and negative developments that will be of interest to users of international arbitration.

7. The impact of the London Principles on law reform

The national arbitration law is among the most central factors in determining the strength of a seat and among those factors whose improvement is most readily achievable. In places where legislators have not yet seen the financial benefits of competing for international arbitrations and in relation to this, the need to place legislative reform in this area high on the agenda, the local international arbitration community may struggle to make the case for it. The development of the GAR–CI Arb Seat Index based on the London Principles seeks to establish a reliable and accessible reference point for commercial parties to make wise choices of seats and for all to be aware of the relative strengths and weaknesses of seats on the world stage. Where an index rating can be improved by law reform, it is hoped that these initiatives will provide the necessary impetus to pursue it.

Cases

“Arbitration? We Had No Idea!”

Ekaterina Sjöstrand

Abstract

This article deals with the concept of “proper notice” of arbitration proceedings within the meaning of the Arbitration Act 1996 s 103(2)(c) and the wider notion of natural justice. There used to be very little English law authority in relation to this concept and the position was unclear. *Zavod Ekran v Magneco Metrel* has shed light on this point. The court has helped crystallise the definition of “proper notice” and provided useful guidance. In particular, “in the context of international commerce, the fact that notice of an arbitration was received in England in a language other than English should not, in itself, affect the validity of the notice” (but might do in some circumstances).

1. Introduction

Until recently, there was very little authority under English law in relation to notices in the context of international commercial arbitration, that is, what would amount to a “proper notice” of commencement of arbitration proceedings, appointment of arbitrators and other steps in the process, what sort of criteria should apply, which defects would render any such notice invalid and so on. The issue was only briefly touched upon in some specialist textbooks (such as Merkin’s *Arbitration Law* and Born’s *International Commercial Arbitration*).¹ In *Zavod Ekran v Magneco Metrel*,² the Commercial Court considered this concept and provided a detailed analysis and useful guidance.

This case deals with a challenge to the enforcement of an arbitration award pursuant to the Arbitration Act 1996 s 103(2)(c) and CPR 62.18(9) where the court earlier granted the claimant leave to enforce the award against the defendant pursuant to the Arbitration Act 1996 s 101(2) and entered judgment against the defendant in the terms of the award pursuant to s 101(3).

2. Background

In November 2016, Zavod Ekran, an open joint stock company incorporated in Russia and situated in Novosibirsk, Russia (Ekran, the claimant), started proceedings in the High Court³ in London in order to seek recognition and enforcement of an award made in Moscow, Russia, by an arbitration tribunal under the auspices, and in accordance with the Rules, of the International Commercial Arbitration Court at the International Chamber of Commerce and Industry of the Russian Federation (the ICAC).

The claimant, Ekran, is one of the leading and largest manufacturers of glass containers in Siberia. It is a manufacturing plant with a long history which goes back to 1954. The defendant in the proceedings was Magneco Metrel UK Ltd (also known as Magneco/ Metrel UK Ltd), a UK company based in Shildon, Co Durham (Magneco Metrel, the defendant). It is a daughter company of Magneco/Metrel Inc, a US company with its headquarters in

¹ Robert Merkin, *Arbitration Law* (looseleaf, Informa); Gary Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2014).

² *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm); [2017] All ER (D) 07 (Sep).

³ Queen’s Bench Division, Commercial Court.

Addison, Illinois; it is a manufacturer of speciality refractory products which are used in industries including the glass industry.

At the heart of the dispute there was a sale and purchase contract entered into between Ekran and Magneco Metrel on 30 April 2013 whereby Magneco Metrel had agreed to supply to Ekran certain refractory products for the purposes of repairing a furnace (the Contract). The contract was written in both Russian and English. Clause 10 of the Contract provided for disputes to be referred to arbitration at the ICAC and for Russian law to be the governing law of the Contract. In full, it read as follows (verbatim):

“10. **Arbitration.**

- 10.1 All disputes and discrepancies arising during the fulfilment of this Contract will be resolved as far as possible by negotiations between parties. Should the parties not negotiate, the matter should be transferred with the exception of general courts jurisdiction to the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry under the Russia law.
- 10.2 The parties agree that during the settlement of disputes the Rules of the International Commercial Arbitration Court at Russia’s Chamber of Commerce and Industry and the substance of Russia shall be applied.
- 10.3 The Contract shall be governed by the laws of Russia.
The place of arbitration—Moscow, Russia.
The language of arbitration—Russian.
- 10.4 In all other cases not stipulated in this Contract the parties are governed by Russia law and International regulations of interpretation of Incoterms 2010.
- 10.5 The Arbitrage award is final and obligatory for both parties.”

Soon after the products were supplied by Magneco Metrel and used by Ekran for the repair of the furnace, a dispute as to their quality arose between the parties. The problem was that the concrete wall of the repaired furnace had shown signs of damage and in November 2014 there had been a massive leak of molten glass. Therefore, Ekran alleged that the supplied products were of poor quality and that, as a result, the counterparty was liable in damages for breach of contract. Magneco Metrel disagreed.

The ensuing dialogue between the parties with a view to finding common ground and achieving a settlement produced no result, and on 22 December 2015, Ekran referred the matter to the ICAC pursuant to cl 10 of the Contract. Subsequently, an ICAC arbitration tribunal consisting of three arbitrators was appointed in accordance with the ICAC Rules on 24 May 2016 (the Tribunal).

Pursuant to the ICAC Rules, service of the arbitration documents (such as the claim form and the supporting documents, various notices and so on) was effected by the ICAC Secretary. Evidence of service was subsequently scrutinised by the Tribunal itself in the course of the arbitration hearing (as was reflected in the award made by the Tribunal). It was also among the key documents submitted by Ekran in evidence in the English (enforcement) proceedings. In the award (considered in more detail below), the Tribunal expressed a view that the ICAC Rules had been complied with properly.

According to the defendant, it “received in January 2016 approximately 150 pages ... in Russian ...”; this was a reference to the arbitration claim form and the supporting documents with a cover letter from the ICAC dated 14 January 2016. However, subsequently (in the English proceedings) the defendant complained that it had not understood the meaning and significance of these documents because they were all in the Russian language, save for (i) the heading of the above letter which specifically stipulated, prominently and in English, “International Commercial Arbitration Court at the International Chamber of

Commerce and Industry of the Russian Federation”); (ii) the defendant’s name which was also in English.

It should be reiterated, at this juncture, that the Contract expressly provided for arbitration under the auspices of the ICAC and for the language of arbitrations under its auspices to be Russian by default (unless the parties expressly agree otherwise). Furthermore, the ICAC Rules art 23 provides that the language of arbitrations under its auspices is Russian by default.

The defendant took absolutely no part in the ICAC arbitration proceedings. Nor was there any contact or communication between the parties in the course of the arbitration, save for the claimant’s letter to the defendant dated 10 February 2016 expressing a continuing interest in achieving an amicable settlement.

The ICAC arbitration hearing took place in Moscow on 26 May 2016. The claimant’s legal representatives attended the hearing. On 13 July 2016, the Tribunal produced a detailed award awarding the claimant damages for breach of contract in the sum of US \$270,233 (€3,743.28 and Roubles 54,955,310.89) plus costs (the Award).

By letter of 15 July 2016, the ICAC sent the Award to the defendant via DHL. On 22 July 2016, the claimant also informed the defendant of the Award by email and on 16 August 2016 provided the defendant with an English translation. There was no response from the defendant. Subsequently, it tried to explain its silence stating that “... it did not seem to us like a legitimate procedure had taken place”.

As a result, the claimant started the above-mentioned *ex parte* proceedings pursuant to the Arbitration Act 1996 (the 1996 Act) s 101(2) and s 101(3) for enforcement of the Award. Indisputably, the Award was a New York Convention award within the meaning of the 1996 Act s 100. On 16 January 2017, Males J granted leave (i) to enforce the Award and (ii) to enter judgment in the terms of the Award, and also granted the claimant its costs of the application (the Order).

On 7 February 2017, the defendant served the claimant with an Application Notice seeking to set the Order aside pursuant to the grounds according to the 1996 Act s 103(2)(c), (d) and (e). Following this, there was an intense exchange of evidence between the parties, by way of witness statements and various other supporting documents.

Further, on 25 April 2017, the defendant started parallel proceedings in the Moscow Arbitrazh (Commercial) Court (ie a Russian state court) in order to appeal the Award (the Russian proceedings), as became evident from a witness statement made by the defendant’s Russian lawyer filed in the English (enforcement) proceedings on 19 May 2017. From the outset, limitation of action was a considerable issue for the defendant/applicant in the Russian proceedings because according to the Arbitrazh Procedure Code of the Russian Federation art 230(4), an application to annul the decision of a third-party tribunal (such as the ICAC) ought to be made within three months from the receipt by the applicant of the tribunal’s decision, save as otherwise provided by a federal law or an international treaty to which the Russian Federation is a party. The Russian proceedings were dismissed by the Moscow Court on 5 June 2017 on the ground that the defendant’s lawyers lacked authority for representation at court. Though it was, technically speaking, open to the defendant to rectify the procedural error and re-issue the Russian proceedings, it chose not to do so. The Russian proceedings came to an end.

3. The Commercial Court hearing on 9 June 2017

Shortly before the hearing in the English (enforcement) proceedings, the defendant abandoned the grounds under the 1996 Act s 103(2)(d) and (e). Thus, the entire case was narrowed to the ground under the 1996 Act s 103(2)(c), ie that the defendant was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case. The hearing in the Commercial Court (QBD) took place on 9 June 2017.

Reflecting on the key (and only remaining) issue in the case, Blair J considered the relevant law⁴:

“There is little English authority as to the meaning of ‘proper notice’, but in context, it is an aspect of the wider notion that the party contesting enforcement was unable to present its case (Merkin, *Arbitration Law*, §19.53), so that lack of proper notice suggests some unfairness (*Russell on Arbitration*, 24th edn, §8-040: and see generally *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 327, *Irvani v Irvani* [2000] 1 Lloyd’s Rep 412 at 426, *Kanoria v Guinness* [2006] 1 Lloyd’s Rep 701 at [23]). In the context of s. 103(2)(c) Arbitration Act 1996, ‘*proper notice*’ is such as is likely to bring the relevant information to the attention of the person notified, taking account of the parties’ contractual dispute resolution mechanism, including any applicable institutional arbitration rules (as to the relevance of the latter points see Born, *International Commercial Arbitration*, 2nd edn, p 3509). In this sense, notice is treated by the court as a question of fact (as in *LKT Industrial Berhad (Malaysia) v Chun* [2004] NSWSC 820), the onus of proof being on the party raising it as a ground of refusal of enforcement of the award, as expressly specified in s. 103(2) Arbitration Act 1996.”(Citations in original. Italics added.)

Thus, the court has clearly (and very helpfully) set out the test for “proper notice” in the context of the 1996 Act s 103(2)(c) (as in italics in the above extract). This is what the court will go by in its reasoning (as indicated below).

The judge took a broad approach to the issue of notice, analysing not only the key documents going to the heart of the dispute, their language and mode of service, but also all the relevant surrounding circumstances such as the pre-arbitration exchange of correspondence between the parties, in order to ascertain whether or not the defendant had had any prior notice of commencement of the ICAC arbitration. Hence, at the hearing the claimant sought to rely on a letter (in Russian) dated 20 July 2015 sent to the defendant. This letter was significant because of an express threat of arbitration contained therein. The claimant’s General Director Mr Boboshik wrote as follows (according to the English translation provided to the court):

“In case of a full or partial refusal to satisfy this demand within the specified time-frame we shall have no choice but to bring a claim for refund of the money paid for the goods of unsatisfactory quality, damages and legal costs, in the International Commercial Arbitration Court under the auspices of the Chamber of Trade and Industry of Russia in accordance with the established procedure.”

The letter was produced at the last minute at the hearing and the court expressed dissatisfaction, directing that an affidavit be filed by the claimant “as to the provenance of the letter”. Accordingly, the affidavit was filed on 16 June 2017 exhibiting, among other papers, the courier documentation. Blair J subsequently commented in his judgment⁵ that it “appears to show that the letter was indeed received by D in England, as well as by D’s head office in Illinois, and by Mr Edward Goncharov, a Russian speaker said to be D’s area manager in St Petersburg”. Further, “the evidence also shows a letter proposing a settlement signed by Mr Goncharov dated 18 August 2015 which could be a response to the letter of 20 July 2015, though it is not referred to (nor is arbitration)”⁶. However, the court doubted that, since the ICAC arbitration was commenced much later the same year (ie on 22 December 2015), the letter of 20 July 2015 would be particularly helpful in countering the defendant’s assertion that it did not receive proper notice of the arbitration. Indeed, it is stated that “a feature of the case is that there is not the kind of chain of correspondence

⁴ *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [12]; [2017] All ER (D) 07 (September).

⁵ *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [15]; [2017] All ER (D) 07 (September).

⁶ *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [16]; [2017] All ER (D) 07 (September).

between the parties with threats of arbitration culminating in express notice that the dispute is about to be referred to arbitration that one might normally expect”.⁷

The court proceeded to focus on the actual documents sent by the ICAC to the defendant, the claim form and its enclosures (altogether in the region of 150 pages) being “the most important part of the evidence in this respect”. It had no difficulty in accepting that on 15 January 2016, the defendant had received at its office in Shildon those key documents together with the ICAC’s cover letter of 14 January 2016 (the Cover Letter):

“The receipt is evidenced by the documentation issued by the courier, DHL ... which shows that the shipper was ‘Commercial Arbitration Court’ in Moscow, and the ‘proof of delivery/statement of final status’ sent to its customer (i.e. ICAC) dated 28 January 2016. According to the latter document, the package was signed for by the receiver (i.e. D), the name of an individual being given. There has been no suggestion made by D that it was not signed for, and it clearly was.”⁸

However, the defendant submitted that as the above-mentioned Cover Letter was almost entirely in Russian and no translation had been provided, there had been no “proper notice” within the meaning of the 1996 Act s 103(2)(c). Therefore, it was not notified of its right, in accordance with the ICAC Rules, to appoint an arbitrator and a reserve arbitrator within 15 days and to file a defence within 30 days. Trying to explain why it took no action to ascertain the contents of what looked like a hefty formal package, the defendant submitted that it had thought that the documents reflected, yet again, the claimant’s “earlier and unfounded complaints”. The court expressed a doubt “as to the credibility of this explanation”.⁹

The court proceeded with the analysis of the Cover Letter:

“[It] is in Russian, the heading is in English. It states in English that it comes from the ‘THE INTERNATIONAL COMMERCIAL ARBITRATION COURT AT THE CHAMBER OF COMMERCE AND INDUSTRY OF THE RUSSIAN FEDERATION’. Additional wording in English says that this body was, ‘Founded in 1932’ and a ‘Member of the International Federation of Commercial Arbitration Institutions (IFCAI)’. The address at the bottom of the letter is in Russian and in English, but the email address in both includes the English word ‘arbitration’.”

Furthermore, the court noted that it was perfectly open to the defendant to have the Cover Letter (which was quite brief, only one page) translated into English but it chose not to do so.

In addition to the matters discussed above, the claimant made further submissions in support of its position that the fact that the notifications were in Russian did not invalidate notice of the ICAC arbitration, namely:

- It was obvious that the documents sent to the defendant were formal documents, ie they had been sent by courier and required a signature on receipt.
- The defendant’s Mr Edward Goncharov (Regional Director of the defendant), a native Russian speaker, was closely involved with the dealings between the parties from an early stage, before, at the time of and after the ICAC arbitration. He actively participated in verbal and written discussions between the parties and was copied onto the relevant emails. Through Mr Goncharov (at least), the defendant ought to have appreciated the nature of the documents.
- The Contract (ie the form) was provided by the defendant to the claimant. It was believed to be a standard form used by the defendant in its dealings with its Russian counterparts.

⁷ *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [17]; [2017] All ER (D) 07 (September).

⁸ *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [18]; [2017] All ER (D) 07 (September).

⁹ *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [21]; [2017] All ER (D) 07 (September).

Also, the claimant submitted, by reference to an extract from Born,¹⁰ that:

“... consistent with the parties’ procedural autonomy courts virtually never accept arguments that use of language specified in the arbitration agreement ... was procedurally unfair ... Courts ... have reasoned that a party which cannot understand the language of the arbitration can, and should, arrange for translations.”

The claimant went on to argue that the approach proposed by the defendant would undermine the entire enforcement regime of arbitration awards under the New York Convention. For example, applying the same logic, it would be open to Russian courts to refuse to enforce awards made in arbitrations conducted in English on the ground of language difficulties by Russian parties, even where the parties have specifically agreed to English as the language of the arbitration (the same scenario as in the present case, where the parties specifically agreed to Russian as the language of the arbitration). In short, it would open a can of worms and land enforcement of arbitration awards on very slippery ground.

4. The court’s decision

The court held, applying the above-mentioned test for “proper notice”, that the defendant was “(i) given proper notice of the appointment of the arbitrators, (ii) given proper notice of the arbitration proceedings, and (iii) was otherwise able to present its case in the arbitration”.¹¹ Blair J reasoned as follows:

“In the context of international commerce, the fact that notice of an arbitration is received in England in a language other than English should not in itself affect the validity of the notice, though it may do so, depending on the circumstances. It is easy to envisage some circumstances in which it would not amount to proper notice.

However, such circumstances do not obtain in this case. It is relevant in this regard that the parties entered into a Contract providing for arbitration in Moscow under Russian law through the ICAC, that at least some of the communications between the parties were in Russian, and that a dispute had arisen between the parties as to performance of the Contract in Russia (albeit D says that the dispute was quiescent). Further, as C points out, the Contract provides that the language of the arbitration was to be Russian. However, the most important point from a practical perspective is that the heading of the letter of 14 January 2016, in English, states that it comes from the Moscow arbitration body—the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. As C submits, from that alone it should have been obvious that an arbitration was being commenced. There was no other reason for ICAC to be writing to D.”¹²

Applying the above-mentioned test, the judge concluded that the Cover Letter was “clearly likely to bring the relevant information to the attention of the person notified”¹³ and, therefore, the defendant was given proper notice of the arbitration proceedings.

This also deals with “proper notice” as regards the appointment of the arbitrator and reserve arbitrator, the arbitration hearing in Moscow and an invitation to make submissions as to costs. The defendant’s sole objection was that the above letters (dated 9 March 2016, 24 May 2016, 30 March 2016 and 30 May 2016) sent by the ICAC were in Russian. Those letters bore a resemblance to the Cover Letter in that they had the same headings. They

¹⁰ Gary Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2014) 1315–1316.

¹¹ *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [33]; [2017] All ER (D) 07 (September).

¹² *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [24] and [25]; [2017] All ER (D) 07 (September).

¹³ *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [26]; [2017] All ER (D) 07 (September).

were also delivered to the defendant by DHL. The court, unsurprisingly, held that it would have been equally reasonable for the defendant to arrange for them to be translated but it failed to do so. Equally, in this regard, it could not be accepted that the defendant “was not given proper notice of the appointment of the arbitrator” under the 1996 Act s 103(2)(c), and that “[t]here was no breach of natural justice in this case”.¹⁴

5. Conclusion

The judge did, however, express a certain amount of criticism, stating that the claimant:

“could have done more to alert [the defendant] to the commencement of the arbitration. It may also fairly be said that ICAC itself could have done more to explicitly flag in the English language the importance of dealing with its notifications, since the letters were sent to and received in England.”¹⁵

However, on the facts of the present case “the overall conclusion is not open to doubt”. As a result, the defendant’s application was dismissed.

The case would seem to highlight, at the very least, two key practical points. First, from a defendant’s viewpoint, the requirement of dealing with anything that bears the hallmarks of a formal document and/or notification in the context of an unresolved or ongoing dispute/controversy. Such documents must not be ignored, even if they are in a foreign language. This no doubt concerns all forms of dispute resolution but would appear to be particularly relevant where the parties have specifically agreed to refer their disputes to arbitration. In those cases, particular attention should be paid to the language and seat of the arbitration chosen by the parties (as per the arbitration clause), the governing law of the contract itself and the relevant arbitration rules applicable to the dispute, as it is against this background that “proper notice” would be primarily scrutinised.

Secondly, from a claimant’s viewpoint, thought should be given to whether it would be prudent to provide at least a basic alert in the defendant’s native language of commencement of arbitration proceedings against it. Quoting from the above decision:

“the fact that notice of an arbitration is received in England in a language other than English should not in itself affect the validity of the notice, though it may do so, depending on the circumstances. It is easy to envisage some circumstances in which it would not amount to proper notice.”

It is a pity, perhaps, that the court did not elaborate on this last scenario. However, the case contains much useful guidance on the point of “proper notice” generally and gives considerable food for thought.

¹⁴ *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [30]; [2017] All ER (D) 07 (September).

¹⁵ *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) [33]; [2017] All ER (D) 07 (September).

Book Reviews

The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States, by Reyadh Mohamed Seyadi, (Cambridge Scholars Publishing, 2017), 243 pp, £61.99, ISBN: 978-1-4438-9577-4.

This book fills a gap in the literature on arbitration in the Middle East. As its title suggests, it deals with the recognition and enforcement of foreign arbitral awards in the Gulf Co-operation Council (GCC) countries¹ under the New York Convention on the recognition and enforcement of foreign arbitral awards, done in New York, 10 June 1958. The New York Convention will be known to readers as the leading international enforcement instrument for foreign arbitral awards in the world. The New York Convention has been ratified by and has entered into force in all GCC countries. It therefore plays a defining part in the recognition and enforcement of foreign (and in particular Convention) awards before the GCC courts.

To the best of my knowledge, this book is the first of its kind. Before its publication, discussions on the subject were invariably confined to journal articles or individual chapters on recognition and enforcement in collective works on arbitration in the Middle East. The text provides a systematic analysis of the subject and provides a comprehensive insight into the state of law on recognition and enforcement in the GCC. On thornier issues, such as the Islamic Shari'ah and its role in daily enforcement practice, the reader is provided with reliable guidance across the jurisdictions.

Before delving into the heart of the subject matter, the book provides a background for discussion. Chapter 1 provides a general introduction, explaining inter alia the main terms and objectives of the New York Convention. Chapter 2 discusses the legal framework for international commercial arbitration and the New York Convention more generally. In doing so, the chapter examines in some detail the obligation imposed on Convention States to recognise arbitration agreements within the meaning of the Convention and the legal effects of valid arbitration agreements under the Convention. The chapter also explores the limits of the principles of separability and competence-competence, party autonomy and choice of laws to the extent relevant to the enforceability of arbitration agreements under the Convention. Chapter 3 places the discussion into a GCC context, tracing the history of arbitration in the GCC states, investigating the role played by arbitration in Islamic law and exploring the GCC's arbitration experience to date.

Chapters 4 to 6 form the heart of the publication. Their focus is on recognition and enforcement under the New York Convention in three core GCC jurisdictions with particular experience in the field, namely Qatar, the UAE and Saudi Arabia. Needless to say, the Saudi experience stands out for being devoutly Shari'ah compliant, concepts such as *riba* (usurious interest) and *gharar* (uncertainty) informing the limits of the practice of arbitration as well as recognition and enforcement there. It will also hardly come as a surprise that recognition and enforcement are still comparatively recent phenomena in the GCC and as such—given the lack of practice in dealing with them—fraught with some procedural difficulties. That said, of these three jurisdictions, the UAE are arguably the most enforcement friendly² (although this is not a view shared by the author, who finds that the laws on enforcement

¹ Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates (UAE).

² The UAE having demonstrated a consistent enforcement practice under the New York Convention from 2010 to date (bar some minor exceptions: see Case no 156/2013, *Canal de Jonglei*, Dubai Court of Cassation's ruling of 18 August 2013, which introduced a domicile criterion into the UAE's enforcement practice by reference to the New York Convention art III).

of Qatar and the UAE are in urgent need of reform given the prolonged validation process prevailing in those two jurisdictions). Chapter 7 concludes with the author's suggestions for reform. The book contains the usual front and end matter, apart from an index (although the table of contents makes the content of the book sufficiently navigable).

Overall, the book is well researched and well written and provides clear and concise guidance on the recognition and enforcement of foreign arbitral awards under the New York Convention in the GCC countries. I would not hesitate to recommend it to both practitioners and academics with an interest in the field.

Gordon Blanke

Building International Investment Law: The First 50 Years of ICSID, by Meg Kinnear (ed.), Geraldine R. Fischer (ed.), Jara Mínguez Almeida (ed.), Luisa Fernanda Torres (ed.) and Mairée Uran Bidegain (ed.), (Wolters Kluwer, 2016), 723 pp, US \$263, ISBN: 978-9-0411-6133-8.

Building International Investment Law was published on the occasion of the fiftieth anniversary of the International Centre for the Settlement of Investment Disputes (ICSID). The volume presents key principles of international investment law and how these operate in dispute resolution under the 1965 ICSID Convention. ICSID has become the world's leading investment arbitration facility, having generated a caseload of over 550 cases since its foundation in the 1960s. The present publication is unique in that it explores the positive law applicable under the Convention through the lens of landmark ICSID case law precedents.

The key areas discussed include (1) interpretation; (2) jurisdictional thresholds (including, for instance, the nationality requirement, the notion of investment, the Convention meaning of "foreign control", conditions precedent to arbitration and the consent of States to arbitration); (3) the standards of protection under the Convention and international investment instruments more generally (such as the minimum standard of treatment, fair and equitable treatment, full protection and security, indirect expropriation, national treatment and most-favoured nation treatment); (4) exceptions and defences (such as the consequences of corruption, the exercise of the host state's police powers, the necessity defence); (5) valuation and cost considerations (including, for instance, valuation standards in the assessment of damages, the impact of contributory investor conduct, allocation of costs and security for costs); and (6) core procedural matters (such as the role of dissenting opinions, consolidation and parallel proceedings, interim measures, conflicts of interest, transparency in investment arbitration, the role of *amici curiae* and the ICSID annulment process).

This publication will prove particularly useful for those who do not have much of a background in international investment law and its application under the ICSID Convention. That said, the analysis also contains tips for the more seasoned practitioner, who will find pleasure in reading various chapters for a brief refresher or to contextualise relevant case law on a specific subject. The contributions are drafted with the evolution of ICSID case law precedent over time in mind and therefore serve particularly well as refreshers. For the avoidance of doubt, each of the contributors has relevant experience in investment arbitration, whether as a scholar or a practitioner in the field. The editorial team, spearheaded by Meg Kinnear, the current Secretary General of ICSID, hardly needs any introduction.

As one would expect, the publication contains the usual front and end matter and lends itself to reading from cover to cover or for research on specific aspects of the practice and procedure of international investment arbitration. I recommend it without reservation.

Gordon Blanke

Commentary on the UAE Arbitration Chapter, by Gordon Blanke, (Sweet & Maxwell, 2017), 372 + lxi pp, £159, ISBN: 978-0-41-405942-9.

The United Arab Emirates is a civil law jurisdiction whose laws are drafted in Arabic and whose court system operates in Arabic. Given this, it might be surprising to an outsider that there is a robust market of non-Arabic-speaking, often common-law-trained, lawyers who advise on, advocate before, and adjudicate various disputes in the country. This is not simply due to the prevalence of various so-called “offshore” dispute resolution options (including the Dubai International Financial Centre and the Abu Dhabi Global Market, both as options for litigation and as arbitral seats); international counsel also routinely advise on so-called “onshore” arbitrations, namely arbitrations seated in Dubai, Abu Dhabi or even Sharjah.

Despite the multitude of expatriate lawyers who advise on UAE-seated arbitrations, an English-language UAE-equivalent to *Russell on Arbitration*¹ or Merkin’s *Arbitration Act 1996: An Annotated Guide*²—both well-known texts on arbitration in England—is lacking. Dr Blanke has done his part to rectify this, with his efforts taking multiple forms. In 2014, Dr Blanke produced a digital publication (available on Westlaw Gulf) entitled *Annotated Guide to UAE Arbitration*.³ His most recent effort—and the subject of this review—is a hardback publication (going against the general trend of digitisation) entitled *Commentary on the UAE Arbitration Chapter*.

In exploring the significance of Dr Blanke’s work, it is helpful to set out the context of the legislative regime governing onshore arbitration in the UAE. As of the submission of this review (December 2017), there is no stand-alone arbitration legislation in the UAE (leaving aside the distinct arbitration regimes in the Dubai International Financial Centre and the Abu Dhabi Global Market). Rather, the UAE’s arbitration law can be found in around twenty articles within the UAE Civil Procedure Code, the majority of which can be found in a section often called the “Arbitration Chapter”.⁴ Particularly for those used to arbitration legislation based on the Model Law, the Arbitration Chapter may feel unfamiliar and even unclear in parts. Indeed, the laws were enacted well before the UAE acceded to the New York Convention.

In this regard, Dr Blanke’s *Commentary* is not just an annotated statute: it also fills a real need for a “user’s guide” to arbitration in the country. The book primarily consists of two parts. Part I provides an overview of arbitration practice and procedure in the UAE, with a focus on the Arbitration Chapter and relevant case law. Part II can be understood as an annotated Arbitration Chapter, going through each of the articles and setting out a bibliography as well as points of interpretation that arise from the case law available to the author. The book also includes various source materials in its appendices, including the UAE Arbitration Chapter itself, a number of relevant decrees which relate to dispute resolution involving governmental interests (ie the establishment of the Dubai World

¹ *Russell on Arbitration* (Sweet and Maxwell 2015).

² Robert Merkin, *Arbitration Act 1996: An Annotated Guide* (LLP Ltd, 1997).

³ Gordon Blanke, *Annotated Guide to UAE Arbitration* (Thomson Reuters 2014).

⁴ The Arbitration Chapter is commonly understood to encompass arts 203–218 of the UAE Civil Procedure Code. The author also rightly addresses arts 235–238 of the Code in his book—which relate to the execution of foreign judgments, orders and deeds—as they are also understood to extend to foreign arbitral awards.

Tribunal) along with relevant practice directions, and key Conventions to which the UAE is party. The author also includes a helpful flowchart setting out the procedure (and anticipated time periods) for the enforcement of both onshore and offshore awards.

Part I provides a general commentary on and overview of arbitration in the UAE: it discusses at a high level the legislative and judicial framework in the UAE, and even sets out commonly used resources for legal research. It considers the various arbitral institutions available including lesser known institutions (with frank commentary on the degree to which these institutions are used and in which contexts), the options available in terms of arbitral seat (including both onshore and offshore jurisdictions), and also enforcement. Of particular importance to any newcomer to onshore UAE arbitration is that Dr Blanke also highlights potential procedural pitfalls including that:

- the *page* of the agreement in which an arbitration clause is contained must be signed by both parties to the arbitration;
- the signatory of the arbitration agreement should have special authority to sign the agreement;
- it is best practice for counsel in an arbitration to have a special power of attorney to represent their client; and
- witness testimony *must* be sworn.

Dr Blanke also explains in a practical manner how not to run up against these rules.

Part I is well researched, and though the array of references to blogs may appear out of place in a hardback publication, it also reflects the evolving nature of arbitration law in the UAE, the difficulty of accessing judgments and the reality of how most developments are reported for English-speaking practitioners operating in the region. Part I of Dr Blanke's book would be very useful for any practitioner or arbitrator considering the onshore UAE arbitral regime for the first time; it may also be a helpful resource for more experienced practitioners.

Part II sets out an annotated version of the Arbitration Chapter. It takes the form of a list of the relevant articles of the UAE Civil Procedure Code, providing a detailed bibliography for each article and a list of judicial decisions which refer to that article. Helpfully, the citations indicate whether a judgment is available online. Part II is not intended to be exhaustive, as most cases are inaccessible to the public, though it nonetheless boasts reference to over 650 UAE court rulings (mostly enforcement and nullification actions heard by the UAE courts).

This part of the book can be difficult to navigate, particularly because of the editorial decision to use endnotes. As a result, some pages appear to be almost entirely filled with citations, making any actual commentary difficult to locate on the page. Part II is most successful when the author merely clarifies the purpose and operation of particular articles which may have been obscurely worded.

Throughout the *Commentary* the author takes pains on various occasions to highlight how "arbitration friendly" the UAE courts are (sometimes, in fairness, following the adverb "surprisingly"). However, various points raised by the author suggest otherwise, including his remark that "Importantly, the UAE courts have expressly confirmed that arbitration clauses providing for arbitration under the ... ICC Rules are enforceable locally".⁵ We would hope that a signatory to the New York Convention would provide at least that, as a minimum. The author also refers to a number of surprising decisions refusing to enforce arbitral awards on spurious grounds, including one where it was believed that the UK was not a member country of the New York Convention (though that decision was overturned on appeal). Furthermore, while the commentary mentions that a number of legal actions have been commenced in the UAE courts against arbitrators (albeit on vexatious grounds),

⁵ Gordon Blanke, *Commentary on the UAE Arbitration Chapter* (Sweet & Maxwell 2017) 17.

the book does not address the recent enactment of a law which threatens the possibility of imprisonment for arbitrators and testifying experts in certain limited circumstances.⁶

As Dr Blanke has undertaken this project, the prospect of legislative reform has been looming over him. Since at least 2009, the UAE has promised to modernise its arbitration law. Draft arbitration laws presented by the Ministry of Justice have come and gone, with ultimately no new legislation enacted. This time it may be different, given that a draft arbitration law is understood to have been passed by the UAE's national assembly and Cabinet of Ministers, and merely awaits final Presidential approval.⁷

There are only passing references to attempts to modernise the UAE arbitration law in the book, which is altogether understandable given the number of false starts in the past. It is, nonetheless, likely that *Commentary on the UAE Arbitration Chapter* will soon be outdated. Dr Blanke maintains, however, that the book will not be obsolete following any legislative overhaul, as it will still be helpful in relation to any provisions that remain unchanged from the latest law or are replaced with similar provisions. He also emphasises his work's "unprecedented historic value" as one of the few coherent narratives on the application of the UAE arbitration legislation in the English language.⁸ These are both valid points.

At the time of this review, UAE arbitration law remains somewhat in flux. Indeed, while this book was being reviewed, the UAE Minister of Justice passed a law which appeared to prevent arbitral tribunals from accepting the representation of parties by lawyers who are non-Emirati.⁹ Just in time for the submission of this review, the Dubai Government expressly disavowed this position.¹⁰ Given the ongoing developments of the UAE arbitral regime in real time, it may be more productive for Dr Blanke to focus his more-than-welcome research efforts in the digital realm.

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⁶ See Alison Ross, "UAE pledges to amend penal code and makes progress towards new law" *Global Arbitration Review* 13 November 2017 at <<http://globalarbitrationreview.com/article/1150078/uae-pledges-to-amend-penal-code-and-makes-progress-towards-new-law>> accessed 14 March 2018.

⁷ "At last a new law for the UAE?" *Global Arbitration Review* 17 May 2017 at <<http://globalarbitrationreview.com/article/1141782/at-last-a-new-law-for-the-uae>> accessed 14 March 2018.

⁸ Gordon Blanke, *Commentary on the UAE Arbitration Chapter* (Sweet & Maxwell 2017) viii–ix and xii.

⁹ Ministerial Resolution No 972 of 2017 promulgating the Executive Regulations to the Federal Legal Profession Law No 23 of 1991 and its Amendments, *Federal Official Gazette* Issue 622, Year 47, 28 September 2017, entered into force on 29 September 2017. See also Amr Omran, "'Oops! ... I Did it Again': New restrictions on foreign counsel in UAE arbitrations" *SSRN*, 16 November 2017 at <<https://ssrn.com/abstract=3072125>> accessed 14 March 2018.

¹⁰ See Lacey Yong and Alison Ross, "Dubai backtracks on 'locals only' law" *Global Arbitration Review* 11 December 2017 at <<http://globalarbitrationreview.com/article/1151608/dubai-backtracks-on-%E2%80%98locals-only%E2%80%99-law>> accessed 14 March 2018; see also Tom Jones, "Has Dubai shot itself in foot again with 'locals only' law?" *Global Arbitration Review* 17 November 2017 at <<http://globalarbitrationreview.com/article/1150647/has-dubai-shot-itself-in-foot-again-with-%E2%80%99Clocals-only%E2%80%9D-law>> accessed 14 March 2018.